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1 Analysis of Concepts

Meaning of Title

In one sense, and in the sense in which it is often used in an action for declaration of title to land, 'title' is synonymous with 'ownership'. Proof of title to land entails the establishment of facts from which a person's claim of ownership to the land in dispute may be inferred. In its true meaning, 'title' signifies the lawful right of possession.[1] Thus, Professor Lawson has aptly defined 'title' as the 'shorthand term to denote the facts which, if proved, will enable a plaintiff to recover, and the defendant to retain, possession of a thing'.[2]

The existence of the right of possession is one thing, the quantum and quality of the right is another. Title to land may be absolute or unrestricted, or it may be limited or restricted. When title is absolute, it is synonymous with ownership. Thus in this country the distinction is usually drawn between right of ownership and occupational right.[3] Title to land is absolute when it is not qualified by the superior right of another person through whom the title is derived. A limited or occupational title is merely a subtraction from, and at the same time part and parcel of, such superior title. Thus 'title' connotes a degree of control. As Sir Frederick Pollock has aptly put it, 'what we call the law of property is in the first place the systematic expression of the degrees of control and forms of control, use and enjoyment that are recognized and protected by law'.[4] Thus there may be a series of titles subsisting in a given piece of land and vesting in different persons at the same time. For example, A grants a tenancy of his land to B, and B pledges the land to C. Both B and C have titles which are good against A while the tenancy subsists and C's title is good against B while the pledge subsists. A still retains title to the land which signifies *vis-à-vis* his tenant the right of future possession, otherwise known as 'reversionary right', and *vis-à-vis* the

[1] See Stonham, *The Law of Vendor and Purchaser*, Australia, 1964, p. 887.
[2] Lawson, *The Law of Property*, p. 35.
[3] The term 'possessory right' is sometimes used, but the expression which we have adopted in the text is to be preferred, as the expression 'possessory title' is used by conveyancers to denote title (ownership) *founded* upon possession merely.
[4] Pollock, *Jurisprudence and Legal Essays*, London, 1961, p. 93.

rest of the world the right to put his tenant there. If it turns out that A has no title to the land, the rights derived through or under him cannot stand.

'Right' or 'lawful right' of possession implies that the possession claimed has been acquired by the mode prescribed by law, but this is only a half truth. Possession itself may lead to the inference of title until the contrary is proved. To put it in another way, possession, however acquired, is *prima facie* evidence of title and is protected against any person who cannot show a better title. There is no doubt that all titles to land, whether claimed by an individual or by a community, are ultimately founded upon first occupation or possession after conquest, and a person can only prove a better right if he is able to show that he or his predecessor in title had earlier possession of which they were wrongfully deprived by the defendant or his predecessor in title. It is also clear that the wrongful possession may become rightful by lapse of time either under the doctrine in *Awo* v. *Gam*[1] or under the statute of limitation.[2] Where possession is not based on right, the person in possession is described as a 'squatter'.

In yet another sense, the expression 'title' may denote the instrument in which the holder's right is recorded, as when a person refers to his conveyance as his title to the land. This is, however, not the lawyers' language. The documents serve as evidence of title, and are referred to by conveyancers as the 'document of title' or the 'title deed'.

Conceptual Problems Concerning Ownership in Nigeria

The expressions 'owner' and 'ownership' require more elaboration. In works on English land law the words are used as if the meanings are obvious. With regard to Nigeria and, indeed, African jurisprudence, they have not passed without much controversy. Opinion is divided, firstly, as to whether land in African communities can be said to be 'owned' and, secondly, as to the content of ownership. The second assumes that there is nothing wrong in ascribing 'ownership' to African land if the sense in which the expression is used is understood.

Dr Coker states that the idea of ownership in the English language, or to use his own expression, *'in stricto sensu'*, is unknown to customary law. To him, 'ownership' does not admit of restriction. An owner must have plenary powers to do what he likes with his own. Consequently, as the greatest right which, according to him, a person can have in the land he occupies under Nigerian customary laws is the right of user with no power of alienation, Dr Coker has submitted that the greatest right which a person can have in

[1] (1913) 2 N.L.R. 29.
[2] See below, p. 112.

land is the right of possession and not 'ownership'.[1] To support his argument, Dr Coker cited the following passage from Dr Elias's *Nature of African Customary Law*:

> What we have said so far, as well as what we shall say later, will show that the land-holding recognized by African customary law is neither 'communal' holding nor 'ownership' (in the strict English sense of the term). The term 'corporate' would be an apter description of the system of land-holding since the relation between the group and the land is invariably complex in that the rights of individual members often co-exist with those of the group in the same parcel of land.[2]

It is submitted that by 'ownership' in the passage Dr Elias should be taken as meaning 'individual ownership'[3] and that by 'corporate' he meant 'group' ownership, as otherwise the passage becomes unintelligible. Dr Elias states that his assessment followed from what he had written previously: 'Whereas the radical title to land remains with the family or community, the individual can have, at any rate in theory, a right of use. In other words, *the ownership* is in the group and the individual member has mere possession.'[4] And in a footnote, Dr Elias explained that he was using 'ownership' and 'possession' in their ordinary English senses. Where then lies the authority for Dr Coker's assertion about Dr Elias's views?

In the words of Professor Allott:[5]

> This sort of approach assumes that there is something wrong with a foreign legal institution which does not conform with English legal principles. It assumes that a term such as 'ownership' has a God-given meaning, a true meaning, and finally it assumes that a thing called 'ownership' exists and can be discovered in a country's laws just as one might discover diamonds in a river bed.

Indeed, as Mr Simpson[6] has aptly remarked, 'the idea of ownership is in fact a simple and intelligible one to any human being anywhere'. To quote further from another distinguished author, 'the linguistic symbols, "I" and "thou", and "mine" and "thou", are inseparable from the human scene, representing as they do distinguishing relationships incident to human character and society'.[7]

The concept of ownership becomes more intelligible 'if we recognize that rights are not held in relation to inanimate objects but in relation to other

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[1] Coker, *Family Property among the Yorubas*, pp. 32-4.
[2] T. O. Elias, *Nature of African Customary Law*, p. 164.
[3] Even then, it is not correct to say that individual ownership is unknown to customary law.
[4] Elias, op. cit., p. 163.
[5] Allott, 'Towards the definition of absolute ownership' (1961) 5 J.A.L., pp. 99-100.
[6] Simpson (1961) 5 J. A. L., p. 146 (a reply to the above).
[7] K. Bentsi-Enchill, *Ghana Land Law*, p. 7.

people. A right is not held in land but against another person.'[1] Unless the argument is that all the members of the community in the African context have a concurrent right to use the same parcel of land at the same time (which is not the human method), it cannot be seriously disputed that the idea of ownership is known to Nigerian customary land law. The fact that the right of a landowner is qualified by the general requirement of land-holding in the area does not render it inappropriate to refer to him as 'owner'. Thus the mere fact that a land-holder may only plant a particular type of crop on his land or that he can only alienate it to a particular class of individuals and by a particular procedure, as where alienation of land to strangers without the prior consent of the traditional authority is not permitted, does not amount to a denial of ownership if it is a general condition of land-holding in the area. In Southern Nigeria, a non-Nigerian cannot acquire an interest in land without the approval of the Government,[2] and in Western Nigeria, the maximum interest which a non-Nigerian can acquire in land is a lease for a term of 99 years.[3] No one would say, for that reason, that the ownership of the land was thereby vested in the Government or that land in areas affected thereby became ownerless. In any event, it is clear that, nowadays at least, the idea of inalienability of land, on which Dr Coker based his views, has been discarded.

The Meaning of Ownership

Granting that it is not inappropriate to ascribe ownership to the system of land-holding in Nigeria, how do we identify the owner of land? In other words, what are the contents of ownership? What rights must a claimant possess before he can be described as the owner of the land he is claiming? This brings us to the other controversy hinted at above as to the need to define the expression 'ownership' in the African situation and the legal method of achieving a clear definition for the avoidance of doubt.

We may start with this view expressed by Dr Lloyd:[4] 'It is rare, if not impossible, for an individual to hold land by such a tenure that he can aver that no other person (except the State) has any right in it.' As such, he declared: 'Every legal system must, therefore, define what rights shall amount to ownership; the definition of one system will not necessarily coincide with another.' Dr Allott[5] too, agrees that it is vital to spell out in legislative terms what rights shall amount to ownership because 'in West African countries

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[1] Lloyd, *Yoruba Land Law*, p. 60.

[2] Native Lands Acquisition Law, 1958, Western Nigeria. Acquisition of Land by Aliens Law, 1959, of Eastern Nigeria; Acquisition of Lands by Aliens Edict, 1971, Lagos State.

[3] See Reg. 4 of the Native Lands Acquisition (Approval of Transactions) Regulations.

[4] Lloyd, op. cit., p. 66.

[5] Allott, op. cit., p. 99.

at any rate (such as Southern Nigeria and Ghana) an interest in land held under customary law may at any moment be transferred by a mode of transfer known only to English law or converted into an interest under English law and vice versa. The establishment of a legal rate of exchange then becomes extremely important.'[1] Although this opinion is founded upon a wrong premise, the need for a clear definition of ownership cannot be over-emphasized. For example, declaration of title to land is of frequent occurrence in our courts, and it is only right that the court should have a firm understanding of what ownership entails before it can grant or withhold the declaration sought.

However, the legislative approach which has been put forward by Dr Allott does not seem to be the answer. Such an approach would appear to have no precedent, as legislative definition of a popular word is only resorted to if the ordinary meaning of the word is departed from, as where the word is used in a special sense, thus entailing a restriction or an enlargement of its ordinary meaning. This approach, far from solving the problem, may even add to it. In section 1 of his draft model legislation, Dr Allott suggested a definition as follows:

> 'An absolute owner' means, in respect of any land held by the absolute owner as absolute owner, the person (whether individual or corporate)
> (i) whose interest is vested and is not defeasible or determinable upon the occurrence of some certain or uncertain future event, and
> (ii) who has or whose predecessors in title have the ultimate right to possess the said land (whether the said person is at any time in possession or not, etc.) and
> (iii) whose interest in the said land is not derived from nor dependent upon any other interest in land (save by transfer or transmission from a predecessor in title of the absolute owner) and
> (iv) who has or would have, if he were in possession in respect of the same land, the totality of claims, privileges, powers and immunities which the law permits any person to enjoy in respect of land, etc.[2]

There is nothing new in this draft provision and, although it appears to be comprehensive on first reading, no one can comprehend its import without further defining certain other concepts employed therein. For example, what is an 'indefeasible interest'? What is 'right to possess'? As title is only relative, in theory at least, it is always possible for another person to prove a better title than that of the person to whom absolute ownership has been awarded.[3] In effect, if such definition were to be pursued to its logical conclusion, nobody can succeed in proving that he is the absolute owner of any piece of land. Therefore, while a correct analysis of the concept of ownership is indispensable and welcome in any legal system, to make a legislative definition

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[1] See Chapter 2 on the issue of conversion.
[2] (1961) 5 J.A.L. 99 at p. 102.
[3] See Farrand, *Contract and Conveyance*, Oyez Publications, 1968, p. 71.

without intending to use the word in a different sense from its popular meaning may not only lead to confusion but may also obscure the meaning of the term, thereby defeating the purpose of the definition.[1] Thus, Mr Simpson, an adjudication officer, has justifiably rebuked Professor Allott for having needlessly projected a 'dark cloud into a relatively clear sky' by offering this solution.[2]

In simple terms, the owner of the 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 strict sense, the right claimed must be infinite and absolute. If it is liable to determine upon the occurrence of a future event, the right does not amount to ownership in the sense in which the expression is used under customary law. But an owner does not cease to be an owner because he has granted his land to a tenant for an indefinite period, for by law the grantor has a right of reversion which is exercisable upon abandonment by the tenant of his holding or the occurrence of misconduct on the tenant's part as may warrant a forfeiture of his holding by the landlord. Such conduct on the part of a tenant is a challenge to the landlord's title as the law enjoins him to recognize his landlord's title. Since the tenant recognizes the superior right of the landlord, his title cannot amount to ownership. The legal position is that ownership is vested in the landlord while possession is vested in the tenant. Indeed, in so far as the world at large is concerned, the possession of the tenant is ascribed to his landlord. The superior right of the landlord may have been acquired by himself through his own exertion or through a grant from a person whose right to do so is recognized by the society, as by allocation of permanent right by the ruler or his agent or by purchase from a previous owner. To borrow the language of Sir Frederick Pollock, the owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such powers when we have accounted for every detached and limited portion of it, and he will be the owner even if the power of control and use is elsewhere.[3] This observation is no less apposite for Nigeria, traditional or modern, than it is for England.

Ownership is often defined by reference to the power of alienation. We have seen that the primary reason for the opinion of Dr Coker that the system of land-holding in Nigeria is not ownership is that land is inalienable. But if land is not alienable in a given society, it only means that right to alienate is not one of the incidents of ownership in that society. It is not by itself a negation of ownership. In mediaeval England, land was inalienable, and yet Pollock and Maitland have said that any suggestion that no land in

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[1] Simpson, op. cit., p. 146.
[2] Ibid.
[3] Pollock, op. cit., p. 98.

England is owned leads to a paradox.[1] The Nigerian society is no longer such a society. Power of use and abuse, including the power of absolute disposition, is a legal incident of ownership in this country. If this power is an incident of ownership, to define 'the owner' as the person who has the power of making important disposition merely begs the question; for, in many cases, the person asking the question, the owner of land, wants to know who is competent to dispose of it. Under customary law, it is well known that the owner can make an important disposition of it by sale, lease or mortgage. A holder of an occupational right has no such power; he cannot even transfer his own limited interest to a purchaser either *inter vivos* or by will,[2] although it may be transmissible to his heirs. A lessee under the received English law, however, has the right to dispose of his limited interest either by sale, lease or mortgage. It would be absurd to say that for that reason a customary tenant is not an owner, while the lessee under English law is an owner. However, as the term 'ownership' is loosely used to describe titles less than real ownership, as when one speaks of limited ownership or the ownership of a lease, for the sake of convenience the person who is able to prove ownership of the ultimate title is often described as the 'absolute owner', and his interest as 'absolute ownership' or 'absolute title'.

Right of Sovereignty

Ownership is often confused with sovereign right and the two concepts should be carefully distinguished. Ownership relates to proprietary right, while sovereign right relates to administrative control by the political authority. In the past, sovereign right was exercised by the traditional authority of the area concerned, either the paramount chief, the village chief, the council of elders or the whole community through the respective family heads, as the case might be, depending on the political structure of the society in question. While in many respects this power of management still survives today, the ultimate right of control is vested in the respective governments. The Parliament of the Federation and the State Legislatures have the power to legislate generally on the question of land tenure within their respective areas of jurisdiction and competence. It is, indeed, an aspect of their attributes of supremacy over all persons and over all matters within their respective areas of authority.

Possession

Possession, in law, means exclusive possession. Where it is not exclusive, the law does not protect it. Possession may be defined as the direct physical

[1] Pollock and Maitland, *A History of English Law*, Book II, p. 5.
[2] *Daniel* v. *Daniel* (1956) 1 F.S.C. 50.

relationship of a person to a thing. This should not, however, be understood to mean that a person claiming to be in possession of land must prove that he has always been physically present thereon since his act of possession began. It is sufficient if there is such conduct on his part, in relation to the land, as would lead to the inference that he has exclusive control of it. Whether or not the act proved is sufficient to establish possession is a question to be decided on the merits of each case. While it is true that the cultivation of a piece of land or the erection of a building or fence thereon is evidence of possession, it is by no means essential that in every case the claimant must prove that he has taken some active steps in relation to the land, such as enclosing it or cultivating it. The type of conduct which indicates possession must vary with the type of land. In *Wuta-Ofei* v. *Danquah*[1] the land in dispute was uncultivated bush land and it was held that the demarcation of the land with pegs at its four corners by the claimant was sufficient act of possession on her part.[2] Similarly in *Alatishe* v. *Sanyaolu*,[3] where the land in dispute was also bush land, all that the claimant did was to demarcate the land with stout wooden pegs by which it was held that possession had been established.

Acts of user are not sufficient indication of possession if they are flimsy, or just make-believe. An illustrative case is *Lewis* v. *The Colonial Secretary*[4] which concerns the question whether land was occupied or unoccupied within the meaning of the Public Lands Ordinance Act, 1876. The evidence that was given showed that the land, which was barren, had been planted once or twice with cassava with a view to cultivation, but had later been left to rot or left for vagrant cattle, and that a flimsy fence had been erected which could not, however, prevent the incursion of goats. The Full Court held that such evidence could not justify the Divisional Court in coming to the conclusion that the land was occupied. Similarly, in *Arefunwon* v. *Barber*,[5] evidence to the effect that the defendant had been using a piece of land for the occasional deposit of firewood was held to be insufficient to support a claim of title by long possession. Thus, in every case where user is relied upon, it must be shown that the land has been put into effective and beneficial use.

It is important to note that a person can be in possession through a third party. Land in the possession of a servant or tenant is, in law, deemed to be in that of his master or landlord. Thus a person in receipt of rent in respect of a piece of land is deemed to be in possession of it, even though

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[1] *Wuta-Ofei* v. *Danquah* [1961] 3 All E.R. 596 (Privy Council).

[2] An important point which weighed heavily in the Court's mind was the fact that the defendant never had any title to the land in dispute. It would not seem, however, that that would necessarily restrict its application to actions in trespass as demonstrated by the case which followed in the text.

[3] [1964] 1 All N.L.R. 398.

[4] (1891) 1 N.L.R. 11.

[5] [1961] 1 All N.L.R. 887 (Privy Council).

he may not be physically present thereon or may not, as between himself and his tenant, be entitled to possession at the material time. Furthermore, the possession of a predecessor in title is, in law, deemed to be continued by his successor.

Legal Conception of Land

The legal conception of land under customary law has been a matter of controversy among writers. Obi[1] claims that a remarkable aspect of African customary law is the fact that land does not include things growing on, or attached to, the soil and that neither economic trees nor houses form a part of the land on which they stand. Lloyd[2] also claims that in Yoruba customary law a distinction is drawn between land (the soil) and improvements thereon. On the other hand Dr Coker[3] states categorically that in any application of the term 'land' includes buildings thereon. This view is supported by Ollennu[4] as regards the customary law of Ghana. Coker's view, which appears to accord with judicial decisions on the subject, is more convenient and is therefore to be preferred. Thus, as conceived by law, land includes the surface of the earth, the subsoil and the air space above it, as well as all things that are permanently attached to the soil. It also includes streams and ponds.[5] On the other hand, things placed on land, whether made of the product of the soil or not, do not constitute land. Thus, building materials placed on land do not become 'land' until the building is erected and would cease to be 'land' when the building is demolished. Again, timber is only 'land' when it still grows; as soon as it is cut, it ceases to be 'land' and becomes a chattel. Annual, cultivated crops, though growing on land, are not regarded as 'land', because of the transient nature of the cultivation. Thus a cultivator of, say, cassava may sell the products while still attached to the land without following the procedure prescribed for the sale of land, and a person entitled to inherit land is not entitled to reap the annual crops growing thereon. In English law,[6] a chattel which has become a part of land is known as 'a fixture'. Whether a chattel is a fixture or not depends on two main considerations: (i) the degree of annexation, i.e. whether it can be easily removed without injury to itself or the building, and (ii) the purpose of annexation, i.e. whether it was for the permanent improvement of the land or merely for a temporary purpose, for the greater enjoyment and use

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[1] Obi, *The Ibo Law of Property*, 1963, p. 32.
[2] Lloyd, op. cit., p. 13.
[3] Coker, op. cit., p. 45.
[4] Ollennu, *Customary Land Law in Ghana*, 1962, p. 1.
[5] Tidal waters cannot be the subject of private ownership; see *Amachree* v. *Kalio* (1914) 2 N.L.R. 108. See also *Adogan* v. *Aina* (1964) 1 All N.L.R. 127, where the subject matter of the suit was a stream which was claimed to be family property.
[6] See *Emmet on Title*, 1967, pp. 487-92.

of it as a chattel. Those guides should also prove useful in determining claims governed by customary law. Thus, while a wooden window frame or a glass window pane can easily be seen as a fixture, the same cannot be said of an air-conditioning machine fixed to the wall of a house.

For the sake of convenience the law does not distinguish between the ownership of the soil and the ownership of the fixtures thereon. The principle, *quicquid plantatur solo, solo cedit*, applies.[1] Thus, if A builds on B's land with his own (A's) materials, the building belongs to B. This principle has been applied in a number of cases and is not confined to any particular locality. In *Francis* v. *Ibitoye*,[2] the plaintiff entered into negotiation with the defendant for the purchase of a piece of land. The negotiation fell through but, in the meantime, the plaintiff had developed the land by building thereon at the cost of ₦240. In this action the plaintiff sought to recover the sum of ₦240 which he had spent on the building. He failed to recover on the ground that the defendant could not be made to pay compensation on what belonged to him. Another clear application of the principle occurred in *Osho* v. *Olayioye*[3] where the defendant built on the plaintiff's land despite the latter's protests. An injunction was granted against him restraining him from going into the house which had become the property of the plaintiff.

While commenting on *Francis* v. *Ibitoye*, Dr Elias[4] raised a query as to whether the builder should not be able to remove his building materials if he was prepared to pay compensation for injury to the land. This is, no doubt, founded on the Roman law approach to the problem. Under Roman law, although a building erected on another's land acceded to the land and thereby became the property of the landowner, the union was not indissoluble. The solution which the law found was that the building remained the property of the landowner so long as it remained affixed to the soil. Thus, if the building fell down or it was voluntarily pulled down, a *vindicatio* might be brought to recover the building materials from the landowner.[5] The approach of the Nigerian courts to the problem, as borne out in the recent case of *Eziani* v. *Ejidike*[6], seems to be different. The union is indissoluble. The owner of the land remains owner of everything, whatever subsequently happens. The respondent in that case built on the land which was later adjudged to be the property of the appellants in a previous action for a declaration of title brought by them. After those proceedings, the respondent was allowed to stay in the house for five years at a rent. When the term expired, the respondent was given a notice to 'remove and pack out all your belongings'. The respondent did not dispute the effectiveness of the notice

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[1] See Coker, op. cit., *contra* Obi, op. cit.
[2] (1936) 13 N.L.R. 11.
[3] [1966] N.M.L.R. 329 (the decision was reversed on appeal on another ground); see also *Finn* v. *Ayeni* [1964] N.M.L.R. 130.
[4] *Nigerian Land Law and Custom*, p. 214.
[5] See Nicolas, *Roman Law*, 1962, p. 135.
[6] [1964] 1 All N.L.R. 402.

but he demolished the house and sought to remove the materials. He was obstructed by the appellants who themselves took the materials away. In this action, the respondent, as plaintiff, sought to recover damages for conversion of the building materials by the appellants and succeeded, but the decision was reversed by the Supreme Court on appeal. In the words of Brett, J.S.C., 'the demand that the respondent should "remove and pack out all your belongings" is not apt for the purpose of conferring a licence to remove what belongs to someone else'.[1] Implicit in this observation is the opinion of the Court that the building materials, after the collapse or demolition of a house built on another's land, still belonged to that other.

An apparent, but not too real, exception to the rule that ownership of land and of improvements made thereto go together exists under customary law. Where the structure or other improvement has been erected or made with the express or implied permission of the landowner, the improvement is not regarded as belonging to the landowner but is vested in the maker. In fact, the attitude of customary law is that the maker of the improvement has the right to use the land so long as the improvement stands thereon. Thus, to that extent customary law recognizes a division between ownership of the soil and ownership of improvements thereon, and the maxim *quicquid plantatur solo, solo cedit* applies where the improvement has been created without the permission of the owner.[2]

Because of the leaning of the law against unjust enrichment, the courts, including the customary courts, have, in the exercise of their equitable jurisdiction, in many cases intervened to temper the hardship to which the rigid application of the principle under consideration may give rise. Some protection is usually given where the original entry was not trespassory, or where the owner himself is guilty of misconduct. A discussion of this will be given in a later chapter.[3]

Minerals

It is important to note that the rights of a landowner in this country do not extend to mineral and mineral oil deposits found in, under or upon his land[4]; only the Government of the Federation has a right of property over them.

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[1] Ibid, at p. 404.

[2] The implication of this, in relation to family ownership, is considered in Chapter 3.

[3] See Chapter 7 at p. 124.

[4] S. 3, Minerals Act, 1946, Cap. 121, Laws of the Federation of Nigeria and Lagos, 1958. Mineral is defined by s. 2, and mineral oil is defined by s. 2 of the Mineral Oils Act, 1914, Cap. 120, Laws of the Federation of Nigeria and Lagos, 1958.

of it as a chattel. Those guides should also prove useful in determining claims governed by customary law. Thus, while a wooden window frame or a glass window pane can easily be seen as a fixture, the same cannot be said of an air-conditioning machine fixed to the wall of a house.

For the sake of convenience the law does not distinguish between the ownership of the soil and the ownership of the fixtures thereon. The principle, *quicquid plantatur solo, solo cedit*, applies.[1] Thus, if A builds on B's land with his own (A's) materials, the building belongs to B. This principle has been applied in a number of cases and is not confined to any particular locality. In *Francis* v. *Ibitoye*,[2] the plaintiff entered into negotiation with the defendant for the purchase of a piece of land. The negotiation fell through but, in the meantime, the plaintiff had developed the land by building thereon at the cost of ₦240. In this action the plaintiff sought to recover the sum of ₦240 which he had spent on the building. He failed to recover on the ground that the defendant could not be made to pay compensation on what belonged to him. Another clear application of the principle occurred in *Osho* v. *Olayioye*[3] where the defendant built on the plaintiff's land despite the latter's protests. An injunction was granted against him restraining him from going into the house which had become the property of the plaintiff.

While commenting on *Francis* v. *Ibitoye*, Dr Elias[4] raised a query as to whether the builder should not be able to remove his building materials if he was prepared to pay compensation for injury to the land. This is, no doubt, founded on the Roman law approach to the problem. Under Roman law, although a building erected on another's land acceded to the land and thereby became the property of the landowner, the union was not indissoluble. The solution which the law found was that the building remained the property of the landowner so long as it remained affixed to the soil. Thus, if the building fell down or it was voluntarily pulled down, a *vindicatio* might be brought to recover the building materials from the landowner.[5] The approach of the Nigerian courts to the problem, as borne out in the recent case of *Eziani* v. *Ejidike*[6], seems to be different. The union is indissoluble. The owner of the land remains owner of everything, whatever subsequently happens. The respondent in that case built on the land which was later adjudged to be the property of the appellants in a previous action for a declaration of title brought by them. After those proceedings, the respondent was allowed to stay in the house for five years at a rent. When the term expired, the respondent was given a notice to 'remove and pack out all your belongings'. The respondent did not dispute the effectiveness of the notice

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[1] See Coker, op. cit., *contra* Obi, op. cit.
[2] (1936) 13 N.L.R. 11.
[3] [1966] N.M.L.R. 329 (the decision was reversed on appeal on another ground); see also *Finn* v. *Ayeni* [1964] N.M.L.R. 130.
[4] *Nigerian Land Law and Custom*, p. 214.
[5] See Nicolas, *Roman Law*, 1962, p. 135.
[6] [1964] 1 All N.L.R. 402.

but he demolished the house and sought to remove the materials. He was obstructed by the appellants who themselves took the materials away. In this action, the respondent, as plaintiff, sought to recover damages for conversion of the building materials by the appellants and succeeded, but the decision was reversed by the Supreme Court on appeal. In the words of Brett, J.S.C., 'the demand that the respondent should "remove and pack out all your belongings" is not apt for the purpose of conferring a licence to remove what belongs to someone else'.[1] Implicit in this observation is the opinion of the Court that the building materials, after the collapse or demolition of a house built on another's land, still belonged to that other.

An apparent, but not too real, exception to the rule that ownership of land and of improvements made thereto go together exists under customary law. Where the structure or other improvement has been erected or made with the express or implied permission of the landowner, the improvement is not regarded as belonging to the landowner but is vested in the maker. In fact, the attitude of customary law is that the maker of the improvement has the right to use the land so long as the improvement stands thereon. Thus, to that extent customary law recognizes a division between ownership of the soil and ownership of improvements thereon, and the maxim *quicquid plantatur solo, solo cedit* applies where the improvement has been created without the permission of the owner.[2]

Because of the leaning of the law against unjust enrichment, the courts, including the customary courts, have, in the exercise of their equitable jurisdiction, in many cases intervened to temper the hardship to which the rigid application of the principle under consideration may give rise. Some protection is usually given where the original entry was not trespassory, or where the owner himself is guilty of misconduct. A discussion of this will be given in a later chapter.[3]

Minerals

It is important to note that the rights of a landowner in this country do not extend to mineral and mineral oil deposits found in, under or upon his land[4]; only the Government of the Federation has a right of property over them.

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[1] Ibid, at p. 404.

[2] The implication of this, in relation to family ownership, is considered in Chapter 3.

[3] See Chapter 7 at p. 124.

[4] S. 3, Minerals Act, 1946, Cap. 121, Laws of the Federation of Nigeria and Lagos, 1958. Mineral is defined by s. 2, and mineral oil is defined by s. 2 of the Mineral Oils Act, 1914, Cap. 120, Laws of the Federation of Nigeria and Lagos, 1958.

2 Duality of Laws

Like every other subject in the Nigerian legal system, both customary law and the received English law govern land rights in Nigeria. Local legislation has however had a serious impact on them, particularly in Northern Nigeria.

Implication of the Duality of Laws

It has been claimed that the application of both customary and English law has resulted in a dual system of land tenure[1] and that land may be converted from customary tenure to English law tenure and vice versa. The exclusion of land held under customary tenure from the operation of certain statutes[2] shows that our legislatures are of the same mind. The stage at which a particular piece of land would cease to be subject to customary tenure and become converted to English tenure is, however, not clear. In *Garuba* v. *Public Trustee*[3] Brooke, J., observed that one source of confusion as to land tenure in Lagos was the failure to distinguish between English and native tenure which, he said, were incompatible and an attempt to graft one upon the other. The problem arises from the employment of English conveyancing techniques in delimiting land rights acquired, even in transactions between Nigerians. Where a limited right only has been transferred there is usually no difficulty, as the parties' intention to have their respective rights and obligations regulated by English law would have been manifested by such use of English law conveyancing devices even though English law does not govern the right to convey. Where the difficulty arises is in respect of a conveyance expressing a particular land to have been conveyed for an estate in fee simple. It is on this that all the cases have turned.

The fee simple estate is the maximum estate which, in England, an individual may hold in the land which he occupies, the fundamental principle

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[1] Park, 'A Dual System of Land Tenure, the Experience of Southern Nigeria' (1965) 9 J.A.L. 1.

[2] For example, the Limitation Law, 1959 and the Property and Conveyancing Law, 1959, both of Western Nigeria; Limitation Decree, 1966.

[3] (1947) 18 N.L.R. 132 at p. 135.

being that land in England belongs to the Queen. The Queen is the owner of land and the individual can only hold an estate, i.e. a right to occupy the land, which may vary as to duration.

The word 'fee' means an estate of inheritance and the word 'simple' indicates that there is no restriction as to the class of heirs of the grantee that might inherit, thus distinguishing this kind of fee from the 'fee tail' which is only inherited by the heirs of the grantee's body, i.e. his descendants, or from the life estate which is for the duration of the grantee's life.

> Originally, the fee simple was an estate which endured for as long as the tenant or any of his heirs (blood relations and their heirs and so on) survived. Thus, at first, a fee simple would terminate if the original tenant died without leaving any descendants or collaterals (e.g. brothers and cousins) even if before his death the land had been conveyed to another tenant who was still alive. But by 1306 it was settled that where a tenant in fee simple alienated the land, the fee simple would continue as long as there were heirs of the new tenant and so on irrespective of any failure of the original tenant's heirs. Thenceforward a fee simple was virtually eternal, subject only to escheat, if the tenant for the time being died leaving no heir.[1]

With the abolition of most of the incidents of tenure, 'an owner in fee simple of land in England now is for every practical purpose, the absolute owner thereof and can deal with the land in any way he wishes'.[2]

Judicial opinions are in conflict as to whether the fee simple estate in fact exists in Nigeria and, if so, whether a conveyance of a fee simple estate creates a distinct tenurial relationship, the incidents of which are unknown to customary law. Let us consider each in turn.

In *Balogun* v. *Oshodi*,[3] Webber, J., said:

> I do not suppose that there is a single house or landowner who is not in possession of title deeds made out in English form and duly registered according to law. With this title deeds, the native has been selling and mortgaging as circumstances necessitated his doing so and to say that he is unfamiliar with the idea of conveying a fee simple is not in accordance with fact.

In *Coker* v. *Animashawun*,[4] de Lestang, C.J., was content to say that 'English common law and statutes of general application on first day of January, 1900, apply in Lagos and it cannot be doubted that the fee simple estates exist in Nigeria.'

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[1] Megarry and Wade, *Law of Real Property*, pp. 41-2.
[2] *Per* Abbott, F.J., in *Alade* v. *Aborishade* (1960) 5 F.S.C. 167, at p. 169.
[3] (1929) 10 N.L.R. 36 at p. 51.
[4] [1960] L.L.R. 71 at p. 72.

On the other hand, in *Balogun* v. *Oshodi*,[1] Kingdon, C.J., observed:

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

The learned Chief Justice was fortified in this view by the remarks of the Privy Council in *Oshodi* v. *Dakolo*,[2] where the following passage occurred:

> The paramount chief is owner of land, but he is not owner in the sense in which ownership is understood in this country. He has no fee simple . . .

Kingdon, C.J.'s opinion, in so far as it is founded on *Oshodi* v. *Dakolo* is misconceived, for when the case went on appeal to the Privy Council their Lordships pointed out that the sentence quoted above must be read in the light of the original claim of the chief involved which was that he was entitled beneficially to the whole compensation payable by the Government in respect of the family land: 'The . . . sentence quoted means only that the chief as contrasted with the family as a whole has no fee simple . . . . No question as to the extent of the family title arose.'[3] This implied that, in their Lordships' opinion, it might not be inconsistent to describe the interest of the family, if absolute, as a fee simple estate. The question was, however, left open as their Lordships were able to hold that the appellant in the case could not, in any case, have acquired the fee simple estate.

There can be no doubt, however, that, in a way, the fee simple estate does exist in Nigeria; but how does it arise? Here again, judicial opinions are not at one. In *Balogun* v. *Oshodi*,[4] Berkeley, J., propounded a theory of what he called the 'dormant fee simple'. He explained:

> What happened after the cession of the territory of Lagos seems to have been that the Crown acquired the *dominium directum* but left the customary tenure undisturbed as between the natives of the territory. This acquiescence in a local form of land tenure among the natives of the land in their dealings with each other would not operate to extinguish the *dominium directum* and a fee simple tenure was lying dormant in this *dominium directum*. . . . The fee lay dormant, and remained dormant, so long as native of the territory was dealing with native of the territory under the communal

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[1] (1929) 10 N.L.R. 36 at p. 57. See also *Thomas* v. *Holder* (1946) 12 W.A.C.A. 78.

[2] [1930] A.C. 667.

[3] (1936) 4 W.A.C.A. 1 at p. 7.

[4] Loc. cit., at p. 48.

system. . . . But when the same natives make use of such forms as conveyance and mortgage or when family land is treated as private property and alienated to strangers, the dormant fee simple revives in favour of the stranger.

In that case, the land in question was sold in 1912 to one L. F. by a son of a domestic of Oshodi Tappa. The land belonged to the Oshodi chieftaincy family. The plaintiffs bought it in 1914 from L. F. who purported to convey the fee simple to him. The plaintiffs asked for a declaration that they were owners in fee simple of the land. The Full Court held, Kingdon, C.J., dissenting, that the plaintiff had acquired the fee simple estate on the grounds (*inter alia*) that:

> [Although] the [vendor] has not got an individual title which he can pass . . . his method of dealing with the land (i.e. by the use of a conveyance in English form) awakens the dormant fee simple in favour of the purchaser.[1]

How the learned judge came to the conclusion that the fee simple lay dormant and that the conveyance or mortgage 'awakens' it in favour of the purchaser is not clear, but it is elementary law that a person cannot convey a title he does not have. If a member of a family sells the part of the family land which he occupies, the purchaser gets nothing, however absolute the language of the grant. The theory of Berkeley, J., is, therefore, not helpful, and we have to look elsewhere for guidance.

In *Coker* v. *Animashawun*[2], de Lestang, C.J., observed:

> Just as in England a fee simple estate is created by the use of certain words of limitation in the document of title, so in Lagos land held under native law and custom may become fee simple when it is alienated by means of a conveyance in English form expressed to convey a fee simple estate; [for] ownership of land by native law and custom is . . . absolute ownership and, in theory at least, is more extensive than the freehold estate in fee simple.

This, in a way, is accurate, but to say that the land 'may become fee simple' appears to be misleading, as the conveyance does nothing more than convey the grantor's title to the grantee. Moreover, the opinion that ownership of land by customary law is in theory more extensive than the freehold estate in fee simple can be taken to mean that the grantor retains a kind of interest in the land, however vague. That is also misleading, as in Nigerian law the conveyance exhausts the interest of the grantor and vests it in the grantee.[3]

The following opinion expressed by Morgan, J., in *Alade* v. *Aborishade*[4] is nearer the truth:

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[1] Ibid, *per* Berkeley, J.
[2] [1960] L.L.R. 71.
[3] See *Jegede* v. *Eyinogun* (1959) 4 F.S.C. 270.
[4] [1962] W.N.L.R. 74 at p. 83.

. . . Where the totality of the interest of a family (or a land-owning individual) under native law and custom is unlimited and unrestricted, and where the totality of that interest is conveyed to a purchaser, there is conveyed an interest equivalent to an estate in fee simple.

Morgan, J., however, would seem to be incorrect when he said:

. . . if such absolute interest is conveyed by use of an expression in 'fee simple' it means it ceases to be an estate under customary law and by the deed of conveyance would be created an estate in fee simple.[1]

It is true that in all the cases so far considered, the judges are of the opinion that a conveyance is necessary for the transformation of a title under customary law into one held under English law in fee simple. The one exception is *Thomas* v. *Holder*[2] in which the West African Court of Appeal held that a conveyance cannot have that effect since, on the principle *nemo dat quod non habet*, if the vendor can only show a title under customary law he has no fee simple to convey. The reasoning of this case, however, also proceeded on the traditional argument that the fee simple estate created a tenure, the incidents of which were unknown to customary law. This view was clearly expressed by the same court in *Rihawi* v. *Aromoshodun*[3] where the plaintiff sued for declaration of title to a certain parcel of land in fee simple but the evidence disclosed that the land was family land. The Court refused the declaration on the ground that the plaintiff did not prove the title claimed. As Verity, C.J., remarked: 'The nature and incidents of [a fee simple] title are very different from those of a title under customary law.'[4] It is submitted however, that there is no difference. Ownership of land under customary law is absolute ownership and ownership in fee simple today stands for absolute ownership. If land is conveyed in fee simple in this country, it is another way of expressing an intention to convey an absolute title. As Morgan, J., has aptly said: 'In what better manner can an intention to create an absolute title be manifested than by the use of an expression which describes in legal terms an absolute title?'[5]

Nelson v. *Nelson*[6] is a clear authority for the proposition that the execution of a deed of conveyance does not burden the land with the incidents of English law. In that case, family land was acquired by the Government and the family decided to use the compensation money for the purchase of another piece of land to replace it. The land was conveyed to the head of the family by a conveyance in English form for an estate in fee simple and, subsequently, the head of the family sold and conveyed the land to a third party, the second respondent. In an action to set aside the sale, it was contended that, since

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[1] [1962] W.N.L.R 74 at p. 83.
[2] Loc. cit.
[3] (1952) 14 W.A.C.A. 205.
[4] Ibid, at p. 206.
[5] [1962] W.N.L.R. 74 at p. 83.
[6] (1951) 13 W.A.C.A. 248.

the land was conveyed in English form for an estate in fee simple, the members of the family could not assert their rights which were incidents of customary tenure. The contention was rejected by the court on the ground that:

> It is conceded by counsel for the respondent that the mere fact that a form of English deed is used does not in itself attach to the property incidents of English land tenure. . . . Even if the appellants allowed and acquiesced in the first defendant's title by such means, this would not . . . necessarily imply that they had agreed that English law was to regulate the tenure under which the land was to be held, even if, as may be, it might have regulated the transaction of purchase as between the first respondent and his vendor, had any dispute arisen between them.[1]

Similarly, in *Miller Brothers* v. *Ayeni*,[2] it was held that land which had been conveyed for an estate in fee simple became family property nonetheless on the death of the owner intestate, on the grounds that the deceased was governed by customary law. Park[3] interpreted this decision as an illustration of the reconversion to customary tenure of land which had formally been converted to English tenure. The truth was, however, that there never had been any conversion.[4]

The idea of conversion or reconversion signifies nothing, for, whether the interest conveyed is described as a fee simple under English law or as an absolute estate under customary law, the rights and obligations of the owners are the same. As was said by Berkeley, J., in *Balogun* v. *Oshodi*[5]: 'It seems that Mr Irvine's fee simple, and Mr Johnson's absolute estate are one and the same thing under different names.' In *Thomas* v. *Holder*,[6] the West African Court of Appeal also had this to say: 'the basis of the appellant's claim is clear enough; in spite of the misuse of the words "in fee simple" in the conveyances the real nature of the appellant's claim was not in doubt'. The same idea was expressed by Ademola, C.J.F., in *Alade* v. *Aborishade*:[7]

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

The Court was more precise in *Kabiawu* v. *Lawal*.[8] In that case the

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[1] Ibid, at p. 250.
[2] (1924) 5 N.L.R. 40. See also *Ogunmefun* v. *Ogunmefun* (1931) 10 N.L.R. 82.
[3] Park, op. cit., p. 6.
[4] We shall consider in the appropriate places how this reasoning affects the operation of the legislation to which we have referred earlier.
[5] (1929) 10 N.L.R. 36 at pp. 46-7.
[6] Loc. cit., at p. 80.
[7] (1960) 5 F.S.C. 167 at p. 174.
[8] [1965] 1 All N.L.R. 329.

plaintiff claimed a declaration of title to certain land under customary law. A conveyance was tendered in which the land was said to have been conveyed to the plaintiff's father in fee simple. Nonetheless, the declaration was granted as 'there is no dispute that an owner of land under native law and custom can transfer his absolute interest and *describe* the entirety of such interests as conveyed by him as an estate in fee simple.[1] Thus, the problem is merely one of terminology.

In other words, land held in absolute ownership may be described as land held for an estate in fee simple. The term 'fee simple' in Nigeria has a connotation quite different from its connotation in strict English law. The term used here means absolute title or absolute ownership by whatever method it is claimed or acquired, i.e. whether by deed of conveyance or a transfer under customary law.[2] It also follows that an absolute owner of land can convey a fee simple estate within the meaning of, say, the Registration of Titles Act.[3]

This should not be understood to mean that English land law has no application at all in Nigeria. It is well known that interests such as leases and tenancies, mortgages, easements and profits, etc., are often created in this country in the same way as they are created in England. The nature and extent of such interests are governed by English law. The interests of two or more persons having concurrent or successive rights over a particular piece of land may be governed by English law or by customary law, depending on the intention. For example, two or more persons may hold interests in land as co-owners under English law, either by the express direction of the grantor or testator, as the case may be, or by operation of law. Except in the West and Mid-Western States, land may even be entailed.[4] Strict settlements of land are not of frequent occurrence. In all these cases where an intention to be bound by English law is manifested, English law applies for the determination of the rights, *inter se*, of the various individuals concerned, but has nothing to do with their relationship with the world at large. In short, while English law may govern the rights *inter se* of persons with concurrent or competing interests in a piece of land, it cannot govern the land itself. Thus any thought about conversion or reconversion of land from customary law to English law tenure and vice versa is misconceived.

Applicable Customary Law

The applicable customary law is the one prevailing in the area where the land is situated. There is no uniform system of customary law operating through-

[1] [1965] 1 All N.L.R. 329 *per* Coker, J.S.C.
[2] See *Alade* v. *Aborishade* (1960) 5 F.S.C. 167 at p. 169.
[3] Cap. 181, Laws of the Federation of Nigeria and Lagos, 1958 Revision.
[4] See *Jenmi* v. *Balogun* (1936) 13 N.L.R. 52. The fee tail has been abolished by statute in Western Nigeria—see s. 3(3), Property and Conveyancing Law, 1959, Cap. 100, Laws of Western Nigeria.

out Nigeria. There are as many systems of customary law as there are ethnic groups and even within an ethnic area there may be variations, not in essence but in detail, in respect of the particular localities of the area. Nevertheless, a careful examination of the various systems reveals some common characteristics. As Dr Elias has said: 'The evidence which one gets from comparative estimate of [the studies of field-workers] as also of the available data from judicial decisions, points to a large measure of common basic principles which underline indigenous systems of land tenure in various parts of Nigeria.'[1] This observation is not only true of systems of customary law in Nigeria but also throughout West Africa. The celebrated dictum of Lord Haldane in *Amodu Tijani* v. *Secretary, Southern Nigeria*,[2] referred to below, derived from a report on land tenure in West Africa, and a good number of cases which are referred to in this work are of Ghanaian or Sierra Leonian origin. It is on these common principles that this work is, in the main, based, although efforts will be made to refer to significant local variations which have been made known by judicial decisions. A person interested in the laws of a particular locality should make his own inquiries as to possible variations in that particular locality.

Another point to bear in mind is that customary law is a question of fact to be proved by evidence[3] unless, by consistent application in the courts, judicial notice has been taken of it.[4] The extent to which the court can use cases decided on a point of customary law in one area as the foundation for taking judicial notice of the same point of customary law in another area is not clear.[5] But, where the rule in question has been shown to be of wide application to a cross-section of the country or to a particular ethnic group, it is submitted that the court should presume that the rule is of general application.[6]

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[1] Elias, *Nigerian Land Law and Custom*, p. 93.
[2] [1921] A.C. 399.
[3] S. 14(1), Evidence Act, Cap. 62, Laws of the Federation of Nigeria and Lagos, 1958 Revision.
[4] S. 14(2), Evidence Act.
[5] See *Akande* v. *Akorede* (Unreported) CAW/9/71 (Western State Court of Appeal).
[6] For a development of this idea, see Olawoye, 'Establishing Customary Law: *Akande* v. *Akorede*', *Nigerian Journal of Contemporary Law*, 1971, Vol. 2, p. 260.

3 Indigenous Systems of Land Tenure

Introductory

The principle commonly asserted is that land belongs to the community, village or family, and never to the individual, as witness the following passage from the judgment of Lord Haldane in *Amodu Tijani* v. *Secretary of Southern Nigeria*:[1]

> The next fact which it is important to bear in mind in order to understand 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 village or community or head of the family has charge of the land and in loose mode of speech is sometimes called the 'owner'. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family. He has control of it and any member who wants a piece of it to cultivate or build upon goes to him for it. But the land so given remains the property of the community or family.

His Lordship explained that individual ownership, where it existed, came through contacts with Europeans, and that, except where land had been bought by the present owner, there were few 'natives' who were original owners of land.[2]

This statement of principle has been reaffirmed and applied in numerous other cases but, with respect, it is misleading in a number of respects. In the first place, the statement that the notion of individual ownership of land is foreign to native ideas is incorrect. Individual ownership has always been a feature of customary tenure throughout the country, although many lands are held in communal tenure by the community or family. The term 'family property' applies essentially to inherited land and extensions thereof by communal effort of the family members. When an individual acquires

[1] [1921] A.C. 399 at p. 404, cited from Rayner, *Report of Land Tenure in West Africa*, 1898. This case was cited with approval in *Sunmonu* v. *Disu Raphael* [1927] A.C. 881.

[2] Ibid.

absolute ownership of land either through self-help or through a grant from the traditional authority, or by purchase (gift) from a previous owner, on his death, it devolves on his children as family property unless and until the land is partitioned between the children. The land is thus handed down from generation to generation until it is partitioned. Thus, it would seem that the basis of the concept of family property is the recognition of individual ownership.

Secondly, the statement that all the members of the community have a right to use the land needs some qualification. It does not signify user in common. That explains Dr Elias's statement, quoted above, that the system of land holding is not 'communal'. It is ownership that may be communal, not the right of use. A member of the community has the right to use the portion which has been allocated to him or which, where custom so permits, he has appropriated to the exclusion of the other members of the community. In the majority of places such right of user may be permanent and may be transmissible to the occupier's descendants. The following observation of Forster Sutton, P., in *Tongi* v. *Khalil*,[1] a Sierra Leonian case, is pertinent:

> Under customary law when land has been allocated to a member by the tribal authorities such member acquires a right to occupy the land which is transmissible to his successors.

In *Eze* v. *Owusoh*,[2] Taylor, F.J., (as he then was) observed that the custom of some parts of Nigeria is similar, although it was shown not to be the position in the case before him.

Finally, the statement that land allocated to a member of the family remains the property of the community is not true of some parts of the country, as will be shown below.

The observation in the *Amodu Tijani* case has, however, generated a climate of legal opinion in favour of a presumption that land is communal property. In *Eze* v. *Igiliegbe*,[3] it was held that the burden is on the person claiming that land is not, or has ceased to be, communal property to prove his claim. Similarly, in *Ovie* v. *Onoriobokirhe*,[4] Onyeama, Ag. J., (as he then was) declared:

> The onus is on the plaintiff to establish by credible evidence that under local custom land could be owned by individuals; that is to say that the general principle of communal land ownership which has been recognized and acted upon in all courts in West Africa does not apply in his locality, or is in any way modified in its application.

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[1] (1953) 14 W.A.C.A. 331 at p. 332.
[2] [1962] 1 All N.L.R. 619 at p. 623.
[3] (1952) 14 W.A.C.A. 61.
[4] [1957] W.R.N.L.R. 169 at p. 170. See also *Aderemi* v. *Adedire* [1966] N.M.L.R. 398.

In that case the plaintiff who claimed to have been in possession for a long time failed to discharge the burden. It was held that at best he had a possessory title only, and could therefore not obtain a declaration of title in his favour to the exclusion of the community.

Community Land

Management of Community Land

Where title to a portion of land is vested in the community, no single member of the community can lay a claim to it as his. The land is not vested jointly in the individuals comprising the community in the sense that all members have a say in its management. The principle commonly asserted is that the land belongs to the head chief of the area who, however, holds it as head chief and not in his personal capacity. This principle has given rise to some difficulty, as it is not uncommon for a chief to claim beneficial rights over the land of his domain. Some chiefs are known to have sold or leased community land to business concerns and to have refused to account to the native treasury of their people. The argument of such rulers is not based on a claim of outright ownership of the land, but on the ground that, as they are the embodiment of the political society itself, they are entitled to any income or benefit coming to the society as an entity.[1] This, however, is completely dishonest. No doubt an Oba or chief is vested with authority over the land, but it is on the understanding that, because of his pre-eminence and the customary reverence in which he is held, he is the person best able to administer the land for the benefit of all. It is, indeed, part of his general administrative powers, which were referred to in Chapter 1. Moreover, the head chief is under an obligation to consult his senior chiefs, who together with him constitute the traditional authority. Thus a chief holds the land for the benefit of his people and, in the words of Lord Haldane, 'he is to some extent in the nature of a trustee of the land'.[2] The idea that community land is held on a kind of trust has received legislative recognition in Western Nigeria where, under the Communal Land Rights (Vesting in Trustee) Law, 1959, communal land in certain areas declared by the Minister of Lands to be within the area of operation of the law is declared to be vested in trustees appointed by the Minister under a properly drawn trust instrument. Such trustees are appointed primarily from among members of the traditional authority of the area, and are made strictly accountable for their management of the land.

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[1] Obi, *The Ibo Law of Property*, 1963, pp. 45-6.

[2] The chief is, however, not a trustee in the English sense. See Jegede, 'The Position of Head of Family in relation to Family Property' (1966) 7 N.B.J. 21. The arguments therein advanced apply to the chief's position with equal force.

In some village communities, the administration of village land is vested in all the heads of the families comprising the village, with the village head occupying a position analogous to that of a family head in respect of family property.

Individual Rights in Community Land

The rights which an individual may hold over the community land which he occupies vary from place to place, but it seems that certain common features are discernible. One such common feature is the distinction drawn in all the known systems between the position of members of the community and that of 'strangers'. A 'stranger', in this context, is a person who is not a member of the community in question but who has been allowed to settle there.

Rights of Members

With regard to the rights of members, about three patterns are discernible. In some areas an individual may acquire permanent rights in community land which is equivalent to ownership. Many Yoruba communities are of this type. In *Adewoyin* v. *Adeyeye*,[1] the Oni of Ife, the paramount ruler of Ile-Ife, testified that once an Oni had allocated a portion of communal land to a native of Ife for farming, the allocatee enjoyed ownership rights to the exclusion of the community. Similarly, a native might appropriate a portion of virgin community land to his own use, even without the specific sanction of the traditional authority, and thereby acquire permanent rights which might be equivalent to ownership. Lloyd[2] puts the matter thus:

> Once a man has farmed land he has the right to return to it after its fallow period. . . . Such permanent rights are sometimes explained by the belief that a man who spends immense labour initially clearing thick forest for cultivation is entitled to its use for more than one crop cycle and should have the benefits of the light clearing necessary after the bush fallow period.

Lloyd further explains that, where such permanent rights are recognized, they are not only held by the man for his lifetime but pass on his death to his children as family land.[3] The judgment of the Supreme Court in *Oragbade* v. *Onitiju*[4] illustrates this idea. The plaintiff in that case brought an action for declaration of title to land as representative of the Ifetedo community which, he alleged, owned the land. The evidence, however, disclosed that the plaintiff and others had an individual farm each within the area in dispute.

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[1] [1963] 1 All N.L.R. 52.
[2] Lloyd, *Yoruba Land Law*, 1962, p. 74.
[3] Ibid.
[4] [1962] 1 All N.L.R. 32 at pp. 37-8.

Bairamian, F.J., held that the effect of that evidence was that the Ifetedo community as a whole could not claim the entire area as communal land, as the farms belonged to the individuals to whom they had been allotted, and no longer to the entire community. In such areas the allocation of town land to a native for building confers ownership.

In some areas, the individual may acquire permanent, but only occupational, rights. In such cases the community holds a right to reversion which is exercisable upon abandonment. The position of such a member is analogous to that of a customary tenant of the community except that he is not required to pay rent.[1] In some areas the right acquired upon allocation is usually of limited duration, say, for a season, as is the case in many Ibo villages.[2] But even among the Ibos it is recognized that a man may acquire ownership of a portion of bad bush which he has reduced to cultivation for two seasons.[3]

The chief may not revoke the allocation made to a member of the community unless the land is required for public purposes by the community,[4] nor can he make an inconsistent grant of it to someone else. In *Adewoyin* v. *Adeyeye*,[5] and again in *Asiyanbi* v. *Adeniji*,[6] the Supreme Court held that the Oni could not make a grant of land over which a family enjoyed hunting rights to another person, whether a member of the family or not, without consulting the family, and that any rule of customary law to the contrary would be rejected as repugnant to natural justice, equity and good conscience. Inconsistent grants of farming rights could not *a fortiori* be made, and any subsequent grant, if made, would be void. It made no difference that the earlier grant was in respect of a very large area.[7]

Position of Strangers

The right to appropriate vacant virgin land is the exclusive preserve of members of the community; it is not available to a stranger. A stranger can only acquire title to land by grant from the traditional authorities, or from the family in whom ownership has been vested. Moreover, a stranger cannot acquire ownership of land, although his rights may be permanent and may be transmissible to his descendants. He is regarded as a customary tenant of the host community. While a member has a relatively free hand in the use of his land, a stranger can only use the land for the purposes for which the grant had been made, which usually is for the purposes of farming.[8]

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[1] For example, Benin, where communal ownership is still in use.
[2] *Per* Taylor, F.J., in *Eze* v. *Okwuzoh*, loc. cit.
[3] Obi, op. cit., p. 36.
[4] In which event a new site would be allocated as compensation.
[5] Loc. cit.
[6] [1966] N.M.L.R. 106.
[7] *Adewoyin* v. *Adeyeye*, loc. cit.
[8] See Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons*, 1957, Chapter 22.

Extent of Community Ownership Today

From what has been said so far, it follows that in those areas where a member's right to acquire ownership is recognized, the term 'community land' can only apply to bush land which has not been granted to, or appropriated by, the individual members of the community. Land used for the public purposes of the community also attracts the incident of community ownership, and it is to this that the term can be more meaningfully applied. In many Yoruba communities, certain chieftaincy titles carry with them the right to reside in an official residence, usually referred to as a palace, in the case of the Oba or head chief, and 'title house' in the case of a sub-chief. The palace or 'title house' together with the land appurtenant thereto, otherwise known as 'stool land' and usually a vast expanse of land, is vested in the chief for the time being for his use and occupation during his tenure of office. In the case of the Oba's palace, improvements made on the land by a reigning Oba accede to it and cannot be inherited by his children, as the land vests automatically in his successor in office who is invariably not his own son. The legal position is the same in respect of a 'title house' except that, while in the case of the palace improvements created by a reigning Oba pass with the palace to his successor and not to his children, the family of a late chief is allowed to remove improvements made by him to a 'title house'.[1] The palace and 'title house' are owned by the entire community and can only be divested of the incidents of community ownership by the traditional authority of the community. Alienation by a chief to a third party is clearly invalid and the alience can be evicted by the successor to the chieftaincy title.

Community Land Distinguished from Council Land

A local government council may hold land in the same way as an individual and land formally held by native authorities as such is now deemed to be vested in local government councils.[2] But land held by a traditional authority on behalf of a community does not pass to the council by virtue of this provision. The reason is that the role of the Oba and their chiefs under customary law is technically different from the role which they formerly played as the native authority under statute, that role being transferred to

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[1] See Lloyd, *Yoruba Land Law*, pp. 47, 71-2, 112-15. A source of difficulty is already rearing its head in this connection. What happens when a reigning chief puts up a modern concrete building, worth several thousand naira, on the land which, of course, he is entitled to do? It is senseless to think of its removal, but who owns it? Has the successor the right to use it?

[2] See s. 225, Local Government Law, Western Nigeria. Any person disputing the right of the community over the land has, in default of agreement, a right to apply to the High Court for declaration of his rights, provided his claim was made within one year after the vesting of such land in the Council has been notified in the Gazette.

the modern councils. The land is vested in the traditional authority under customary law and not by virtue of the statutory powers under the Native Authority Ordinance.

The Forestry Act[1] empowered the native authorities or local government councils by order to constitute as native authority or local government council forest reserve any land lying within the area of its jurisdiction.[2] The effect of such an order was that any right in or over land within an area constituted as such forest reserve was relinquished.[3] In *Aderawos Timber Company* v. *Adedire*,[4] the Privy Council held that the effect of the provisions was that ownership of the land covered by the order became vested in the native authority or local government council and, this being so, the right of the communal owners over the land, or at any rate over the trees, was extinguished and the land ceased to be communal land. The same principle, it is submitted, applies to other community land which is held by the local government council. In relation to the community, it is in the same position as State land which is owned and controlled by the Government; a member of the community has no individual right of property to such land unless a grant has been made to him, and may be guilty of trespass as a result of unauthorized use. Certainly, in his capacity as a private member of the community, he has no voice in its management.[5]

Family Property

The institution of family property is one of the corner-stones of customary land law. The rules of all the various systems of customary law are largely uniform as to the incidents of this form of tenure, although the composition of the group making the family varies from place to place.

Creation of Family Property

Where a landowner dies intestate, his land becomes the family property of his heirs.[6] It is, however, not a correct proposition of law that all inherited land is family land. A mistake in that direction led the Supreme Court to hold in *Abeje* v. *Ogundairo*,[7] that land which was inherited by a sole heir was family land which the sole heir could not dispose of under his will.

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[1] Cap. 72, Laws of the Federation of Nigeria and Lagos, 1958. This is now a State legislation.

[2] Ibid, s. 22.

[3] Ibid, s. 27.

[4] [1963] All N.L.R. 429.

[5] Ibid.

[6] *Lewis* v. *Bankole* (1908) 1 N.L.R. 89; *Ogunmefun* v. *Ogunmefun* (1931) 10 N.L.R. 82; *Miller Brothers* v. *Ayeni* (1924) 5 N.L.R. 42.

[7] (As yet unreported) Suit No. S.C. 80/1968 of 13/2/70. See Olawoye 'The Meaning of Family Property', *Nigerian Journal of Contemporary Law*, Vol. 1, 1970, p. 300.

Thus, family property is a form of co-ownership[1] and as such it cannot arise upon an intestacy where there is a sole heir. A further qualification is that the intestacy must be one which is regulated by customary law. Where English law governs the intestacy, the co-heirs take as tenants in common under English law.[2]

Family property may also be created by a conveyance *inter vivos*, for example, where land is purchased with family money. Such property becomes family property as if it had formed a part of the inheritance.[3] The fact that the land had been conveyed to the family head for an estate in fee simple does not affect the rule.[4]

Finally, family property may be created by will, whether or not the testator's intestacy is subject to customary law. It would not seem, however, that a non-Nigerian can create family property by his will, unless the devisees are persons subject to customary law. Whether a will creates family property or not depends on the construction of the will.[5]

Definition of Family

Dr Elias[6] has defined the family as the smallest social unit in the body polity which is variously composed of a man, his wife or wives, and their children. Lloyd[7] says that among the Yorubas the term may connote any group from the smallest nuclear family of a man, his wife and child, to several thousands tracing descent from a common ancestor. However, in its strict analytical sense in the context of family property 'family' has a restricted meaning. As the term 'family property' applies essentially to land inherited by a plurality of heirs, only those who, for the time being, are entitled to the inheritance are within the group. Thus, the answer to the question, 'Who are members of the family?', must coincide with the answer to the question, 'Who are those entitled to claim as heirs of the founder of the family at the material time?' Thus, widows are excluded as a widow cannot inherit her husband's property. Therefore, where inheritance is by the children, only the children of the founder of the family constitute the family. In the case of those parts of Ibo territory where sons only inherit land,[8] daughters are not included. In default of issues or, in the case of Ibo land, in default of male issues, the family is constituted by collaterals (i.e. brothers and sisters or brothers only, as the case may be) of the founder of the family.

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[1] This explains the rule that partition terminates family property.
[2] *Johnson* v. *United Africa Company* (1936) 13 N.L.R. 13.
[3] *Nelson* v. *Nelson* (1913) 13 N.L.R. 248. See also *Dosunmu* v. *Adodo* [1961] L.L.R. 149.
[4] *Nelson* v. *Nelson*, loc. cit.
[5] For a further discussion of this topic, see Chapter 6.
[6] Elias, op. cit., p. 91.
[7] Lloyd, op. cit., pp. 31-2.
[8] For example, Onitsha. See *Nezianya* v. *Okagbue* [1963] 1 All N.L.R. 352.

In the case of family property created by will, the composition of the family is determined by the terms of the will. For example, in *Sogbesan* v. *Adebiyi*,[1] a testator devised his property to be held as family property and appointed his brother, Sogbesan, as the head of the family. It was held that the family was intended to include his brothers and sisters and their descendants. As the judge said, 'It would be contrary to the conception of native law and custom as well as to good sense to appoint a person who himself is given no interest in the property to act as head of the family.' In *Jacobs* v. *Oladunni Brothers*,[2] as well as in *George* v. *Fajore*,[3] the children who were intended to benefit were specifically mentioned by name in the will creating the family property. In such a situation, the family would embrace those children only and their descendants in their stead.

Position of Grandchildren

The statement of Dr Lloyd that 'family' 'includes all [the founder's] descendants in the male line (in the case of agnatic lineage) or both male and female lines (in the case of the cognatic descent group)' and that 'new members belong to it by virtue of their birth and accede to their rights at the time of their birth',[4] may lead to the erroneous inference that grandchildren or other descendants are part owners of family property during the lifetime of their own parents. Grandchildren or other descendants or the children of collaterals and their descendants do not come into the fold until the death of their own parent through whom they claim and into whose shoes they step irrespective of their number. In *Lewis* v. *Bankole*,[5] the Full Court held that a grandchild could not demand as of right a portion of family land for building. In *Balogun* v. *Balogun*,[6] it was held by the West African Court of Appeal that a grandchild of the founder of the family could not challenge a disposition by his father of a portion of family land which was allotted to his father upon a partition.

Position of Slaves or Domestics

Where the circumstances of the family admit, the family may include slaves or domestics and their descendants. That was the case in *Dabiri* v. *Gbajumo*[7] where Taylor, F.J., said: 'In the past, slaves, with particular reference to the Oshodi family and their descendants, have regarded themselves and been

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[1] (1941) 16 N.L.R. 26.
[2] (1935) 12 N.L.R. 1.
[3] (1939) 15 N.L.R. 1.
[4] Lloyd, op. cit., p. 78.
[5] (1908) 1 N.L.R. 82.
[6] (1943) 9 W.A.C.A. 78.
[7] [1961] 1 All N.L.R. 225 at p. 231.

regarded as members of the family or house of their overlords under native law and custom.' This was a claim which concerned the right of descendants of slaves to the occupation of a portion of family land which had been allocated to their ancestor, and the validity of the observation must necessarily be limited to that type of case and cannot be taken as a general proposition of law that slaves and their descendants can be part owners of family property. As the Supreme Court aptly observed in *Chairman, L.E.D.B.* v. *Fahm*,[1] slaves and domestics were their master's chattels and were themselves the objects of inheritance.

Management of Family Property

Management of family property is put in the charge of the family head. It is he who makes allocation of portions to members or others for use and, where the property is let out to tenants, it is his duty to collect the rents and also to pay the outgoings from the family funds. We have seen that in *Amodu Tijani* v. *Secretary, Southern Nigeria*,[2] the position of the family head was likened to that of a trustee and, in loose mode of speech, he is frequently referred to as the 'trustee' or 'owner' of family property. It has been argued with justification that such a description is strictly inaccurate and tends to give the erroneous impression that the family head holds the legal estate in the land whilst the beneficial ownership is vested in the family in equity.[3] The trusteeship of the family head is in a special sense of the term. It signifies only that he is expected to exercise his powers not for his own private advantage, but for the benefit of the family. Thus, whilst it is inaccurate to say *simpliciter* that the family head is a trustee of family property, it is not inaccurate to say that he is a trustee of his powers.

The family head does not enjoy absolute powers in the management of family property. He is required to consult the other members of the family and, in the case of important dispositions of the property, such as sale, long lease or mortgage, the consent of the principal members is required. A junior member of the family has, however, no voice in the management of family property. He can only be heard through the head of his own branch of the family.[4]

Who is Family Head?

Traditionally, under most systems of customary law the family head is the eldest surviving male member of the family, but nowadays the claim of

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[1] (Unreported) F.S.C. 140/62—16/3/63.
[2] [1921] A.C. 399 at p. 404.
[3] Jegede, op. cit., at p. 34.
[4] *Lewis* v. *Bankole*, loc. cit.

females has been recognized.[1] It was conceded in *Lewis* v. *Bankole* that the first family head is the *Dawodu*, i.e. the eldest male child of the founder of the family,[2] unless the deceased left no male child. After the death of the *Dawodu* the family headship becomes a matter of seniority. This proposition is not true of Ibo law. Under that law, the family headship devolves on the eldest son and his male descendants on the principle of primogeniture.[3] The founder of the family may indicate before his death, or in his will, the person to act in the capacity of family head. Such a desire was expressed in *Sogbesan* v. *Adebiyi*[4] and was respected. Subsequent heads of the family have no such power.[5] Similarly, the members of the family have the right to appoint one of their number as family head in preference to the oldest member if they are dissatisfied with him.[6] The method of election is invariably the case in respect of chieftaincy families in Lagos and the Western State. Except in the case of such chieftaincy families, the appointment and deposition of the family head are the internal affairs of the family. There is no formal requirement for such appointment, and it is not necessary to publicize it, although it may be prudent to do so. In the case of the chieftaincy families, the formal recognition of the head chief is normally a requirement, but a purchaser should be entitled to assume that the person occupying the chieftaincy stool is the head of the family.

Principal Members

The other principal members of the family are the respective heads of the various branches of the family. The composition of that body would depend on the structure of the family. In the case of a polygamous family, the children born of each wife to the founder constitute one branch, and the oldest member of the branch or a person delegated on that behalf by the members of that branch is a principal member of the family. In the case of a monogamous family (if the founder has directed in his will that the property should be held as their family property), or where the founder is a woman,

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[1] In *Lewis* v. *Bankole* (1909) 1 N.L.R. 81, it was held that a woman can be head of family. The contrary was held in *Ricado* v. *Abal* (1927) 7. NL.R. 58, but it is submitted that *Lewis* v. *Bankole* is to be preferred. The truth is that, because a woman is not usually forward, it is not uncommon for the family to displace her by appointing a male member as head or for her to acquiesce in the eldest male's exercise of the functions of family head. In *Taiwo* v. *Sarumi* (1913) 2 N.L.R. 106 where the first-born female was of influential character, her claim to the headship of the family was recognized.

[2] The term 'founder of the family' is a convenient expression to describe the person whose property is being treated as family property. Thus the founder of the family need not have founded a family in the social or biological sense, as in the case of a bachelor whose property devolves on his collaterals as family property.

[3] See *Ngwo* v. *Onyejena* [1964] 1 All N.L.R. 352, in respect of Asaba custom.

[4] Loc. cit.

[5] *Ajoke* v. *Olateju* [1962] L.L.R. 32.

[6] *Inyang* v. *Ita* (1929) 9 N.L.R. 84.

each child of the founder constitutes a branch and such a child is a principal member. After the death of the child, his eldest descendant becomes a principal member in his place unless a younger person has been elected to the headship of that branch.

Where a junior member of the family plays a significant role in the family's affairs, he may be co-opted into the family council. For example, in *Esan* v. *Faro*[1] the court rejected the contention that the appellants were not principal members of the family when it was proved that:

> One of the appellants had at one time been Secretary to the family, and that they were all sufficiently important to be summoned to the meetings, while the first respondent in a previous case had stated that the first appellant should have signed a deed as a member of the family.[2]

Nature of a Member's Right in Family Property

A member of the family has no general right to use any portion of the family property as he pleases. He is only entitled to occupy the portion which his head of family has allocated to him for that purpose. In *Lewis* v. *Bankole*[3] it was held that a member of a family has no right of ingress and egress in respect of any portion of the family property not allocated to him. This means that the member in possession has exclusive possession of the portion allocated to him.[4] His interest in the portion so allocated is in the nature of that of a customary tenant of the family.[5] Subject to the family head's power to vary the allocation if the circumstances of the family so warrant, or the purpose of the grant, his interest may endure for the whole of his lifetime and in certain cases may be transmissible to his own descendants. The legal position was put by Graham Paul, J., thus:

> That individual right of user is . . . purely and simply a life interest. On the death of the individual, that interest reverts to the whole family, though by reason of the user enjoyed by the deceased individual during his or her life, the family will generally permit his or her children to have among them the same user as their parent had *if the circumstances of the family and of the property admit.*[6]

It need hardly be said that a member of a family cannot dispose of his family property, since it is not his own alone. What is, perhaps, more sig-

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[1] (1947) 12 W.A.C.A. 135.
[2] Ibid, at p. 136.
[3] (1908) 1 N.L.R. 81.
[4] See *Okoh* v. *Olotu*, where it was held that a member rightfully in occupation of a portion of family property could maintain an action in trespass against other members of the family.
[5] See *Adagun* v. *Fagbola* (1932) 11 N.L.R. 110.
[6] *Taylor* v. *Williams* (1935) 12 N.L.R. 67. Emphasis supplied.

nificant to note is that he cannot even dispose of his own share to a third party, as a tenant holding an undivided share under English law is competent to do. In English law, a tenant in common has the right to dispose of the undivided share, whatever the proportion of the holding, to a third party without the consent or even the knowledge of his co-owner, because it is his separate property. A member of the family has not that power, as he has no separate interest in the property. In *Akeju* v. *Suenu*,[1] a portion of family land was allocated to a member for occupation with his family, and the members of the family continued to occupy this land until the time of the proceedings. Subsequently, without the knowledge of the family a son of the allottee purported to convey the portion to one Kuti in fee simple and Kuti subsequently mortgaged the property to the defendant. Van der Meullen, J., had no difficulty in holding that both the conveyance to Kuti and the mortgage were void on the ground that the property in dispute was part of the plaintiff's family property.

For the same reason, the interest of a member of a family in family land cannot be attached for the payment of his personal debt.[2] Commenting on this proposition in *Jacobs* v. *Oladunni Brothers*,[3] Graham Paul, J., declared:

> I am unable to find anything repugnant to natural justice, equity or good conscience in a native custom which protects 'family property' from attachment for the individual debts of one or more members of the family. In fact, counsel for the execution creditors admitted that once this property was held to be family property it was well settled by authority in this Court that it could not be attached for the individual debt of one or more members of the family and that in that event he had no case.[4]

A member's right over the portion allocated to him does not devolve on his heir at law. Indeed, where his heir is not a member of the family no interest in the family land whatever devolves on him. This is illustrated by *George* v. *Fajore*,[5] in which case a portion of family land was allocated to one Peter Durojaiye, one of the twelve named beneficiaries in the will creating the family property, and a son of the defendant. Peter Durojaiye died in 1931 leaving a widow and a child. After the death of the child in 1936, the defendant took possession of the portion which had been allocated to her son. The plaintiffs sued for its recovery. Butler Lloyd, J., held that 'as the testator intended the property to be held in accordance with native law and

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[1] (1925) 6 N.L.R. 87.

[2] See *Miller Bros.* v. *Ayeni* (1924) 5 N.L.R. 42 at p. 44.

[3] (1935) 12 N.L.R. 1.

[4] Ibid, at p. 3. The question for decision, therefore, was whether the members held the property under English law or under customary law.

[5] (1939) 15 N.L.R. 1. See also, *Caulcrick* v. *Harding and Another* (1926) 7 N.L.R. 48, where a husband claimed his wife's one-third portion of family property without success.

custom . . . I have no difficulty in holding that the defendant could acquire no interest upon the death of her son and failure of his issue'.[1]

For the same reason, a member of the family cannot dispose of his interest in family property by will. In *Ogunmefun* v. *Ogunmefun*,[2] a testatrix devised her share in her family property to certain relations. It was held that the disposition was void. The same decision was reached in *Taylor* v. *Williams*,[3] notwithstanding that the devisees were the children of the testatrix.

The restrictions remain, however, until partition.[4] Thus, a member wishing to alienate his interest should first seek partition but, even where a partition has been agreed upon, the member's separate interest will not arise until the partition has been effected. In *Akerele* v. *Liye-Labelu*,[5] a member of a land-owning family sold his share expectant upon a proposed partition but died before the partition was actually effected. It was held that the sale was void, the land being family land at the time of the sale.

The foregoing should not be understood to mean that a member can under no circumstances part with his holding. Under most systems of customary law, or where the circumstances of the family admit, a member of the family may 'lend' family land occupied by him to strangers or, with the consent of the family head, put some lodgers or tenants there. He may even pledge it to secure a loan, but a mortgage in English form cannot be validly created in respect of such interest since the mortgagee's power of sale is inherent in the transaction.

Where a Member has Improved Family Land

Family property does not cease to be so merely because a member has improved it out of his own private means. In *Bassey* v. *Cobham*,[6] a family member reclaimed marshy family land out of his own pocket, but it was held that that did not confer on him any special interest in the land reclaimed as against the corporate title of the family. Similarly in *Shelle* v. *Asajon*[7] a member of the family replaced the old thatch roof of the family house which she occupied with corrugated iron sheeting; it was held that she did not thereby become owner of the house. As Jibowu, Ag. F.C.J., explained: 'The person who lives in a family house is expected to keep the place in good

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[1] Ibid, at p. 3.
[2] (1931) 10 N.L.R. 82.
[3] (1935) 12 N.L.R. 67. See also *Johnson* v. *Macaulay* [1961] 1 All N.L.R. 743.
[4] Ibid.
[5] [1956] L.L.R. 35.
[6] (1924) 5 N.L.R. 92.
[7] (1957) 2 F.S.C. 65. See also *Adenle* v. *Oyegbade* [1967] N.M.L.R. 136. But where a member rebuilds a family house which has gone to ruin, he has a definite life interest therein. On his death, it becomes the property of the entire family and not of his immediate descendants. That being the case, he cannot devise it by his will. See *Owoo* v. *Owoo* (1945) 11 W.A.C.A. 81, approved by the Supreme Court in *Shelle* v. *Asajon*.

state of repair in order to make the house habitable or more comfortable for him, the occupier.'[1] It is clear that performance of this obligation cannot confer a special advantage on that member.

Where land is allocated to a member for the purpose of its being built upon or for the cultivation of permanent crops such as cocoa, rubber or oil palm, the improvement thus made does not accede to the land. The maker becomes the absolute owner thereof, although the land remains family property.[2] In principle, he can deal with it in whatever way he pleases; the improvement can be sold or pledged without reference to the family; if the property is acquired by the Government, he alone, and not the entire family, is entitled to the compensation payable thereon, allowance being made, of course, for the soil. On the death intestate of the maker, it becomes the family property of his own descendants alone. As the maker of the improvement cannot dispose of the soil alone, it would seem that the consent of the family to any alienation to strangers is indispensable. In effect, it means the maker cannot alienate his improvement without family consent, as otherwise the purchaser might not be able to use the land on which the improvement stands and, consequently, the improvement itself. As was said in *Odunlami* v. *Soroyewun*[3] a purchaser of his interest from a member of a family who has built on family land 'could only acquire the right to demolish the house and remove the materials: the purchaser could not as against the family assert a right to use and occupy the house which was on family land'. This observation was cited with approval by Irwin, J., in *Omolodun & Others* v. *Olokude*[4] where it was held that the family was entitled to recover possession of a portion of family land upon which a member had built and which had been sold by court order in execution of a judgment debt incurred by the member of the family. Dr Lloyd has suggested that it may be otherwise if the alienation is to a member of the family since that member has a customary right to use the land.[5] It is, however, doubtful whether the member to whom such alienation has been made can acquire a right of possession without the consent of the family head.

Determination of Family Property

Family ownership may come to an end in any one of the following three ways:

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[1] (1957) 2 F.S.C. at p. 67.

[2] *Santeng* v. *Darkwa* (1940) 6 W.A.C.A. 52. This is a decision of the West African Court of Appeal in respect of Ghana but, as the decision was based on justice rather than strict customary law, it seems to be generally applicable in West Africa. The customary law of the Western State of Nigeria is definitely the same. See Lloyd, op. cit., p. 82. See also *Salako* v. *Oshunlami* [1961] W.N.L.R. 189.

[3] Unreported Suit No. I/52/48 *per* Hallinan, J.

[4] 1958 W.R.N.L.R. 130, at p. 131.

[5] Op. cit., p. 82.

(i) by an absolute conveyance of the family land to a single individual whether or not he is a member of the family. This is normally in pursuance of a sale, but it could well be by way of gift.
(ii) by partition between several individuals of the family entitled to a share.
(iii) by devolution on a single individual. This is controversial in view of the decision in *Abeje* v. *Ogundairo*.[1]

Partition or sale of family property may be either at the instance of the family or by an order of court. As to sale by the family, nothing further need be said at this stage.[2]

Partition

By partitioning the property among the several members of the family entitled to a portion, the family property is split into several individual properties, each portion vesting absolutely in the member to whom it has been apportioned. The leading case on the subject is *Balogun* v. *Balogun*.[3] The property in dispute originally belonged to one Oloko Balogun. In 1903 the children of Oloko Balogun by deed partitioned the whole of their father's property among themselves, and the various portions so partitioned were clearly specified in a plan attached to the deed. Alli Balogun, one of the children, in addition to his own portion, later purchased the portion acquired by another of the seven children. He died intestate leaving two sons, the plaintiff and one Yesufu Balogun, who partitioned between themselves their father's share of the property. Later Yesufu Balogun conveyed his share to the plaintiff by deed. In this action, the plaintiff claimed against the defendants, the children of Yesufu Balogun, a declaration that he was absolutely entitled to Alli Balogun's share of the property and for ejectment of the defendants. On the other hand the defendants claimed that the land was family property and that the deed of conveyance executed by their father was ineffectual. The defendants' claim succeeded in the High Court, but was dismissed by the West African Court of Appeal. As Graham Paul, C.J., said:

> It being well established that there can be . . . absolute alienation of family property by general consent it is clear that the 1903 partition deed, to which all the members of Oloko's family were parties, in this case effectually vested in each of the parties an absolute title to his or her share. Similarly the later partition and conveyance by and between the sons of Alli Balogun effectually vested in the plaintiff the absolute title of Alli Balogun to which the 1936 conveyance . . . referred which it is not disputed include the premises of which the appellant now asks for recovery of possession.[4]

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[1] Loc. cit. See also Chapter 6.
[2] See Chapter 4.
[3] (1943) 9 W.A.C.A. 78.
[4] Ibid, at p. 82.

Partition should be distinguished from mere allotment of occupational rights by the family head. Such allotment confers a right of occupancy and the portion so allotted continues to be corporately owned by the entire family. This is so even where there is an understanding that the allottee's own descendants should succeed to his holding.[1] Whether there has been a partition or an allotment for occupation is a question of fact, and the burden of proving that family land has been partitioned is on the person alleging it.[2] It is, however, clear that partition must be consciously done. The division must be understood as partition by the members of the family and would be preceded by a family meeting. Thus, if the partition was not documented, any member of the family present at such a meeting could be called as a witness where the issue is litigated. In any case of difficulty, the court will be guided by the intentions as collected from all the surrounding circumstances. For example, in *Makejodunmi* v. *Tijani*,[3] Berkeley, J., held that evidence that some of the family land still remained unallocated was sufficient to show that no partition had taken place. Similarly, in *George* v. *Fajore*,[4] the fact that a portion of the property was left unallocated but was let to tenants for the upkeep of the entire property was held to indicate that the property was still family property. On the other hand, in *Dosunmu* v. *Adodo*[5] the family acquired a large area of land with family funds and the family head, with the consent of the family, subsequently apportioned the land between the three branches of the family by giving each a number of plots. The branches in turn allocated these plots to their members. De Lestang, C.J., (Lagos) held that this was, in the circumstances, a partition between the branches and not merely a grant of occupational rights.

Today a partition could probably be effected by a deed of partition[6] or by a conveyance by the family of the portion allocated to the member to whom it had been allocated.[7] In this way argument can be avoided.

Partition or Sale by Order of Court

The court has an inherent power to order a partition or sale of family property, anything in customary law to the contrary notwithstanding.[8] It was asserted in *Lopez* v. *Lopez*[9] that a member of the family has the unrestricted right

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[1] In *Onisiwo* v. *Fagbenro* (1954) 21 N.L.R. 3, it was held that certain members of the family forfeited their right of occupancy by attempting to alienate it, notwithstanding that they and their ancestors had been in occupation for about thirty years.
[2] *Idewu* v. *Hausa* (1936) 13 N.L.R. 96.
[3] (1932) 11 N.L.R. 74.
[4] Loc. cit.
[5] [1961] L.L.R. 149.
[6] As in *Balogun* v. *Balogun*, loc. cit.
[7] See *Suberu* v. *Sunmonu*, loc. cit.
[8] *Lewis* v. *Bankole* (1908) 1 N.L.R. 81 at p. 105.
[9] (1924) 5 N.L.R. 50.

to apply to the court for a partition or sale of family property, but his chance of success in such an action is very much restricted. From what one can gather from the decided cases, it seems that the court will not order a partition or sale of family property at the suit of a member of the family unless there is a dispute in the family which renders the maintenance of family ownership unwise in the interests of peace in the family.[1] This principle was elaborated upon in *Lopez* v. *Lopez*[2] where Combe, C.J., declared:

> Where there has been a persistent refusal by the head of a family or by some members of the family to allow other members of the family to enjoy their rights under native law and custom in family land, the court has exercised, and will continue to exercise, its undoubted rights to make such order as will ensure that members of the family shall enjoy their rights and if such right cannot be ensured without partitioning the land, to order a partition.
>
> The court however has not interfered, and should not interfere, with the management of family property by the persons entitled by native law to manage such property unless reasons for such interference are alleged and proved.[3]

In this case the plaintiffs failed to allege any grounds which, if proved, would justify the court in ordering a partition of the property. Accordingly, their claim was dismissed. It follows from this that a member cannot ask for a partition merely because he intends to deal in his share. As was said in *Bajulaiye* v. *Akapo*,[4] the court will not order the sale of family property 'merely because some interested parties desire to turn the property into cash'. In that case, since the plaintiff did not express any desire to live in the family property and the defendant was willing for the plaintiffs to share in the occupation of the premises or alternatively in the rents derived thereon, it was held that the plaintiffs had not made a case for an order of partition. On the other hand, in *Ajobi* v. *Oloko*,[5] where the plaintiffs were not allowed to participate in the occupation of the property, partition was ordered.

The decision in *Ajibabi* v. *Jura*[6] should be noted. In that case, the family property consisted of two rooms and seven members of the family were entitled to reside in it. A sale was ordered as the house was incapable of fulfilling its role as a family house. This case should not be regarded as authority for the proposition that a sale of family property would be ordered where the property was too small to accommodate all those entitled to reside therein. The court should have regard to the needs of the members of the

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[1] See *Lewis* v. *Bankole*, loc. cit., at pp. 95, 97 and 103.
[2] (1924) 5 N.L.R. 50.
[3] Ibid, at p. 54.
[4] (1938) 14 N.L.R. 10 at p. 11.
[5] [1959] L.L.R. 105. See also *Salvador* v. *Salvador* [1959] L.L.R. 52, where the court ordered a sale.
[6] (1948) 19 N.L.R. 27.

family in occupation and the effect which a sale of the property would have on them, particularly where the members requesting a sale can well provide for themselves. This view is consonant with the conception of the family house as a kind of social insurance for needy members of the family.

These cases concerned disputes over the 'family house', which is only a species of family property. The extent to which the same principles would govern farm land or buildings other than the family house is not clear.

4 Acquisition of Title to Land *inter vivos*

In the absence of a system of registered conveyancing, the evidence of title is necessarily directed to the mode of acquisition of the title claimed or sought to be transferred. If the plaintiff or vendor admits the prior ownership of the land by another person, he must show that his title has been validly acquired from that person. Thus, where title to a disputed land has been traced to a person whose prior ownership is admitted or established, the party whose title is validly derived from that person will be adjudged owner of the land. Our immediate task, therefore, is to analyse the ways in which a good title to land may be acquired.

Title to land may be either original or derivative. By original title, we mean a title which does not depend on the prior ownership of any other person than its present owner, while a derivative title is one which has been acquired through a grant from, or by succession to, the previous owner. This chapter is devoted to the acquisition of original ownership and acquisition of ownership by grant. Succession to land will be discussed separately in Chapter 6.

Acquisition of Original Title

Original ownership may be acquired through self-help which may take one of two forms: (i) by settlement, (ii) by conquest. It may also be acquired through a grant by the traditional authority of the community, where by customary law such a grant confers ownership on the grantee.[1]

Settlement

An individual family or community may acquire title to land by being the first to settle on land over which no previous claim (individual, family or community) exists. The title acquired in such a situation is definitely absolute.

Authority for this proposition can be found in the following observation of the learned trial judge in *Owonyin* v. *Omotosho*:[2]

[1] See pp. 23-4, above.
[2] [1962] W.N.L.R. 1 at p. 3.

> But ownership or title must go to the first settler in the absence of any evidence that they[1] jointly settled on the land or that a grant of joint ownership was made to the later arrival by the first. The question, therefore, resolves itself to this—who was the first settler on the land, Okegbemi or Owonyin?

Although the decision of the trial judge was reversed on appeal, the Federal Supreme Court did not quarrel with the view taken by the trial judge that ownership must go to the first settler. The decision was reversed on the grounds that the question as put 'assumes that there was no evidence that a grant of joint interest was made to the later arrivals by the first',[2] thus confirming the learned judge's view that ownership goes to the first settler. Again, in *Iba Oluyole* v. *Olofa*,[3] Brett, J. S. C., said:

> The judgment in the plaintiff's favour can only be upheld if this Court is prepared to say that the judge ought to have been satisfied on the evidence that the plaintiff's ancestor was an original settler.

We have seen that in certain areas an individual may acquire title to a portion of community land by being the first to cultivate it.[4] Whether or not the title so acquired amounts to ownership depends on the customary law of the area. However, first occupation of land without the manifestation of an intention to make one's own the land which one was the first to occupy does not create ownership.[5] Where, for example, a person occupies land and subsequently abandons it without leaving any mark of his occupation, he cannot afterwards oust a subsequent occupier merely by asserting that he was the first to occupy the land. His story might not even be believed. The only way whereby a settler can manifest his intention to acquire ownership is by behaving to later arrivals on the land as the owner thereof; as by imposing a rent for the use of the land or by insisting on his prior consent to the use of portions thereof. At least two points follow from this argument: first, the belief of the settler that the land has no prior owner; second, the acquiescence of newcomers in the title which the settler claims for himself, by agreeing to pay the rent charged or by seeking the settler's permission to use the land either peaceably or by force.

While, in theory, it is still possible today to acquire ownership of land by self-help, the onus of proving that the land in question was believed *bona fide* to be without an owner would be a very heavy one indeed. Such a claim would be extremely suspect and readily disbelieved. In the first place, there is no land which does not form a part of an administrative division in Nigeria, and it is clear that these administrative divisions are based on the boundaries

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[1] i.e. the ancestors of the parties.
[2] [1962] W.N.L.R. 1 at p. 6.
[3] (Unreported) S.C. 420/65 of 17 March 1967.
[4] See p. 23, above.
[5] Bentsi-Enchill, *Ghana Land Law*, p. 261.

of the old land-owning kingdoms or communities. Even within the areas where permanent rights over community land can be acquired merely by occupying the land and asserting one's title, the comparative ease with which ownership can be acquired makes it difficult for a reasonable man to believe that the land has not been previously appropriated by somebody after a long period of occupation by the community. Thus, it can be asserted with complete confidence that in Nigeria today there is no piece of land without an owner, whether the owner be the individual, the family, the community or the State.

Conquest

The right of ownership claimed by a person through first occupation is lost if he is ousted by another who intends to make the land his own. Thus, it has been asserted that title to land can be acquired by conquest.[1] In *Mora* v. *Nwalusi*[2] the Privy Council observed: 'It is not in doubt that proof of possession following conquest will suffice to establish ownership.'

This must, however, relate only to acquisition of the title of a community by strangers and not to acquisition by members of the community *inter se* of land within their boundaries. Moreover, while a claim of title by conquest in the past would be upheld in a land dispute today, that mode of acquisition is no longer available. An attempt to recover one's own land by force is even a criminal offence.[3]

Derivative Titles

Introductory

It was not the practice in the past to alienate land, land being believed to be held by its present owners in trust for future generations. Thus, in order to meet the needs of posterity, the family landowner was always reluctant to alienate its land to non-members of the group except for a short period of time for the cultivation of food crops only; the idea being that the land so given out might be recalled whenever required for the purposes of the family. Even in those cases where the family could conveniently make a grant of permanent rights, the attachment to the land was so strong that ownership was not parted with; only occupational rights were transferred to the grantee. This attitude of landowners has led observers to the view that land was inalienable under customary law. Thus Dr Elias writes: 'There is perhaps no other principle more fundamental to the indigenous land tenure system

[1] See Ollenu, *Customary Land Law in Ghana*, p. 12.
[2] [1962] 1 All N.L.R. 681 at p. 684.
[3] See s. 7, Criminal Code, Cap. 42, Laws of the Federation of Nigeria and Lagos; *Okotie-Eboh* v. *Director of Public Prosecutions* [1962] 1 All N.L.R. 353.

throughout Nigeria than the theory of inalienability of land'.[1] This idea has also gained judicial recognition in a number of cases. For example, in *Lewis* v. *Bankole*,[2] Osborne, C.J., observed: 'The idea of alienation of land was undoubtedly foreign to native ideas in the olden days.'[3]

It is not clear from the above observations whether what is meant is that alienation was forbidden by a positive rule of customary law or whether it was merely not the practice in former times to alienate land. It is, however, known that gifts of land to close relatives and friends are not unknown to customary law. Fortunately, whatever may be the correct interpretation, it is clear that the customary law of today permits alienation of land. In other words, gifts of land may be absolute, although very often they are not. Any doubt which might have lingered on in that respect was finally laid to rest by the Federal Supreme Court in *Jegede* v. *Eyinogun*.[4] In that case, the plaintiff, in support of his claim that a gift of family land was not absolute, had relied on the decision in *Oloto* v. *Dawuda*[5] where the Full Court upheld a similar claim on the grounds, *inter alia*, that 'the Court must require strong evidence to come to a conclusion contrary to custom'. Mbanefo, F.J., commented on the observation in *Oloto* v. *Dawuda* as follows: 'If that statement is meant to lay down the rule that native land cannot under any circumstances be transferred, it needs some qualification.'[6] The learned judge then declared:

> If the family is absolute owner of land there is nothing to stop the family, if the head and all the members agree, from transferring the totality of their interest in it. It is a question of the nature of the grant as to whether they meant to transfer their entire interest in the piece of land or only a part of such interest.[7]

Mbanefo, F.J., cited with approval the following observation of the Privy Council in order to reinforce his decision:

> In the olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago, a custom has grown up of permitting alienation of family land with the general consent of the family and a large number of premises on which substantial buildings have been erected for purposes of trade or permanent occupation have been so acquired. . . . Their Lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in favour of the Chief was retained.[8]

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[1] T. O. Elias, *Nigerian Land Law and Custom*, p. 18.
[2] (1908) 1 N.L.R. 81.
[3] Ibid, at p. 104.
[4] (1959) 4 F.S.C. 270.
[5] (1904) 1 N.L.R. 58.
[6] *Jegede* v. *Eyinogun*, loc. cit., at p. 272.
[7] Ibid.
[8] *Oshodi* v. *Balogun* (1936) 4 W.A.C.A. 1 at p. 2.

A variant of the theory of inalienability of land is the idea that sale of land is contrary to customary law. Judicial notice was taken of this in *Lewis* v. *Bankole*[1] and, more recently, in *Okiji* v. *Adejobi*.[2] In the latter case, the Supreme Court held that the trial judge was entitled to disbelieve a story that the plaintiff's ancestor had bought the land in dispute 200 years previously. The prohibition of sale or other grants for value was explained on the consideration that land was God-given and that it was, therefore, wrong to make it the subject of commercial trafficking. It could not be disputed that land was not the subject of sale in former times; there was no monetary system in the olden days which could command a 'price' and therefore the question of sale did not arise. Even then, there were transactions under customary law where land was transferred for value. Folarin[3] distinguished between a gift of land and what he described as 'quasi-sale.' The former was where the grantor received only a nominal consideration or none at all, and the latter was where the grantor received substantial gifts from the grantee. Ward Price,[4] however, said that such a transaction was to all intents and purposes a sale. Conveyance of land for money or money's worth has been, for more than a century, a regular feature of customary law. The power of alienation either by way of sale or gift is a legal incident of ownership throughout Nigeria.

Forms of Alienation and their Incidents

Alienation of land may take any of the following forms:

(i) sale
(ii) absolute gift
(iii) conditional gift
(iv) borrowing of land
(v) pledge

Sale

Sale is used here in the sense of a transfer of permanent rights over land for a monetary consideration. The effect of a sale of land is that the totality of the interest of the grantor in the land is transferred to the grantee, the grantee ceasing to have any claims whatever on the land. It should be noted, however, that mere exchange of money is not conclusive of a sale. A grant of a customary tenancy for value is not inconsistent with customary law, although it arises largely by way of gift. Again, what is in fact a pledge may be disguised as sale. Thus, the transaction must be viewed as a sale by both parties.

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[1] Loc. cit.
[2] (1960) 5 F.S.C. 44.
[3] Folarin, *Laws and Customs of Egbaland*, 1939, p. 69.
[4] Ward Price, *A Note on Land Tenure in Yoruba Provinces*, para. 165, p. 50.

Absolute Gift

The effect of an absolute gift is the same as that of a sale. The proposition made by Dr Elias[1] that a donee of land enjoys perpetuity of tenure subject to good behaviour, thereby implying that a gift is revocable upon misconduct, is not true of a donee under an absolute gift, and is incompatible with the decision in *Jegede* v. *Eyinogun*[2] where it was held that a family which had made an absolute transfer of its land by way of gift could not recall the land upon misconduct. It is possible that, if the grantee's heirs should die out, the land might revert to the grantor, but, as was said in *Jegede* v. *Eyinogun*,[3] that possibility would not be such an interest in land as would support a claim for a declaration of title.

Conditional Gift

The position of a grantee under a conditional gift is quite different. Only an occupational title passes under the gift. Where such is the case, a customary tenancy is said to be created. The incident of that form of tenure is that the grantee acquires a right of use which endures for an indefinite period of time and which is transmissible to his descendants. As Martindale, J., observed in *Etim* v. *Eke*:[4]

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

For practical purposes, therefore, he is the owner of the land, subject to the qualification that he cannot alienate the land to third parties. Such alienation is not only void, it also affords the grantor a good reason for forfeiting the tenant's rights. The grantor retains a reversion which is exercisable when the grantee abandons the land or is guilty of such misconduct as would entail a forfeiture.

However, Martindale, J., appeared to have overstretched the principles in two respects. Firstly, the statement that full rights of possession are transferred is too wide. A customary tenant has exclusive possession, no doubt, and such possession will support an action for trespass against the landlord.[5] It is equally true that a customary tenant can only use the land for the purpose for which the grant was made and cannot change the pre-

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[1] T. O. Elias, *Nigerian Land Law and Custom*, p. 181. Cf. Obi, op cit., p. 120. But *Ikeanyi* v. *Adighoghu* (1957) 2 E.N.L.R. 38, which Obi cited, is not a direct authority in support of his proposition.

[2] Loc. cit.

[3] Loc. cit., at p. 273.

[4] (1941) 16 N.L.R. 43 at p. 50.

[5] *Emegwara* v. *Nwaimo* (1954) 14 W.A.C.A. 347.

scribed use without the consent of the grantor. Thus, if a grant is made for farming, the grantee may not plant economic trees[1] or convert the land to a building estate. Indeed, the duration of the tenancy is measured by reference to the accomplishment of the purpose for which the grant was made. Thus, in *Ochonma* v. *Unosi*,[2] the land in dispute, which was situated in Eastern Nigeria, was granted to the defendant for the purpose of establishing an oil-pressing machine. He later dismantled the machine and began to lay out the land for building. It was held that by discontinuing the oil-pressing business, the defendant's interest had terminated and that the plaintiff was entitled to recover possession. Moreover, under most systems of customary law, the grantor continues to enjoy his rights over economic trees planted on the land by him. As regards wild trees (i.e. those of natural growth) the tenant has the right of exploitation to the exclusion of the grantor. This may be subject to particular customs. In some Yoruba areas the grantee may not reap palm fruits, unless the trees have been planted by him with the grantor's permission. In *Odu* v. *Akinboye*[3] it was held that, according to Awori customary law, only natives of the soil could reap palm fruits and that a gift of land to a tenant does not carry with it the rights of unconditional exploitation of such trees. It follows that the tenant's right to exclusive possession is subject to the grantor's right of entry for the purpose of enjoying his customary rights.

Secondly, the statement that the grantor cannot convey any rights to strangers without the permission of the tenant is misleading. The true position is that a subsequent grantee takes subject to the tenant's rights. The grantor cannot convey the land to his prejudice. In *Esi* v. *Itsekiri Communal Land Trustees*,[4] Morgan, J., held that the grantor's reversion might be transferred absolutely or for a term of years without reference to the tenant, the transferee being subrogated to the grantor as the tenant's landlord. It is clear, however, that the grantor cannot revoke the rights of the customary tenant unless he is guilty of misconduct sufficient to work a forfeiture.

In view of the fundamental distinction between an absolute and a conditional gift the criteria for distinguishing one from the other is of primary importance. We have seen that in *Jegede* v. *Eyinogun*,[5] Mbanefo, F.J., said that it was a question of the intentions of the parties as expressed at the time of the grant. Now that transactions may be documented, the problem may be avoided as the intentions would have been expressed in the document evidencing the transaction. Where the intention is to transfer absolute ownership, it may be manifested by using words appropriate for the purpose of

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[1] But the tenant may grow a few economic trees and permanent food crops. This is because, according to Obi, ownership of a handful of these is considered a necessary adjunct to farming. See Obi, op. cit., p. 110.

[2] [1965] 1 All N.L.R. 321.

[3] (Unreported). See Elias, op. cit., p. 185.

[4] [1961] W.N.L.R. 15.

[5] Loc. cit.

creating a fee simple estate under English law.[1] Indeed, it can be said that the effect of the decision of the Supreme Court in *Shonekan* v. *Smith*[2] is that, where the intention is to convey by deed, the appropriate words for limiting a fee simple must be used; otherwise a life estate would arise by implication. Thus, a grant by deed of blackacre to A for an absolute title under customary law may fail to create an absolute title and may only pass a life estate.

However, the fact that a document couched in absolute terms has been executed by the grantor in the grantee's favour does not necessarily conclude the matter. In *Oloto* v. *Dawuda*,[3] the plaintiff's predecessor made a gift of land to the predecessor in title of the defendants. The plaintiff claimed that his family had reversionary rights, while the defendants claimed that the grant was absolute. In support of their contention, the defendants produced a deed of gift which was couched in absolute terms. In his evidence, the plaintiff explained that he had executed the deed after the grant was made for the purpose of enabling the defendants to frighten off some intruders, with no intention to alter the relationship of the parties. Moreover, after the execution of the deed, the grantee had paid rent and tribute. It was held that, despite the deed, the relationship of the parties was that of customary landlord and tenant, and that the defendants' claim of absolute title was dishonest. It should be noted, however, that, generally speaking, the court does not admit oral evidence to contradict the clear meaning of an instrument. In *Molade* v. *Molade*,[4] the Federal Supreme Court observed that, while evidence of acts done after the execution of a deed may be a guide to the intentions of the parties, such evidence will not be allowed to contradict the plain meaning of the instrument. In the light of that observation one can only see *Oloto* v. *Dawuda* as a case decided on its own facts, upon the consideration that the defendant *knew* that the deed did not mean what it said.[5]

In order to avoid confusion, where the relationship of landlord and tenant is contemplated, a token payment of rent or tribute (*'ishakole'* in the Yoruba areas) is usually exacted. The payment of the tribute is usually in kind but may be in cash. It is not regarded as consideration for the grant; rather, its payment serves as the grantee's acknowledgement of the grantor's reversionary rights, and is clear evidence of the existence of the relationship of landlord

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[1] The appropriate words for limiting a fee simple to an individual at Common Law are 'and his heirs'. The Conveyancing Act, 1881, permitted the use of 'in fee simple' as an alternative. Words of limitation are no longer required in the Western and Mid-Western States. A grant by deed without words of limitation passes the whole of the grantor's interest unless the contrary is indicated. See s. 85, Property and Conveyancing Law, 1959.

[2] [1964] 1 All N.L.R. 168; (1964) N.M.L.R. 59.

[3] (1904) 1 N.L.R. 58.

[4] (1958) 3 F.S.C. 72. See also *Roberts* v. *Wilson* [1962] L.L.R. 39.

[5] Emphasis supplied. It is instructive to read the dissenting judgement.

and tenant. Thus, in *Adeleke* v. *Adewusi*,[1] it was held that the finding of the trial judge that tributes were paid to the appellant's father by the respondent's predecessor in title precluded the trial judge from refusing the appellant a declaration that he was the owner of the land in question. The converse is, however, not necessarily true. The fact that tribute is not paid is evidence, but not conclusive evidence, of an absolute gift. In *Okuojevor* v. *Sagay*,[2] the court observed:

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

But where the court finds that the grantee is in fact a customary tenant it usually orders tribute to be paid in order to avoid controversy in the future, notwithstanding that the grantor has acquiesced in its non-payment for a long time. Such was the case in *Etim* v. *Eke*[3] and also in *Ikeanyi* v. *Adighoghu*[4] in which the dispute was as to whether the grantees were tenants or pledgees. It should be noted that it is not usual to exact tribute in respect of a conditional gift of town land for building. In the case of a kola tenancy, discussed below,[5] the payment of tribute is not an incident of the grant.

In any case of difficulty, particularly with regard to transactions which took place in the past, the court is often guided by the consideration of whether in the circumstances the grantee's claim of ownership is probable or not. For example, in *Okuojevor* v. *Sagay*,[6] the court made the following observations as to the appellant's claim of ownership:

> It is so highly improbable that the respondent's community some fifty years ago would transfer the absolute title to part of their land to a fugitive and his followers, as was the appellant's predecessor, without any rights reserved in case the land was abandoned and without any right to control its alienation to a stranger, which alienation might introduce into the land people whom the respondent would not desire to have as neighbours, and who would be under no obligation to the respondent's community that the appellant's contention may be rejected without further discussion.

Similarly in *Okiji* v. *Adejobi*,[7] where the plaintiff claimed ownership of land by virtue of a sale 200 years previously, the Federal Supreme Court upheld the decision of the trial judge that the plaintiff's story was improbable, particularly as his ancestor was not a native of the area in question; the reason being that it had been held in some cases that land was not sold in

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[1] [1961] 1 All N.L.R. 37.
[2] [1958] W.R.N.L.R. 70 at p. 71 (F.S.C.).
[3] Loc. cit.
[4] (1957) 2 E.N.L.R. 38.
[5] See below, p. 48. [1958] W.N.L.R. 70 at p. 71.
[6] [1958] W.N.L.R. 70 at p. 71.
(1960) 5 F.S.C. 44.

the past or, alternatively, that it was improbable that land would have been sold to a stranger 200 years ago.

More recently, in *Obasi* v. *Oti*,[1] the plaintiff's claim of ownership was rejected on the ground that it was improbable because the alleged grant to the plaintiff was for no particular purpose. Onyeama, J.S.C., observed:

> In our experience an outright grant of land to live in is not uncommon. An outright grant for cultivation is unusual, but not unheard of; but an outright grant which is neither required for living nor for cultivation is so exceptional that it should not be presumed.[2]

It is however submitted that such consideration is relevant to proof of the gift, not to its quality. A grant which is made for a specific purpose creates a tenancy. Logically, therefore, the fact that the grant, if proved, was not tied to a particular user is evidence in support of an absolute gift. The effect of the decisions is obviously that an absolute gift will not be presumed but must be clearly proved, and that evidence in proof must be clear. Where the donee is a child or a close relative of the donor, it would seem that the presumption may be in favour of an absolute gift, as it is improbable that the relationship of landlord and tenant would be contemplated in such cases.

Kola Tenancy

A kind of tenure which is prevalent in the East-Central State in general, and in Onitsha Province in particular, is that described as 'kola' tenancy. It is created when permanent right in land is granted in exchange for a token gift of kola. The kola tenant enjoys all the rights of an absolute owner except the right of absolute disposition.[3] His right is transmissible to his descendants but the grantor retains a right of reversion which is exercisable on the determination of the tenancy. The kola tenancy differs from an ordinary customary tenancy in three vital respects:

(i) The rent or tribute which is normally exacted in the case of a customary tenancy is not an incident of a kola tenancy. The kola tenant pays no further consideration than the initial kola or other gifts given.

(ii) A kola tenant has a limited right of disposal. He can grant subleases to third parties without reference to the grantor, in the absence of any stipulation to the contrary, and he is in no way accountable to the grantor for the rents received.[4] But a kola tenant cannot dispose of the land in such a way as would deny the grantor of his right to the reversion. Thus, a kola tenant cannot sell the land, or mortgage it. Such alienation is not only void, it also constitutes a challenge to the grantor's title which may entail a forfeiture.

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[1] [1967] N.M.L.R. 74.
[2] Ibid, at p. 75.
[3] *Daniel* v. *Daniel* (1956) 1 F.S.C. 50.
[4] See *Mgbelekeke Family* v. *Madam Iyaji Family* (Unreported), noted in T. O. Elias, *Nigerian Land Law and Custom*, p. 195.

(iii) A kola tenant is not restricted in the use to which he may put the land. Thus, in *Ochonma* v. *Unosi*,[1] it was held that the fact that the grant in question was for a specific purpose precluded the trial judge from holding that the grantee was a kola tenant, despite the fact that the money paid in consideration of the grant was described as kola.[2]

Borrowing of Land

A grant of an interest in land may be made for a short duration of time which may be as short as one year only, for the purpose of enabling the grantee to put the land to a particular use, usually farming. This is what is known as 'borrowing' of land. When such grants are made, the day and month of its commencement and termination are not specifically agreed to in every case. The duration of the interest granted is computed by reference to the purpose for which the grant is made. As soon as the purpose is accomplished, the interest of the grantee terminates. Thus, where land is granted for farming for one season, the grantee's interests terminates when the crops are harvested. The purpose of the grant may also be a guide as to the real nature of the transaction between the parties, should dispute arise as to whether the grant was temporary or permanent. For example, in *Adeyemo* v. *Ladipo and Another*,[3] it was held that a temporary grant of land for building was unknown to customary law. The same decision should govern a grant made for the cultivation of permanent cash crops. In such cases, a customary tenancy should be inferred, not merely a borrowing transaction.

Pledge

Disputes often arise as to whether a grantee of land is holding as a customary tenant or whether he is a mere pledgee of the land. A pledge is created when an owner of land transfers possession of his land to his creditor as security or, rather, in consideration of a loan with the object that he should exploit the land in order to obtain the maximum benefit as consideration for making the loan. Any interest in land may be pledged. The nature of the interest acquired is that the grantee has the right to exercise all acts of ownership over the land so long as the debt is unpaid, and the right of the pledgee is transmissible to his heirs. A pledgee may not, however, commit waste and he is not expected to plant economic trees or to build thereon. If he does, he cannot be prevented by the grantor, for that is the way he has chosen to use the land. Such conduct will not, however, be allowed to hamper the

[1] [1965] N.M.L.R. 321.

[2] In order to avoid the bad blood which this kind of tenure has engendered between the grantor and grantee due to the rise in the value of land nowadays, which could not have been contemplated at the time of the grant, the Kola Tenancy Act, 1935, was enacted. The Act made provisions for the determination of the tenancy at the instance of a grantor who had become jealous. The Act has been little used and, despite its enactment, kola tenancy is still vigorously in vogue in the areas affected.

[3] [1958] W.R.N.L.R. 138.

grantor's right of redemption. Therefore, a pledgee who plants economic trees or erects permanent structures does so at his own peril, in the absence of express agreement. The interest of the pledgee ceases as soon as the debt is repaid.[1] The right of the pledgor to redeem cannot be defeated by lapse of time,[2] and it can be exercised by the pledgor's successors in title against the pledgee or his successors in title. It seems the right cannot be fettered by agreement; it is absolute. However, as the pledgee is expected to obtain some benefit out of the transaction, the right of redemption can only be exercised after a reasonable lapse of time from the date of the grant. Also, the right of redemption cannot be exercised in such a way as to prejudice the pledgee's right to harvest growing food crops on the land. Because only possessory rights are granted, and because the right of redemption is perpetual, a pledgee can never become the absolute owner of the property by reason of long possession. He has no power to sell the land to discharge the pledgor's obligations to him; such a disposition will be void. A pledgee who is pressed for money may, however, re-pledge it to another creditor who is subrogated to him.[3]

An interest which is very similar to that just described, and which is said to exist in parts of the East-Central State, is that acquired upon what has been inelegantly described as 'a redeemable sale'.[4] After the sale, the land is transferred to the purchaser, but the vendor has an absolute right of redemption by refunding the purchase money! Lapse of time is not a bar, and it is immaterial that the land has been developed by the purchaser. When the exact money which was paid to the vendor is refunded, the interest of the purchaser determines. It can be seen from the foregoing account that nothing is in fact sold. In substance, the interest acquired by the so-called purchaser is the same as that obtained under a pledge of land and it is, perhaps, neater to label it as such.

It is appropriate here to distinguish briefly between a pledge, which is the indigenous idea of mortgage, and a mortgage in English law form. The latter appeals more to sophisticated minds today, as it sometimes happens that land is pledged but the instrument, sometimes a deed, executed in that behalf describes the transaction as a 'mortgage'. The two interests are vitally different, although the ostensible aims may be the same. Except in the Western and Mid-Western States, a mortgage in English law form is created by a conveyance of the entirety of the mortgagor's (the debtor's) interest to the mortgagee (the creditor) with a condition for reconveyance on redemption.

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[1] Repayment can only be effected by tendering the exact sum advanced when the grant was made. There is no liability on the part of the pledgee to account for his use of the land. But see Elias, *Nigerian Land Law and Custom*, p. 181, and see *Amao* v. *Adigun* [1957] W.N.L.R. 55.

[2] *Laregun & Others* v. *Funlayo* [1955-6] W.N.L.R. 167.

[3] The law of pledge in Ghana is ably analysed by Ollennu, *Customary Land Law in Ghana*, pp. 94-107. The general principles appear to be the same throughout West Africa.

[4] See Obi, op. cit., p. 130.

Upon default the mortgagee has a statutory right of absolute disposition (after fulfilling certain conditions) in order to satisfy the debt. Notwithstanding that the title to the property is vested in the mortgagee, it is not contemplated that he should go into possession. The property mortgaged is *solely* intended as security for the loan. The mortgagee's right to enter into possession is exercised only when it becomes necessary to realize the security. Even then, the mortgagee is strictly accountable to the mortgagor for the rents and profits of the land which may be set off against the debt. Thus, the distinction between a pledge and a mortgagee in English law form is one of substance. Where it is intended that the creditor should go into possession at the commencement of the transaction, it is a pledge, however it is described. On the other hand, where his entering into possession is contingent upon default, the transaction is not a pledge, however it is described.[1]

Rules Governing Validity of Grants

It is trite law that it is only the owner of land, or that of the particular interest affected, that is competent to alienate it. Therefore, it is the concern of a purchaser to satisfy himself that his vendor has the title which he contracts to convey or grant, as in no part of the law is the maxim *nemo dat quod non habet* more thoroughly maintained than in the law relating to title to land.[2] Where the property is vested in an individual, there is usually no difficulty. Problems often arise, however, where the title is in the group, or where the owner of the land has mischievously granted it to two or more persons. Thus, we are interested to know (i) how title can be validly acquired from the family or the community, as the case may be, and (ii) the rules governing the priority of competing claimants.[3]

Alienation of Family Property

Necessary Consents

As the family is a legal concept, it can only act through its accredited agents. The first important question to answer, therefore, is who are the proper persons to act for the family when disposing of its land? The principle laid down in *Agbloe* v. *Sappor*[4] is that the head of the family must join in the conveyance of family land and the principal members must concur therein, and that a conveyance purporting to transfer family land without these consents is void *ab initio*. In *Ekpendu* v. *Erika*,[5] the Supreme Court remarked

[1] See *Ogundiran* v. *Balogun* [1957] W.N.L.R. 51. See also Ollennu, op. cit., p. 96, and the cases therein discussed.

[2] Thus, a person who occupies land as a result of a grant from the wrong person is guilty of trespass at the suit of the rightful owner.

[3] See Chapter 5.

[4] (1947) 12 W.A.C.A. 187.

[5] (1959) 4 F.S.C. 79.

that, although *Agbloe* v. *Sappor* was decided in Accra on a point of Fanti customary law, nevertheless the judgment in the case was not based on any customary law peculiar to the Fanti people and it was clear that the pronouncements of the Court were meant to have general application to family land in West Africa. That case is, therefore, an authority for the proposition that the law as to the alienation of family land under whatever system of customary law in Nigeria is the same, or at least that the Supreme Court will take the same attitude in every case. An earlier attempt to establish that the customary law of Ibadan on the subject was different was thwarted by the West African Court of Appeal in *Adedubu* v. *Makanjuola*.[1] In that case, evidence was led to prove that, according to the customary law of Ibadan, a sale by the head of the family alone without family consent, or even in defiance of the opposition of the principal members of the family, was valid, and this was accepted by the trial judge. The decision, however, was reversed on appeal on the grounds that such a novel proposition could not be entertained.

In *Adewunyin* v. *Ishola*,[2] Ademola, C.J., (West) (as he then was) suggested that a sale supported by the majority vote of the members of the family is valid, but this view is contrary to the stand expressly taken by the West African Court of Appeal in *Esan* v. *Faro*[3] where a sale was set aside at the instance of two principal members who opposed the sale, notwithstanding that it was with the consent of the family head and the majority of the members. As the Court observed: 'Nowhere can we find a ruling to the effect that the acquiescence of the majority of the family renders a sale valid.'[4]

In *Mogaji* v. *Nuga*,[5] Ademola, C.J.F., suggested (*obiter*) that the consent of a member who is not available can be dispensed with. If this proposition is correct, it means that the sale cannot be attacked if the member subsequently emerges. Acceptance of a title made in this way is, however, hazardous, as his lordship did not elaborate on the meaning of 'not available'. The phrase cannot and must not be literally interpreted. The mere absence of the member should not be sufficient. It must be shown that the whereabouts of the member is not known after reasonable efforts to locate him have failed. A purchaser of family land with such missing consent should insist on a recital, in the deed of conveyance, of the circumstances justifying the dispensation with the consent, in order to facilitate proof of his title.

Consent of Minors

Kasunmu and James[6] assert that, where a principal member is an infant, his consent can be dispensed with at least where the alienation is for value, e.g.

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[1] (1944) 10 W.A.C.A. 33.
[2] [1958] W.N.L.R. 110.
[3] (1947) 12 W.A.C.A. 135.
[4] Ibid, at p. 136.
[5] (1960) 5 F.S.C. 107.
[6] Op. cit., p. 8.

sale, lease or mortgage. In support of this view, *Mogaji* v. *Nuga*[1] and *Onade* v. *Thomas*[2] were cited. This appears to be an overstatement as it would be contrary to good sense for the court to hold that a sale is valid where it was effected without the consent of the guardian of such a minor, who may not necessarily be a member of the family. It is conceded, however, that in many cases the guardian would be either the family head or another principal member who is near to the infant by blood. This was substantially the case in *Onade* v. *Thomas*. The following observations of Butler Lloyd, J., in that case are pertinent:

> . . . it is now contended that the conveyance to the plaintiffs was bad as the minor heir was not made a party. It is true that the other two vendors who covenanted on her behalf had not been formerly appointed as guardians but they were the proper persons to be so appointed and I am not inclined to regard the whole conveyance as invalid for want of formality.[3]

From this, it is clear that the judge upheld the sale on the ground that the two other members of the family were acting in the capacity of the minor's guardians. The decision might have been otherwise if an independent person had been appointed, or had acted as, the guardian. As regards *Mogaji* v. *Nuga*, there appears to be nothing in the decision to support the view that a minor may be ignored. The view expressed by the learned trial judge as regards the consent of a minor cited by Ademola, C.J.F., was not considered by the Supreme Court, as the Court was able to find, on other evidence, that the sale was voidable. In any case, the statement can only be construed as meaning that the consent of a minor is not sufficient. Thus, if the only members available are minors, the sale cannot be carried out by the head of the family; but that is quite a different thing from saying that a minor's consent is not essential. The opinion that the consent of a minor is not essential is inconsistent with the decision in *Chairman L.E.D.B.* v. *Ashani*[4] that a member who is not satisfied with the terms of a partition effected during his minority may, upon reaching his majority, apply to the court to have it set aside. As an order varying or setting aside such partition will necessarily affect third parties, a purchaser of family property or of land that was once family property should be careful to see that the interest of a minor is not, or has not been, ignored.

Onitsha Custom

Finally, the Supreme Court has recently held in *Erokwu* v. *Bosah*[5] that, under Onitsha customary law, the consent of all important members is

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[1] Loc. cit.
[2] (1932) 11 N.L.R. 104.
[3] Ibid, at p. 105. In any case, it was not stated that the property was family property and the circumstances (the original owner being a member of the clergy) pointed to the contrary. The principle appears to be the same, however.
[4] (1937) 3 W.A.C.A. 143.
[5] [1966] 1 All N.L.R. 166.

required to give a disposition validity. By what criteria importance is judged has not been explained.

Distinction between 'Void' and 'Voidable'

It is not in every case that a disposition of family property without all the necessary consents is ineffectual. In certain cases the absence of a requisite consent makes the disposition merely voidable and not void *ab initio*. While the distinction between 'void' and 'voidable' is generally accepted, opinions are divided on the criteria for the distinction. Dr Coker expressed the view that a disposition is void only where the member of the family effecting it has denied the family's title by asserting that he was the owner of the property, but that where the disposition was expressed to be effected 'for and on behalf of the family', it is voidable, not void, even though it turns out that the agency was falsely asserted. This view cannot stand with the clear pronouncement of the Supreme Court in *Ekpendu* v. *Erika*[1] which is now the *locus classicus* on the subject. In that case, a member of the family had leased a portion of the family's land without the consent of the others, including the family head. The Court reviewed the previous decisions in *Agbloe* v. *Sappor*[2] and *Esan* v. *Faro*,[3] and declared:

> . . . the joint effect of the two decisions is that a sale of family land which the head of family carries out, but in which other principal members of the family do not concur, is voidable, while a sale made by principal members without the concurrence of the family head is void *ab initio*.[4]

Although the above quoted dictum made reference to a sale, the principle applies to all important dispositions beyond the customary annual tenure. In fact the disposition under consideration in the case itself was a lease by a principal member which was held to be void. It made no difference that the member making the disposition professed to be acting for the family.

Notwithstanding the decision in *Ekpendu* v. *Erika*[5] which is binding on all inferior courts, in *Coker* v. *Animashawun*,[6] De Lestang, C.J., (Lagos) applied Dr Coker's approach and this decision was followed in *Odunukan* v. *Odukale*[7] by Adepipe, J., who referred to the proposition that a sale by a member of the family without family consent is voidable where it is expressed to have been effected on behalf of the family, as well as settled by authority.

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[1] (1959) 4 F.S.C. 79.
[2] Loc. cit.
[3] Loc. cit.
[4] (1959) 4 F.S.C. 79 at p. 81. The Court explained the apparent conflict between *Agbloe* v. *Sappor* and *Esan* v. *Faro* on the grounds that in the former case the grant was made by some of the principal members contrary to the wish of the family head. Thus, the declaration in that case seemed to be wider than that before the Court. See p. 80.
[5] Loc. cit.
[6] [1960] L.L.R. 71.
[7] [1964] L.L.R. 149.

The two decisions must, however, be disregarded as having been reached *per incuriam*.

The rule that dispositions by the family head without family consent are voidable is subject to three important qualifications. Firstly, the rule applies only where the family head has acted as such. In *Alabi* v. *Rufai*[1] the family head described himself in the conveyance as the owner of the land, and Duffus, J., held that the sale was void and not merely voidable. But the court should always try and discover the real state of affairs in each case. Thus, in *Akano* v. *Ajuwon*,[2] where the evidence disclosed that, although the family head conveyed family land as his own, he was in fact acting in his capacity as family head, it was held that the sale was not void.[3] The decision in *Alabi* v. *Rufai* should only be applicable where the head of family had acted fraudulently.

Secondly, the family head cannot make a gift of the family land without family consent. Such gift, if made, is not merely voidable, but is void *ab initio*. It makes no difference that the gift was made to a member of the family and not to a stranger. Thus, in *Oshodi* v. *Aremu*,[4] a gift of family land was made to a member of the family by the then head of the family. The property was subsequently sold by the member to a purchaser from whom the defendant derived his title. It was held that the gift was void *ab initio*, and, consequently, the defendant's title which depended on it was bad.

Thirdly, the family head cannot unilaterally order the partition of family property. The consent of all the principal members of the family is necessary and, if not obtained, the purported partition is ineffectual to determine the family ownership of the property.[5]

Effect of a Voidable Disposition

We have stated earlier that, in law, a voidable title is valid until it is set aside by an order of the court at the instance of the aggrieved member or members of the family, and that the effect is that the title would be preferred to that of a subsequent purchaser, albeit with the consent of the entire family, unless and until it is set aside. This point is illustrated, though not directly, in *Assaf* v. *Oyinloye*.[6] In that case, the plaintiff took a lease of premises from a family and sublet it to the defendants. Subsequently, the defendants bought the property from the family outright and, thereafter, refused to pay rent on the ground that the lease to the plaintiff was invalid, being without family consent. The plaintiffs forfeited the sub-lease and sued the defendants for possession. It was held that, even assuming that the lease

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[1] (Unreported) Suit I/28/62 High Court, West. See Kasunmu and James, op. cit., p. 17.

[2] [1967] N.M.L.R. 7.

[3] In fact, the family contested the case on the basis that the family head *did not* sell the land, and not on the basis that he had no capacity to do so.

[4] (1952) 14 W.A.C.A. 83.

[5] *Onasanya* v. *Shiwoniku* [1960] W.N.L.R. 166.

[6] (1951) 20 N.L.R. 1.

to the plaintiff was without family consent as alleged by the defendant, it was merely voidable and, until set aside by the court on the application of the family, it remained binding on it and, as such, the defendants took subject to it. As the defendants had denied their landlord's title, the sub-lease became forfeited and the plaintiff was entitled to possession.

The court will set a voidable transaction aside at the instance of an aggrieved member of the family,[1] and it seems that the only thing which the member has to prove in order to succeed is that his consent was necessary but had not been obtained. The court has no alternative but to order the transaction to be set aside unless the plaintiff member is guilty of culpable delay. In *Manko* v. *Bonso*,[2] the West African Court of Appeal, citing with approval its earlier dictum in *Bayaidie* v. *Kwamine Mensah*,[3] laid down the principle that, in order to avail himself of the right to have the sale set aside, the member must act in time and under circumstances in which, upon rescinding the contract, the purchaser can be fully restored to the position in which he stood before the sale. This principle was adopted by the Supreme Court in *Mogaji* v. *Nuga*.[4] In that case the plaintiff purchased family land from the head of the family with the consent of two branches of that family. About ten years after the sale, the appellants, who were principal members of the family, objected to the sale for the first time on the grounds that their consent had not been obtained. It was held that, even assuming that their consent had not been obtained, as they knew about the sale and had not done anything for ten years, it was too late for them to exercise their right to have it set aside.

The period of culpable delay will not start to run until the aggrieved member acquires knowledge of the transaction. Whether or not knowledge has been acquired is a question of fact. In *Mogaji* v. *Nuga*,[5] the evidence disclosed that the defendants approached the middleman, who had negotiated the transaction in the first place, for more money, and that was held to be sufficient to prove knowledge of the sale. If they were ignorant of the sale, the court asked, how did they know about the existence of the middleman? Knowledge can even be imputed to the member if there is something which could have put the member on inquiry but he has made no inquiry as to the status of the purchaser. Thus, where a purchaser has been exercising overt acts of ownership, it will be hard for a member of the family later to say that he had no knowledge of the sale; for if he had been sufficiently interested in the property he would have acquired knowledge of the transaction.[6]

[1] *Esan* v. *Faro*, loc. cit.
[2] (1936) 3 W.A.C.A. 62.
[3] (Unreported). But see Sarbah, F.C.L., p. 150.
[4] Loc. cit.
[5] Loc. cit.
[6] A customary court in Abeokuta held that nobody except those ignorant of the custom or manners of the people of this country would believe somebody claiming to be unaware of the presence of surveyors on his land, as no house is surveyed in this country by night and valuation of property is never made at night. In *re Sodunke and Kuti*, reported by Lloyd, op. cit., p. 343.

But how can a purchaser change his position and thus make it inequitable to set a voidable sale aside? It has been suggested that, where a third party has acquired an interest from the purchaser, the sale can no longer be set aside, as *restitutio in integrum* is no longer possible,[1] the analogy of voidable contracts at common law being made. In support of this, *Oshodi* v. *Imoru*[2] and *Osinaike* v. *Odusote*,[3] decided by Thomas, J., were cited. The argument is, however, not convincing. It is clear that a purchaser of land acquires the right of his vendor, whatever it is, and a defective title cannot be perfected merely by sale to a third party. The proposition is not convincing for the reason that the invalidity is not a matter of contract as such; it is a matter of title. It may, however, be that, if the aggrieved member acquired knowledge of the sub-sale and nevertheless suffered the sub-purchaser to invest his money in the property, the court would be disinclined to re-open the original transaction to his prejudice. But that is a different matter.

Where, to the knowledge of the aggrieved member, the purchaser has started to develop the property, and he (the member) takes no steps to challenge his title until the building, or other improvement, is completed, the court will be reluctant to re-open the transaction as, obviously, the purchaser cannot be restored to his original position.

A problem may arise where the purchaser has quickly changed his position before the member acquires knowledge. It is submitted that culpable delay must amount to acquiescence before it can operate to bar the member's right, and it is clear that there can be no acquiescence without knowledge.[4] Moreover, the behaviour of the purchaser cannot be ignored. A person who knew that he was purchasing a 'voidable title' should be given less protection, if any, than a man who thought that he had obtained all the consents but was mistaken. Thus the degree of culpability required on the part of the aggrieved member should be greater in the former case than in the latter; otherwise, the reasonable rule laid down by the courts as regards sale by the family head could be employed to perpetrate a fraud.

Effect of a Void Disposition

A void disposition leaves the title in the family, the purchaser acquiring nothing thereby. It is axiomatic that the title of a purchaser derived from a person who himself obtained a void title is also void, so that a later purchaser from the family takes free of it.[5] In *Ekpendu* v. *Erika*,[6] family land was leased by a member of the family without family consent. The Supreme Court

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[1] Kasunmu and James, op. cit., pp. 33-4.

[2] (1936) 3 W.A.C.A. 93. The Court sent the case back to the lower court for the defence of the third party to be heard and not for the Court to decide whether he was a *bona fide* purchaser without notice, as the learned authors suggested.

[3] (Unreported) Suit I/73/63, Ibadan Judicial Division.

[4] See *Oshodi* v. *Imoru*, loc. cit.

[5] *Oshodi* v. *Aremu* (1952) 14 W.A.C.A. 83.

[6] Loc. cit.

held that this title being void *ab initio*, the 'lessee' was guilty of trespass at the suit of the family. Another case that well illustrates the nature of a void disposition is *Ajose* v. *Harworth*.[1] Family land was sold by one Obalade, a member of the family, to one Cole in 1916. In 1919, Cole sold to Oguntuyi, who in his turn sold to the plaintiff. In the meantime the family had released the whole of its interest in the land to Obalade, who in 1920 mortgaged the land to the defendant, who, in the exercise of his power of sale, sold the land to the second defendant. It was held that, since the sale to Cole in 1916 was without family consent, it was void and accordingly ineffectual to transfer any interest to the plaintiff's predecessor and that the subsequent release of the family interest to Obalade could not validate the prior invalid alienation by Obalade of his then unliquidated interest in the family land. The mortgage to Harworth was accordingly held valid and so was the title derived therefrom.

The family may, however, be prevented from recovering the land from the purchaser if it has been guilty of laches and acquiescence. In view of this, Dr Lloyd[2] has commented that 'the distinction between void and voidable is perhaps largely academic for the average purchaser is not likely to appreciate the difference between having a title which is good until proved bad . . . or a bad title which can become good through lapse of time'. While it is clear that the distinction is not merely academic, the fact that acquiescence will bar a claim for recovery has narrowed down the distinction between void and voidable titles, particularly as the court will almost as a matter of course set aside a voidable title at the instance of the aggrieved member on merely proving that his consent was not obtained, unless he has been guilty of laches and acquiescence.

Ratification

Where a person purports to act for the owner without his authority, it is open to the owner to ratify the sale or other transaction, and the subsequent adoption by the owner of the agent's act has the same legal consequence as if the owner had originally authorized the act.[3] A voidable title acquired from the family can be ratified by the person whose consent had been missing at any time after the transaction, by his giving his consent to it. Such consent may be inferred from the subsequent conduct of the member concerned, as where he accepts a share of the purchase money. In *Johnson* v. *Onisiwo*[4] family land was leased without the consent of a member of the family. Later the member sued the others for her share of the rent. It was held that by that conduct she had adopted the lease.

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[1] (1925) 6 N.L.R. 98.

[2] Op. cit., p. 341.

[3] See *Folashade* v. *Duroshola* [1961] 1 All N.L.R. 87. See also Friedman, *Law of Agency*, p. 37.

[4] (1943) 9 W.A.C.A. 189.

Commenting on the decision in *Ajose* v. *Harworth*,[1] Dr Elias[2] put the question whether it would mean that a void title can under no circumstance be ratified. Kasunmu and James[3] submitted that there can be no question of ratification since there is nothing in existence to ratify and, in support of this, the learned authors cited the decision in *Onasanya* v. *Shiwoniku*[4] where Duffus, J., held expressly that a void sale cannot be ratified. This proposition is not altogether correct. Where the transaction is governed by English law, in principle, ratification is possible where the vendor claims, at the time of the sale, to have negotiated the sale on behalf of the family (thus asserting an agency). The family may subsequently adopt the sale, and that will be ratification. This is probably what led Dr Coker to think that a title so derived is voidable. It is, however, a better conveyancing practice that a purchaser who finds himself in such a position should obtain a fresh conveyance from the family rather than a deed of ratification. By so doing, the purchaser will not be worse off, for where a third party has acquired an interest the purported ratification cannot divest him of that title. As Ademola, C.J.F., has said: 'a proper case of ratification is subject to the important qualification that ratification must be within a reasonable time after which an act cannot be ratified to the prejudice of a third party.'[5]

In that case, it was common ground that the land in dispute originally belonged to one, Blaize. In 1926 and in 1927 the land was sold to one, Aminu Alfa, by persons who purported to be agents of Blaize, but no conveyances were executed. The land was in 1949 sold and conveyed by a registered deed to the plaintiff by the next-of-kin of Aminu Alfa. There was no evidence that the agents were authorized by Blaize to sell the land. In 1952, Blaize sold and conveyed the land to one, Akodu, who, in turn, sold and conveyed to the defendant in 1956. In 1955, the plaintiff obtained from Blaize a document which purported to be a deed of ratification. It was contended for the plaintiff that the ratification dated back to 1926 and 1927 when the original sales took place and, as such, the plaintiff acquired the legal estate before the land was conveyed to the defendant. It was held, however, that, as Blaize in whom the legal estate was vested had divested himself of the estate in 1952 in favour of the defendant, there was no legal estate to which the ratification could relate.

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[1] Loc. cit.
[2] Op. cit., p. 208.
[3] Op. cit., p. 31.
[4] [1960] W.N.L.R. 166.
[5] *Folashade* v. *Duroshola* [1961] 1 All N.L.R. 87 at p. 91. The statement as worded appears to be misleading. If no one had acquired an interest in the meantime, there is no reason why unreasonable delay should defeat the power to ratify. Conversely, if a third party had acquired an interest from the owner, ratification of the unauthorized sale cannot be effectual, however short the lapse of time. The important thing is that, at the time of the ratification, the principal must be legally capable of disposing of the property.

Sale by an Order of Court

The court may order the sale of family property either at the request of a member of the family, upon sufficient cause being shown,[1] or in satisfaction of a judgment debt awarded against the family as such. In either case, the consent of the family is not a legal essential. The certificate of purchase issued by the court is sufficient proof of title. The fact that the sale has been ordered by the court does not, however, make it *ipso facto* valid. For example, if the family had previously to the sale divested itself of its title to the land, the purchaser gets nothing.[2] Again, where the sale has been ordered on account of a debt incurred by an individual member of the family, the sale by order of court is ineffectual to vest the family title in the purchaser.[3] Although the law is that what the purchaser acquires as a result of a sale by court order is the right, title or interest of the judgment debtor in the property sold, it does not mean that the purchaser can claim the customary right of the member in respect of such land. Such a claim is inconsistent with the character of the property as family property.

Alienation of Community Land

The lawful authority to alienate community property is the traditional authority of the community which consists of the Oba, or head chief, together with his senior chiefs. The effect of a disposition by the head chief acting alone is not quite clear. In principle, a title so derived is bad, but the question is, can it be challenged? On the analogy of the rules governing the alienation of family property, it may be argued that senior chiefs should be able to have the disposition set aside. The weakness of such an argument is that it is difficult for the chiefs to establish such a right under customary law. This is because, before the advent of the British, the head chief was the fountain of justice and thus could not have been impleaded in his own court. It seems to follow that the head chief cannot be made legally accountable for his management of community land. The fact that the head chief cannot be made legally accountable is the background of the Communal Land Rights (Vesting in Trustees) Law, 1959, of Western Nigeria. However, as the disposition is invalid, it may be that his successor in office can recover the land.

In some communities in Eastern Nigeria the traditional authority consists of all the elders of the community. In such cases, it seems that the analogy of family property applies.

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[1] *Lewis* v. *Bankole* (1908) 1 N.L.R. 81; *Bajulaiye* v. *Akapo* (1938) 14 N.L.R. 10.

[2] *Abakah* v. *Akanni* (1947) 19 N.L.R. 15.

[3] *Adejoke* v. *John Holt* (1942) 8 W.A.C.A. 152. It was also held in this case that an action to have the sale set aside on the grounds that the debtor had no title to the land was misconceived. The disappointed purchaser cannot recover his money from the execution creditor (see *Owo* v. *Kasumu* (1932) 11 N.L.R. 116; *Shoti* v. *Paul* (1932) 11 N.L.R. 120) unless the money has not been paid over by the Sheriff (see *Ajike* v. *Tamakloo* (1935) 12 N.L.R. 62).

Benin Custom

The situation in Benin deserves special consideration. All land in Benin is vested in the community. An individual has only possessory title to the land he occupies. A person seeking such possessory title must apply for allocation from the Oba, and this is so even where he is purchasing from a person to whom the right of occupation has already been allocated.[1] In effect, all dispositions of land *inter vivos* must be with the approval of the Oba. The application for the Oba's consent must be processed through the Ward Council who would make recommendations to him. It is not clear whether the recommendation of the Ward Council is a legal essential under Benin customary law. In *Uwagboe* v. *Evbuomwam*,[2] the evidence on the point was lacking, and the case was sent back to the High Court for evidence to be taken. It is clear, however, that, until the approval of the Oba is obtained, the purchaser does not acquire any title to the land, not even an equitable interest.[3] Where, however, the Oba has approved the occupational rights of an individual, he cannot approve a grant of the same parcel of land to another person. Any custom to the contrary may be held contrary to natural justice, equity and good conscience.[4]

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[1] *Per* Begho, J., in *Edokpayi* v. *Oke* [1964] M.N.L.R. 53 at p. 54.

[2] (1959) 4 F.S.C. 91.

[3] But an equity would have been acquired against the vendor himself.

[4] See *Ashiyanbi* v. *Adeniji* [1966] N.M.L.R. 106, where the Supreme Court held that once a family had been granted hunting rights over a parcel of land, the Oni of Ife could not make a valid grant of farming rights therein to any other family without consulting the family in possession of the area. The decision was not based on any rule of customary law peculiar to the Ife people, but on the demands of justice.

5 Mode of Conveyance and the Priority of Competing Interests

As we have said earlier, difficulties often arise where two persons claim to have derived titles from the same person who formerly owned the land. It is obvious that if the first grant has been made validly, on the principle *nemo dat quod non habet*, the vendor, having divested himself of his title to the land, will have had nothing to convey to the subsequent purchaser. In order to prevent any fraud which may arise as a result of secret dealings in land, the law prescribes the formalities that must be complied with before the title granted can become legally vested in the purchaser.[1] The examination of those rules is the subject of this chapter.

Applicable Laws

Subject to any applicable local legislation, the formalities for a grant of an interest in land may be regulated by either English law or customary law, whichever is the law applicable to the circumstances of the particular case.

In general, customary law governs transactions between Nigerians,[2] except in a case where parties have by contract agreed either expressly or by implication that their transaction is to be regulated otherwise than by customary law, or where the transaction is unknown to customary law.[3] Where the parties by their agreement, or by the nature of the transaction, render customary law inapplicable, the transaction is judged from the standpoint of English law.

In the case of a transaction between a Nigerian and a non-Nigerian, English law is the applicable law, unless strict adherence to English law

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[1] 'Purchaser' is here used in its wider legal sense, and it includes every person deriving title by the act of the owner, and not by operation of law.

[2] The terminology used in Lagos and Northern Nigeria is 'natives' and in Eastern Nigeria 'persons of Nigerian descent'. A 'native' is defined by the High Court of Lagos Act as meaning a native of Nigeria or a native foreigner. A native foreigner is a person belonging to a tribe indigenous to some part of Africa, but who is normally subject to customary law in his own country. References to 'Nigerian', therefore, include a native foreigner in respect of Lagos and Northern Nigeria.

[3] S. 27, High Court of Lagos Act; s. 22, High Court Law of Eastern Nigeria; s. 34, High Court of Northern Nigeria and s. 12, High Court Law of Western Nigeria.

would result in injustice to either party.[1] As regards land transactions, this proviso may be ignored as it is hard to imagine how such injustice could arise. By implication, transactions between non-Nigerians can only be judged from the standpoint of English law, as the court can under no circumstance whatever apply customary law in disputes between non-Nigerians. Additional formalities are prescribed by the local statutes in respect of transactions governed by English law.

In the Western and Mid-Western States, English law, as such, is no longer in force. The law on the subject is now contained in the Property and Conveyancing Law, 1959,[2] which has enacted the English law on the subject. This Law is applicable to transactions in respect of land which is not held under customary law.[3] In the case of land held under customary tenure, it is applicable in any transaction where the parties agreed or were presumed to have agreed that the transaction should be exclusively regulated otherwise than by customary law.[4]

This provision raises a problem of interpretation. We have seen that in *Alade* v. *Aborishade*,[5] Morgan, J., (as he then was), stated boldly that once a piece of land is conveyed by the owner to another by means of a conveyance in English form expressing that the land is conveyed for an estate in fee simple that estate ceases to be one under customary law. Presumably it becomes an estate under the Property and Conveyancy Law, or under English law, as the case may be. Section 3 of the Law itself encourages one to hold this view as it is there enacted that the only freehold capable of subsisting as a legal estate is an estate in fee simple absolute in possession. In the present writer's opinion this approach is misleading. A conveyance is concerned with change of ownership, and is not related to any question of tenure. We have seen, too, that the expression 'fee simple' denotes the quantum of the estate which is granted and, as used in this country, is another way of saying that the title granted to the purchaser is absolute. It does not by itself attach to the land incidents of English or any other law. Even section 3 of the Law to which we have referred can only operate subject to section 1 (2). Thus, in determining whether the interest claimed under the law is a legal estate or not, the question whether the land is held under customary or non-customary law must first be answered. It is after this that any question of the quantum of estate can be relevant.

A plausible argument is that State land is not held under customary tenure, as the State, although it is the aggregate of the entire people, is by convention not considered to be subject to customary law. That being the case, it cannot

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[1] Ibid.
[2] This legislation no longer applies to those parts of the Lagos State which were formerly parts of the former Western Region. See Lagos State (Applicable Laws) Edict, 1968.
[3] S. 1 (2).
[4] S. 1 (3).
[5] 1962 W.R.N.L.R. 74.

hold an interest in land under customary law. But, assuming this is so, what happens where the land is conveyed to an individual? Does it continue to be held under customary tenure, particularly where the land becomes family property upon that individual's death? Again, it may be argued that the expression relates to estates held by non-Nigerians. The weakness of such an argument is that a non-Nigerian cannot acquire an interest in land in Western Nigeria with a lease for more than 99 years. The result is that, where his term is held under the statute, the reversion may be held under customary law; but we have seen that it is the land itself that is burdened with the incidents of the Law and not the parties.

A clarification by the legislature is necessary, although one is rather of the view that a repeal of section 1 (2) is the more appropriate step to take as it created a misconception of law and as there is no manifest justification for the restricted operation of the Law. The provisions of the Law are, however, applicable where customary law is, by the intention of the parties or the surrounding circumstances, rendered inapplicable. Thus, with the exception of the source of the Law, the position in Western Nigeria is the same as in other places.

Further consideration of the problem concerning choice of law will be discussed later after the formal requirements prescribed by the law or statute have been outlined, so as to facilitate better understanding of the cases to be discussed thereunder.

Transactions Governed by English Law or Statute

The applicable law is contained in section 3 of the Real Property Act, 1863, in respect of Lagos, Eastern and Northern States, and section 77 of the Property and Conveyancing Law, 1959. Additional formalities are prescribed by the Land Registration Act and the Registration of Titles Act. The Registration of Titles Act will be discussed in a later chapter.[1]

Section 3 of the Real Property Act, 1863, provides that all land lies in grant, and that the grant of the legal estate is void unless it is evidenced by deed. This provision has been enacted for Western Nigeria by section 77 of the Property and Conveyancing Law, 1959. The following are, however, excluded from the provisions of the statutes:

(i) assents by personal representative
(ii) surrender by operation of law, including surrenders which may, by law, be effected without writing
(iii) receipts not required by law to be under seal

[1] See Chapter 9.

(iv) vesting orders of the court or other competent authority
(v) conveyances taking effect by operation of law[1]

The implication is that, notwithstanding that the property has been sold or that a gift has been made of the land and that the purchaser has gone into possession, until the deed of conveyance is executed the legal title remains with the grantor who, at law, is competent to make a valid grant of it to someone else. But, as soon as the deed is executed, the title granted becomes vested in the grantee.[2] Thus, although the Act says that the grant shall be evidenced by a deed, it is by the deed that the interest of the grantee is actually created. The deed is the essential part of the grant.

Grants of interests in land other than the legal estate must be in writing and signed by the person creating or conveying the same or by an agent lawfully authorized in writing to act on his behalf. A declaration of trust respecting land or any interest therein must be manifested and proved by some writing signed by some person able to declare such trust or by his will. It is also expressly provided that an equitable interest must be made in writing or by a lawfully authorized agent.[3]

A contract to create an interest in land is not enforceable unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by his agent lawfully authorized in writing to act on his behalf.[4] It should be noted that the contract itself need not be in writing; the section only requires it to be *evidenced* in writing. Therefore, the memorandum or note of it may not be contemporaneous with the conclusion of the contract; it is sufficient if the requirement of writing is fulfilled at any time before an action is brought for its enforcement.[5]

Registration of Instruments

In addition to the requirement that a grant of an interest in land must be made by deed or writing, as the case may be, the Lands Registration Act, 1924[6] makes provisions for the registration, in the Lands Registry, of all

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[1] See s. 77 (2), Property and Conveyancing Law, 1959.
[2] But see s. 16, Land Registration Act, Cap. 181, Laws of the Federation of Nigeria and Lagos, discussed below, p. 68.
[3] S. 1, Statute of Frauds, 1677; s. 78 (1), Property and Conveyancing Law, 1959. The provision does not affect the creation or operation of resulting, implied or constructive trusts.
[4] S. 67 (1), Property and Conveyancing Law, 1959; s. 5 (6), Law Reform (Contracts) Act, 1962, in respect of Lagos; s. 4, Statute of Frauds, 1677, in respect of Northern and Eastern States.
[5] For a fuller consideration of this provision, see Farrand, op. cit., pp. 21-41.
[6] Cap. 99. Every jurisdiction has its own enactment, the provisions of which are almost identical. The Western and Eastern Nigerian statutes are styled Land Instruments Registration Law.

instruments affecting land.[1] It should be firmly understood that it is the instrument that is required to be registered and not the interest thereby granted. The aim of the legislation is to provide prospective purchasers of land with information of existing claims on the land. Registration of an instrument does not in any way enhance its value, as it is expressly provided that registration does not affect the validity or otherwise of an instrument.[2] Failure to register an instrument, however, does attract sanctions. In certain cases the instrument becomes void,[3] while in every case failure to register entails loss of priority in relation to a subsequent registered instrument affecting the same land,[4] and also non-admissibility of the instrument in evidence in judicial proceedings.[5]

Meaning of 'Instrument'

An instrument is defined as:

> A document affecting land in Nigeria whereby one party (hereinafter called the grantor) confers, transfers, limits, 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.[6]

In *Coker* v. *Ogunye*,[7] Ames, Asst. J., held that only those who actually are the very means by which the right or interest in land is conferred, transferred, charged or extinguished in favour of another party are within the ambit of the Act and have to be registered. If, on the other hand, the right or title or interest is not conferred, etc. by the document, but was conferred by some other act of the parties or by some other means and could exist without the document, so that the document becomes an appendage to that other act or other means, such a document is not within the ambit of the Act. In *Coker* v. *Ogunye* two documents concerning sale of land were put in evidence. They were in substance a memorandum of sale and were tendered in support of an equitable interest arising from the payment of the purchase price. It was held that, as the equitable interest was acquired by the payment of the purchase price and not by means of the documents, the interest in land which the plaintiff thereby acquired existed independently of the document and, consequently, that it was admissible without registration.

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[1] S. 6.
[2] S. 19.
[3] S. 14.
[4] S. 16.
[5] S. 15.
[6] S. 2.
[7] (1939) 15 N.L.R. 57.

The decision in this case was explained and applied by de Commarmond, S.P.J., in *Elegbede* v. *Savage*.[1] The document in question in the case was a receipt which was also tendered to support an equitable interest. The learned judge held that the effect of *Coker* v. *Ogunye* is that a document which is an integral part of a transaction and is by itself an operative document (not merely evidential) must be registered. As the receipt tendered was not such a document it was held admissible to prove the payment of money.

In *Ogunbambi* v. *Abowab*,[2] Verity, Ag. P., held that an agreement for sale is an instrument within the Act and must be registered, but it would seem that the learned judge overlooked the provisions of Regulation 5 of the Land Registration Rules whereby agreements for sale or for lease affecting land are exempt from the provisions of the Act. Thus, while an agreement for sale or for lease is an instrument, it need not be registered.[3] But the law in force in the Western and Mid-Western States is no longer the same. It is expressly provided that an 'instrument' includes an estate contract.[4] Briefly put, an estate contract is a contract to create a legal estate,[5] and it includes an agreement for sale, for lease or for a mortgage. Thus, in the areas to which this legislation applies, such agreements must be registered.[6]

Documents Void for Non-Registration

Section 14[7] provides that:

(*a*) every State grant executed after 1 January 1925, which was the date of commencement of the Act, and
(*b*) every instrument affecting land comprised in a State grant and
(*c*) every instrument whereby a Nigerian confers an interest in land on a non-Nigerian

must be registered within the period of six months of execution, if executed in Nigeria, or twelve months if executed outside Nigeria.

In the case of an instrument whereby a non-Nigerian acquires title from a Nigerian, the time stipulated is computed from the date the grant receives the approval of the Governor. The penalty for non-registration within the prescribed period is that at the expiration of the period the instrument becomes void in so far as it affects the land, i.e. it ceases to be effectual to

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[1] (1951) 20 N.L.R. 9.
[2] (1951) 13 W.A.C.A. 222.
[3] See *Yaya* v. *Mogaga* (1947) 12 W.A.C.A. 132.
[4] S. 2, Land Instruments Registration Law, Cap. 56, Laws of Western Nigeria.
[5] For a fuller definition, see s. 2, Property and Conveyancing Law, 1959.
[6] For a full discussion of the subject see *Fakoya* v. *St Paul's Church, Shagamu* [1966] 1 All N.L.R. 74.
[7] S. 15 in the Western Nigeria statute.

pass the interest granted. It is as if it had not been executed. It follows that from that date it cannot be registered as an instrument affecting the land. It also follows that if the land is sold and conveyed to a purchaser after the expiration of the statutory period, the purchaser acquires at the best an equitable interest in the land. The subsequent conveyance will be ineffectual to convey the legal estate, notwithstanding that it is duly registered, since the grantor has not the legal estate in him.[1] However, where failure to register within the prescribed period is not due to neglect or default on the part of the grantee, the Registrar of Lands may grant an extension of time.[2]

Loss of Priority

Section 16 provides that every instrument registered under the Act shall take effect in so far as it affects the land, as against other instruments affecting the same land from the date of its registration. The provision fell for interpretation by the Supreme Court in the recent case of *Amankra* v. *Zankley*.[3] Bairamian, J.S.C., who read the judgment, held that the intention of the section was to make an instrument requiring registration ineffectual unless and until it is registered. The implication is that the execution of an instrument creating or conveying an interest in land does not by itself divest the grantor of his title to the land. The title remains outstanding in him until the instrument has been registered. If in the meantime the grantor executes another instrument in favour of a competing purchaser which is registered first, he (the subsequent grantee) has title to the land. The facts of the case under consideration illustrate clearly how the section operates. Both the plaintiff and the defendant's predecessor in title obtained conveyances of the land in dispute from the same vendor. That on which the defendant relied was executed on 16 May 1957, but was not registered until 17 March 1960. On the other hand, the plaintiff's conveyance was executed on 29 August 1957, but was delivered for registration on 16 September 1957. It was argued on behalf of the defendant that, as the conveyance on which he relied was earlier in time to that of the plaintiff and as by that conveyance the vendor had divested himself of his title to the land, the vendor had nothing to convey to the plaintiff when he did. The argument was rejected as, on the true construction of the section, it was the plaintiff who had the earlier effective title, and, that being the case, he was entitled to a declaration of title.[4]

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[1] See *Onashile* v. *Idowu* [1961] 1 All N.L.R. 313, decided on a similar provision of the Registration of Titles Act, 1935.

[2] From the decision in *Onashile* v. *Barclays Bank* [1963] 1 All N.L.R. 310 it seems that an extension of time may be granted after the expiration of the prescribed period.

[3] [1963] 1 All N.L.R. 304. But see *Crayem* v. *Consolidated African Selection Trust* (1949) 12 W.A.C.A. 443, where it was held that a later instrument can by registration obtain priority over an earlier one only if it was obtained without fraud and without notice of the earlier unregistered instrument.

[4] S. 16 was defended on the ground that if the law were otherwise, it would 'open the door to fraud'. After all, the entire scheme of the Act is to prevent fraud.

What matters, then, is the day and hour of registration. To this end, the registrar is obliged to certify the day and hour of registration on the instrument and also on the copy delivered for registration.[1] To be on the safe side a grantee should, wherever possible, seek to register his instrument on the very day that it is executed.

Section 16 applies to instruments executed after the commencement of the Act on 1 January 1925. Instruments executed before that date took effect from the date of execution. With two exceptions, that also appears to be the law in the Western and Mid-Western States as the Land Instruments Registration Law contains no provisions equivalent to section 16. The two exceptions are contained in section 119 and section 151 of the Property and Conveyancing Law, 1959, which brought the law in relation to the interests mentioned in line with that applicable to other areas.
Section 119 provides as follows:

> Every mortgage affecting a legal estate in land made after the commencement of this law whether legal or equitable shall rank in accordance to its date of registration under the Land Instruments Registration Law.[2]

To the same effect, section 151 provides:

> Every instrument registered under the Land Instruments Registration Law shall, so far as it affects any equitable interest in land, take effect as against other instruments affecting any equitable interest in the same land from the date of its registration under that law.

Commenting upon this, Professor Marshall[3] remarks that section 151 presupposes the existence of (i) an equitable interest in land and (ii) more than one instrument affecting that equitable interest. Thus, while the section applies to successive assignments of an equitable interest in land, it does not apply to successive creations of equitable interests affecting the legal estate. For example, where A sold, but did not convey, Blackacre to B, and B later sells the same portion to C, also without a conveyance, the equities of A and B rank according to the date of creation under the general law. On the other hand, where, in the example given above, B sells his equitable interest to X and later to Y, priority as between X and Y depends on the date of registration under the Land Instruments Registration Law.

Non-Admissibility in Evidence

The disqualification under section 15 holds so long as the instrument remains unregistered, and only in respect of cases in which the document is tendered as one affecting the land. It has been held that an unregistered instrument

[1] Ss. 17 and 18.
[2] But the section is not applicable to a mortgage of registered land. See ss. 17 and 18.
[3] 'A Critique of the Property Legislation in Western Nigeria', *The Nigerian Law Journal*, Vol. I, No. 2, 1965, pp. 171-2.

may be admitted as evidence of the existence of a contractual relationship between the parties, although not in support of an equitable interest as such. In other words, it may be admitted as affecting the parties but not as affecting the land. The rule, which was laid down by the Supreme Court in *Fakoya* v. *St Paul's Church, Shagamu*,[1] was justified on the grounds that:

> The personal obligations created by a contract for the sale of land are already known to the parties to the contract and neither party can maintain against the other party that he was taken by surprise because the contract was not registered. Third parties may on occasion enter into unprofitable negotiations but the register of instruments affecting land does not purport to record the personal obligations of those who have interests in land, and the purchaser for value and without notice will have no less protection in consequence of our decision in this case than he had before.[2]

That being the case, it is submitted that, notwithstanding the jural distinction made earlier in the judgment between an equitable interest as such and the personal obligation created between the parties by the contract, the contract is admissible to prove the existence of an equitable interest arising from the contract and the unregistered instrument is only ineffectual against a purchaser for value without notice.

Although the instrument concerned in this case was merely an estate contract, the reasoning applies with equal force to a conveyance or to a lease which has not been registered. Such an instrument can be admitted to prove the existence of personal obligations between the vendor and purchaser and if, as it usually does, it contains an acknowledgement of the receipt of the purchase money, it is admissible to prove the payment of money, thus laying a foundation for a title in equity. It follows, therefore, that an unregistered conveyance is only ineffectual against a *bona fide* purchaser of a legal estate for value without notice.

The Doctrine of Notice

Although we have seen that, even where the purchase price is paid in full, the legal estate remains with the vendor until a deed of conveyance is executed by him in favour of the purchaser and that deed is tendered by him for registration, in equity the vendor is in conscience bound to execute the conveyance and he is bound not to execute a grant in favour of another person, and the court will enforce that obligation. The equity also binds a subsequent purchaser from him unless he is a *bona fide* purchaser for value without notice of the existence of the equity. In *Taylor* v. *Arthur*,[3] the West

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[1] Loc. cit.
[2] Ibid, *per* Brett, J.S.C.
[3] (1947) 12 W.A.C.A. 179. See also *Fraser* v. *Young* (1944) 10 W.A.C.A. 135.

African Court of Appeal held that the onus of proving that the purchaser of the legal estate has notice of the prior equitable interest lies on the owner of the equitable interest, and the action for specific performance brought by the owner of the equitable interest in that case was dismissed because he could not show that the defendant, purchaser of the legal estate, had notice of his equitable interest. This decision is inconsistent with the decisions of English courts which were not cited to the court. It was held in *re Nisbet and Pott's contract*,[1] as well as in *Wilkes* v. *Spooner*,[2] that, as the purchaser of the legal estate can only avoid the prior equitable interest if he can show that he is a *bona fide* purchaser for value without notice, the burden of proving absence of notice lies on him. As Farwell, L.J., has said:

> It was held in *Biphosphated Guano* v. *Attorney-General*[3] that, under such circumstances, it was not a case of first, a defence that the defendant is a purchaser for value and then a reply that he had notice, but a single defence that the defendant is a *bona fide* purchaser for value without notice, the onus of which is on the defendant.[4]

It is, therefore, submitted that the opinion expressed in *Taylor* v. *Arthur*[5] was misconceived and should not be followed.

'Notice' in this context does not mean actual notice alone. A purchaser is deemed to have notice of all the facts which, if he had made the proper investigation, such investigation would have revealed. Thus, a purchaser cannot avoid notice of equities merely by refusing to make the necessary investigation. Where a purchaser has notice of the existence of a document he is deemed to have had notice of its contents. Where the owner of an equitable estate is in possession, the possession constitutes notice of his interest to any purchaser of the legal estate.[6]

An attempt to define the scope of the last rule was made by the Supreme Court in *Orasanmi* v. *Idowu*.[7] Both parties in the case traced their titles to the land in dispute to one, Onitiri, who was the undisputed owner of the land. The plaintiff/respondent's claim to the land was by virtue of a sale to him by one, Coker, who bought it in 1950 from the administrators of Onitiri (deceased). Coker held a deed of conveyance dated 28 August 1950. The plaintiff/respondent had a deed of conveyance by Coker dated 3 September 1955. The defendant/appellant contended that he was owner by virtue of a previous sale to him in 1936 by Onitiri for which sale he held two receipts, although he had never had a deed of conveyance executed in his favour. It was found by the trial judge that he was not in possession when the predecessor

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[1] [1905] 1 Ch. 391; [1906] 1 Ch. 386 (C.A.).
[2] [1911] 2 K.B. 473.
[3] (1879) 11 Ch.D. 327 at p. 337.
[4] *Wilkes* v. *Spooner* [1911] 2 K.B. 473 at p. 486.
[5] Loc. cit.
[6] See *Ogunbambi* v. *Abowab* (1951) 13 W.A.C.A. 222.
[7] (1959) 4 F.S.C. 40.

of the plaintiff respondent bought and obtained a conveyance. Accordingly it was held that the plaintiff was not affected with notice. Ademola, C.J.F., declared:

> Now, to rely on *Ogunbambi* v. *Abowab* there must be, in addition to payment, an undisturbed and continuous possession for many years by the claimant or by his successors in title under whom he claims. In other words, it is not enough that the appellant should go into possession after the sale to him, but it is important to establish that he remained in possession.[1]

This observation is not free from criticism. Although the learned Chief Justice intended the second proposition in the dictum quoted above as an explanation of the first, it seems that they are entirely different propositions. The second, it is submitted, cannot be controverted. As regards the statement that the possession should be undisturbed and continuous for many years, it appears that the learned Chief Justice was confusing the rule laid down in *Ekpo* v. *Ita*,[2] in an entirely different connection, with that under consideration. With deference to the learned Chief Justice, it is not a correct exposition of the law. The important thing, if the purchaser of the legal estate is to be affected with notice through possession, is that the purchaser without conveyance must be able to establish that he was in possession of the land *at the time* of the sale to the subsequent purchaser. The underlying reasoning is that, if the subsequent purchaser had inspected the land at the time of the sale, as a reasonable purchaser would do, he would have discovered that the prior purchaser without conveyance was in possession; and if he had gone further to inquire of him about the nature of his occupation, he would have had notice of the nature of his interest. In the case under review, it is clear that if the purchaser, Coker, had inspected the land, the defendant not being in possession, nothing would have caused him to make inquiries. The respondent's contention, as put, amounted to no more than that once the payment of the purchase money had been followed by entry into possession the purchaser had acquired the legal estate. That is, of course, not the law. But, even if the possession of the equitable owner is for one day prior to the sale to the purchaser of the legal estate, that possession would suffice to fix the purchaser with notice of the prior sale; and conversely, if he had been in possession for twenty years before the subsequent sale but abandoned possession a day before the sale, the subsequent purchaser would not be affected with notice.

In *Omosanya* v. *Anifowoshe*,[3] Mbanefo, F.J., ruled that possession of an adjacent plot could not be notice of possession of the plot in dispute unless there was evidence that the subsequent purchaser knew that the two plots

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[1] (1959) 4 F.S.C. 40 at p. 41.
[2] (1932) 11 N.L.R. 68.
[3] (1959) 4 F.S.C. 94.

were originally acquired as one piece. It was further unsuccessfully contended in that case that the sale to the purchaser without conveyance being by public auction, the whole world must be taken to have been affected by notice. As Mbanefo, F.J., observed:

> Appellant's counsel has not cited any authority for the proposition that a sale by public auction constitutes notice to the whole world of the interest sold. I doubt whether any such authority exists, especially where, as in the present case, there is no evidence of how much publicity was given to the sale in each case.[1]

It might be different if there was evidence that the purchaser of the legal estate was present at the public auction, but that would constitute express knowledge.

As 'the whole basis of the equitable principle of a *bona fide* purchaser without notice is to protect a purchaser from the fraud of his vendor,'[2] a purchaser from a vendor who had notice but who himself takes without notice, takes free of the equity. 'Notice to the vendor is not notice to the purchaser.'[3] Similarly, where a person derives title from a vendor who took without notice, his title will be free of the equity, irrespective of notice on his own part.[4]

Effect of Registration on the Doctrine of Notice

It sometimes happens that the owner of an equitable estate would transfer his interest to another by deed or other instrument. The question is that, if the instrument is registered in accordance with the provisions of the Land Registration Act, would a subsequent purchaser of the legal estate be deemed to have had notice by virtue of the registration? This question was raised before the Supreme Court in *Omosanya* v. *Anifowoshe*,[5] and again in *Folashade* v. *Duroshola*,[6] and answered in the negative. Explaining this attitude in the former case, Mbanefo, F.J., declared:

> It is nowhere provided in the Ordinance that registration shall be notice of what the deed contains or conveys; and if it was the intention of the legislature it would have said so quite clearly.[7]

In the latter case, Ademola, C.J.F., said:

> It seems appropriate to reiterate here what was said by this Court in the case of *Omosanya* v. *Anifowoshe* . . . that the Land Registration [Act] deals

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[1] Ibid, at pp. 99-100.
[2] *Per* Mbanefo, F.J., in *Omosanya* v. *Anifowose*, loc. cit. at p. 99.
[3] Ibid.
[4] *Wilkes* v. *Spooner*, loc. cit.
[5] Loc. cit.
[6] [1961] 1 All N.L.R. 87.
[7] (1959) 4 F.S.C. 94 at p. 98.

with registration of instruments, with non-admissibility of unregistered instruments as evidence, with priorities of registered documents and the like but makes no provisions that registration of a deed is to be regarded as notice of what the deed contains or conveys nor does it provide that registration shall cure any defect in the deed.[1]

The learned Chief Justice, however, added this warning, the precise implication of which, in this regard, is not too clear. He said: 'This should not be taken to mean that the Court will not take cognizance of the doctrine of notice wherever it is applicable.'[2]

The doctrine of notice was held applicable in the following circumstances. In *Ashimi* v. *Oke*,[3] the evidence disclosed that the defendant was 'alive to the need of a search to find out whether there had been a conveyance of the land to someone else', and for that reason Coker, J.S.C., held that he had constructive notice of the plaintiff's registered conveyance which such search would have led him to discover. In *Ricketts* v. *Shotte*[4] the defendant admitted that he in fact made a search but that he had not discovered the plaintiffs' conveyances, and Brett, J.S.C., held that if the defendant had made a more thorough search he would have discovered the true position. Similarly, in *Akingbade* v. *Elemosho*[5] the respondent testified that he had searched the Land Registry but that he had not discovered the appellant's conveyance, registered only two months previously. On this, Ademola, C.J.N., commented:

> It is not possible for the Court to believe the respondent bought without notice of the appellant's prior equity; he is either untruthful or *he deliberately shut his eyes or was guilty of gross negligence in finding out the facts*, and this is enough to fix him with notice.[6]

The only distinction, on the facts, between *Omosanya* v. *Anifowoshe*[7] and *Folashade* v. *Duroshola*,[8] on the one hand, and the cases which have just been discussed, on the other, is that in the former the purchaser made no search at all while in the latter he either made a search which had not been thorough, or was aware of the need to search. This distinction is untenable. A person who fails to make a search should be regarded as having deliberately ignored the need to make inquiry, or as being negligent. In either case he should be deemed to have had constructive notice of the registered instrument, and, consequently, of its contents. The fact that the party concerned is illiterate should be irrelevant as, by definition, an illiterate cannot write, so that he

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[1] [1961] 1 All N.L.R. 87 at p. 88.
[2] Ibid.
[3] (Unreported) F.S.C. 296/62 of 19/10/66.
[4] (Unreported) F.S.C. 461/61 of 4/4/63.
[5] [1964] 1 All N.L.R. 154.
[6] Ibid, at p. 159. Emphasis supplied.
[7] Loc. cit.
[8] Loc. cit.

must have engaged the services of a solicitor, or at least of a letter-writer. A person who purchases land today without the intervention of a solicitor should be regarded as being negligent and, where a solicitor acts for the parties, he should be conclusively presumed to be aware of the necessity to make a search.

In the case of Western Nigeria, section 193 (1) of the Property and Conveyancing Law expressly provides that registration of an instrument shall be deemed to constitute actual notice of such instrument to all persons and for all purposes in so far as it affects the following:

(i) an estate contract
(ii) an equitable easement
(iii) a general equitable charge
(iv) a restrictive covenant

One way of viewing this provision is that registration of instruments affecting other equitable interests does not constitute notice of such instruments. It is, however, submitted that the provision should be regarded as one concerned with actual notice only and should not detract from what has been said about constructive notice.

Imputed Notice

Where a purchaser employs an agent, such as a solicitor, any actual or constructive notice which the agent receives may be imputed to the purchaser. This rule is subject to the important statutory limitation contained in section 3 (1) of the Conveyancing Act, 1882,[1] that the notice must have come to the solicitor or other agent while acting as solicitor or agent for the purchaser in respect of the particular transaction in question. Previous knowledge obtained by the agent in other transactions is irrelevant.[2]

The doctrine of imputed notice was considered in *Orasanmi* v. *Idowu*,[3] the facts of which are as follows. The plaintiff, purchaser of the legal estate of the land in dispute, had approached one, Emanuel Onitiri, in order to ascertain whether there were other registered instruments affecting the land than that of Coker, his vendor. He was assured by Onitiri that he had made a search in the Land Registry and that only Coker had registered his interest in the land. In the light of this it was contended for the defendant that Onitiri was the agent of the plaintiff for the purpose of the sale to him and that since he (Onitiri) knew or ought to have known of the sale to the defendant twenty years previously and, in fact, negotiated the sale on his father's behalf, the plaintiff was bound by that knowledge. It was held that in the circumstances Onitiri could not be regarded as an agent for the plaintiff. The court

[1] A statute of general application.
[2] *In re Cousins* (1886) 31 Ch.D. 671.
[3] (1959) 4 F.S.C. 40.

went further to hold that even if Onitiri could be regarded as agent of the plaintiff for the purpose of the conveyance by Coker in 1955, the knowledge which Onitiri acquired in 1936 in a different transaction, and in a different capacity, could not be imputed to the plaintiff.

Transactions Governed by Customary Law

It is obvious that in the case of a transaction governed by customary law there can be no requirement of a formal deed of conveyance, since the deed is the invention of English lawyers, or even of writing. Thus, in *Ogunbambi* v. *Abowab*,[1] Verity, Ag. P., declared *obiter* as follows:

> There can be no doubt that by such law and custom no such things as written contracts or conveyances are necessary to effect a valid sale. The payment of the purchase money and the delivery of possession are enough.

In that case the Oloto family sold the land in dispute to the respondent's vendor in 1927 but no deed of conveyance was executed in his favour. In 1948, the Oloto sold and conveyed the land to the appellant. On these facts, Verity, Ag. P., commented as follows:

> If . . . the transaction between the respondent's vendor and the Oloto family in 1927 were to be viewed from the standpoint of native law and custom, then, long prior to the conveyance under which the respondent claims, the Oloto family had divested themselves of their interest in the family land.[2]

It must be noted, however, that mere payment of money followed by entry into possession is not sufficient to secure a valid title under customary law; the purchaser must show that the handing-over of possession was done in the presence of witnesses.[3] In *Cole* v. *Folami*[4] the appellant went into possession after paying the purchase money, for which he obtained a receipt, and claimed that he had thereby acquired the title of the vendor. There was no evidence of a formal handing-over of possession in the presence of witnesses. It was held that, in the absence of such evidence, the appellant had failed to prove that the vendors had divested themselves of the land under customary law prior to the sale and conveyance to the respondent.

There can be no doubt that Jibowu, Ag. F.C.J., who decided the case, correctly stated the position under customary law. Customary law always requires publicity about dealings in land and, indeed, about all transactions. Unless there were witnesses present when a bargain was sealed, how can a

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[1] (1951) 13 W.A.C.A. 222 at p. 225.
[2] Ibid, at p. 225. See also *Akingbade* v. *Elemosho*, loc. cit., at p. 159.
[3] *Cole* v. *Folami* (1956) 1 F.S.C. 66; *Erinosho* v. *Ozokoniran* [1965] N.M.L.R. 479 at p. 483; *Taiwo* v. *Ogunsanya* [1967] N.M.L.R. 375.
[4] Loc. cit.

tribunal resolve any conflict that may arise as to the true intention of the parties? A purchaser can go into possession on account of a variety of transactions. It could have been on account of a pledge, a tenancy, and so on. It must be remembered that it was not the practice in the past to make an outright disposition of land by way of sale.[1] For the avoidance of doubt, the transfer of title is performed at a ceremony, the parties to which become the living witnesses to bear testimony to the event. These ceremonial rites vary in detail from one society to another. Obi[2] says that goats, fowls, palm wine, tortoise and kolanuts are among the things which are produced and consumed by those taking part in the ceremony. Also outlining the procedure for making a gift, Dr Elias[3] said:

> The Chief or family head will go in person or delegate someone else on his behalf to go to the land, the extent of which is demarcated by placing a mound of earth at each of the four corners or sometimes by planting some trees in the same positions as evidence of the boundaries. Then kola is split, gourds of wine are drunk and other viands taken in celebration of the occasion to which those present are expected to be witnesses in any future dispute.[4]

The procedure thus described is not peculiar to the transfer of land by way of gift, but is the usual practice when alienation of any kind is contemplated. It does not follow that failure to produce one or two of the things mentioned will vitiate the transfer of title. The essential thing is that there must be publicity. The purpose of the ceremony itself is to give those present, who are expected to be witnesses in the future, an occasion to remember in connection with the event. Unless the land is formally transferred in the presence of witnesses, the title to it would remain with the vendor and, if in the meantime it is sold and transferred properly to another person in accordance with custom, or if a conveyance is executed in favour of a *bona fide* purchaser without notice of the earlier sale, the subsequent purchaser would gain priority.[5]

Customary Dealings and Statutory Requirement of Writing

In *Alake* v. *Awawu*,[6] the question was raised as to whether the Statute of Frauds, 1677, renders oral evidence of customary disposition of land inadmissible in evidence. As we have seen, sections 1 and 4 provide that dealings in land must be supported by a memorandum or note thereof signed by the

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[1] The Supreme Court took judicial notice of this in *Okiji* v. *Adejobi* (1960) 5 F.S.C. 44.
[2] *The Ibo Law of Property*, p. 129.
[3] *Nature of African Customary Law*, p. 184.
[4] The procedure is similar to livery of seisin at common law.
[5] *Adebona* v. *Amao*, loc. cit. and *Cole* v. *Folami*, loc. cit.
[6] (1932) 11 N.L.R. 39.

party to be charged or his agent. In this case, the defendant sought to prove a gift of land allegedly made to her by her mother. There was no document in support of it. It was contended for the plaintiff that, assuming such a gift was made, it was invalid inasmuch as it did not comply with the Statute of Frauds. Kingdon, C.J., rejected the contention and held that the gift was effective to transfer the land to the defendant and could be proved orally. The judge appears to have decided the case as he did on the ground that both the grantor and grantee were illiterates. Similarly, in *Orisharinu* v. *Mefun*,[1] the effect of the decision was interpreted to be that the Statute of Frauds does not necessarily apply between illiterate persons.

The decision, however, need not be restricted only to dealings between illiterates. The Statute of Frauds, like any other English statute of general application, has application only in the case of a transaction governed by English law. The received English law does not ordinarily apply to Nigerians, they being *prima facie* governed by customary law. The result is that, if the transaction is intended to take effect under customary law, the Statute of Frauds cannot possibly have any application. An attempt was made in *Moloma* v. *Olushola*[2] to show that the law was altered by the provisions of the Supreme Court Ordinance which says that customary law is not to be enforced if it is incompatible with 'any law for the time being in force', which, Counsel submitted, included the Statute of Frauds. This means, in his contention, that the rule of customary law which does not require writing in evidence of customary dealing must give way to the provisions of the Statute of Frauds, which require writing. It is true that the Supreme Court Ordinance, 1914, which was in force when *Alake* v. *Awawu* was decided, invalidated only a rule of customary law which was incompatible with 'local legislation' and not just 'any law' in force as in the current legislation. De Commarmond, S.P.J., declined to decide the point, as he was of the view that, even if the change of wording effected a change in the law, being a law laying down a procedural requirement, it could not be construed as having retrospective effect. But the correct legal view is that the change in phraseology does not effect a change in law. As Waddington, J., said in *Rotibi* v. *Savage*:[3] 'the intention is that reference to "any law" is to be interpreted as "any local enactment" as the suggested change would have been so startling that the legislature could not possibly have intended it'.

Section 4, Statute of Frauds has been replaced in relation to Lagos and Western Nigeria by section 5 (2) of the Law Reform (Contracts) Act, 1961, and section 2 of the Contracts Law, 1958,[4] respectively. It is expressly provided in the Lagos enactment that its provisions do not apply to any contract for the sale or other disposition of land made under customary

[1] (1937) 13 N.L.R. 187. See also *Kadiri* v. *Akeju* (1937) 13 N.L.R. 186.
[2] (1954) 21 N.L.R. 1.
[3] (1944) 17 N.L.R. 77.
[4] Cap. 25, Laws of Western Nigeria.

law.[1] The Contracts Law of Western Nigeria, on the other hand, applies to every contract or other disposition of land, irrespective of whether it is governed by customary law or English law.

The Effect of Writing

Although we have seen that a customary disposition need not be evidenced in writing, this does not mean that the transaction cannot be reduced to writing. It is often done and can even be said to be the order of the day. It becomes necessary, therefore, to determine its implication.

In the first place, it must be firmly stated that the fact that a transaction is reduced to writing cannot be taken as evidence of an intention to be governed by English law. The suggestion to the contrary by Jibowu, Ag. C.J.F., in *Cole* v. *Folami*[2] is erroneous. In that case, the learned judge held that, as the giving and taking of receipts were unknown to customary law, the transaction before him could not be judged from the standpoint of customary law. It is well known that customary law itself insists on publicity in any dealing, particularly in dealings in land. The significance of this requirement is that, should the grantor at a future date deny the grant or that the grant be of a different character to the one claimed by the grantee, and vice versa, the witnesses would be able to contradict him. That being the case, it is submitted that the memorandum in writing does nothing more except that, unlike human memory, it is more reliable. It is common knowledge that memory becomes dim with the passage of time; by the time an issue comes up for litigation important witnesses might be dead and, even when alive, might not be willing to tell the truth. A document, on the other hand, if properly kept avoids these hazards; it speaks for itself. It is natural, therefore, that the parties to a transaction are anxious to take advantage of the opportunity afforded by writing; and the court would not encourage them to do so if it were to hold that, since writing was unknown to our forebears, the implication of the reduction of their agreements to writing is that customary law was not contemplated. In any case, the opinion of Jibowu, Ag. C.J., is incompatible with the recent decision of the Supreme Court in *Djukpan* v. *Orovuyoube*[3] where the court held customary law to be applicable despite the fact that the transaction was reduced to writing.

Secondly, what has been said cannot be interpreted to mean that a party can rely on a document as operating to transfer an interest in land by itself and in the same breath contend that customary law applies. The reduction into writing cannot displace the requirement for a formal transfer of title in the presence of witnesses; the document can only serve as a memorandum of the transaction or as a receipt for money paid. It is of evidential value only.

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[1] S. 2 (3) a.
[2] (1956) 1 F.S.C. 66.
[3] [1967] N.M.L.R. 287.

Therefore, if it is to be of any benefit to the holder, it must identify the property in full: the date of the formal transfer and the witnesses before whom it was effected must be recited, and it would seem that the witnesses should subscribe their signatures or marks to the document.[1]

The question whether the document should be registered under the Land Instruments Registration Law was considered by the Supreme Court in *Djukpan* v. *Orovuyoube*[2] and answered in the negative. The explanation was that a grantee's title is conferred by virtue of the transfer ceremony and not by virtue of the instrument. Thus, it does not fall within the meaning of 'instrument' as laid down in *Coker* v. *Ogunye*.[3]

Choice of Law

Whether or not it is the parties' intention that their transaction be governed by English law or by customary law is a question of fact. The case of express agreement does not present any difficulty. But what will the court take into consideration in making an inference that the parties intended to exclude customary law? In many cases, the courts have looked into the circumstances and have drawn an inference as to what a reasonable bystander would understand the parties' intention to be. For example, in *Griffin* v. *Talabi*[4] a purchaser bought a piece of land from the Oloto family and obtained a receipt for the purchase price. The receipt contained the following sentence: 'We shall be ready to convey unto the purchaser the land aforesaid at any time that we may be called upon to do so and that without delay.' The question for decision was whether title to the land had been validly transferred to the purchaser or whether it still remained with the Oloto. The purchaser contended that, as the parties were Nigerians, customary law should be applied, and that, since under that law a deed of conveyance was not necessary to create an interest in land, he had obtained a valid title from Chief Oloto by paying the purchase price of which the receipt was evidence. That contention was rejected on the ground that from the inscription on the receipt it was obvious that it was the intention of the parties that the mode of transfer was to be by deed of conveyance. As the deed was not executed until a third party acquired the Oloto's title, the third party's interest was preferred.

An intention to be bound by English law may also be inferred from the subsequent conduct of the parties. For example, in the case which we have just discussed the Oloto was joined as a party to the conveyance made to the defendant by his vendor. That is evidence that he (the defendant's

[1] As the courts always insist on the best evidence, if the witnesses are still available at the time the issue is litigated they ought to be called so that they can be cross-examined.

[2] Loc. cit.

[3] Loc. cit.

[4] (1948) 12 W.A.C.A. 371.

vendor) realized that the legal estate still remained with the Oloto, notwithstanding the payment of the purchase price by him. In *Adebona* v. *Amao*[1] the Oloto family in 1927 sold a piece of land to the plaintiff, who obtained a purchase receipt for the money paid to the family, but no conveyance. In 1952, as the Oloto failed to convey the land when requested to do so, he instituted an action against the family, and the Court ordered the defendant to execute such conveyance in favour of the plaintiff. The Oloto family appealed against the judgment but, between the judgment of the then Supreme Court and the hearing of the appeal by the West African Court of Appeal, the family purported to sell and convey the land to the defendant. Onyeama, J., held that the sale in 1927 was governed by customary law and, consequently, that the family had no interest to convey to the defendant when they did, but the decision was reversed by the Supreme Court. As Brett, J.S.C., said:

> The trial judge in the present case has found that a transaction of sale according to customary law was completed in 1927 but in 1952 the plaintiff brought an action in the former Supreme Court against the head of the Oloto family to enforce the undertaking to convey the land, and in doing so he impliedly admitted that the title was still vested in the Oloto family and had not passed to him by virtue of customary sale.[2]

Vendor's Title Made by Deed

The fact that a grantee obtains a title by means of deed of conveyance does not import an intention to be governed by English law or statute whenever the grantee subsequently sells to another person. The intention evinced by the deed through which he derives his title is related to that transaction between him and his vendor only and cannot import a contract with the whole world that he will always be bound by English law in respect of the land.[3] Moreover, the position of his purchaser who was not a party to the original transaction cannot be ignored. Section 27 of the High Court of Lagos Act, for example, speaks of a contract express or implied to be bound by English law. This contract must necessarily be between the vendor and purchaser. The result is that a title derived by a deed may be transferred to another by the customary mode of conveyance, and that English law applies only in so far as an intention to be bound by that law, independently of the conveyance, can be found. The Western Nigerian Statute also cannot apply by virtue of the deed, since, as we have said, the deed does not effect a 'conversion' of the land to one held under non-customary tenure.

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[1] [1966] N.M.L.R. 404.
[2] Ibid, at p. 405.
[3] *Nelson* v. *Nelson* (1951) 13 W.A.C.A. 248.

6 Succession to Rights in Land

Succession to land may be either testate or intestate. A person is said to have died testate if he has given directions for the disposition of his property after his death in the manner prescribed by law, and he is referred to as a 'testator' or, if female, 'testatrix'. If he has not given any such directions, he is said to have died intestate, and he is referred to as an 'intestate'.

Wills

Subject to the qualifications to be mentioned presently, an owner of land or of any interest in land has always had the freedom to dispose of his property by will. Dr Okoro[1] claims that matrilineal societies in Eastern Nigeria are an exception to this rule, and that among the Boki people of Eastern Nigeria a father may not deprive his sons of their right to inherit the house where he lived, and that a woman cannot defeat her father's right to her property by making a will. These claims have not been subjected to judicial scrutiny and it is not clear to what extent it is still the established custom in the areas concerned. In *Adesubokan* v. *Yinusa*,[2] the court was invited to pronounce on the will of a Muslim which was at variance with the Maliki law of Muslim, alleged to be binding on the testator. The testator was a Yorubaman from Lagos, and he died in Zaria, Northern Nigeria, where the property affected by the will was situated, and where Muslim law applied as part of customary law. The alleged grounds of invalidity were that the testator had discriminated against the plaintiff, one of his children. Belo, J., in the first instance, held that the will was invalid and set aside the probate of it which had already been granted. On appeal to the Supreme Court, the will was upheld on two alternative grounds. Firstly, that there was no evidence that Muslim law of the Maliki School was part of the customary law of Lagos which was the law binding on the deceased.[3] Secondly, that on the assumption that Muslim law applied, such Muslim law was

[1] *Customary Law of Succession in Eastern Nigeria*, 1966, p. 8.
[2] (As yet unreported) suit No. S.C. 25/70 of 17/6/71.
[3] A contention that a Muslim in Abeokuta was subject to Muslim law was rejected in *re Alayo* (1946) 18 N.L.R. 88.

incompatible directly or by implication with the provisions of the Wills Act, 1837, an English statute incorporated by reference in section 33 of the High Court Law, of Northern Nigeria.[1] The implication of the second alternative is that any rule of customary law which denies a Nigerian full testamentary capacity in respect of his individual property will not be enforced.

We have seen that the interest of an individual in his family property under customary law cannot be disposed by will. The decision in *Adesubokan* v. *Yinusa* does not govern such cases for, as we have seen, the cases on that subject have recently been re-affirmed in *Abeje* v. *Ogundairo*,[2] although they were misapplied in that case. A provision in a will affecting the devolution of such an interest is void and ineffectual.[3]

Testamentary disposition may be effected either in accordance with the rules of English law or those of customary law.

Written Wills

A will under English law must be in writing.[4] No special words are required but the will must be signed by the testator or by some other person in his presence and at his direction, and it must be attested by two disinterested persons to witness the signature. If the requirement as to form is not satisfied, an intestacy occurs. A detailed consideration of the form and construction of wills is beyond the scope of this study.[5]

Nuncupative Wills

Wills under customary law take the form of a death-bed declaration by the testator as to the disposition of his properties on his death. It is essential that the declaration should be in the presence of responsible witnesses. A declaration made in secret to the beneficiary alone, or to one of the interested parties alone, is invalid.[6] There is no hard and fast rule about the number of witnesses. The expert witness in *Ayinke* v. *Ibidunni*[7] stated that they should number about four. What is clear from that judgment is that one witness is not enough.

Gifts *inter vivos*

The same end may be achieved by way of gift *inter vivos* to the intended beneficiary, provided that the gift is followed by a transfer of the property

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[1] There are equivalent provisions in the High Court Law of each State.
[2] Loc. cit.
[3] *Taylor* v. *Williams*, loc. cit.; *Ogunmefun* v. *Ogunmefun*, loc. cit.
[4] S. 9, Wills Act, 1837; s. 6, Wills Law, Western Nigeria (Cap. 133).
[5] Standard English textbooks, such as Parry, *Law of Succession*, should be consulted.
[6] See *Ayinke* v. *Ibidunni* (1959) 4 F.S.C. 280.
[7] Loc. cit.

to him in the presence of witnesses.[1] In *Bankole* v. *Tapo*[2] it was held that land which was allotted to a particular individual during the lifetime of the owner could not become family property on the owner's death. Such property becomes the individual property of the person to whom it has been granted.

Creation of Family Property by Will

Just as a person who is subject to customary law may disappoint his family by making a devise of his property to a stranger or to a particular member of his family, or direct that English law should govern the distribution of his estate, a person subject to English or other non-customary law may direct that his individual property be held as the family property of his children, or of his extended family or of any group of individuals within his family.

Any language from which an intention to create family property can be gathered is sufficient to create that tenure, although in almost all the cases reported the expression 'family', 'family property' or 'family house' has been used. In *re Edward Forster*[3] a devise of a house to 'the whole of my family and their children's children throughout' was held to create family property. In *George* v. *Fajore*[4] a devise to twelve named individuals as tenants in common was held to create family property because it was coupled with a prohibition against alienation, and it is an essential characteristic of family property that a family member has no alienable interest in his family property. But the mere fact that alienation was prohibited is not conclusive in favour of family ownership. The surrounding circumstances may show that such was not intended. Two cases illustrate this point. The first is *Giwa* v. *Otun*,[5] where the trust deed under which the plaintiff claimed provided that the grantees were to hold as joint-tenants and as tenants in common and that the property was to be held for the joint-benefits of the grantees and their descendants and to be kept as a common dwelling house and not to be sold without their written consent. Butler Lloyd, J., held that the principles of English law and not those of customary law were to be applied. *George* v. *Fajore*[6] was distinguished from this case on the grounds that in the former there was no provision for sale even by consent,[7] and also on the grounds that the will contained a provision for the upkeep of the house from the proceeds of a portion to be let out by the executors. In *Branco* v. *Johnson*[8] the property in dispute was devised to trustees upon trust to let the same and

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[1] *Ayinke* v. *Ibidunni*, loc. cit. at p. 282.
[2] [1961] 1 All N.L.R. 140. See also *Molade* v. *Molade* (1958) 3 F.S.C. 72; *Roberts* v. *Wilson* [1962] L.L.R. 39.
[3] (1938) N.L.R. 83.
[4] (1939) 15 N.L.R. 1. See also *Jacobs* v. *Oladunni Brothers* (1935) 12 N.L.R. 1; *Shavu* v. *Kehinde* (1947) 18 N.L.R. 129.
[5] (1934) 11 N.L.R. 160.
[6] Loc. cit.
[7] But that is implied by law in any case!
[8] (1943) 17 N.L.R. 70.

distribute the proceeds among the testator's children. It was held that family property was not created in spite of the fact that the will contained a clause to the effect that the property should never be sold.

It must be noted that a person cannot make provisions for his illegitimate children by devising his property to be held as family property as only legitimate children or relations can benefit. Where it is intended that both legitimate and illegitimate children are to benefit, the testator should say so expressly. It is better, in such a situation, to mention the children by name.

Intestacy

In the absence of any expression of his desire as to how his property should be distributed after his death, the property of a deceased person, including his interests in land, devolves on his heirs. The answer to the problem of establishing the heir in respect of land depends on which system of law governs the case. In the case of a non-native, the applicable law is English law or any statutory modification or replacement thereof. As regards natives, the applicable law is customary law unless the deceased is within the class of natives whose intestacies are brought under English law or statute, or unless he has by his own conduct ousted the application of customary law by directing in his will that English or other law should apply.[1]

The application of the customary law of succession is complicated by the fact that there is no single system of customary law for the whole country, and the principle which has been adopted is that the applicable customary law in a given case is the one to which the intestate was subject, irrespective of where the property is situated or where the death occurred.[2] In other words, if a Yorubaman dies intestate leaving property in an Ibo territory, the intestacy is governed by Yoruba customary law and not by Ibo customary law. Thus, in *Tappa* v. *Kuka*,[3] where a Muhammadan from Nupe in Northern Nigeria died intestate leaving a house in Lagos, Brooke, J., held that the applicable law was the Muhammadan law which was the deceased's personal law, and not the customary law prevailing in Lagos.

The rule as to the choice of law is slightly varied in Northern Nigeria. Section 30 of the Land Tenure Law, 1962, provides as follows:

> The devolution of the rights of an occupier upon death shall be regulated, in the case of a native, by the native law or custom existing in the locality

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[1] That, really, would be testate succession.

[2] S. 20 (2), Customary Courts Law, Cap. 31, Laws of Western Nigeria, 1959; s. 12 (4), High Court Law, Cap. 44, Laws of Western Nigeria, 1959; s. 15, Customary Courts Edict, 1966, of Eastern Nigeria. The right of the heir is, however, subject to the rules governing land-holding in the particular locality.

[3] (1945) 18 N.L.R. 5. See also *re Whyte* (1945) 18 N.L.R. 70.

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

As a native is defined by the law as a person whose father was a member of a tribe indigenous to Northern Nigeria, it means that the devolution of the rights of a Northern Nigerian is governed by the *lex situs*, and not by his personal law, while the devolution of the rights of a non-native is governed by his personal law and not by the *lex situs*. This provision relates, however, to the right of occupation only. It does not affect other rights which may subsist in the land. This, we submit, is the implication of Proviso (a) to section 30 which states:

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

In other words, the devolution of the right of a native is governed by the *lex situs* as regards the right to occupy and by the personal law of the intestate as regards other beneficial rights.

A consideration of the customary law of succession of each ethnic group in Nigeria is beyond the scope of this study.[1] However, it appears that there are four patterns typified by the Yoruba, the Ibo[2] (two patterns) and the Benin rules of succession. The rules of succession of the other ethnic groups have features of one or other of these four patterns. The following discussion will, therefore, be confined to the rules of inheritance of those four areas.

Yoruba Rules of Inheritance

Under Yoruba customary law, land is inherited by the children of the intestate to the exclusion of all other relations,[3] and females share equally with males.[4] A widow has no right of succession under customary law.[5] although she has a right of residence in the family house during her widowhood, conditional on her good behaviour.[6] The same rule would seem to apply to a husband in relation to his wife's property.

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[1] Useful reference can be made to Elias, *Nigerian Land Law and Custom*, Chapter 10; Okoro, *Customary Law of Succession in Eastern Nigeria*, 1966; Obi, *The Ibo Law of Property*, 1963, Chapters 8-10.

[2] There are two patterns of succession in Iboland; one in respect of patrilineal societies, the other in respect of matrilineal societies.

[3] *Adeseye* v. *Taiwo* (1956) 1 F.S.C. 84.

[4] *Sule* v. *Ajisegiri* (1937) 13 N.L.R. 146.

[5] *Oloko* v. *Giwa* (1939) 15 N.L.R. 31.

[6] *Re Edward Forster* (1938) 14 N.L.R. 83.

As regards succession to the property of a person who left no issue, the following evidence of customary law was given and acted upon by the court in *Adedoyin* v. *Simeon*:[1]

(i) If the deceased left brothers and sisters by the same mother, they have the right of succession to the exclusion of other relations.
(ii) Where there is no brother or sister by the same mother, the parents are together entitled but more usually the father would leave everything to the mother.
(iii) If the deceased is survived by only one parent, that parent takes everything.
(iv) Brothers and sisters of the half blood by the same father have no right of inheritance, notwithstanding that the property was inherited from their father.

The principles laid down in this case are subject to the qualification which was accepted and declared by the Supreme Court in *Suberu* v. *Sunmonu*[2] that, where the property in dispute was inherited from the father's family, inheritance is by his paternal relations and, where the property was inherited through the mother, the maternal relations have the right of succession. That being the case, it is submitted that the decision in *Adedoyin* v. *Simeon*[3] that a mother is entitled to inherit property in preference to the deceased's half-brothers by his father, even where the property was inherited from their father, can no longer stand as the mother is not a member of the father's family.

Distribution

Where the intestate is a woman, or a man who had children by only one woman, distribution among the children is in equal proportions, regardless of sex.[4] The same principle applies where the heirs are collaterals.[5] In the case of a polygamous family, it is well settled that the *idi-igi* system applies. The system is that the property is divided into as many places as there are wives who bore children, the children born of each wife being collectively entitled to a share.[6] The *idi-igi* system is said to be subject to the qualification that the family head may, in order to avert a family dispute over the inheritance, direct that the property should be distributed equally among the children. This method of distribution is known as *ori-ojori*.[7] Grandchildren

[1] (1928) 9 N.L.R. 76. But see *Andre* v. *Agbebi* (1931) 10 N.L.R. 79 which was decided on the principles of justice, equity and good conscience on the wrong assumption that there was no custom on that matter. Subject to the qualification to be noted later, the fourth proposition in *Adedoyin* v. *Simeon* is indisputable.
[2] (1931) 10 N.L.R. 79 at p. 80.
[3] Loc. cit.
[4] *Sule* v. *Ajisegiri* (1937) 13 N.L.R. 146.
[5] See *Taiwo* v. *Taiwo* (1958) 3 F.S.C. 4.
[6] *Dawodu* v. *Danmole* [1962] 1 All N.L.R. 702.
[7] Ibid.

take their deceased parent's share *per stripes* irrespective of whether such parent survives the intestate.

Ibo Rules of Inheritance

Patrilineal Societies

In the majority of Ibo communities the family grouping is strictly patrilineal. An intestate's heir is his paternal next-of-kin.

A distinction is made in Ibo law of succession between the house where a man lived with his family and other houses or property owned by him. The father's residence is inherited by his eldest son to the exclusion of all other children. In the case of a house allocated to a wife for her occupation, inheritance is by the eldest son of that wife to the exclusion of all other children, subject to the wife's right of residence during her widowhood. Obi states that where the eldest son predeceases his father his own eldest son is subrogated to him and is entitled to the house to the exclusion of his uncles.[1] This point is disputed by Dr Okoro[2] who says that the statement is only true if there are no other male issues of the deceased surviving him. In Dr Okoro's view, the right of inheritance is vested in the eldest surviving son of the intestate or of the widow, as the case may be. But Obi's view is consistent with the finding in *Ngwo* v. *Onyejena*[3] that succession to the headship of the family in Asaba is by the descendants of the eldest son. If this is so, one is inclined to believe that the death of that eldest son during his father's lifetime may not affect the rights of his descendants.

The title acquired by the eldest son over his inheritance is absolute, although Obi[4] says that he (the heir) cannot turn out members of the family who were in residence during his father's lifetime. If this is so, it means that the heir cannot deal in the property in any way that will prejudicially affect the possessory right of such family members. That right is, however, strictly one of residence. With regard to the Ibo settlement pattern, this appears to be almost an imaginary problem as such apartment, as it is designed, can only serve the needs of one person and his dependants.

These rules are framed in relation to the pattern of settlement in rural areas. How the right of the eldest son over the father's apartment, on the one hand, and the right of a wife's eldest son over the house allocated to his mother, on the other hand, can be reconciled in the case of urban dwellers where both apartments exist under the same roof, is not free from doubt; perhaps a form of family ownership, with the eldest son having a larger share, will emerge. As regards other property, be it a house or farmland, the principle of primogeniture has no application, except in so far as the right of management is concerned. The rule that is usually asserted is that

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[1] Op. cit., p. 172.
[2] Op. cit. pp. 117-18.
[3] [1964] 1 All N.L.R. 352.
[4] Obi, op. cit., p. 185.

land is inherited by the eldest son who holds it in trust for himself and the other sons of the deceased. 'These other children have a beneficial interest in the land and have a right to farm on it.'[1] A revealing case is *Onwusike* v. *Onwusike*[2] where Betuel, J., held that an eldest son was not entitled to obtain a renewal of a lease of his father's property in his own name, but had to hold the lease as the property of all his father's sons.

From what has been said above, it can be seen that female members of the family have no right to inherit land. Where a landowner dies without leaving any male issue, inheritance is by his brothers or other male paternal next of kin. This custom was acted upon by the Supreme Court in *Nezianya* v. *Okagbue*,[3] concerning Onitsha custom. The custom was justified on the grounds that it was wrong, in the view of the Onitsha people, for the real property of a man who died without male issue to go to his female issue, who on her marriage would carry the property to her husband's family. *A fortiori*, a widow cannot succeed to her husband's property. However, both the widow and the daughter have the right of residence with the consent of the family.

A qualification to the general statement that a daughter cannot succeed to land exists among the Ibo in Mid-Western State. Where a man dies leaving no sons, his eldest daughter may defeat her uncles' claim by choosing to be an *idegbe*.[4] An *idegbe* is a daughter who remains unmarried and who stays in her father's house for the purpose of raising sons in his name, thus putting herself in the position of a son. An *idegbe* is entitled to succeed to her father's land, and if she also raises no son, her daughter can choose to be an *idegbe* and, as such, succeed to the land on her mother's death. The institution of *idegbe* can only come into being where the deceased left no male issue. Thus, a daughter cannot claim the right to share with her brothers merely by remaining unmarried in her father's house.

Women's Property

Where a woman leaves sons, the position is the same as described above. Her land is inherited by those sons. In the absence of sons, the position depends on whether she is married or unmarried. In the case of a married woman, the following evidence of customary law was accepted by the court in *Nwugege* v. *Adigwe*:[5]

(i) Property acquired by the deceased before her marriage goes to her own family and not to her husband.

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[1] *Per* Onyeama, J.S.C., in *Ngwo and Another* v. *Onyejena* [1964] 1 All N.L.R. 352 at p. 355. The decision is in connection with Asaba customary law, but it seems that the rule is of universal application in those parts of Iboland where patriliny applies.

[2] 1962 (Unreported) suit 0/81/59, Onitsha High Court. See Okoro, op. cit., p. 120.

[3] [1963] 1 All N.L.R. 352

[4] Obi, op. cit., p. 185.

[5] (1934) 11 N.L.R. 134.

(ii) Property acquired by her after her marriage goes to her husband or his next of kin.

The position in respect of an unmarried woman is the same as that of a man.[1]

Matrilineal Societies

In a few societies in Iboland, succession is matrilineal. Under this system, a child belongs to his mother's, rather than to his father's, family. When a man dies, his property is not inherited by his own children but by his maternal relations. Chubb[2] listed the order of priority as follows:

(i) his brothers of the same mother, though not necessarily of the same father, in order of seniority
(ii) his sisters of the same mother in order of seniority
(iii) the children, male and female, of his eldest sister by the same mother

It would seem, however, that Chubb's account is related only to the right of management, rather than to succession to the beneficial rights. No distinction is made between the rights of full brothers and those of full sisters, in so far as right of property is concerned, as they are in the same degree of relationship to the deceased but, as regards right of management, females are subordinate to males. Thus, the right of management vests in the male members of a class of successors in order of seniority and, in the absence of males, the females are entitled in order of seniority.[3] The right of children to succeed to their father's self-acquired land, as distinguished from land inherited from his matrilineage, and to land which their father inherited from his own father, has been recognized. If this is so, it cannot be disputed that in some measure there is patrilineal succession of a sort in these areas, and a proper investigation may reveal that the situation is not too different from that declared by the Federal Supreme Court in respect of the Yoruba in *Suberu* v. *Sunmonu*[4]; for, where a child has inherited property from his father and himself dies without issue, his mother's relations cannot succeed to it. The right of succession is vested in his next-of-kin in his father's maternal family.

Bini Rules of Inheritance

The Bini customary law of succession to land is clearly different from those described above. The strict principle of primogeniture applies, the eldest son succeeding to all the landed property of his parent to the exclusion of

[1] For the rules governing distribution see Okoro, op. cit., pp. 126-8.

[2] Chubb listed Afikpo, Edda, Unwana, Ameseri Okpoha and Enna clans in Afikpo, and the Ohafia in Bende as such societies. See Chubb, *Ibo Land Tenure*, 1948. According to Dr Okoro, only Ngwo and Unyaeda clans of the Andoni are truly matrilineal, the others he classified as bilineal. See Okoro, op. cit., p. 160.

[3] See Okoro, op. cit., p. 116.

[4] Loc. cit.

other children. The nature of the right acquired by the eldest son is similar to his interest in his self-acquired property. His title is absolute; it is not subject to any trust in favour of the younger children, although the obligation to bring up the minor children is said to be imposed. It would seem, however, that the obligation does not derogate from his right as heir. It is not imposed on him *qua* successor to the property, but rather *qua* the person *in loco parentis* to the minors. Thus, his liability is not greater than a father's, and is in no way tied to the land inherited by him.

Rowlings[1] said that the principle of primogeniture was limited to the right over the house in which the deceased had lived and 'title house' if he was a chief. He said that the eldest son had a share with his younger brothers and sisters in the rest of the property, and he could not lightly exclude the other children from their father's house. These views have been disproved by the decision in *Ogamien* v. *Ogamien*.[2] In that case the first defendant was the first son and heir of Chief Edo Ogamien (deceased) who was one of the senior chiefs in Benin. The plaintiff was the eighth son of the deceased and there were some female children. The deceased left three houses—one stool property and two others. One of the two houses was sold in accordance with his wishes to defray his funeral expenses. The second house, which was the property in dispute, was originally used by the members of the family at large and the eldest son moved into the stool property as his father's successor. About twelve to thirteen years after the death of the deceased, the first defendant laid claim to the property in dispute and proceeded to sell it. In the proceedings that ensued, the younger son did not challenge the validity of the custom that the eldest son became owner of the property left by his father, but instead claimed that the deceased had made a gift of the house to the family. That claim, however, was not justified. The Benin Divisional Court held that the eldest son 'is the rightful owner of all the late Chief Ogamien's property', and ordered the defendants, the younger sons of the Chief, to quit the house forthwith. This finding was not queried by the Supreme Court.

In the absence of a male issue, the eldest daughter takes charge of the property, provided she remains in her father's house unmarried in order to produce a son who will take over from her as heir. Where the deceased leaves no issue, it seems that his heir is his junior brother or his paternal next of kin.

Family Property

Where there is only one heir, that heir takes the property as his individual property by operation of law in the same estate as the owner. Where there

[1] *Notes on Land Tenure in Benin Province*, 1948.
[2] [1967] N.M.L.R. 245.

is a plurality of heirs, the property is held by them in common as their family property, unless and until it is partitioned among them.

Succession to Family Property

A member of a family has no interest in family property which can be inherited by his heirs as such. The only heirs recognized as capable of inheriting a member's share are the children of the deceased member who collectively step into his shoes. In *Idewu* v. *Hausa and others*[1] a landowner died leaving three daughters. His property was divided between the two daughters still living and one, Belo, the son of the third daughter who had died. On Belo's death his father continued to collect the rents on the property and exercised other acts of ownership. On the father's death, his other children by other women claimed the property, on the grounds that on Belo's death the property was inherited by their father and that on their father's death the property descended to them as his heirs. It was not proved that the arrangement of 1904 amounted to a partition in the strict sense and, in the absence of satisfactory proof, it was held that the surviving members of Belo's mother's family were entitled to Belo's portion. If a partition had been proved, the decision might have been otherwise.[2] *George* v. *Fajore*,[3] where a mother claimed without success the share of her son in unpartitioned family property, and *Caulcrick* v. *Harding*,[4] where a husband unsuccessfully claimed his wife's portion in such property, are other illustrations of this. It follows that where a member of a family dies without leaving children of his own, his share of the family property is inherited by the surviving members of the family.[5] It also follows that a sole surviving member of the family succeeds to the whole estate and the property is thenceforth rid of the incidents of family property. Thus if A, B and C are brothers and together hold Blackacre as their family property and A and B die without issue, the property ceases to be family property and C becomes the absolute owner and can deal with it as such. In the same way, if A, B and C are all survived by a descendant of any one of them, that surviving child or grandchild becomes the absolute owner.

A submission to this effect was, however, rejected by the Supreme Court in *Abeje* v. *Ogundairo*,[6] on the grounds that 'it is in the nature of family property that it must remain in the family in perpetuity for the enjoyment of members of the family'. It was not clear which family the Court was referring to. Moreover, the reasoning of the Court was not well-founded. It

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[1] (1936) 13 N.L.R. 96.
[2] But see *Suberu* v. *Sunmonu*, loc. cit.
[3] Loc. cit.
[4] Loc. cit.
[5] See *Akerele* v. *Liye Labelu* [1956] L.L.R. 60; *Taiwo* v. *Taiwo*, loc. cit.
[6] Loc. cit.

is inconsistent with the view expressed in *Balogun* v. *Balogun*[1] 'that family land can lose its character of family land and come to be land which is absolutely owned by an individual',[2] and the rule established in that case, which is of undoubted validity, that partition terminates family property.

Variation of Customary Rules of Succession by Marriage

Where a person who is subject to customary law contracts a monogamous marriage, his intestacy is not regulated by customary law but by English law or statute, as the case may be. The source of the law in this respect is to be found in section 36 of the Marriage Act,[3] with application to Lagos State; section 49 (5) of the Administration of Estates Law, 1959,[4] of Western Nigeria, with application to the Western and Mid-Western States; and the decision of the Full Court in *Cole* v. *Cole*[5] for all other cases not covered by the statutory provisions.

Cases within section 36 of the Marriage Act

Section 36 of the Marriage Act provides that where:

(i) a person who is subject to customary law contracts a marriage in accordance with the provisions of the Act and dies intestate after the commencement of the Act leaving a widow or husband or any issue of such marriage or

(ii) any person who is an issue of a marriage under the Act dies intestate subsequent to the commencement of the Act,

real and personal property left by the intestate which might have been disposed of by will shall be distributed in accordance with the law of England relating to the distribution of the personal estates of intestates,[6] any customary law to the contrary notwithstanding.

It is expressly provided that the customary law governs the devolution of property which the intestate has no power to dispose of by will, such as his interest in family land.[7] It is also provided that where, by English law, there is no relation who is able to intest, and the estate becomes *bona vacantia*,

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[1] (1939) 9 W.A.C.A. 78.
[2] Ibid, *per* Kingdon, C.J., at p. 84.
[3] Cap. 115, Laws of the Federation of Nigeria and Lagos, 1958.
[4] Cap. 1, Laws of Western Nigeria, 1959.
[5] (1898) 1 N.L.R. 15.
[6] It is to be noted that this provision lays down the method of distribution. It does not affect the nature of the property.
[7] Proviso (i).

it should not devolve on the State but should be distributed in accordance with customary law.[1]

Section 36 applies to the former Colony only,[2] which is approximately the area of the present Lagos State. Similar provisions have been enacted for the Western and Mid-Western States by section 49 (5) of the Administration of Estates Law, 1959, in respect of intestacies occurring after 23 April 1959, which was the date of the commencement of the Law. The provisions of Western Nigerian legislation differ from those of section 36 of the Marriage Act in two material respects, as follows:

(i) The issues of the marriage are not brought in.
(ii) The applicable law is not English law. The table of distribution is prescribed in the law itself.

It is not clear from the provision of section 36 (2), which restricts the operation of the section to Lagos, whether the provisions applied where the marriage was celebrated in Lagos, or where the intestate was resident in Lagos or where he left real property within Lagos. Since the section deals with the distribution of estates it seems preferable that the section should apply where the intestate has left property in Lagos, irrespective of where in Nigeria the marriage took place, or where the death occurred. Conversely, where the intestate married in Lagos or died in Lagos, leaving property outside Lagos, section 36 does not affect the devolution of such property. The same is the true construction of the Western Nigerian statute, *mutatis mutandis*.

The Rule in *Cole* v. *Cole*

We have seen that the statutory provisions apply in respect of marriages contracted in accordance with the provisions of the Marriage Act. In other words, they do not apply to persons who contracted a monogamous marriage outside Nigeria. The authority for the application of English law to the distribution of the intestate estate of such persons is derived from the decision of the Full Court in *Cole* v. *Cole*.[3] In that case, the deceased was married to the defendant in Sierra Leone in accordance with the rites of the Christian Church. They later returned to Lagos where he died leaving real property. He was survived by the defendant, his widow, and an only child of the marriage who was retarded. In this action the deceased's brother claimed a declaration that he was the customary heir of the deceased and the trustee for the retarded child. The defendant on the other hand claimed that English law and not customary law governed the devolution of the deceased's intestate estate. The plaintiff succeeded in the Divisional Court but the decision was reversed by the Full Court. The decision was based on the reasoning that

[1] Proviso (ii).
[2] S. 36 (2).
[3] (1898) 1 N.L.R. 15.

the incidents of a Christian marriage are quite different from those of a marriage under customary law, that a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to customary law and that, where the matter before the court contains an element which is foreign to native life, the court is not bound to apply customary law. The rejection of customary law of inheritance in the circumstances was further justified on the grounds that:

> Were such a contention to hold good, then an educated native gentleman, maybe a doctor, a barrister or a clergyman, or a bishop . . . marrying an educated native lady out of the Colony and coming to reside permanently in Lagos would have his estate subject to customary law in case he died intestate, his widow being required by strict undiluted native law to act as wife to her brother-in-law in order to obtain support.[1]

The precise *ratio decidendi* of the decision has been a subject of controversy among judges. In *Smith* v. *Smith*,[2] Van der Meulen, J., was of the opinion that it merely raises a presumption that English law applies. After the death of the intestate, who had contracted a monogamous marriage, his widow, the plaintiffs and the defendant, the three children of the marriage continued to occupy the house in dispute which had belonged to the intestate. After the widow's death the children continued to live there. In 1922, when the defendant needed money, the property was mortgaged and all the children signed the mortgage deed as mortgagors. When the defendant wanted to raise a further loan on the security of the property, the plaintiffs refused to join in the execution of the mortgage deed. Thereupon the defendant, for the first time, set up a claim of absolute ownership as heir at law under English law. The contention that English law governed the case was rejected on the ground that the parties had not attained the level of education and culture to justify the application of the principles laid down in *Cole* v. *Cole*. The correctness of this interpretation of *Cole* v. *Cole* was doubted by Brooke, J., in *Coker* v. *Coker*[3] and again by Ames, J., in *re Emodie*. In *Coker* v. *Coker*[4] it was held that the effect of the decision was that 'the intestacy of a native who contracted a Christian marriage or a civil marriage is removed from the operation of customary law and brought under the common law'. *Smith* v. *Smith*[5] was, however, followed by Baker, Ag. C.J., in *Ajayi* v. *Whyte*,[6] in similar circumstances. The suggestion that the decision was based on the fact that the Coles were Christians was rejected by Petredes, J., in *Haastrup* v. *Coker*.[7] In that case, the intestate had contracted other marriages under

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[1] *Per* Brandford Griffith, J., at p. 22.
[2] (1924) 5 N.L.R. 102.
[3] (1943) 17 N.L.R. 55.
[4] Loc. cit.
[5] Loc. cit.
[6] (1946) 18 N.L.R. 41.
[7] (1927) 8 N.L.R. 68.

customary law subsequent to the monogamous marriage, as a result of which nine other children were born. It was contended that the fact that the intestate contracted marriages under customary law showed that he was a pagan and that that should be sufficient to rebut the presumption as to the application of English law. It was held that the decision was not based on the fact that the Coles were Christians but on the fact that they had contracted a Christian marriage.[1]

The rule in *Cole* v. *Cole* has been held to apply to a case where a person has contracted a marriage under the Marriage Act and left property outside Lagos. The case in point is *re Emodie*,[2] concerning the distribution of the personal property of an intestate in Eastern Nigeria. If *Cole* v. *Cole* was rightly decided, there can be no doubt as to the correctness of that extension, but the decision is inconsistent with two decisions of the Supreme Court regarding succession to land in Eastern Nigeria. The first is *Daniel* v. *Daniel*,[3] where it was held that the rule cannot apply to land held by the deceased under a kola tenancy. The other is *Nezianya* v. *Okagbue*,[4] where the intestacy of a person who had contracted a marriage under the Marriage Act leaving landed property in Onitsha was regulated by customary law. The authority of this case is, however, weakened by the fact that the issue of whether English or customary law applied was not raised by counsel or the court. Nonetheless, the case is significant in that the fact that the intestate's marriage was monogamous was quite evident from the judgment. As there can be no valid distinction between the effect of a monogamous marriage contracted in Nigeria and one contracted abroad, the decision in *Nezianya* v. *Okagbue*[5] casts a substantial doubt on the validity of the rule in *Cole* v. *Cole* and the rational basis of the provisions.

It is important always to bear in mind, in applying section 36 of the Marriage Act, that English law applies as regards an intestate who contracted a monogamous marriage only in so far as he is survived by the other party to the monogamous marriage or by the children of the marriage. The fact that the intestate contracted a monogamous marriage does not *per se* import English law of succession. Thus, where the issue of the marriage, as well as the other spouse, predeceased the intestate, customary law and not English law governs the succession to his property. The same would seem to apply in regard to cases within the rule in *Cole* v. *Cole*, since the basis of the application of English law is the inequity of applying customary law to the

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[1] The fact that a church ceremony was performed does not necessarily conclude the matter. See *Asiata* v. *Goncallo* (1900) 1 N.L.R. 41. But this case is not authority for any proposition that where non-Christians enter into a Christian marriage the union is not monogamous. The basis of the decision was that the parties knew that their union was not monogamous.

[2] Loc. cit.

[3] (1956) 1 F.S.C. 50.

[4] [1963] 1 All N.L.R. 352.

[5] Loc. cit.

relationship of the parties and their offspring. Where the intestate is an issue of a marriage under the Act, the condition that he must have been survived by a spouse or children is not imposed. His intestacy is simply regulated by English law. The rule in *Cole* v. *Cole*[1] does not extend to the issue of the marriage. It only affects the intestacy of the parties to the marriage.

Which English Law?

The portion of English law rendered applicable by section 36 of the Marriage Act is the one dealing with the distribution of personal estate of intestates. In 1884, when the provisions first appeared, and also in 1914, when the current provisions were enacted, the law was contained in the Statutes of Distribution, 1670 and 1685. Before 1917 the position as regards other cases was different; the applicable law was the law regulating the devolution of real property.[2] By that law the eldest son is heir to the exclusion of all other children. In the absence of a son, daughters are together entitled as co-parceners but, in either case, subject to the widow's right of dower[3] over one-third of the property. The position was altered by section 2, Administration (Real Estates) Act, 1917, which enacted that from the commencement of the Act real property should be treated as personalty for the purpose of administration.[4] The law regulating the distribution of personal estate by 1917 was still the Statutes of Distribution, 1670 and 1685. The table of distribution prescribed by the Statutes of Distribution after the payment of debts and funeral expenses is as follows:

(i) The wife is entitled to one-third absolutely and the residue is to be divided among the children in equal proportions.
(ii) Where there are no children, the wife is entitled to one-half and the residue is to be divided equally among the next of kin who are in equal degree to the intestate or those who legally represent them, provided that no representation be admitted after brother's and sister's children.
(iii) Where there is no wife the estate is to be distributed equally among the children, and where there is no child the next of kin in equal degree to the intestate are entitled.
(iv) A husband is entitled to his wife's intestate estate irrespective of whether there are children of the marriage.

In Western Nigeria, real property to which a deceased was entitled for an interest not ceasing on his death devolves on his personal representatives. in the same way that before 23 April 1959 chattels real devolved on personal representatives of deceased persons[5] and the personal representatives were

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[2] See *Cole* v. *Cole*, loc. cit., *per* Griffith, J., at pp. 22-3.
[3] Which is a life interest.
[4] See note 6, p. 93 above.
[5] S. 3 (1) Administration of Estates Law, 1959.

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[3] Which is a life interest.
[4] See note 6, p. 93 above.
[5] S. 3 (1) Administration of Estates Law, 1959.

deemed to be the heirs.[1] The personal representatives are, however, not entitled beneficially. The property is vested in them upon trust for sale[2] and they are under an obligation to apply the proceeds of sale for the purpose of administration. The table of distribution of the residual estate is as prescribed by section 49 (1) of the Administration of Estates Law, 1959.

Questions Relating to Status

It used to be thought that reference to 'child' or wife in the statutory provisions meant the child or wife of a monogamous marriage.[3] This has been shown to be incorrect. The decisions in *re Adadevoh*[4] and *Bamgbose* v. *Daniel*[5] have finally settled that the question whether a person is a child of the deceased or not is one of status, the determination of which should be referred to the law of his domicile. Thus, if any person is, by the law of Nigeria applicable to the deceased, English or customary, regarded as the deceased's child or his wife, he or she will be so regarded for the purposes of the Statutes of Distribution.

An illegitimate child has no right of inheritance and illegitimate relations are not considered.[6] This is so whether the intestacy is governed by English law or statute, or by customary law. The suggestion in *Sogunro Davies* v. *Sogunro*[7] to the effect that an illegitimate child may take under customary law is misconceived. This view is an application of the principle laid down in *Bamgbose* v. *Daniel*.[8]

Nature of the Interest of Co-heirs under English Law

In conclusion it is important to point out that where English law applies it does not stop at marking out the respective shares of the individuals concerned. It also regulates the relationship of the parties in regard to that interest. Each co-heir is entitled to his share in the proportion laid down in the respective statutes as individual property in the same estate as the intestate. He can deal with it however he wishes, including disposition by will. On his intestacy his share passes to his heirs at law and not to the surviving members of the family. He can enforce a partition against the majority of the co-owners and the court has no discretion in the matter.[9] 'It is only

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[1] S. 3 (2).
[2] S. 37 (1).
[3] See *Adegbola* v. *Folaranmi* (1921) 3 N.L.R. 89; *Goodings* v. *Martins* (1942) 8 W.A.C.A. 108.
[4] (1951) 13 W.A.C.A. 304.
[5] [1955] A.C. 107; [1954] 3 All E.R. 263. See also *Coleman* v. *Shang* [1961] A.C. 481.
[6] As to legitimacy in Nigerian law, see *Cole* v. *Akinyele* (1960) 5 F.S.C.
[7] (1936) 13 N.L.R. 15.
[8] Loc. cit. But see *Ogunmodede* v. *Thomas* (Unreported) F.S.C. 377/64 which was referred to and explained in *Olympio* v. *Oluwole and Another* [1968] N.M.L.R. 469.
[9] *Mayfair Property Co.* v. *Johnston* [1894] 1 Ch. 508.

when a sale is sought that the court has a discretion and even in that case, a sale will be ordered if asked for by parties interested in a moiety or more of the property unless the court sees good reason to the contrary.'[1] Being his individual property, the share of a co-heir can be attached for the payment of his debt,[2] notwithstanding that a partition has not been effected.

[1] *Per* Butler Lloyd, J., in *Giwa* v. *Otun* (1934) 11 N.L.R. 160 at p. 161.
[2] *Johnson* v. *United Africa Co.* (1936) 13 N.L.R. 13.

7 Extinction of Rights in Land

Title to land may be lost in certain circumstances, either by act of parties or by operation of law. The subject will be considered in two parts as follows:

(i) extinction of occupational rights
(ii) extinction of ownership by adverse possession

Extinction of Occupational Rights

The rights of a customary tenant and others enjoying permanent occupational rights in land may be extinguished in any of the following ways:

(i) by forfeiture upon misconduct
(ii) by abandonment
(iii) by extinction of issues. This is obvious as there would be no one to claim the right. It is analogous to abandonment. Accordingly nothing further need be said.

Forfeiture

The principle of customary law throughout the country is that a customary grantee of land is only entitled to occupy the land during his good behaviour, unless the grant is intended to be absolute. This principle applies whether the grantee is a stranger to the land-owning group,[1] or is a member of the group.[2] The law is that he is liable to have his interest forfeited if he is guilty of such acts as would amount to misbehaviour on his part.

Acts amounting to Misbehaviour

The real foundation of the misbehaviour which involves forfeiture is the challenge of the overlord's title, which may take one of the following forms:

[1] *Oloto* v. *Dawuda* (1940) 1 N.L.R. 58.
[2] *Adagun* v. *Fagbola* (1932) 11 N.L.R. 110.

(i) refusal to pay rent or tribute, or to render the customary services stipulated
(ii) denial of the overlord's title

It is also claimed that bad behaviour towards the chief or family head may work a forfeiture.

Refusal to Pay Tribute

Refusal to pay rent or tribute will work a forfeiture only in so far as such a refusal is viewed as a challenge to the overlord's title. Thus, failure to pay rent or tribute is not by itself a ground for forfeiture. The refusal must be of such a character that the court can infer an assertion of title by the tenant either in himself or somebody else. Thus, in *Akande* v. *Akorede*[1] where the defendants persistently refused to pay rent or tribute for six years before the action for forfeiture was brought on the grounds that they were not liable to pay tribute to the plaintiff, it was held that such refusal was a serious misconduct warranting a declaration of forfeiture.

Denial of Title

Denial of title may be express, as where the grantee claims the land as his, denying the existence of the relationship of landlord and tenant, or asserts a title in some other person than the person through whom he claims. It may also be by implication, as where the tenant does an act which is inconsistent with his status as a tenant, impliedly asserting his ownership of the land.

Cases of Express Denial

In *Oloto* v. *Dawuda*,[2] the land in dispute belonged to the Oloto family of which the plaintiff was head. The defendants were successors in title to a customary tenant of the family. On being asked for rent, the defendants claimed that the land had been granted absolutely to their predecessor in title by the plaintiff's predecessor in title and that there was no relationship of landlord and tenant between them. In support of his contention, a document, whereby the plaintiff's predecessor purported to grant the land to the defendant's predecessor in title, was put in evidence. Extrinsic evidence was, however, admitted to prove that the parties intended that the relationship of landlord and tenant was to continue in spite of the purported grant and that the defendants knew the true position. The Full Court held, Pennington, J., dissenting, that by setting up a claim to ownership of the land and thus putting the plaintiff to the trouble of proving his title, the defendants had incurred a forfeiture.

This case should be contrasted with *Owume* v. *Inyang*.[3] There the defendant

[1] (Unreported) Suit No. CAW/9/71.
[2] Loc. cit.
[3] (1931) 10 N.L.R. 111.

was permitted by the owners to occupy a portion of land as a customary tenant. Later, he alleged that he had purchased the land from the head of a local community for ₦6 and in support of his claim he produced an instrument to that effect. Carey, J., held that he had not thereby infringed the rule of customary law. The decision was apparently based on the consideration that the 'defendant had merely tried to obtain a grant of what he considered to be a better title than that granted to him by the appellants, which, in any case, he could not obtain, the land being communal land'. The reasoning in this case is not satisfactory as one would have thought that it was in trying to acquire a better title that he had misbehaved; at least, he intended to oust the claim of his overlords by seeking a grant from somebody who he thought had a superior title.

The court will, however, take into consideration the circumstances leading to the denial of title. For example, in *Ashogbon* v. *Odutan*,[1] the statement by which the defendant denied his overlord's title was made in the course of an answer to a question under cross-examination in an earlier case, and Graham Paul, J., held that it did not amount to such denial of title as would involve forfeiture. A statement made in jest, in anger or in a drunken state, which upon a sober reflection is retracted, may not work a forfeiture. An express denial in pleadings will, however, in the absence of other mitigating circumstances, certainly work a forfeiture.[2] But where it is clear that the denial of title complained of is attributable to a genuine misunderstanding of the true state of affairs, it may not work a forfeiture.[3]

Cases of Implied Denial

Where the customary tenant or family member to whom family land has been allotted for occupation alienates his holding to a stranger, he has by implication set up a claim of ownership, as it is clear that it is only the owner of land who can make a valid grant of it to another. The clearest example of alienation is sale,[4] but other forms of alienation will suffice. In *Adagun* v. *Fagbola*,[5] the alienation complained of was by way of mortgage. A member of a family mortgaged his portion of family land to his creditor, and Kingdon, C.J., held that by doing so he had incurred a forfeiture and was liable to be ejected. In *Onisiwo* v. *Bamigboye*,[6] members of a family leased family land in their possession to strangers for a term of thirty years without reference to the family. Butler Lloyd, J., held that they had thereby forfeited their rights to occupation and the decision was upheld by the West African Court of Appeal. The basis of the decision was explained thus by the Court of Appeal:

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[1] (1935) 12 N.L.R. 7.
[2] *Eletu and Others* v. *Omojewonniya and Others* [1962] 2 All N.L.R. 13.
[3] See *Ogbakumanwu* v. *Chiabolo* (1950) 19 N.L.R. 107.
[4] *Inasa* v. *Oshodi* (1930) 10 N.L.R. 4.
[5] Loc. cit.
[6] (1947) 7 W.A.C.A. 69.

> The real question is not how the word 'alienation' as used in any judgment is to be interpreted but what exactly is the law and custom which applies. The real foundation of the misbehaviour which involves forfeiture is the challenge to the overlord's rights. This is commonly shown by some form of alienation and such alienation may take the form, as in this case, of leasing under a claim of ownership.[1]

That being the case, the fact that alienation is in law ineffectual, which undoubtedly it is, cannot affect the legal position. Thus, in *Onisiwo* v. *Fagbenro*[2] where the defendants, customary grantees of family land, leased it to a business concern for 50 years with an option of renewal for a further period of 25 years, the family successfully objected to the first registration of the purported lease under the Registration of Titles Act, 1935. De Commarmond, S.P.J., held that the execution of the lease was by itself sufficient misconduct to make the defendants liable to forfeiture.

A lease for a short period, however, may carry with it no challenge to the overlord's right and consequently may involve no misbehaviour or forfeiture. Each case must be considered on its own facts.[3]

Bad Behaviour towards the Chief or Family Head

'It is not easy to define in precise terms the complex of social norms, a violation of which might entail forfeiture of the individual's right in his holding,'[4] and we are little assisted by what we can gather from the reported decisions. Each case must depend on its particular facts and the circumstances surrounding the act of misbehaviour complained of. It would seem that a mere quarrel with the chief or head of the family will not suffice. The misconduct must have been so serious as to make it undesirable for the tenant to continue in his occupation of the land. Giving evidence before Tew, J., in *Oshodi* v. *Inasa*,[5] the two white-cap chiefs called by the plaintiff in the case listed burglary, the 'making of bad medicines', adultery and the like as such serious misconduct. Ollennu[6] says that giving evidence in support of an adverse claimant, or even failure to give his overlord active support against such claimant, may work a forfeiture. It is, however, significant to note that the two chiefs referred to above testified further that, in their experience, they could not recall an instance where the strict customary law had been enforced, although one of them recalled a case in which the offender, knowing that his conduct was about to be considered at a family meeting, had voluntarily quitted the land. The chiefs also stated that in their experience the

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[1] Ibid, at p. 70.
[2] (1951) 21 N.L.R. 3.
[3] *Per* Coram in *Onisiwo* v. *Bamigboye*, loc. cit.
[4] T. O. Elias, *Nigerian Land Law and Custom*, p. 178.
[5] Unreported, but referred to by Graham Paul, J., in *Ashogbon* v. *Odutan*, loc. cit., at pp. 9-10.
[6] *Customary Land Law in Ghana*, p. 90.

erring occupier had usually been treated leniently and, usually on the intercession of his fellow slaves, or some influential persons, had been allowed to remain in occupation of the land. In the light of this, it is submitted that the court should be reluctant to decree forfeiture on the grounds of personal misbehaviour, unless the culprit has been persistent in his act of misbehaviour.

The evidence of the chiefs referred to above related to the position of domestics who had been regarded as members of the family and not to the blood members of the family. There is no good reason why the rule should be extended to such blood members. It seems that the underlying principle is that a stranger accepted as a member of the family is so treated as a favour, and if he abuses the privilege by making himself a nuisance he can be thrown out. The position of a blood member is quite different. He is entitled to a portion as of right and, as such, he is not under any obligation to show gratitude to the head of the family or to the entire family for the use of the and. However, where the use of his portion by a member of the family is against general family interest and the member concerned is not willing to conform, his holding may be forfeited. Thus, in *Sheffi* v. *Williams*[1] it was held that a female member of a family had forfeited her right to the occupation of the family house when she had brought her husband to reside therein without the previous consent of the family head. Such forfeiture cannot, however, affect the member's claim to a share of the proceeds if the family land is eventually sold, if he is otherwise entitled to share in the proceeds of sale, or to a portion if the land is eventually partitioned.

Persons Affected

The question whether the misbehaviour of a customary tenant would also involve in forfeiture his relatives or those otherwise claiming through him was left undecided by the Privy Council in *Inasa* v. *Oshodi*.[2] There is, however, no doubt that where such persons have encouraged or abetted an act of misbehaviour, they, too, are liable to be ejected. In the case just cited, their Lordships concurred in the finding of the trial judge that the relatives sought to be ejected had taken side with the offending member against the chief in a long-standing dispute and, accordingly, were themselves liable to be ejected. But their Lordships were not prepared, without further argument, to uphold any customary law in the matter which went beyond that which was affirmed. The earlier case of *Uwani* v. *Akom*,[3] where the point was directly in issue, was not cited to their Lordships. In that case, members of the Aro community were permitted to settle on certain land in Bende Division which belonged to the respondents. One Aro having sold or mortgaged his portion of the land to another, the respondents took proceedings

[1] Law Reports (Colonial) Nigeria A. See T. O. Elias, op. cit., p. 180.
[2] Loc. cit.
[3] (1928) 8 N.L.R. 19.

to eject the members of the entire Aro community. On appeal, the Full Court refused the order. Combe, C.J., observed:

> It may be that the trivial offence committed by some members of the Aro community would render the whole Aro community liable to be ejected from the land, although I cannot but think that if the question of the native custom was further investigated, it might be found that it is the persons who were parties to the offence and not the whole community who would be so punished.[1]

The authority of this case is, however, diminished by the admission of counsel for the respondents that it would be inequitable to eject the whole community from their houses, on which they depended for their maintenance, because some members had committed an offence of a trivial nature. However, from the views expressed by the Board in *Inasa* v. *Oshodi*,[2] and by Combe, C.J., in the case just considered, there is the strong likelihood that such a custom, if proved, may be held unenforceable as being repugnant to natural justice, equity and good conscience; or, at the least, that the court will be more willing to grant relief against forfeiture to such persons.

Forfeiture Not Automatic

The fact that a person permitted to occupy land under customary law has committed such an act of misbehaviour as might work a forfeiture does not mean that the grantor is automatically entitled to possession. Forfeiture is not automatic. Misbehaviour merely makes the culprit liable to forfeiture at the will of the overlord, which, nowadays, if resisted can only be enforced by reference to the courts.[3] Thus, an owner of land claiming an immediate right to the reversion through forfeiture must first apply to court for a declaration of forfeiture before he can resume possession thereof. This principle is clearly brought out by the decision in *Coker* v. *Jinadu*,[4] the facts of which are as follows. The A family allowed one, S, to occupy a portion of their land as a customary tenant. In 1907, S purported to sell the land to J, and it was found as a fact that since 1914 J and his family had been in continuous occupation of the land. In 1957, the A family purported to sell the land to C who applied to be registered as the owner. The descendants of J objected. The Assistant Registrar of Titles upheld the objection on the grounds that, even assuming that S might be liable to forfeiture under customary law by the sale to J, as the forfeiture had not been decreed by the court, S did not forfeit his interest. On appeal it was contended for the appellants that forfeiture was automatic and that, from the moment of the unauthorized alienation by S, his occupational rights were determined and

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[1] Ibid, at p. 22.
[2] Loc. cit.
[3] *Lawani* v. *Tadeyo* (1944) 10 W.A.C.A. 37 at p. 39.
[4] [1958] L.L.R. 77.

the land reverted to the owners. Rejecting this submission, De Lestang, C.J., (Lagos) commented:

> In a sense forfeiture may be said to operate automatically, e.g. where, as a result of the forfeiture the reversioner has peacefully re-entered. In such a case he need not apply to the court for a declaration of forfeiture, but in other cases, and in particular in cases where forfeiture is claimed on the ground of misbehaviour, which includes unauthorized alienation, there must . . . be a declaration by the court. This is the view which this court took in *Waddel* v. *Bisi Aromolaran*,[1] where it was said that 'where misbehaviour is alleged the forfeiture is not automatic but a matter to be brought before the court in appropriate proceedings'. . . . The Federal Supreme Court did not disapprove of this view on appeal. It must also be remembered the court has the power to grant relief against forfeiture; a power which it has frequently exercised to mitigate the rigours of native customary law.[2] . . . This is not consonant with the principle of automatic operation of forfeiture alleged.[3]

The decision of Hallinan, J., in *Ogbakumanwu* v. *Chiabolo*,[4] illustrates the same principle. In that case, the plaintiffs were the owners, and the defendants were customary tenants, of certain land in Eastern Nigeria. The plaintiffs' claim was for damages for trespass and the grounds of the claim were that in 1944 the defendants denied their title by claiming ownership of the land in an action for declaration of title instituted by the defendants, and thereby forfeited their rights. The present action was instituted in 1949. Hallinan, J., held that it would be inequitable in the circumstances to order forfeiture. The learned judge went further to hold that, even on the assumption that the institution of the suit in 1944 would involve the defendants in forfeiture, as the landlords had not asked them to quit, the defendants were not trespassers. One could even go further to say, on the authority of *Coker* v. *Jinadu*,[5] that where the tenants refused to quit in response to the quit order from the owners they would still not be guilty of trespass, unless and until a declaration of forfeiture had been made by the court.

The right of peaceable entry referred to by De Lestang, C.J., in *Coker* v. *Jinadu* is exercisable only where the tenant has voluntarily left the land in consequence of his misbehaviour. A good illustration of such a situation is the instance mentioned by one of the chiefs who testified before Tew, J., in *Oshodi* v. *Inasa*,[6] where a domestic, ashamed of his misconduct, had

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[1] (Unreported) F.S.C. 182/57.

[2] As a condition for relief the court may impose an annual payment by way of tribute or a fine coupled with such annual payment. See *Uwani* v. *Akom*, loc. cit., and *Uyovbaria* v. *Kporoaro* [1966] 1 All N.L.R. 86.

[3] [1958] L.L.R. 77 at p. 78.

[4] (1950) 19 N.L.R. 107.

[5] Loc. cit.

[6] Loc. cit. On appeal in this case, the Judicial Committee of the Privy Council deprecated the resort to self-help where the occupier had refused to move.

voluntarily vacated the land. It has been held that an owner who disturbs his tenant's possession on the grounds that the tenant has incurred a forfeiture renders himself liable for trespass at the suit of the tenant and will be restrained by injunction.[1] Where the suit is against an offending tenant in possession, it seems that an action for declaration of title *simpliciter* would fail, since the court cannot make such declaration until forfeiture has been pronounced.[2] The plaintiff should first claim a declaration of forfeiture and then a declaration of title. Both can, of course, be claimed in the same action. Where the owners are able to resume possession peaceably, the forfeiture serves as a justification for their entry and a purchaser from them can take advantage of it in order to rid his title of the tenant's interest. The tenant will not be restored to possession unless the court deems it fit to grant relief against forfeiture. But the discretion of the court to grant relief in an appropriate case makes it unsafe for a purchaser to invest his money in the land until the court has pronounced forfeiture.

Position of a Purchaser of the Reversion

An interesting question that has been raised is whether a purchaser of the reversion can proceed to evict the tenants of his vendor on grounds of misconduct. In *Lawani* v. *Tadeyo*,[3] the plaintiff bought the right, title and interest of the Oloto family as a result of a judicial sale of certain property. In this action the plaintiff claimed against the defendants, who were tenants of the Oloto family, a declaration that the interest purchased included the right to forfeit the defendants' interest on the ground that the defendants had challenged the sale. It was held that the right bought did not include the right sought by the plaintiff.

It seems strange that the court should come to this conclusion since the effect of the sale was to vest the reversion in the plaintiff, the plaintiff thus becoming the defendants' landlord. The decision has been doubted by Brett, J.S.C., in *Ricketts* v. *Shote*.[4] The explanation advanced by Kingdon, C.J., was that 'it would, in fact, be entirely contrary to the fundamental ideas upon which native law and custom is based, namely, the duty of the occupier to recognize the rights of his chief'.[5] This reasoning is defective, as it shows that the learned judge misunderstood the principles on which the claim for forfeiture was based. The power to forfeit the tenancy for misbehaviour was vested in the family as landlord and not in the Oloto as chief. The fact that the Oloto was a chief in this case was a coincidence. It is clear that a tenant's right cannot be enlarged because his landlord's title has become vested in another person.

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[1] *Emegwara* v. *Nwaimo* (1953) 14 W.A.C.A. 347.
[2] *Adeleke* v. *Adewusi* [1961] 1 All N.L.R. 37; *Akinkuowo* v. *Fafimoju* [1965] N.M.L.R. 349.
[3] (1944) 10 W.A.C.A. 37.
[4] (Unreported) F.S.C. 461/61—4/4/63.
[5] (1944) 10 W.A.C.A. 37 at p. 39.

Abandonment

The right of occupation of a person permitted to occupy land under customary law ceases if he abandons his holding. The simplest form in which the intention to abandon land can be manifested is by quitting the land, or by expressly surrendering possession to the owner. But abandonment can also be inferred from the mode of use of the land, especially where the land has been granted for a specified purpose and is no longer required for that purpose.

Intention to Abandon Possession

Evidence that a tenant has vacated possession of the land is not conclusive. The grantor will fail if the tenant is able to prove that when he quitted the land he had no intention of abandoning it. If he has the *animus revertendi*, there can be no abandonment. A case that illustrates this point is *Baillie* v. *Offiong*.[1] The plaintiff in that case was a customary tenant of the defendants. In 1917, the plaintiff left the land and the house which he had built thereon fell down. In 1920, the defendants entered on the land, and claimed the right to resume possession. Thereupon the plaintiff sued for damages for trespass. He explained in evidence that he left his house and went to live somewhere else because he was ill, but that he had always intended to return. He further explained that he had allowed his house to fall down because he intended to build a new and better house. In the light of this explanation, the learned trial judge held that the plaintiff had no intention to abandon the land, and the finding was affirmed by the Full Court on appeal. Combe, C.J., who delivered the opinion of the court, remarked:

> The fact that Baillie had allowed his dwelling house on the land to fall down was a fact which the court must consider in deciding whether or not Baillie had abandoned the land; but such fact was not conclusive evidence of abandonment and the court was not only entitled to, but was bound to, take into consideration the circumstances in which the house had been allowed to fall down and any other facts which might show that Baillie had not intended to abandon, and had not in fact abandoned, his land.[2]

An intention to abandon the holding may be inferred from an explained absence for some length of time. There can be no hard and fast rule as to what length of time will be deemed sufficient in all cases. Each case must be decided in the light of its own special circumstances.

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[1] (1923) 5 N.L.R. 29.
[2] Ibid, at p. 32.

Land Granted for a Specified Purpose

Where land has been granted for a specified purpose, the right of occupation of the grantee subsists so long as the land is used for that purpose. Use of the land for any other purpose will be construed as abandonment, notwithstanding that the grantee is still in possession. This point is illustrated by the decision of the Supreme Court in *Ukwa and Others* v. *Awka Local Council and Others*.[1] In that case, the land in dispute was granted in 1939 by the plaintiffs to the people of Awka for a central market, called Eke Odenigbo. The site of Eke Odenigbo market was not popular with sections of Awka and, as a result, another site was chosen and a market was established there in 1949. In 1952, the Awka Local Council began to administer the area of Eke Odenigbo, made grants of portions of it, and collected rents from the grantees. It was held that, as the land had been abandoned as a market, the plaintiffs were entitled to resume possession of it.

An interesting problem that is closely related to what has just been considered is that presented by a situation in which a tenant has let out his holding under a circumstance that does not involve a challenge of his overlord's title. Is it not possible to argue that he has thereby abandoned his holding in the sense that, by his action, he has shown that he no longer requires it for himself? In *Eyamba* v. *Holmes*,[2] the plaintiff's family were the owners of the land in dispute, which was in the possession of the first defendant, who had inherited the right of occupation from her father. The plaintiff sought to recover the land on the grounds, *inter alia*, that she had allowed one, Moore, to become her tenant on the property and had thus dealt with it in a way not intended by the grantors. Moore occupied only two rooms and a parlour and the remaining portion was in the occupation of members of the Holmes family. Berkeley, J., held that, as Moore was nothing more than a lodger, his presence in the compound was merely incidental and did not in the least mean that the Holmes family had abandoned occupation. From this decision we can see that if the alienation to Moore had been of the entire premises, the Holmes family merely receiving rent, the decision might have been otherwise. It would, indeed, be surprising if this were not so.

We have said that a kola tenant under Ibo customary law is for practical purposes the owner of the land, except that he cannot make a grant of it so as to deprive the grantor of his claim to the reversion,[3] but that the land reverts to the grantor if the tenant abandons the land.[4] Suppose the tenant sublets the land to a third party for a term, say, of three thousand years, with an option to renew for a further term of the same duration. If he were able to do that without being regarded as having abandoned the land, it would mean that he would be able to achieve indirectly what the law says he cannot

[1] [1966] N.M.L.R. 41.
[2] (1924) 5 N.L.R. 83.
[3] An attempt to do that may involve him in forfeiture.
[4] See *Daniel* v. *Daniel* (1956) 1 F.S.C. 50.

do. It is submitted, therefore, that in such a situation, the tenant should be entitled to resume possession.[1] In the application of this rule, it is further submitted that the court should have regard to the principle laid down in *Baillie* v. *Offiong*[2] that all the surrounding circumstances should be taken into consideration. Thus, a lease for a short period may not, and should not, be construed as abandonment.

Resumption of Possession After Abandonment

Where a grantee has abandoned the land, the grantor's right to possession automatically revives, and there can be no question of the grantor taking positive steps to resume possession or ownership. This point was made by the West African Court of Appeal in *Oloto* v. *John*,[3] and again by the Supreme Court in *Ukwa* v. *Awka Local Council*.[4] In the former case, the Oloto family, who were the owners of the land in dispute, permitted some tenants to occupy their land. The tenants occupied the land for a time and abandoned it. The plaintiffs did not thereafter resume possession. Some seven or eight years before the present action the defendant entered upon the land and built upon it. The trial judge found that the plaintiff's family were the original owners of the land, but nevertheless dismissed the suit for a declaration of title on the ground that 'there is no satisfactory evidence that the plaintiff's family have ever effectually resumed ownership of it since these Ishan people left'. Commenting on this, the West African Court of Appeal declared, 'In permitting the Ishan people "*to occupy*" the land the Oloto family were exercising their rights as owners, and not parting with the *ownership* of the land,' so obviously it would be doing violence to logic and language to suggest that they should have 'effectually *resumed* ownership of it since these Ishan people left'.[5] The appeal was accordingly allowed. In the latter case,[6] Onyeama, J.S.C., commented:

> We do not think the question is whether the appellants resumed possession, for, in our view, their right to recover possession revived when the area was abandoned in respect of the use for which it was originally given, unless the grantors made a fresh grant or agreed to the land being used for some other purposes.[7]

The logical implication of this is that the grantee can be sued in trespass as soon as the act from which abandonment is inferred is done. Laches and acquiescence on the part of the owner may, however, defeat his claim to

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[1] This means that the sublessee may be liable to the grantor in trespass.
[2] Loc. cit.
[3] (1942) 8 W.A.C.A. 127.
[4] [1966] N.M.L.R. 41.
[5] (1942) 8 W.A.C.A. 127 at p. 128. The court declined to comment on whether the squatting possession of the defendant should be protected in equity.
[6] The facts have been given above.
[7] [1966] N.M.L.R. 41 at p. 45. Such fresh grant or agreement can, however, be inferred from the acquiescence of the owner in the new mode of user.

damages, even though they are not of such a degree as will suffice to oust his claim to possession.[1]

Although we have said that in law the owner's right to the reversion automatically revives on abandonment, the owner may not be able to prove his title satisfactorily to a purchaser from him. In the absence of express surrender, the customary tenant may at any time come forward to explain his absence and, if he is able to satisfy the court that he has not abandoned the land, a purchaser of the reversion will take subject to it. Moreover, an owner who re-enters in the belief that his customary tenant has abandoned the land may be guilty of trespass if it turns out that the tenant had no intention of abandoning his holding.[2]

Extinction of Ownership by Adverse Possession

The liability of an owner of land to lose his title by adverse possession for a long time is based on the consideration of public policy that title to land ought not to be left in uncertainty for a long time and that a person who has been in possession of land for a long time should not be disturbed in his occupation. This branch of the law is of considerable importance locally due to the general uncertainty about title to land, particularly in view of the hazards inherent in the conveyance of family property.

The subject is treated in three parts as follows: (i) the operation of the Limitation Statutes, (ii) long possession under the rule in *Awo* v. *Gam*, and (iii) the equitable doctrine of standing by. The last is not so much concerned with adverse possession as with the need to prevent fraud and unjust enrichment through an abuse of the maxim *quicquid plantatur solo, solo cedit*. Before we proceed with the discussion of the various topics, let us first consider the meaning of adverse possession.

Meaning of Adverse Possession

Adverse possession is one that is inconsistent with that of the owner, i.e. one that is not derived from the owner. Thus, a person holding under a tenancy is not in adverse possession, even if, as in the case of some customary tenancies, the tenant has been in occupation for six generations without paying rent or tribute.[3] But where a customary tenant alienates the land to a purchaser absolutely, if the purchaser goes into occupation of the land his possession will be adverse to the owner's title, since the tenant has no right of alienation.[4] Similarly, a void[5] disposition of land would give rise to adverse

[1] *Ukwa* v. *Awka Local Council*, loc. cit.
[2] As in *Baillie* v. *Offiong*, loc. cit.
[3] *Ado* v. *Wusu* (1940) 6 W.A.C.A. 24; see also *Dania* v. *Soyenu* (1937) 13 N.L.R. 143.
[4] But see *Coker* v. *Jinadu*, loc. cit., and *Balogun* v. *Oshodi*, loc. cit., where it was held that time does not begin to run until the owner acquires knowledge.
[5] Not as to formalities required, but as to right to convey.

possession. The reason is that, the sale being void, the possession of the purchaser is logically independent of the transaction.

Before adverse possession can bar the right of the owner, it must be open and unconcealed. Subject to this, it is immaterial that the squatter is aware of the true state of title.

Limitation of Actions

The relevant statutes for our consideration are the Real Property Limitation Acts, 1833-74, which are English statutes of general application; the Limitation Law, 1959, of Western Nigeria, applicable to the Western and Mid-Western States, and the Limitation on Decree, 1966, which once applied in the former Federal Territory only but which now applies throughout the Lagos State. It follows that the Real Property Limitation Acts can have application, if at all, in the Eastern States only where there is no local statute of limitation. As for the North, the provisions of the Acts are clearly repugnant to the provisions of the Land Tenure Law, 1962, section 4 of which vests all land in the Northern States in the Minister responsible for land. A non-native can claim title to land only through a grant of a right of occupancy.[1] We will consider next the operation of each of the statutes.

Real Property Limitation Acts

The first pronouncement on the applicability of the Real Property Limitation Acts, 1833-74, was made by Webber, J., in *Dede* v. *African Association Ltd.*[2] After considering the practical difficulties in the way of application of the statutes, the learned judge declared:

> I am of the opinion that the statutes of limitations relating to land . . . do not apply in the Colony and Protectorate of Southern Nigeria and those relating to speciality and simple contracts debts only apply if the parties by contract, express or implied, intended them to apply.[3]

A contrary view was expressed by Graham Paul, J., in *Green* v. *Owo*,[4] where it was held that the statutes were applicable unless their application was excluded under section 20 of the Supreme Court Ordinance then in force, by proving a rule of customary law to the contrary which was applicable to the facts of the case. The plaintiff in this case claimed recovery of possession of a piece of land, a portion of a parcel of land purchased by him at a public auction in 1932. He tendered in evidence a conveyance from his vendors, but no possession by him or his predecessors in title was proved. The defendant and his predecessors in title, on the other hand, had occupied the land in dispute since 1914 and it was included in a conveyance to him in

[1] The reasoning was applied by Webber, J., in *Dede* v. *African Association* (1910) N.L.R. 130, in holding that a non-native cannot acquire title by adverse possession in Southern Nigeria.

[2] Ibid.

[3] Ibid, at p. 136. The Full Court held, however, that the defendant had not been in adverse possession, so that the statutes could not have applied in any case.

[4] (1936) 13 N.L.R. 43.

1927. The defendant pleaded the English Real Property Limitation Acts and the plea was upheld. Graham Paul, J., based his decision on the assumption that, the title having been derived under an instrument in English form, the implication was that English law was intended to apply. For the reason which has been advanced earlier, this reasoning cannot be supported.[1] Considering the applicability of the statutes in *Osuro* v. *Anjorin*,[2] Baker, Ag. C.J., observed:

> The better opinion is that, except in cases coming within a provision in section 19 of the Ordinance,[3] these statutes have no application as between natives and that a defence of the Statute of Limitations in a suit between natives, or between a native and a European, must rest entirely, and can only succeed, upon evidence of a contract to be bound exclusively by English law, such contract being either express or implied from the course of dealing or the nature of the transaction between the parties. In this view of the matter, the right to claim the benefit of the statutes is not, in strictness, a matter of law, but is purely conventional or contractual. . . . In order that the court may be induced to hold that English law shall apply under section 19, it must be satisfied tha the parties agreed that their obligations shall be governed exclusively by English law and not partly by English law and partly by native law.[4]

It is submitted that this is a correct statement of the law. There can be no question of a contract, express or implied, between the two contending parties in *Green* v. *Owo*. How can there be a contract without a meeting of minds? In practice, the adverse claimant would not have known about the existence of the conveyance until the statement of claim in the proceedings was delivered to him. It is submitted, therefore, that the opinion expressed by Webber, J., in *Dede* v. *African Association Ltd*, is to be preferred.[5]

Even as regards non-Nigerians, it is arguable that the provisions of the statutes are inconsistent with the provisions in local legislation that a non-Nigerian cannot acquire a title to land without government consent.[6] That being the case, the statutes cannot apply between non-Nigerians also.

Limitation Law of Western Nigeria

The framers of the Limitation Law of Western Nigeria followed the recommendation of Sir Merryn Tew in his Report on Title to Land in Lagos in

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[1] See *Nelson* v. *Nelson* (1951) 13 W.A.C.A. 248. But the decision can be supported on the grounds that the plaintiff failed to prove the title of his vendor. As the learned judge himself said, there can be no customary law which says that possession of written documents gives better title than possession of the land itself.

[2] (1946) 18 N.L.R. 45.

[3] i.e. the Supreme Court Ordinance.

[4] (1946) 18 N.L.R. 45 at p. 47, quoting with approval Redward's comment on the application of the statutes in Ghana.

[5] See *Alade* v. *Bamigbala* [1962] W.N.L.R. 67, where Morgan, J., endorsed it.

[6] Native Land Acquisition Law, Western Nigeria. Acquisition of Land by Aliens Law, Eastern Nigeria. See also *Dede* v. *African Association*, loc. cit.

1939 by providing that the provisions of the statute should have no application in relation to land held under customary tenure.[1] However, as in the case of the Property and Conveyancing Law, 1959, 'land held under customary tenure' is not defined in the law. I have expressed my view earlier on the difficulties inherent in the application of a provision like this in the absence of a clear definition, and it is not necessary to repeat here what has been said.[2] Commenting on the Tew recommendation, Mr Simpson said:

> I find this infinitely puzzling . . . it all seems to me to insert endless and needless doubts and hazards into what should be a relatively plain matter with a law which is the same for all.[3]

Limitation Decree, 1966

The Limitation Decree also provides that its provisions should not apply to any matter regulated by customary law.[4] However, the Federal Executive Council may by order published in the Gazette apply the Decree or any of its provisions to actions which are governed by customary law.[5] No such order has so far been made.

Statutory Provisions Relating to Action for Recovery of Land

The provisions of the statutes are substantially similar. Therefore, only a consideration of the provisions of the Lagos statute will be attempted, pointing out where the Western Nigeria legislation differs from it. The purpose of the statutory provisions is to bar a person's right to bring an action for recovery of land after the expiration of the stipulated period.

Limitation Period

The period of limitation is twenty years[6] in the case of an action by a State authority, and twelve years in the case of a private person.[7] Where the right of action first accrued to a State authority, the action may be brought at any time before the expiration of the period during which the action could

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[1] S. 1 (4).
[2] See Chapter 5 above.
[3] Simpson, *Report on the Registration of Title of Land in Lagos*, 1957, p. 26, para. 60.
[4] S. 67 (1).
[5] S. 67 (2).
[6] S. 15 (1). It is thirty years under the Limitation Law of Western Nigeria. See s. 6 (1). This provision is in conflict with s. 31 of the State Land Act (or Law) which provides that 'No action or other remedy for the recovery of the possession of State land shall be barred or affected by any statute, ordinance, law or other law of limitation.' However, in the case of Western Nigeria, the State has the right to recover the foreshore, or land which has ceased to be foreshore, but it remains in the ownership of the State where the right of action accrued when it was foreshore. See proviso to s. 6 (1). The impression one gathers from this provision is that the provisions of the Limitation Statutes, which are later in time, are intended to supercede those of s. 31 of the State Lands Act. This view is re-inforced by s. 15 (3) of the Limitation Decree which specifically made mention of the accrual of a right of action to the Republic.
[7] S. 15 (2) (a); s. 6 (2) Western Nigeria.

have been brought by the State authority, or twelve years from the date on which the right of action accrued to some other person than a State authority, whichever period expires first.[1] Thus, if a squatter began adverse possession of State land in 1950 and in 1960 the land was conveyed to A, A's right of action will be barred in 1970, i.e. at the expiration of the twenty-year period allowed to the State. But, if the land had been conveyed to A in 1951, his right of action would have been barred in 1963, after the expiration of the twelve-year period allowed to private persons.

Accrual of Right of Action

Time starts to run from the date when the right of action accrues but, where the right of action is concealed, time will not begin to run until the owner discovers the truth or could have done so with reasonable diligence.[2] The cause of action accrues on the date that an owner in possession was either first dispossessed or first discontinued possession.[3] In the case of the land of a deceased person, time begins to run against the person entitled under his will or on his intestacy from the date of his death, if either he was in possession of the land on his death, or was the last person entitled to the land in possession.[4] Notwithstanding these provisions, time will not begin to run unless the land is in the adverse possession of some person in whose favour the period of limitation can run.[5] Where the right of action has accrued in consequence of adverse possession and, thereafter, before the right of action is barred the land ceases to be in adverse possession, the right of action is no longer deemed to have accrued. When the land is again taken in adverse possession, a new right of action is deemed to have accrued. This means that for a claimant to be able to take advantage of the statute, he must have been in continuous adverse possession for a whole period of twenty, or twelve, years, as the case may be. If there is a gap of even one day, the owner will not be barred. It is also provided that, where the person in adverse possession acknowledges the title of the owner, time begins to run from the date of acknowledgement and not from the date of entry.[6]

But to disturb the adverse possession for the purpose of preventing the running of time, a mere formal entry into possession by the owner is not sufficient. No continual or other claim upon or near the land will suffice to preserve any right of action.[7] The effect of the provision that right of action is not to be deemed to have accrued until there is adverse possession, in relation to the right of an owner of land to recover the land from a tenant who has committed such an act as would involve forfeiture, is not clear.

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[1] S. 15 (1) (b); s. 6 (2) Western Nigeria.
[2] S. 57.
[3] S. 16.
[4] S. 17.
[5] S. 18; s. 12 Western Nigeria.
[6] S. 39; s. 22 (1) (a) Western Nigeria.
[7] S. 19; s. 4 Western Nigeria.

Where the misconduct is founded on alienation to a stranger, there is no problem, as the stranger's possession amounts to adverse possession. Where, however, the tenant himself continues in possession after committing an act that can be construed as misconduct on his part, his possession is not adverse to that of his overlord. An example is where the tenant refuses to pay rent or to render the customary services required of him. Does it mean that time cannot run against the owner seeking to recover the land? The true inference that can be drawn is that the framers of the law did not direct their minds to this point. Weight is lent to this view by the provisions of section 20 that, on the expiration of the time stipulated by the Decree for any person to bring an action to recover land, the title of that person is extinguished. The provision cannot, obviously, be applied where the relationship of landlord and tenant is involved.[1] The Limitation Law of Western Nigeria is quite clear on this point, as section 10 provides that 'a right of action to recover land by virtue of a forfeiture or breach of condition shall be deemed to have accrued on the date on which the forfeiture was incurred or the condition broken'. There is a proviso, however, that where the person bringing the action is entitled in reversion or remainder, the right of action will not accrue until the interest vests in possession.

Mortgagee's Right

The mortgagee's power of sale cannot be exercised after the expiration of the period of thirty years where the power is vested in a State authority, or twelve years in the case of a private person. If the right first accrues to a State authority, the action may be brought at any time before the expiration f the thirty years allowed to a State authority, or twelve years from the date e right became vested in a private person, whichever first expires.[2]

But if the person in possession acknowledges the mortgagee's title to the nd, or such person or the mortgagor acknowledges the debt or makes ny part payment, a fresh accrual of right of action is deemed to have taken place and time begins to run afresh from that date.[3]

Mortgagor's Right

Where a mortgagee has been in possession of the mortgaged land for a period of sixteen years from the date the right of action first accrued, the mortgagor's right to redeem is lost,[4] unless the mortgagee acknowledges the title of the mortgagor or his equity of redemption[5] or receives any payment in respect of the mortgage debt,[6] in which event the time prescribed will start to run afresh.

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[1] Unless 'title' is construed to mean right of action.
[2] Ss. 24 and 25.
[3] Ss. 40 and 49; s. 22 (1) (b) Western Nigeria.
[4] Ss. 26 and 27; twelve years in Western Nigeria. See s. 13.
[5] S. 42; s. 22 (2) Western Nigeria.
[6] S. 52; s. 22 (2) Western Nigeria.

Trust Property

The period of limitation prescribed by the statute does not apply to an action by a beneficiary under a trust against a trustee, or any person claiming through him where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was a party or privy; or where the action is for the recovery of trust property in the possession of the trustee and converted to his own use.[1] Time does not begin to run against a beneficiary under a trust until his interest falls into possession.[2]

Persons Under Disability

Where, at the time the right of action accrued, the person in whom the right is vested is an infant or someone of unsound mind, the action may be brought within six years after the cessation of the disability, or death, whichever event first occurs.[3] This provision must be understood as an addition to the time allowed in normal cases, and cannot be applied to deprive the person under disability of the enjoyment of the full twelve-year period allowed a normal person. Thus, if at the time adverse possession began, the owner was under a disability and the disability ceased after a year, the owner has eleven years thereafter to bring his action, and not six years; but where the disability ceased ten years after the commencement of the adverse possession, the owner has four years after the initial twelve-year period to pursue his action. If the disability ceases after the expiration of the limitation period, the owner has six years from the date the disability ceases. The provision does not apply where the person under disability claims through a normal person in whom the right of action was originally vested; or where, after the death of the person under disability, the right of action becomes vested in another person under a disability. The implication of the latter provision is that if the person under disability dies before the expiration of the initial period of twelve years, the successor has the remainder of the twelve-year period or six years, whichever is longer. Where, however, the disability continues after the twelve-year period and he dies, his successor has only six years, whether he is under disability or not, by virtue of the provisions of section 35 (1) (a).

In the Western Nigeria statute, it is further provided that the right of action cannot survive for more than thirty years from the date when it first accrued to a person through whom the person under disability claims.[4]

Adverse Possession in Relation to Certain Tenancies

The Limitation Law of Western Nigeria provides that a tenancy at will is deemed to be determined at the expiration of one year from the date of its

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[1] S. 31 (4); s. 19 (1) Western Nigeria.

[2] Ibid.

[3] S. 35 (1) (b) and (c); s. 21 Western Nigeria.

[4] Ibid. Since the main provision applies where there is disability at the time the right of action accrues, it is submitted that reference to the person through whom he claims is irrelevant and misleading.

commencement unless it has been determined earlier, and that time begins to run against the landlord from the date of such determination. This means that after thirteen years a tenant at will becomes owner of the land. In the case of a tenancy from year to year or other periodic tenancies without a lease in writing, the limitation period starts to run from the expiration of the first year or other relevant period. In either case, however, if the tenant subsequently pays rent, time runs afresh from the last receipt of rent.[1] In the case of a tenancy at sufferance, time runs from the beginning of the tenancy. The explanation is that a tenant at sufferance is not a tenant at all, but is an adverse possessor. However, where the tenant pays rent, time runs from the date rent was last received.

These provisions relating to tenancy at will and periodic tenancies considered above are not contained in the Lagos statute. It seems that it is a deliberate omission. In the situation of this country, it may be difficult to distinguish a tenancy at will from other tenancies under customary law, particularly as writing is not required to create an interest in land. In any case, such abuse of generosity would seem to be repugnant to the Nigerian sense of justice.

Adverse Receipt of Rent

Where a tenant occupying land by virtue of a lease in writing, by which a rent of not less than ₦2 is reserved, pays rent to some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no rent is subsequently received by the person rightfully entitled, the right of action of that person to recover the land is deemed to have accrued at the date when rent was first received by the person wrongfully claiming to be entitled, and not at the date of the determination of the lease.[2] This means that the owner cannot bring an action to recover the land from the tenant in consequence of the denial of title after twelve years, but it does not affect his claim to the reversion at the expiration of the term as against the tenant. He will, however, fail in an action for a declaration of title as against the person adversely receiving rent, if he delays for more than twelve years.

There is no corresponding provision in the Lagos statute, but there can be little doubt that adverse receipt of rent amounts to adverse possession.

Long Possession: The Rule in *Awo* v. *Gam*

In strict customary law, once a person succeeds in establishing his ownership of land, unless he has by sale or gift divested himself of his rights of ownership, he remains the owner at all times, notwithstanding that he has been

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[1] But the court may be able to avoid this result if the grant can be construed as a licence rather than as a tenancy. See *Cobb* v. *Lane* [1952] 1 All E.R. 1199.

[2] S. 11 (3) Limitation Law, 1959.

out of possession for many years.[1] As the Privy Council has said: 'There is in Nigeria no corresponding law to the English rule of prescription for conferring title to land.'[2] Thus, no length of squatting possession can ever suffice to bar an owner's title under customary law. In order to temper the rigours of this rule of customary law, the courts have laid it down that they will, in the exercise of their equitable jurisdiction, protect a person who has been in continuous and undisturbed possession for many years in the belief that he has a valid title thereto. This rule was first formulated in the leading case of *Akpan Awo* v. *Cookey Gam*,[3] thus:

> It would be wholly inequitable to deprive the defendants of property of which they have held undisturbed possession and in respect of which they have collected rents for so long a term of years with the knowledge and acquiescence of those who now dispute their title, even if it were . . . clear . . . that they entered into possession contrary to the principles of native law. We do not decide this point in accordance with any provision of English law as to the limitation of actions but simply on the grounds of equity, on the ground that the court will not allow a party to call in aid principles of native law, and least of all principles, which, as in this case, were developed in and are applicable to a state of society vastly different from that now existing merely for the purpose of bolstering up a stale claim.[4]

This rule has been considered and applied in many cases and was approved by the Privy Council in *Oshodi* v. *Balogun*.[5] After holding that the case before them was not one within the rule, their Lordships observed as follows:

> In coming to this conclusion on the facts proved in the present case, their Lordships do not desire to throw any doubt on the decision of the Full Court in the case of *Akpan Awo* v. *Cookey Gam*, . . . and other decisions of that character. In such a place as Lagos, where the native law is in some respects in a fluid state as a result of pressure of necessities of trade and of European laws and customs, it may well be just and equitable, in the absence of a statute of limitation, to hold it inequitable to deprive persons of property of which they have held undisputed possession for many years. . . .[6]

Conditions for the Operation of the Rule

It is not enough for a party seeking to rely on the rule in *Awo* v. *Gam* to prove the mere act of continuous and undisturbed possession for a long

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[1] But if traces of his earlier occupation are lost, the burden of proving that he was the first settler will be a very heavy one upon him.

[2] *Mora* v. *Nwalusi* [1962] 1 All N.L.R. 681 at p. 687.

[3] (1913) 2 N.L.R. 100.

[4] *Per* Webber, J., at p. 101.

[5] (1936) 4 W.A.C.A. 1.

[6] *Per* Lord Maugham, at p. 6.

time. 'Acquiescence does not bar a claim unless certain conditions are fulfilled.'[1] Let us then examine the conditions as follows:

(i) *Possession Must be Adverse*

The person in occupation must show that his possession is adverse to that of the rightful owner. No length of time will suffice to convert the title of a customary tenant into that of an absolute owner,[2] as 'it is of the essence of his tenure that he should be in possession of such land',[3] although the tenant's long possession may bar the owners' right to recover possession.[4] Similarly, a member of the family in occupation of family land cannot oust the title of the family by his long possession. The family's acquiescence in the occupation of such a member is not inconsistent with the family's title and cannot affect its reversionary right. Thus, where a head of family had been in occupation of the family house for many years and he and his descendants after him had been collecting rents thereon to the exclusion, and with the acquiescence, of the other members of the family, it was held that, his possession not being adverse to the family title, the family was not stopped from asserting its title.[5]

When, however, the customary grantee alienates the land to a stranger and that stranger goes into occupation, the stranger is in adverse possession and, if his possession is acquiesced in by the owners, their title will be barred.

(ii) *No Acquiescence Without Knowledge*

The question of acquiescence cannot arise until the owner acquires knowledge that the tenant has alienated or is attempting to alienate the land. In *Oshodi* v. *Imoru*,[6] family land in the occupation of certain domestics of the family was alienated to one, B, who obtained a deed of conveyance from them in fee simple in 1902. The family did not acquire knowledge of the transaction until 1933, when a dispute arose between the children of B and the property was put up for sale. The West African Court of Appeal held that there had been no acquiescence on the part of the family. The same decision was reached by the Judicial Committee of the Privy Council in *Oshodi* v. *Balogun*,[7] where family land had been alienated to strangers in

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[1] *Per* Hurley, Ag. F.J., in *Taiwo* v. *Taiwo* (1958) 3 F.S.C. 80 at p. 82.

[2] *Epelle* v. *Ojo* (1926) 7 N.L.R. 96; *Oloto* v. *Williams* (1943) 17 N.L.R. 27; *Dania* v. *Soyemi* (1937) 13 N.L.R. 143.

[3] *Per* Coker, J.S.C., in *Isiba* v. *Hanson* [1968] N.M.L.R. 76 at p. 78.

[4] See *Longe* v. *Ajakaiye* [1962] 1 All N.L.R. 612, where it was held that possession for 80 years by a licensee bars the right of the grantor to possession. See also *Maji* v. *Shafi* [1965] N.M.L.R. 33; *Oloto* v. *Williams*, loc. cit.

[5] *Chairman, Lagos Executive Development Board* v. *Sumnonu and Others* [1961] L.L.R. 20. See also *Nezianya* v. *Okagbue* [1963] 1 All N.L.R. 352, where it was held that a widow's occupation of her deceased husband's land was not adverse to the husband's family.

[6] (1936) W.A.C.A. 93.

[7] (1936) 4 W.A.C.A. 1.

similar circumstances. The decisions were explained on the ground that 'the owner is not in possession and has indeed no right to possession, and is not concerned, therefore, with the acts of the tenant until he becomes aware that those acts are inconsistent with and, therefore, a denial of, the overlord's rights'.[1] Thus, the person seeking to establish that the owner ought to be estopped must prove that the owner had knowledge of the alienation to him, but nevertheless failed to act.

The situation, is, however, quite different where the original entry was a trespass. In *Suleman* v. *Johnson*,[2] the land in dispute originally belonged to the Oloto family. It was conveyed to the defendant's predecessor in title in 1901 and the predecessor was in undisturbed occupation until 1948 when the land was conveyed to the plaintiffs by the Oloto family. The defendants claimed it as absolute grant, but the Oloto denied that even an occupational right had been granted to him or the person through whom he claimed. Therefore, the question of a reversionary interest did not arise. The plaintiffs sought to rely on the decisions in *Oshodi* v. *Balogun* and *Oshodi* v. *Imoru*, but those decisions were distinguished on the grounds that the defendant's possession was adverse to the Oloto family *ab initio*. In the words of Verity, Ag. P:

> The important distinction is, however, that when there has been a grant of occupational rights which disentitle the owners to possession until the termination of those rights, the fact that persons other than themselves are occupying the land does not necessarily put the owners on inquiry, for they have granted rights of occupation and user and they will not, in the ordinary course, be constantly on the alert as to the precise manner or by whom such rights are being exercised. Even if they saw apparent strangers on the land they might be unknown members of the occupant's family, employees or even sub-tenants to whose presence they might have no objection. The real infringement of the owner's right would only arise by alienation, and of this they might have no immediate knowledge. It is far otherwise when land upon which no occupational rights have been granted, but into possession of which strangers enter and exercise acts inconsistent with the possession of the owners. Then at once the owner is put upon inquiry, and if for many years he takes no action to assert his rights, not to the reversion but to possession, the considerations which apply to his acquiescence are far different, and I think the evidence required to establish such acquiescence as would serve to pass the original rights of the overlord to the occupier is far less than would be required in the case of land over which occupational rights had previously been granted and reversionary rights only come in question.[3]

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[1] *Per* Verity, Ag. P, in *Suleman* v. *Johnson* (1951) 13 W.A.C.A. 213 at p. 215.

[2] Loc. cit.

[3] Ibid, at p. 216. See also *Saidi* v. *Akinwumi* (1956) 1 F.S.C. 107; *Edu* v. *Cole*, [1956] L.L.R. 52.

The principle in *Oshodi* v. *Balogun*, was, however, applied where family land had been conveyed clandestinely to a purchaser by the person who was collecting tributes for the owners.[1]

The question whether the alienee in the *Oshodi* v. *Balogun* case should be confirmed in his occupation, subject to the owner's right to the reversion, was left open by their Lordships as it had not been raised. The point was, however, taken by De Lestang, C.J., (Lagos) in *Coker* v. *Jinadu*,[2] which has been considered in another connection. There it was held that, since the purchaser from the customary tenant and his successors in title had been in possession for about 50 years, they had acquired certain rights in the land which should be protected. The title acquiesced in, however, did not oust the reversion of the owners which they were still free to convey to another purchaser. Although the learned judge did not expressly say so, there can be little doubt that he was proceeding on the basis of the view expressed by the Board in *Oshodi* v. *Balogun*. It is submitted, however, that where the reversioner acquires knowledge of the unauthorized alienation, and he fails to assert his title to reversion, thereby encouraging the person in possession to continue to assume that the land belongs to him absolutely, he will lose his right to the reversion. Time will begin to run against him from the date he acquires knowledge, and not from the date of original entry.

It is not necessary to prove that the owner had actual knowledge. Where there is something which should have caused him to investigate what his tenant was doing and he failed to make such investigation it has been held that the owner should be deemed to have acquired knowledge of the unauthorized transaction.[3]

(iii) *The Defendant Must Have Changed his Position*

In *Taiwo* v. *Taiwo*,[4] Hurley, Ag. F.J., said that 'one of the most important [conditions] is that the party who relies upon his opponent's acquiescence must have been led to expend money or otherwise alter his position'. In that case, the property in dispute was owned by one, Taiwo, who died intestate in 1901. After his death the property was partitioned between his children, A, B, C and D. C died in 1920 and was survived by many children. D died intestate and without issue in 1943 and her portion was shared between A and B to the exclusion of C's children who knew of the arrangement. A died in 1959 and by her will she devised her share of the property to the plaintiffs. The question was whether the devise included A's share in D's portion. The trial judge held that the burden was on the plaintiffs to prove that under customary law A and B were entitled to D's estate to the exclusion

[1] See *Alade* v. *Aborishade* [1962] W.N.L.R. 74. The secrecy in which a transaction was shrouded is certainly a factor to be taken into consideration when deciding whether or not the plaintiff had knowledge of the true state of title.

[2] Loc. cit.

[3] *Ricketts* v. *Shotte* F.S.C. 461/63 (Unreported).

[4] (1958) 3 F.S.C. 80 at p. 82.

of the defendants. It was, however, contended on behalf of the plaintiffs that the defendants should be estopped by their laches and acquiescence since they had done nothing for fourteen years to upset the arrangement. The Federal Supreme Court held that, as there was no evidence that the delay of the defendants had led the plaintiff or their predecessor to change their position, their inactivity did not amount to such laches or acquiescence as would bar their right.

A person will be held to have altered his position if he has built upon the land or has otherwise developed it. But, where the development consisted in substituting corrugated iron sheets for thatch on a house five years after the commencement of the action, it was held that the defendant had not altered his position.[1]

It is not necessary to prove in every case that money had been invested in the land. Acquiescence in the overt exercise of acts of ownership over a long period by the person in adverse possession will bar the owner's title. In *Suleman* v. *Johnson*, as in *Saidi* v. *Akinwumi*, there was no suggestion of investment of money in the land, but there was evidence that the persons in occupation were exercising overt acts of ownership; in the former case by authorizing people to tap palm wine thereupon and by letting the land out to tenants, and in the latter case by taking care of the land and letting it out to tenants. In each case, the court held that it was inequitable to disturb their possession.[2] It is in this respect that the plea of title by long possession differs from that by laches and acquiescence.

(iv) *No Extenuating Circumstances*

The owner will not be ousted by long possession if there are extenuating circumstances which negated acquiescence. One of the factors taken into consideration by the Privy Council in *Oshodi* v. *Balogun*[3] in arriving at the decision that the plaintiff/family did not acquiesce in the respondent's adverse possession was that 'the chief and elders of the Oshodi family might well think that, whilst a number of the children or other issue of the headman were alive, it was not worthwhile to object to an alienation since, if it were prevented or declared void, the reverter to the family would still be very distant'.[4] This view, however, ignores the rule that such alienation is a ground for forfeiture and that, even after a forfeiture has been declared, it would still be open to the owner to treat the tenants leniently by not insisting on possession. Thus, if knowledge on their part has been established, an explanation of this character ought not to relieve them of the consequences of their inaction.

The explanation offered in *Ope* v. *Ope*,[5] however, clearly negatived acquiescence. The property in dispute belonged to A, the appellants' father.

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[1] *Alade* v. *Bamigbala* [1962] W.L.N.R. 62.
[2] See also *Odutola* v. *Akande* (1960) 5 F.S.C. 42.
[3] (1936) 4 W.A.C.A. 1.
[4] (1936) 4 W.A.C.A. 1 at p. 3.
[5] (1959) 4 F.S.C. 208.

When A died, the first appellant was nine months old and was taken care of by J, A's sister. J completed the building by erecting the staircase, and for a very long time J's children, the respondents, had been occupying five of the seven rooms in the house. In this suit, the appellants claimed a declaration that they were owners of the property, but the respondents claimed that they were jointly entitled with them. The learned trial judge held that the house belonged to the appellants' father alone but that, as the appellants had suffered the respondents to occupy five of the rooms for a long time, they were estopped from asserting title in themselves alone. On appeal, Mbanefo, F.J., remarked:

> In finding that there was acquiescence the learned trial judge overlooked the fact that the parties were intimately related, being descendants of a common ancestor . . . The appellants have for the past seventeen years protested against the respondents' use of the house and the matter has been before the family meeting for settlement. If the appellants delayed in going to court it was not because they were indifferent to their rights but because of the close family connection.[1]

(v) *Length of Time Required*

There is no hard and fast rule about the length of time required, but it is clear that the period would be longer where the defendant has not developed the land than where he has. In *Awo* v. *Gam*, the defendant had been in possession for 21 years. In *Solagbade* v. *Ayankoya*,[2] the Federal Supreme Court held that possession for a period of five years was not long enough. On the other hand, in *Okiade* v. *Morayo*[3] Butler Lloyd, J., held that the plaintiff's delay for over five years after acquiring knowledge of the defendant's adverse possession was sufficient to bar her title. The point which, however, weighed in his Lordship's mind was the fact that the defendants had altered their position by building on the land within the five-year period. In principle, since the reason for developing the doctrine of long possession is the absence of a statute of limitation, the length of title should not be less than the statutory period.

The Doctrine of Standing By

The Rule

The principle of standing by was formulated by the English House of Lords in *Ramsden* v. *Dyson*,[4] thus:

> If a stranger begins to build on my land, supposing it to be his own, and, perceiving his mistake, I abstain from setting him right and leave him to

[1] (1959) 4 F.S.C. at p. 211.
[2] [1962] W.N.L.R. 85.
[3] (1940) 15 N.L.R. 131.
[4] (1866) L.R.H.L. 129 at p. 140.

persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

This rule, which has been frequently applied in Nigeria, is the true principle of laches and acquiescence. Ollennu claims that the principle is equally one of the customary law of Ghana.[1] That view is supportable having regard to the consideration that customary law leans heavily against unjust enrichment. It is noteworthy that the principle was invoked in *Ukwa* v. *Awka Local Authority*,[2] a case which was governed by customary law. In that case, Onyeama, J.S.C., restated the rule thus:

> The doctrine of laches is that the owner of land should not stand by and allow another person who thinks that the land is his to make improvements and then assert his rights to the land.[3]

The court will not allow the owner to take the improvement and cheat the other man of the money he has expended. That being the case, once the improvement is allowed to be completed or the work has been carried out to a stage at which it would be inequitable to disturb its progress, the true owner will be deemed by his laches to have acquiesced in the other's claim of ownership and thus be estopped from asserting his title to the land and the improvements. The length of the adverse possession by the person making the improvement is immaterial,[4] provided that the true owner acquired knowledge of the trespasser's activities.

Acquiescence Must Amount to Fraud

Delay will not amount to acquiescence where there are extenuating circumstances. The decision in *Finn* v. *Ayeni*[5] is an ample illustration of the operation of this qualification. In that case, the plaintiff explained that when he discovered that the building was being put up on the land he immediately made inquiries from the workmen on the site as to the identity of the defendant but that they failed to assist him, and that when he did find out he informed his lessee who took action. Duffus, J., held that as the plaintiff did not deliberately stand by and allow the defendant to complete his house in order to have the benefit of it, the inference that he acquiesced could not be made. It follows that delay will not amount to acquiescence unless it amounts to fraud or misrepresentation on the part of the rightful owner. As was said in *Willmott* v. *Barber*:[6]

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[1] Ollennu, op. cit., p. 67.
[2] [1966] N.M.L.R., 41.
[3] Ibid, at p. 46.
[4] The length of the adverse possession would, however, strengthen the defendant's case.
[5] [1964] N.M.L.R. 130.
[6] (1880) 15 Ch.D. 96 at p. 105.

It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights.

The plaintiff would, however, be held to have knowingly stood by if he acquired knowledge of the activities of the defendant and yet refrained from acting. It is not necessary to lead specific evidence of a fraudulent intention.[1] It does not matter that at the time the improvement was being created, his interest had not fallen into possession. For example, in *Taylor* v. *Kingsway Stores of Nigeria Ltd*,[2] the plaintiffs' grandfather devised a house to be held by his children as joint tenants with a remainder to their eldest sons as tenants in common. In 1936, the surviving children obtained an order of court to sell the house and conveyed the land to the second respondent in fee simple. The second defendant later granted a lease of the land to the first defendant who erected a huge department store on the land in 1938. The plaintiffs were aware that their parents had dealt with the land in a manner inconsistent with their rights and that the first defendant was rebuilding on the land. The plaintiffs' interest fell into possession in 1961 when the last surviving joint tenant died. A year later they brought the action in which they sought recovery of possession from the defendants on the grounds that the second defendant could not obtain more than an estate *pur autre vie* by virtue of the conveyance of 1936. The action was dismissed on the grounds that they ought to have sued in 1938 when the first defendants were rebuilding, which would have prevented laches being set up against them.

A further consequence of the rule that acquiescence must amount to fraud is the rule that laches does not run with the land. In *Nwakobi* v. *Nzekwu*[3] the Privy Council said:

> The defence of laches involves essentially a personal disqualification on the part of the particular plaintiff; it cannot be treated as a stigma on the title to land which, once impressed, necessarily descends with the title and affects all succeeding owners.

This observation must, however, be viewed in the light of the special circumstances of that case. The land in dispute was originally Crown land by virtue of the Niger Lands Transfer Ordinance. In 1948 the Crown disclaimed ownership in virtue of the power conferred by the Niger Lands Transfer Ordinance and the land reverted to its former owners, the respondents. Earlier, in 1934, both the appellants and the respondents were forbidden by the Crown 'to have any dealing with the land' but the appellants, in defiance

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[1] See *Abbey* v. *Ollennu* (1954) 14 W.A.C.A. 567.
[2] [1965] 1 All N.L.R. 19; [1965] N.M.L.R. 103.
[3] [1964] 1 W.L.R. 1019.

of that warning, had developed their settlements on the disputed land. In 1944 the Crown instituted proceedings against the individuals of the appellants, claiming that they had no title to possession, but failed. In the present proceedings, it was held that the respondent could not be met with the defence of laches, since there was nothing done or omitted to be done by them to make it inequitable on their part to assert their title to the land against the appellants who proved no title to the land at all. It is submitted that this case is distinguishable from a situation where the plaintiff claims through an owner affected by laches. He would definitely take subject to the burden affecting his grantor's title. In this case the effect of the disclaimer of Crown ownership in 1948 was to leave the title as it was before, so that it is not strictly accurate to say that they were 'successors in title' to the Crown or that they were the Crown's privy. That being the case, it is difficult to sustain the distinction which the court made in the judgment between estoppel *in pais* and the defence of laches and acquiescence. It is submitted that the consequence of laches and acquiescence is that the owner affected is estopped from asserting his title and he cannot cure the disability by transferring his title. Moreover, in view of the decision in *Taylor* v. *Kingsway*,[1] it is difficult for a successor claiming otherwise than by purchase to avoid the equitable defence, except where he can show that he did not know, and had no means of knowing, that the defendant was developing the land in a manner inconsistent with his interests.

The Defendant Must Not be Aware of the True State of Title

In all the cases on the subject the adverse claimant's ignorance of the true state of title is emphasized. He must have acted in the belief that he was the owner of the land. If he was aware of the owner's title, equity will not come to his aid, as he who comes to equity must come with clean hands.[2]

The defendant would be deemed to have had knowledge of the true state of title where he knows that the title to the land is disputed. That was one of the main considerations justifying the decision against the appellants in *Nwakobi* v. *Nzekwu*.[3] This principle was applied in *Morayo* v. *Okiade*[4] to a situation where the defendant had only constructive notice of the plaintiff's title. In that case, the plaintiff bought a piece of land in 1924 and soon after instructed an auctioneer to sell it and handed him her conveyance. Later she brought an action against the auctioneer in which costs were awarded against her and the land was attached. One, Oshodi, paid the costs (without the authority of the plaintiff) and the auctioneer handed him the conveyance. Oshodi died in 1930 and his executors, who had the conveyance and the

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[1] [1965] 1 All N.L.R. 19; (1965) N.M.L.R. 103.

[2] See *Rennie* v. *Youngs* (1858) E.R. 939. See also *Adeniji* v. *Ogunbiyi* [1965] N.M.L.R. 395.

[3] Loc. cit.

[4] (1942) 8 W.A.C.A. 46.

receipt for the costs, sold the land to the first four defendants in pursuance of an order of court, a part being resold to the other defendant. In 1933, the plaintiff made another attempt to resell the land and the defendants, who were then in possession, posted a caution as a result of which the sale was not proceeded with. The plaintiff did nothing until December 1938 when the present action was brought. In the meantime the defendant had built on the land. Butler Lloyd, J., held that, although the defendants had constructive notice of the plaintiff's title, she not having done anything for five years after acquiring knowledge of the plaintiff's adverse possession, within which time the defendants had built on the land, the plaintiff was estopped from asserting her title. The decision was, however, reversed on appeal on the grounds that 'having held that the respondents had constructive notice of the title, the learned trial judge was precluded, on the authority of *Rennie* v. *Youngs*,[1] from finding that acquiescence on the part of the appellant operated as estoppel'. The decision was applied by Brett, J.S.C., in *Rickett* v. *Shotte*,[2] but was disapproved by Bairamian, J.S.C., in the more recent case of *Owodunni* v. *George*.[3] His Lordship was of the opinion that the observation of Turner, L.J., in *Rennie* v. *Youngs* did not 'warrant the engrafting of "constructive notice" in the Morayo judgment upon the doctrine of standing by. To hold otherwise would be helping the plaintiff to reap the fraudulent fruit of standing by.'

But it is submitted that where a person enters upon another man's land without any pretext of title and builds thereon, the owner is not strictly bound to warn him. The reason is that, as we saw earlier,[4] in the present state of things in this country, no reasonable tribunal would believe the squatter if he said that at the time of entry, or of building the house, he believed that the land was his. Where, however, the squatter has for many years been exercising overt acts of ownership over the land and the real owner takes no steps to stop him, the principle of *Awo* v. *Gam* may become applicable.

Long Possession as Proof of Title

The effect of adverse possession for the full period of limitation is that the title of the original owner is extinguished[5] and cannot be put in opposition to that of the person in favour of whom the statute operates. Thus, although the statute does not expressly give ownership to an adverse possessor, its effect is that his title, acquired by wrongful possession, becomes indefeasible. In principle, since the rule in *Awo* v. *Gam* proceeded on the analogy of the

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[1] Loc. cit.
[2] Loc. cit.
[3] 1967 1 All N.L.R. 177.
[4] See Chapter 4, p. 40.
[5] S. 20, Limitations Decree; s. 16, Limitation Law, Western Nigeria; *Suleman* v. *Johnson*, loc. cit.

statutes of limitation, the effect should be the same.[1] In the Ghanaian case of *Ohimien* v. *Adjei*[2] the position was put thus:

> The correct position is that the true owner loses his title to, and the right to recover possession of, the land, not that the stranger acquires title to it, though in actual fact he does thereby acquire title to the land.

In other words, the practical effect is to make the title of the adverse claimant indefensible.

As a successor in title can rely on his predecessor's possession, a squatter can pass a valid title to a purchaser. The problem, however, is that, in view of the several conditions which must be satisfied before the defence can avail him, until a declaration is in fact made by the court it is by no means certain that a defence based on the statute or on equity will succeed. The possession may not truly be adverse; the real owner may be able to explain his inaction, the squatter may be aware of the true state of title, or the owner may not be aware of the adverse nature of the title. All these factors act against the squatter or his successor in title. Thus, unless he can prove that all the conditions are satisfied, the squatter may not be able to force his title on an unwilling purchaser, as it is clear that the court will not force a purchaser to accept a doubtful title.

An interesting question which has gained prominence recently is whether a squatter may himself clear doubts about his title by instituting proceedings against the rightful owner. This has arisen in a number of cases. The first such case was *Odutola* v. *Akande*,[3] the facts of which were briefly as follows: O, the appellant, applied for registration of the land in dispute which was within the Glover Settlement, in respect of which the Oloto family had reversionary rights. This particular land was not allotted to an Egba refugee; accordingly it was vested in possession in the Oloto family. A, the respondent, objected to O's application on the grounds that his father had been in occupation of the land for 50 years without disturbance from the Olotos, and that his family were reputed to be, and believed themselves to be, the owners of the land on which they had built. The registrar dismissed the objection. It was held both at the High Court and the Federal Supreme Court that the registrar was wrong in dismissing the objection because 'by their inaction the Olotos must be presumed to have abandoned the property and acquiesced in the objector's possession, and that it would be most unfair to the objector, who has believed throughout all these years that he was the owner, to hold otherwise'.

Similarly, in *Akuru* v. *Olubadan in Council*[4] the West African Court of Appeal held that the rightful owner, whose title had been barred by long

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[1] *Suleman* v. *Johnson*, loc. cit.
[2] (1957) 2 W.A.L.R. 257 at p. 279.
[3] (1960) 5 F.S.C. 142.
[4] (1952) 14 W.A.C.A. 523.

adverse possession, could not obtain a declaration of title to the land. As de Commarmond, Ag. C.J., observed:

> The course of conduct of the former owners not only excludes their right to possession on the principle laid down in *Cookey Gam*'s case but also creates a position in which it would be inequitable to hold that they were now entitled to rely upon native law and custom *to support their claim to any right of ownership whatever*. The court in the *Suleman* case held that the equitable right to a declaration had been completely extinguished.[1]

The logical inference from the judicial approach in these two cases is that the original owner cannot plead his title in opposition to that of the adverse claimant, either in an application by such adverse claimant for registration of title or in an action for a declaration of title instituted by such adverse possessor. Recent decisions of the Supreme Court, however, have rejected this approach. In *Da Costa* v. *Ikomi*,[2] *Ayodele* v. *Olumide*,[3] *Olayioye* v. *Oso*[4] and *Agboola* v. *Abimbola*,[5] the Supreme Court held that long possession under the rule in *Awo* v. *Gam* could be used only as a defence but could not be relied upon as constituting a basis of title; in the words of Lewis, J.S.C., long possession could only be used as 'a weapon more of defence than of offence'.

Thus, in the first three cases, it was held that the plaintiffs, who had been in undisputed possession for about 50 years, could not succeed in an action for a declaration of title against the defendants, who proved a recent grant from the true owner. The so-called rule that long possession is only a weapon of defence was carried to a ridiculous point when it was also held that the plaintiff in long possession could not sue the rightful owner who had interfered with possession. In *Da Costa* v. *Ikomi*[6] and *Ayodele* v. *Olumide*, the reason given for denial of a remedy in trespass was that the plaintiffs themselves and their predecessors in title were trespassers. An injunction failed for the same reason. In *Olayioye* v. *Oso*,[7] the reason given by Coker, Ag. C.J.N., was that trespass is a wrong to possession and that the rule of law was that a trespasser could maintain an action in trespass against anyone but the true owner. With respect to the learned judge, there is no such rule of law. *Hemmings* v. *The Stoke Poges Golf Club*,[8] which the learned judge cited, is irrelevant. In that case, what was at issue was whether a service occupier whose appointment had been terminated could sue his employer, who had evicted him by force. There was no question of long possession or acquiescence. The correct proposition of the law is that the person in possession

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[1] (1952) 14 W.A.C.A. at p. 525.
[2] (Unreported) S.C. 733/1966 of 20/12/68.
[3] (Unreported) S.C. 260/1967 of 23/5/69.
[4] (Unreported) S.C. 386/1967 of 4/7/69.
[5] (Unreported) S.C. 366/1967 of 4/7/69.
[6] Loc. cit.
[7] Loc. cit.
[8] [1920] 1 K.B. 720.

will be protected against any person who cannot show a better title. That being the case, it is impossible to understand how the court could regard as a better title one which the court will not entertain.

The decision in *Agboola* v. *Abimbola*[1] is more disturbing. In that case the respondent, who had been in adverse possession, applied for registration of his title under the Registration of Titles Act. The appellant, who claimed through a recent grant from the original owners, lodged an objection against the registration. Subsequently the appellant also applied to be registered and the respondent lodged an objection against the application. The appellant's objection and application were dismissed by the Registrar of Titles and the appellant appealed unsuccessfully to the High Court. On further appeal, the Supreme Court said that, by applying for registration of her title, the respondent was using long possession as a basis for title rather than as a defence. Accordingly it was held that her application ought to have been dismissed by the registrar. In reference to the decision in *Awo* v. *Gam* and the cases decided upon it, the court said:

> The cases . . . exemplify some of the most sacrosanct of legal principles and they are well-known and universally accepted. We too are in agreement with these principles and do not propose to shift an inch from their authority. But none of the cases has ever been applied in favour of a plaintiff claiming title thereby as opposed to being applied in favour of a defendant resisting the claims of the proper owner.

It is submitted that in holding that long possession provides merely a weapon of defence the court fell into an error. We have seen that title to land may be acquired by possession, and that the title so acquired, albeit wrongfully, will be protected against anyone who cannot show a better title. It is true that a dispossessed owner would normally be able to recover possession by action, but that right avails him only insofar as his title has not been barred by lapse of time, either under the limitation statutes, where they apply, or under the principle of *Awo* v. *Gam* which proceeded on the analogy of the statutes. Where the title of a rightful owner has become barred, the squatter has a better title,[2] and the form of action should be irrelevant.

The absurdity of the current line of decision is that neither the original owner nor the person entitled to the benefit of long possession can obtain a declaration of title or obtain a first registration. Moreover, it constitutes an invitation to the person whose title has been barred under the rule in *Awo* v. *Gam* to use extra-judicial means to instal himself in possession or to build on the land at all costs, as was the case in *Olayioye* v. *Oso*.[3] Having done that, the person entitled to the benefit of long possession would be rendered helpless, for there is no means by which he can seek redress which would not involve using his long possession as 'a weapon of offence'.

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[1] Loc. cit.
[2] See Magarry and Wade, op. cit., pp. 999-1000.
[3] Loc. cit.

8 Registration of Title to Land

Introduction

The system of registration of title, as distinguished from registration of instruments,[1] was first introduced in Nigeria in 1935, following the enactment of the Registration of Titles Act, 1935.[2] The system has, however, been known in England since 1862. Indeed, the Australian system, called the Torren's system,[3] was established in 1858. The system was devised to make conveyancing simple, cheap, speedy and reliable by obviating most of the difficulties and hazards to which a purchaser of land is exposed under the system of unregistered conveyancing. Under that system a landowner wanting to sell his land must be able to demonstrate proof of his title to the satisfaction of his purchaser, which necessarily entails tracing his title meticulously to the first owner of the land or to a person whose ownership is undisturbed. If there is a missing link, or if the purchaser is not prepared to assume the risk of believing his story, it means the land may not be sold. In the case of the system of registered conveyancing, once the title has been investigated and put on the register proof of title becomes easy, as the register is the evidence of title. Moreover, as we shall see later, registration in some cases cures defects in the registered title.

The Registration of Titles Act was enacted by the then Nigerian Legislature but applied to the Southern Provinces only. Since regionalization of the laws, it has become Regional legislation. The Act of 1935 as amended applies now to the Lagos State only. The enactment in force in the West and Mid-Western States is styled 'Land Titles Registration Law'[4] but Eastern Nigeria has retained the original nomenclature.[5] A new legislation, the Registered Land Act, 1965, has been enacted for Lagos. This legislation provides for the compulsory registration of all titles to land in any area declared by the Minister to be an adjudication area, after adjudication of

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[1] Considered on pp. 65-70.
[2] Cap. 181.
[3] Named after the person who devised the system.
[4] Cap. 57, Laws of Western Nigeria, 1959.
[5] See Cap. 72, Laws of Eastern Nigeria, 1963.

claims over it. The scheme is that the Registration of Titles Act, 1935, which provides for partial registration only, will cease to have any operation in these areas. The 1965 Act has not yet been put into operation, however, and the operation of the Act of 1935 has not in any way been affected. Thus, only the provisions of that statute are considered.

The Scheme of the Registration of Titles Act, 1935

Although the Act applies notionally throughout the State, its operation is restricted to such areas within the State as are declared to be a registration district by the Governor-in-Council. Virtually the whole of the City of Lagos has been put within the scheme of the Act, but no other part of the country has so far been declared to be a registration district. In other words, registration of title is available in the City of Lagos only. Even within a registration district, the Act does not provide for immediate compulsory registration of all titles. It applies only in certain cases when an interest in land is created or conveyed after the area has been declared to be a registration district, but voluntary registration is possible in certain other cases.

The register is divided into three parts:[1]

(i) the property register which contains a description of the land and the estate for which it is held
(ii) the proprietorship register which describes the registered proprietor, and the nature of the title registered
(iii) the charges register which contains entries of all charges and encumbrances affecting the land

The title of the registered proprietor or chargee is evidenced by an instrument issued by the registrar, called the certificate of title, otherwise known as the land certificate, which contains all entries in the register affecting the land or charge.[2] The certificate of title is *prima facie* evidence of the several matters contained therein.[3]

Compulsory Registration

Under section 5, registration of title is made compulsory in respect of the interests comprised in the following instruments, executed after the date the area is declared a registration district:

(i) a conveyance of a fee simple estate for a consideration which consists wholly or in part in money

[1] S. 69.
[2] S. 55 (1).
[3] S. 55 (5).

(ii) a lease granted for a term of not less than 40 years
(iii) an assignment of a lease having not less that 40 years to run for a consideration which consists wholly or in part in money

Application for first registration of the interest comprised in the conveyance, grant or assignment must be made by the grantee within two months of its execution or, where the time is extended, any extension thereof. The sanction for failure to comply with this provision is that the instrument becomes void so far as regards the grant or conveyance of the legal estate in the freehold or leasehold comprised in it.

The expression 'fee simple estate' is not restricted to the fee simple absolute; although since the section applies to commercial dealings, such would be the type of fee simple which would be normally encountered. It does not seem that the necessity to register is confined to a grant of a corporeal interest. In *Onashile* v. *Idowu and Others*,[1] it was held that a legal mortgage must be registered since the mortgage deed does, in fact, create a fee simple estate. A mortgage of freehold land in Lagos is created by a conveyance of the fee simple by the mortgagor to the mortgagee with a condition for reconveyance on redemption. It appears that the court has taken the mortgage deed on its face value. A conveyance of the fee simple estate by way of gift is not required to be registered. Nor is one by way of exchange, unless some money is paid for equality of exchange.

Extension of the Statutory Period

As we have seen, an application to be registered as owner of the interest conveyed or granted must be made by the purchaser within two months of the grant unless the period is extended by order of court. The proviso to section 5 reads as follows:

> . . . The court may, on the application of any person interested in any particular case in which the court is satisfied that the application for registration cannot be made within the said period or can only be made by incurring unreasonable expense, or that the application cannot be made within the said period by reason of some accident or other sufficient cause, make an order extending the said period; . . .

The implication of this proviso fell for decision in *Onashile* v. *Barclays Bank*,[2] which followed from the decision earlier discussed. The Supreme Court held that a conveyance which ought to have been registered did not automatically become void when the two months were up, and that an application for extension might be brought at any time. But the court will not use its power to order extension of time to revive an instrument required

[1] [1961] 1 All N.L.R. 313.
[2] [1963] 1 All N.L.R. 310.

to be registered which the court has declared void. In other words, the courts' decision 'finally closed the door on any application for extension of the prescribed period'.[1] This view was explained on the grounds that, as the court had declared the conveyance to be void as a conveyance of the legal estate, there was no longer a conveyance of a legal estate which the grantee could apply to have registered; thus, an order for extension of time within which to apply for registration could serve no useful purpose.

Mr Willoughby,[2] commenting on this decision, remarked that, in effect, a purchaser could never be certain that an unregistered dealing had become void until the court declared it as such, and that if that point of view was correct it added to the uncertainty of the value of registration under the Act. The assumption in this comment was that the court might grant an extension of time to the prejudice of a subsequent purchaser who had been registered. If that was the meaning of the Supreme Court, it is submitted that it cannot be a legitimate exercise of a discretion, except where the subsequent purchaser took with notice of the earlier unregistered transaction. It is further submitted that just as the court will not grant an extension of time after the instrument has been declared void, the conveyance of the land to a *bona fide* purchaser of the legal estate after the expiration of the two-month period should equally close the door on extension of time, more so after the subsequent purchaser has made an application for first registration.

Implication of 'Void' within the Section

Where an application for first registration has not been made within the stipulated period, the conveyance, lease or assignment becomes void only as regards the conveyance or grant of the legal estate. The validity of the transaction between the grantor and grantee is otherwise not affected. The position is as if the instrument by which the grant is effected had not been executed. That being the case, the vendor having been paid his purchase money will remain trustee of the legal estate for the unregistered purchaser. The inescapable conclusion is that a subsequent purchaser of the legal estate from that grantor will take subject to it unless he is a *bona fide* purchaser for value without notice.[3] Where the first registered owner is affected by notice of a previous unregistered sale, he takes subject to it.[4] However, since the conveyance or grant is ineffectual to create a legal estate, the grantee cannot pass the legal estate in the land to one purchasing from him. A purported grant

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[1] Ibid, at p. 311.

[2] Willoughby, 'Land Registration in Nigeria: Past, Present and Future', 1 Nig.L.J., 1965, pp. 260, 267.

[3] *Johnson* v. *Onisiwo* (1943) 9 W.A.C.A. 189.

[4] This prior interest may be registered as an incumbrance on the registered title. See section 11 (1) which provides that estates outstanding at first registration and having priority to the estate of the registered owner shall be registered as incumbrances.

of such lega, estate is ineffectual. This was the main point in controversy in *Onashile* v. *Idowu and Others*,[1] considered earlier in another connection. It will be remembered that in that case it was held that a mortgage, being in form a conveyance of the fee simple, should have been registered under section 5. The mortgage was not, in fact, registered. When the plaintiff defaulted, the bank sold the property to the first and second defendants by virtue of the power conferred by the Conveyancing Act, 1881. It was held that, as the mortgage deed failed to convey the legal estate to the bank, the bank had no legal estate to convey to the other defendants. Thus, the conveyance to them was also void to the extent that it purported to convey the legal estate. But the deed should have been sufficient to create an equitable mortgage by deed within the meaning of section 21 of the Conveyancing Act, 1881. That is, the power granted by the section was not altogether lost; the conveyance from the bank was sufficient to vest in the purchasers the equitable interest in the land. In other words, the bank had effectively disposed of the plaintiff's equitable interest for whatever it was worth.[2]

One further comment may be made as regards leases. The effect of a failure to register a lease would be to convert the lease at law into an agreement for a lease in equity, under the principle of *Walsh* v. *Lonsdale*.[3] If the lessee goes into possession it would rank as an overriding interest under section 52, should the legal estate be subsequently registered.[4] It has been doubted, however, whether the court would grant specific performance of the contract, since it is the default on the tenant's part that has put him in his predicament. In any case, if the legal estate is subsequently registered, the unregistered lease may be registered as an incumbrance.[5]

State Grants

Section 7 provides that every grant of State land for an estate in fee simple or lease of State land for a term exceeding five years, together with a copy thereof, must be delivered by the Commissioner for Lands to the Registrar of Title for the purpose of registration of the grantee as owner of the land or lease. There is no time limit for compliance, nor does the section provide for penalties for non-compliance with the provision; it is assumed that the Lands Officer, whose duty it is to make the application, will do so promptly. However, if the grant comes within the ambit of the provisions of section 5, the grantee should himself apply for registration within the stipulated period; otherwise he may attract the sanction prescribed by the section.

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[1] Loc. cit.
[2] See *re Hodson and Howes' Contract* (1887) 35 Ch.D. 668.
[3] (1882) 21 Ch.D. 9.
[4] But see s. 54 as interpreted in *Balogun* v. *Salami* [1963] 1 All N.L.R. 129.
[5] *Johnson* v. *Onisiwo*, loc. cit.

Voluntary Registration

Section 6 provides as follows:

(i) Any person who has power to sell or is entitled at law or in equity to an estate in fee simple in any land, whether or not subject to incumbrances, may apply to be registered in the registry as owner of the fee simple in the land.
(ii) Any person entitled at law or in equity to a lease of any land for an unexpired term of not less than five years, whether subject to incumbrances or not, may apply to be registered in the registry as the owner of the lease.

Registration of these interests is at the option of the owner concerned but, when an interest is registered, the nature of the title conferred by such registration and the consequences of registration are exactly the same as in the case of compulsory registration.

The expression 'fee simple estate' as used in this context denotes an absolute title to land, however it is acquired. Thus an absolute owner of land under customary law, whether a family[1] or an individual, may apply for registration under this section because its or his title is a fee simple estate. In any case, there is authority for the view that such an absolute owner can convey a fee simple estate.[2]

Duties of the Registrar

The registrar is required to investigate an applicant's title before proceeding with the registration. In doing so, he is required to advertise the application in the Official Gazette[3] at least once and, at his discretion, in any of the newspapers circulating in Nigeria.[4] The registrar may also take such further steps as would assist him in his investigation and, unless the registrar otherwise directs, notice of the application must be served on each occupier of the land and on all owners of the adjoining lands.[5]

Where an objection to first registration is received within two months of the notice, the registrar must adjudicate upon the objection and may only register the applicant's title if he finds that the objection is without foundation.[6] Where the objection is sustained the registrar must dismiss the applica-

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[1] Subject to the right of a principal member to oppose such registration under s. 10 (1).
[2] See *Kabiawu* v. *Lawal* [1965] 1 All N.L.R. 329. As to registration of possessory titles, see Chapter 7.
[3] S. 8.
[4] Ibid.
[5] Ibid.
[6] S. 9 (2).

tion. The registrar's decision to register or not to register an applicant's title is appealable to the High Court.[1] It is to be noted, however, that the registrar is not strictly called upon to decide a question as to ownership of land. Accordingly he cannot award title to the objector and register him as owner unless the objector has made a cross-application for registration.[2] His power is confined to acceptance or refusal of the application for registration.

Under the former provisions of section 9 (1) the registrar in the investigation of title may act on less than legal evidence, or less than evidence ordinarily required by conveyancers, or on evidence adduced before him in other proceedings. That apparently reasonable provision (having regard to the position of titles in this country and the object of the Act) has unfortunately been repealed on account of the numerous frauds which were perpetrated under it. The new section 9 substituted by section 1 (c) of the Registration of Titles Amendment Edict, 1970, now enjoins the registrar to act exclusively on legal evidence and to accept only such evidence as would satisfy a conveyancer. The full impact of the second part of the provision must await decision.

Protection of Customary Titles

Section 10 deals with the protection of customary titles. Sub-section (1) provides that, where an objection is based on the grounds that the land sought to be registered is family land and the claim is proved to the registrar, the registrar should dismiss the application unless the family consents to the registration. Sub-section (2) deals with a situation where the objector proves that the land is subject to customary law by virtue of which he has rights or interests. In such a case the registrar may either dismiss the application or register the applicant as the owner of the fee simple estate in the land or of a lease of the land and enter on the register such cautions, restrictions, notes and enteries as may be necessary to give effect to the customary right.[3] Further provisions are contained in section 43 (2).

Effect of Failure to Object

The Act is silent on the position of a person who, being aware of an application for first registration, fails to lodge an objection within the prescribed period,[4] with the exception of cases coming within section 10, in respect of which section 10 (3) provides that:

> Subject to any cautions or restrictions or any other notices, notes or enteries which the registrar may direct under subsection 2 of this section

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[1] S. 98.
[2] *Randle* v. *Gbogboade* [1965] L.L.R. 194.
[3] See *Coker* v. *Jinadu* [1958] L.L.R. 77 at p. 79.
[4] But for the specific provision of s. 10 (3) it would have been suggested that the adverse claimant would be estopped by his conduct.

and paragraph (b) or subsection (2) of section 11, any claim which might have been put forward by any person under either of the preceding subsections in opposition to an application for first registration shall not after such registration be entertained under any of the provisions of this [Act].

That provision has been judicially considered in two cases. In *Ajose* v. *Jinadu*[1] de Lestang, C.J., held that a person having a right of occupation under customary law but who failed to oppose an application for first registration of the land by the radical owner is not subsequently barred from registering a caution or notice to safeguard his right. A different view was taken by the Federal Supreme Court in *Balogun* v. *Salami and Others*,[2] the facts of which were similar. A family house which was mortgaged by two members of the family, who described themselves as owners in fee simple, was sold at an auction by an order of the court to one A. F. who applied for first registration. The first defendant was in possession at the time of the auction and shortly afterwards the family head sold a portion of the house to the second defendant who went into possession. The family knew about the auction sale, but they failed to register a caution under section 43 or to oppose the registration under section 10. The second defendant also failed to do likewise. Accordingly A. F. was given first registration. He later sold to the plaintiff who after being registered sued the defendants for possession and injunction. It was held that, in view of section 10 (3), the defendants' claim to possession under customary law could not be entertained, having not been put up in opposition to the application for first registration. In answer to counsel's submission on behalf of the defendants that the section was dealing with a claim which might have been put forward in opposition to an application for registration and not with the question of any right to possession, the court explained that, in construing the section, attention should be given to its purpose. As the court said:

> The Courts are familiar with the bane which attends dealings in family land: some members sell or mortgage . . . and take the money, and others come along . . . and repudiate the transaction on the grounds that the consent of the family has not been given. In addition sales on receipts under native law and custom add to the bedevilment of dealings in land . . . Section 10 (3) of the Registration of Titles Act must have been intended to remove that bane by freeing the first registration of title from claims of the sort which could have been made under subsections (1) and (2). The present case illustrates the bane well. If the defendants' claim could prevail over the plaintiff's registered title, the mischief would continue unabated and the Registration of Titles Act would have achieved nothing in regard to that familiar mischief. . . .[3]

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[1] [1959] L.L.R. 19.
[2] [1963] 1 All N.L.R. 129.
[3] Ibid, at p. 135.

A probable explanation of the decision in *Ajose* v. *Jinadu*,[1] in the light of *Coker* v. *Jinadu*,[2] is that the claim of the customary tenant was not one which could have been put forward in opposition to the registration of the owner's reversionary title, whereas in the later case the first defendant's customary title could not be established without impugning the validity of the sale, which was the foundation of the application for first registration. It follows that a first registration cures defects in the title of the purchaser of family land, but will not discharge it of any existing incumbrance under customary law.

Protection of Unregistered Estates and Interests

An unregistered estate or interest may be protected either by the registration of a caution or a restriction, whichever is appropriate in the circumstances.

(i) *Caution*

The essence of registering a caution is to give the cautioner an opportunity of being heard before a dealing in the land is registered. A caution may be entered against first registration or against dealings in registered land. Section 43 deals with the first situation. Under that section, any person claiming any estate or interest in, or who has a claim over, any unregistered land or lease, may lodge a caution against first registration.[3] This is quite suitable for the protection of equitable estates arising from estate contracts. Sub-section (2) deals specifically with claims over family land or a right or interest under customary law. Thus, a member of the family suspecting that an unauthorized sale of the family's property is to be made could lodge a caution to enable him to challenge the disposition. Where a person successfully opposes an application for first registration under section 10, he is deemed, upon paying the prescribed fees, to have lodged a caution against first registration within the meaning of subsection (2).

Section 44 deals with caution against registered dealing. The effect of registering a caution under that section is that, so long as the caution is subsisting, no disposition or change of ownership affecting the land can be registered without the cautioner's consent until the end of fourteen days after service by the registrar of notice of the proposed registration.[4] The registrar may, however, grant an extension of time where he is satisfied that the delay was due to circumstances beyond the cautioner's control and that the cautioner's claim can be established.[5]

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[1] Loc. cit.
[2] [1958] L.L.R. 77.
[3] S. 43 (1).
[4] S. 44 (2).
[5] Ibid.

A caution may not be entered on the certificate of title unless with the registrar's consent or upon the orders of the registrar.[1]

(ii) *Restriction*

Section 45 deals with restrictions. Unlike a caution, a restriction is a friendly entry. A restriction prevents the registration of a dealing until certain specified requirements have been complied with.[2] It may be registered where the registered owner is not absolutely entitled for his own benefit.[3] Unlike a caution, a restriction may be entered by the registrar of his own initiative[4] and may be noted on the certificate of title.[5]

Dealings in Registered Land

Dealings in registered land must be in the manner prescribed by the Act, and the transaction must be completed by the registration of the purchaser as owner of the land or the interest purchased. Until such registration the title remains in the registered grantor.[6] This provision does not govern a transfer by an applicant for first registration. Such transfer should be effected by the conventional deed of conveyance.[7] Notwithstanding this provision, any person, whether he is a registered owner or not, who has a sufficient interest or power over registered land may deal with it in any manner and by the same mode of assurance as if the land had not been registered. Such disposition will, however, be overridden by a subsequent registered disposition for value.[8] A registered purchaser is not affected by any notice, express or implied, of an unregistered interest[9]; neither is he concerned to inquire whether the terms of any caution or restriction, insofar as they relate to the time prior to the registration of himself as owner, have been complied with.[10]

Extent of the State's Guarantee of Registered Title

The title conferred upon the first registered owner under the Act is not absolute. The extent of the rights obtained by him is defined in section 48 which provides as follows:

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[1] S. 44 (4).
[2] S. 45 (1).
[3] S. 11 (2); s. 45 (1).
[4] S. 45 (3).
[5] S. 45 (2).
[6] S. 28. For the relevant forms see the first schedule.
[7] See *Phillips* v. *Ogundipe* [1967] 1 All N.L.R. 258.
[8] S. 42 (1).
[9] S. 54; applied in *Balogun* v. *Salami*, loc. cit.
[10] Ibid.

(i) Registration of any person as owner of freehold land shall vest in that person an estate in fee simple in that land, together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of registration demised, occupied, or enjoyed with, or reputed or known as part or parcel or appurtenant to the land or any part thereof, and free from all estates whatsoever, including those of the State: Provided that registration of any person under this [Act] shall not confer any right to any minerals or to any mineral oils as defined in the Minerals Ordinance and the Mineral Oils Ordinance respectively.

(ii) Registration of any person as owner of a lease shall vest in that person the possession of the land comprised in the lease for the unexpired residue of the term created by the lease, with all implied or expressed rights, privileges, and appurtenancies attached to the estate of the lessee, and free from all estates whatsoever, including those of the State.[1]

(iii) The estate of every registered owner of land is subject
  (*a*) to any registered charges or incumbrances;
  (*b*) to any estates by this [Act] declared not to be incumbrances;
  (*c*) to any unregistered estates created by himself or arising by reason of his fiduciary relation to any person or protected by a caution or restriction or other notice, note or entry.[2]

(iv) The estate of the first 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.[3]

(v) 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.[4]

The implication of the provisions of sub-section 3 is that if the title of the first registered owner is in issue in any proceedings between him and a person claiming adversely to him, the register cannot be evidence of his title. He must prove the validity of the transaction leading to the registration in the same way as if the title had not been registered. This point is borne out by the observation of Butler Lloyd, Ag. C.J., in *Animashawun* v. *Mumuni*,[5] where he said '. . . the registration of a title under Ordinance No. 13 of 1935 affords no protection whatever to the first registered owner, not even against

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[1] Sub-s. 1.
[2] Sub-s. 2.
[3] Sub-s. 3.
[4] Sub-s. 4.
[5] (1941) 16 N.L.R. 59.

an unsuccessful objector to the registration, even apparently if that objector had appealed unsuccessfully to the Supreme Court.'[1]

Moreover, section 53 (1) provides that registration which is obtained in consequence of a forged disposition or any disposition which, if unregistered, would be void,[2] is ineffectual to confer on the registered owner any estate in the land, although he may be entitled to compensation from the Government where the register is rectified to his prejudice.[3] However, it seems that, until the register is rectified, the registered owner remains the legal owner and the person who has proved an adverse title to his cannot, in the meantime, succeed in an action for a declaration of title. Thus in *Rihawi* v. *Aromashodun*,[4] the plaintiff sued on behalf of members of his family claiming a declaration of title that certain land registered in the name of the first defendant was their family land. The first defendant purchased the land from the other defendants. The trial judge found that the property was the plaintiff's family property and that the sale to the first defendant conferred no title on him, and granted the declaration sought. In reversing the decision on appeal, Verity, C.J., observed:

> It is in my view clear that the plaintiff could not secure in the present action the relief he sought, for before he could secure a declaration of his title, . . . it would be essential that he should secure a rectification of the register, establish his adverse estate and remove from the register the title of the first defendant. This was neither sought nor obtained and for this reason also I think the appeal must be allowed. . . .[5]

Thus, a party seeking a declaration of title in such circumstance must first claim an order for rectification and then the declaration sought.

Subsequent Registered Owner

Section 48 (3) relates to the position of the first registered owner only. Similarly section 53 (1) governs only the position of the registered owner whose registration is immediately consequent on a forged or void disposition. A purchaser for value from such registered owner is protected by section 53 (2) which provides that: 'Nothing in this section shall be deemed to invalidate any estate acquired by any registered owner being a purchaser for value or by any person deriving title under such subsequent owner.'

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[1] The view that an unsuccessful objection does not secure the title of a first registered owner against the unsuccessful objector ignores the rule as to *res judicata* and is inconsistent with the opinion of the Supreme Court in *Adebona* v. *Amao*, loc. cit. It is also inconsistent with the provisions of s. 10 (3) of the Act.

[2] As in the case of a sale or lease of family property without the requisite consent.

[3] S. 53 (1).

[4] (1952) 14 W.A.C.A. 204.

[5] S. 61 makes provisions for the rectification of the register.

The scope and effect of this proviso was considered by the Federal Supreme Court in *Yesufu and Another* v. *Ojo and Others*.[1] The land in dispute originally belonged to one, F. A., a woman, who had two domestics, M. O. and J. A., whom she regarded as her daughters, having no children of her own. F. A. died in 1928 and the property was said to have been devised to J. A. by her will, but the will was never proved. Nevertheless, J. A. succeeded in having her title registered in 1945. She died in 1952 and her son, the first respondent, was registered as the sole owner of the property. In 1954, the first respondent transferred his interest to the second, third and fourth respondents who were duly registered as owners. In these proceedings the appellants, who were the children of M. O., sought a declaration that the property in issue was family property and that, as such, the disposition to the second, third and fourth respondents by the first respondent was invalid as they did not consent to it. The trial judge found that, the will of F. A. not having been proved, the registration based on it was invalid, and that the property was the family property of F. A. to which the appellants and the first respondent were together entitled, but that in view of the provisions of section 53 (2) of the Act, the registered title of the second to fourth respondents was indefeasible. The decision was upheld by the Federal Supreme Court.

An attempt was made by the appellant's counsel to restrict the operation of section 53 (2) to cases where the first registered owner's title was based on a forged or void *disposition* only. However, Mbanefo, F.J., who delivered the opinion of the court, rejected the submission on the grounds that 'Section 53 should be construed in the context of the whole [Act] and any sub-section of it should be construed not only with reference to the section but to the whole Act as well'.[2]

The protection given under section 53 (2) is only to a purchaser for value. A volunteer takes only the title of his predecessor, whatever it is. 'Value' is not defined. In view of the fact that section 5 specifically made reference to a conveyance for a consideration consisting wholly or in part in money, one may be justified in saying that 'value' is here 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 subsection.[3]

Although the statute says nothing about good faith on the part of the subsequent registered owner, from the following passage which occurred in his judgment, Mbanefo, F.J., seemed to be of the view that *mala fide* on his part might defeat the title guaranteed to him. As the learned judge said:

It is not suggested that they[4] paid an under value and nothing has been

[1] (1958) 3 F.S.C. 106.
[2] Ibid, at p. 107.
[3] *Lababedi* v. *Lagos Metal Industries* (*Nigeria*) *Ltd*, [1973] 1 S.C. 1 at p. 14.
[4] The second to fourth respondents.

said which could defeat their title in equity. It is the interest such as theirs that section 53 (2) was designed to save.[1]

Had it been proved that the respondents paid an under value, or that the transaction had been unconscionable, the court might have come to a contrary conclusion. In view of the wide interpretation which has been given to section 53 (2), this limitation is a useful weapon in the judge's hands to prevent an abuse of the sub-section which by itself does not seem fair to the true owners of land. However, it should be remembered that the court will not inquire into the adequacy of consideration. So far as a genuine bargain can be identified, the Act should be given effect to. It is, therefore, suggested that the court should not intervene unless it is clear that the 'value' given is illusory, and is only a disguise for a voluntary disposition; or that the statute is being used as an engine of fraud, as where there is a conspiracy between the first registered owner and his registered purchaser to defeat the interest of the unregistered owner by invoking the sub-section. Thus a registered transferee who takes with notice of the invalidity of his transferor's title should not be protected. In any case, section 53 (2) does not protect a registered owner where the immediate disposition to him is void.[2] Such a case would be governed by section 53 (1) whether he is the first, second or other subsequent owner. Section 53 (2) was not intended as an engine of fraud to validate spurious transfers of registered land.[3]

Overriding Interests

The title acquired by a registered owner is made expressly subject to certain unregistered interests which are described as overriding. 'In general they are the kind of rights which a purchaser of unregistered land would not expect to discover from a mere examination of the abstract and title deeds but for which he would make inquiries and inspect the land.'[4] and which are inconvenient to put on the register. Overriding interests bind the registered owner of the land even though he has no knowledge of them and no reference is made to them in the register. The rights are listed in section 52, and are as follows:

(i) easements
(ii) rights, privileges, and appurtenances, appertaining or reputed to appertain to any other land demised, occupied, or enjoyed with any other land or known as part and parcel of, or appurtenant to any other land
(iii) rights of entry, search and user, and any other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines, minerals, and mineral oils

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[1] *Yesufu and Another* v. *Ojo and Others*, loc. cit., at p. 108.
[2] *Phillips* v. *Ogundipe* [1967] 1 All N.L.R. 258. See also *Lababedi* v. *Lagos Metal Industries (Nigeria) Ltd*, loc. cit.
[3] Ibid.
[4] Megarry and Wade, op. cit., p. 1054.

(iv) leases or agreements for leases for any term less than five years where there is actual occupation under the lease or agreement

(v) any public highway

(vi) any tax or rate for the time being declared by law to be a charge on leases

(vii) rights acquired or in the process of being acquired under the limitation Decree

(viii) the rights of every person in possession or actual occupation of the land which he may be entitled in right of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed

The last item requires some comment. The section did not say that the registered owner is bound by the *possession* of a person in occupation at the time of the grant to him, or of registration. It is his *right* that is binding on the registered owner. If it turns out that the person in possession has no right to be there, his possession will not encumber the land. This point was explained by the Supreme Court in *Balogun* v. *Salami and Others*[1] where the following facts occurred. The plaintiff purchased family land without the consent of the defendants who were in possession. The plaintiff applied to be registered as owner and was duly registered. In this action the plaintiff sought to eject the defendants who relied on section 52 (1) h. The decision turned on the relation of that section with section 10, which provides that any claim that land comprised in a registered title is family land which might have been put forward in opposition to an application for first registration should not be entertained by the registrar or the court under any of the provisions of the Act. The defendants did not oppose the registration of the plaintiff as owner and the plaintiff's action for ejection succeeded. As Bairamian, F.J., said:

> . . . a person is not entitled to any benefit 'in right of [his] possession' when his rights are based on a claim as aforesaid, for the claim cannot be entertained and any rights based on it are consequently unenforceable.[2]

A fortiori, a person who has no right whatever to possession, such as a trespasser, has no right over the land that can prevail over the title of the registered owner. As Bairamian, F.J., further said:

> The true position is that the purchaser must give effect to those rights, whatever they are, and their nature and validity is a matter of investigation. The alleged rights might turn out to be such as cannot be entertained. . . .[3]

It should also be well noted that the registered owner is not bound to give

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[1] [1963] 1 All N.L.R. 129.
[2] Ibid, at p. 135.
[3] Ibid, at p. 138.

effect to the right of a person in possession if, upon inquiry, that person failed to disclose the nature of his occupation.

Because of the existence of these overriding interests a purchaser of registered land is not relieved of the necessity of inspecting the land before completing the transaction. He should inspect the land in the same way as a purchaser would under the system of unregistered conveyancing.

This observation is subject to the provision of section 54 which, as we have seen, protects a registered owner who purchased for value against any unregistered estate, interest or claim affecting the estate of any previous registered owner, irrespective of notice, whether express or implied, on his part. In *Balogun* v. *Salami*,[1] it was held that the fact that the owner of such unregistered estate or interest was in possession could not remove his case from the ambit of the provision, and that since by that section the registered owner for value is not to be affected by the notice which the possession constitutes, his estate or interest cannot rank as an overriding interest. Accordingly, he could be evicted. This construction constitutes a serious limitation of the value of section 52 (h).

Rectification

Section 61 makes provision for rectification of the register. Rectification may be ordered either by the court or the registrar subject to an appeal to the court, in any of the following circumstances:

(i) where the court has decided that a person other than the registered owner is entitled to the estate or interest registered and as a consequence of such decision the court is of the opinion that a rectification of it is necessary and makes an order to that effect
(ii) where the court, on the application of any person who is aggrieved by any entry made in, or by the omission of any entry from the register, makes an order for a rectification of the register
(iii) where all the persons interested consent to the register being rectified
(iv) where two or more persons are by mistake registered as owners of the same registered estate or of the same charge
(v) in any other case where by reason of any error or omission in the register it may be deemed just to rectify the register

However, the register cannot be rectified to the prejudice of an owner in possession except:

(i) for the purpose of giving effect to an overriding interest, or
(ii) where such owner is a party or privy, or has substantially contributed by his act, neglect or default to the fraud or mistake in consequence of which such rectification is sought, or
(iii) where the immediate disposition to him was void or the disposition to any persons through whom he claims otherwise than for value was void, or

[1] Loc. cit.

(iv) where, for any other reason, in any particular case it is considered to be unjust not to rectify the register against him.[1]

Compensation

Any person who has suffered a loss as a result of a rectification or non-rectification of the register is entitled to compensation from the Government under section 63. The right to compensation is, however, excluded where the person suffering loss has substantially contributed to the mistake, fraud or omission necessitating the rectification, or in respect of an entry made with his consent or where he was a party to the proceedings resulting in an order by virtue of which the entry was made.

In *re Chowood Registered Land*,[2] decided on comparable English statute, it was held that a person suffers no loss where the register is rectified in order to give effect to an overriding interest, because by rectifying the register in such a circumstance 'rectification of the register merely recognized the existing position, and put [the registered owners] in no worse position than they were in before'. That being the case, it follows that a registered owner will not be deemed to have suffered loss where the register is rectified by expunging his name from the register in order to give effect to an unregistered estate ranking in priority to the registered estate under section 48 (3).

Exemption of Registered Land from the Land Registration Act

An instrument which originates an application for first registration under the Act, and one affecting registered land executed after first registration are not registrable under the Land Registration Act, 1924. A registered owner being a purchaser for value subsequent to first registration is not affected by notice of any document registered under the Land Registration Act.[3] The provision does not apply to a mortgage created before first registration or to a document affecting an estate registered as an incumbrance in priority to the estate of the first registered owner.[4] Quite unnecessarily, the section goes further to

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[1] S. 61 (3). See *Lababedi* v. *Lagos Metal Industries (Nigeria) Ltd*, [1973] 1 S.C. 1 at p. 16.

[2] [1933] Ch. 574. Followed in *re Boyle's Claim* [1961] 1 All E.R. 620.

[3] S. 86. This was formerly s. 85. There is a contrary statement in Dr Elias's *Nigerian Land Law and Custom*, p. 346, but that statement was based on the old provision of s. 85. The decision in *Zard* v. *Diamandis* (1936) 13 N.L.R. 114, used by the learned author to explain operation of the provision, has also been overtaken by the new provision in s. 86. The first registered owner has, however, the obligation to search the Registry of Instruments.

[4] Ibid. It is difficult to interpret the first leg of this provision in view of the decision in *Onashile* v. *Idowu and Others*, loc. cit.

provide that its provisions do not affect any obligation to register under the Land Registration Act, 1924, any document affecting other land apart from registered land.

In *National Investment Property Co.* v. *Bank of West Africa Ltd*,[1] Bairamian, F.J., held that the effect of section 86 was that a document exempt from the Land Registration Act was admissible in evidence, irrespective of whether it had been registered under the Registration of Titles Act. It has also been held that an instrument which ought to have been registered under the Registration of Titles Act, 1935, but was not so registered, does not cease to be unregistered because it was registered under the Land Registration Act, 1924.[2] In other words, the Land Registration Act, 1924 has no effect whatever in relation to land in a registration district after first registration under the Registration of Titles Act, 1935. This policy is clearly manifested in the Registered Land Act, 1965, which provides for compulsory registration of all titles by the provision that the Land Registration Act, 1924, shall cease to apply in relation to any area which is declared to be an adjudication area.[3]

[1] [1962] 1 All N.L.R. 556.
[2] *Johnson* v. *Onisiwo* (1943) 9 W.A.C.A. 189.
[3] S. 165 and the schedule thereto.

9 The State and Land

The discussion of the State's rights over land necessarily involves a discussion of the nature of the rights which became vested in the British Crown, the predecessor of the modern Nigerian State, when the colonial administration was established, especially since the policy which was adopted by the British administration has been continued by the present Nigerian Governments. The land policy in Southern Nigeria differs considerably from that in Northern Nigeria and the two areas will be treated separately.

Southern Nigeria

State Land

Except in respect of the comparatively small area over which the Government exercises direct proprietary control, land in Southern Nigeria is privately owned, although the State has undoubted rights as the sovereign authority to control the use and management of land by its private owners. It may even terminate ownership by the exercise of its powers of compulsory acquisition where the land is required for public purposes or for the purpose of schemes under the Town and County Planning Statutes.[1] Those areas under the direct control of the Government were formerly known as Crown lands and were held by the Government in trust for the British Crown absolutely. Crown land was re-christened 'State land' after the adoption of the 1963 Republican Constitution.[2]

State land is defined by section 2 of the State Lands Act[3] as:

> All public lands in the Federation which are for the time being vested in the President on behalf of or for the benefit of the Federal Republic or Federal Government, as the case may be, and all lands heretobefore held,

[1] Compensation must however be paid. The measure of compensation is the market value of the land at the date of acquisition. See s. 31, Constitution of the Federation, 1963.

[2] Adaptation of Laws Order, 1964.

[3] Cap. 45, Laws of the Federation of Nigeria and Lagos, 1958 Revision.

or hereafter acquired, by any authority of the Federation for any public purposes or otherwise for such benefit, as well as land so acquired under any Act of Parliament, but does not include lands which although acquired or so held are subject to the Land and Native Rights Act.[1]

The definition in the respective State legislation is to the same effect *mutatis mutandis*. The lands 'heretobefore held' were those acquired by the British Crown in virtue of any treaty, cession, convention or agreement, or by virtue of Her Majesty's Protectorate, as well as land acquired under the Public Land Acquisition Statutes.[2] It is, therefore, important to consider the extent to which the Cession of Lagos and the establishment of the Protectorate in Southern Nigeria vested beneficial ownership in the State.

State Land in the Former Colony

There was considerable confusion both on the part of the Government and the native population as to the nature of the rights acquired by the Crown under the Treaty of Cession, 1861, by which Lagos was ceded by Docemo, King of Lagos, to the British Crown. An early assurance was given to the Lagos chiefs that the treaty, far from abrogating private rights in land, would make such private rights more secure, but certain measures introduced by the Government (e.g. the system of crown grants) obscured the true legal position for many years. The court had an opportunity of pronouncing on the subject in *Attorney-General* v. *John Holt and Others*,[3] where it was held that the cession was a cession of territories and not merely of jurisdiction, but that at the same time the Crown had respected private rights of ownership. The decision in this case proceeded on the footing that Docemo and his chiefs were the true owners of the Port and Island of Lagos prior to the cession and could therefore make a valid grant to the Crown. That reasoning is, however, contrary to customary law. As Dr Elias has aptly remarked, King Docemo no more owned Lagos land at the time of the cession than the whitecap (or Idejo) chiefs, who, however, had a more valid but joint claim to Lagos by virtue of their headship of families who were the ultimate owners of Lagos and its surrounding.'[4]

The first direct confrontation between the Government and the native landowners on the effect of the treaty came several years after the cession, in *Onisiwo* v. *Attorney-General*.[5] This was a claim by the Onisiwo, a whitecap chief, for a declaration of title to certain lands in the neighbourhood of Abekun Lighthouse, which was claimed by the Crown as Crown land in virtue of the Treaty of Cession, 1861. It was not disputed that the Onisiwo family was in occupation before 1861, but it was contended by the Attorney-

[1] See Adaptation of Laws Order, 1964.
[2] See Crown Lands Law, Western Nigeria, Cap. 29.
[3] (1910) 2 N.L.R. 1.
[4] T. O. Elias, *Nigerian Land Law and Custom*, p. 12.
[5] (1912) 2 N.L.R. 79.

General that the land being included in the territory ceded became the absolute property of the Crown. The Court rejected the Onisiwo's argument that Docemo could not make a valid grant to the Crown, on the grounds that the treaty of cession was not of the nature of a conveyancing transaction but was an Act of State by the supreme executive authority of Lagos. For the Crown, while it was conceded that by the principles of international law private property ought to be respected by the Sovereign who accepted the cession, it was contended on the authority of *Cook* v. *Sprigg*[1] that no municipal court could enforce such an obligation. The court was not, however, impressed. As Osborne, C.J., observed: 'If the Crown had chosen to repudiate this obligation, this court would have had no jurisdiction. But this case is distinguishable from *Cook* v. *Sprigg* in one essential particular: there the obligation repudiated was not expressly recognized by the Crown, whereas in this case the obligation now sought to be repudiated, i.e. the obligation to recognize rights of private ownership in the ceded territories, had actually been adopted and such recognition had been made part of municipal law.' The Chief Justice then referred to the numerous ordinances between 1863 and 1908, in particular the Public Lands Ordinance, which authorized the acquisition of privately owned land for public services upon payment of compensation and under which many parcels of land including land in the neighbourhood of the land in dispute had been acquired by the Government, and held that it was too late for the Crown to change its mind. Accordingly, it was held that the Government should comply with local law in the acquisition of the land in dispute.[2]

These views were approved several years later by the Privy Council in *Amodu Tijani* v. *Secretary, Southern Nigeria*[3] where their Lordships declared:

> As the result of cession to the British Crown by former potentates the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which as the outcome of deliberate policy have been respected and recognized; even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.[4]

Later in the judgment, their Lordships further observed that the usufructuary occupation might be so complete as to reduce any radical right in the Sovereign

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[1] (1899) L.R. 1 App. Cas. 572.

[2] The obligation to recognize private rights was not however respected in the case of the Ikoyi area of Lagos which was appropriated by the Government without protest from the chief of the area. The Government's claim to beneficial ownership in fee simple was confirmed by the Supreme Court in 1904 in *Onikoyi* v. *Jimba*. See Meek, *Land Tenure and Land Administration in Nigeria*. 1957, p. 67.

[3] [1921] A.C. 399 at p. 404; (1921) 3 N.L.R. 24, at p. 59.

[4] Ibid, p. 404.

to one which extended to the comparatively limited right of administrative interference.[1]

The false impression created by the issue of Crown grants was corrected in 1947 by three statutes dealing with various aspects of the subject. These three statutes are the Crown (now State) Grants Act,[2] the Arotas (State Grants)[3] Act and the Epetedo Lands Act.[4] The effect of the statutes is that, although Crown grants purported to vest the land comprised in them in the grantee for a fee simple estate, the title of the grantee would still be subject to the interests and restrictions recognized by customary law. Thus, where a Crown grantee was a customary tenant, or a member of a family in occupation of family land, the Crown grant could not enlarge his interest to an absolute title, but the land would be held subject to the customary restrictions.[5] However, under the Epetedo Lands Act, which dealt with the tenure of land in the Epetedo area, the Crown grantee whose grant was subject to customary law could, within one year of the commencement of the Act, enfranchise the land by paying to the chief the value of his reversion, which was fixed by the Act at $2\frac{1}{2}\%$ of the capital value of the land, including buildings thereon. The effect of enfranchisement is that the customary claims of the chief are extinguished.[6] The implication of these provisions is that a Crown grant, ostensibly the best root of title, is not necessarily a sufficient proof of title.

Mention should also be made of the Glover Settlement Act, also of 1947,[7] which dealt with tenure of land within the area of Ebute-Metta known as Glover Settlement. The area which was vested in the Oloto family under customary law between 1867-8 was placed at the disposal of Captain Glover, then Administrator of the Colony, for the purpose of resettlement of certain Egba refugees who sought protection in the Colony. The area was laid out by the Administrator in plots and each plot was allocated to a refugee who was given a voucher, later known as 'Glover tickets', which contained particulars of the plot and of himself. The areas allotted were shown in an allotment plan which is still preserved, but the office copies of the tickets were destroyed about 1885. This caused great uncertainties of tenure, and much litigation followed. Moreover, the nature of the title conferred by the Glover tickets was not clear. The holders regarded them as equivalent to Crown grants. The statute made provision for the appointment of an officer, referred to as the 'prescribed officer', to investigate claims to Glover tickets and award a certificate of title to the occupier who could prove the issue of a

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[1] Ibid, p. 410.
[2] Cap. 44.
[3] Cap. 14.
[4] Cap. 61.
[5] See *Chairman L.E.D.B.* v. *Olowu* [1958] L.L.R. 96. See also *Alaka* v. *Alaka* (1904) 1 N.L.R. 55.
[6] As to the right to have a tenement enfranchised see *Ope* v. *Ope* (1959) 4 F.S.C. 208.
[7] Cap. 75.

ticket to his ancestor. Furthermore, under the Act the Crown relinquished all claims to land in the area other than the areas actually occupied by the Government, which remained Crown land. With regard to land within the Allotment Plan, the statute declared the reversionary rights of the Oloto family. In other words, holders of land within the Glover Settlement area were in the position of customary tenants of the Oloto family. 'Any plot not allotted remained vested (in possession) in the Oloto family.'[1]

It is thus evident that land which was not the subject of private ownership before the cession would at least be State land. This probably explains why compensation is not payable under the Public Lands Acquisition Act in respect of unoccupied lands.

State Land in the Former Protectorate

The position in the former Protectorate (now the Western, Mid-Western and Eastern States) is less complex. The Crown did not lay any claim of beneficial ownership to land by virtue of the declaration of the Protectorate. The Crown however inherited certain parcels of land which were vested in the Royal Nigeria Company, its predecessor. The Company had seized the opportunity of its position as Government to acquire large concessions of land from local chiefs along both sides of the Niger, upon which there were, and still are, native settlements. These parcels of land, with the exception of the Company's trading posts,[2] became vested in the Government in trust for Her Majesty absolutely by virtue of the Niger Lands Transfer Ordinance, 1916.[3] To have allowed the Company to retain ownership of these lands would have been politically inexpedient.

The statutory transfer, unlike the treaty of cession, is of the nature of a conveyancing transaction. Accordingly the State's title thereto under the statutory transfer must stand and fall with the Company's title, since what was vested in the Government was the right title and interest of the Company in the respective areas. There is no case in which the agreement has been challenged but there are dicta in *Egbuche* v. *Idigo*[4] in support of this view. The plaintiff in that case claimed a declaration of title to the land in dispute and sought to rely, as evidence of an overt act of ownership, on an agreement of 1898 by which his ancestor had conveyed the land to the Royal Niger Company. Neither the Company, nor its successor, the Crown, took possession or exercised any overt acts of ownership in respect of the land. The trial court held that the effect of the agreement was that the land was Crown land, but it nevertheless gave judgment for the plaintiff on the grounds that the Crown was deemed to have abandoned possession. Graham Paul, J., reversed the judgment on the grounds that the plaintiff's ancestors, having

[1] *Per* Abbott, F.J., in *Odutola* v. *Akande* (1960) 5 F.S.C. 142 at p. 144.
[2] See the 4th Schedule.
[3] S. 1, Cap. 149, Law of Nigeria, 1948 Revision, now a regional legislation. As to the description of these lands see the Schedule to the Ordinance.
[4] (1934) 11 N.L.R. 140.

on their own showing divested themselves of their title to the land, no longer had any right in the land. It was further held that non-occupation or exercise of any right of ownership by the Crown was no evidence of abandonment by the Crown of its rights under the statutory transfer, or by the Royal Niger Company under the agreement of 1898. The court, however, made the following observation:

> In dealing with the rival versions of the facts the court below said, 'There is really very little to choose between these two versions.' I am in no better position. I am unable to hold that the defendants/appellants have in the court below established their title to the land. I am unable to hold that in 1898 the plaintiffs/respondents were in a position to give a good title to the Royal Niger Company to this land. I cannot therefore hold that the land in question is Crown land, as the court below held.[1]

Although the court held that the non-occupation of the land by the Crown was no evidence of abandonment, it would seem that the Government might be estopped by laches and acquiescence from recovering the land from villagers who had developed it, particularly after the grant to the Royal Niger Company, even where the agreement was valid.[2]

Section 10 (1)[3] empowers the Government to abandon all rights, title or interest in any of the lands vested in it under the statutory transfer, either in whole or in part, with effect from a specified date. The Government's decision to abandon its rights must be signified by an order, called a 'divesting order'. As a result of this provision, a number of claims have been abandoned by the Government. In *Egbuche* v. *Idigo*,[4] Graham Paul, J., held that the effect of abandonment by the Crown was to revive the title of the Royal Niger Company. That is not a correct view of the law, however; the effect of a divesting order is that the land reverts to the original owners or their successors.[5]

Foreshore

In *Attorney-General* v. *John Holt*,[6] and again in *Chief Secretary* v. *The Attorney-General and Others*,[7] it was held that the land covered by the narrow seas adjoining the coast, by arms of the sea or by public navigable rivers, and also the foreshore, i.e. land between the high and low water-marks, belong to the State by prerogative. Accordingly, 'the sole rights which a riparian grantee of land could claim over the foreshore prior to the cession, whether under written grant or under native tenure, unless he

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[1] Ibid, at p. 143.
[2] See *Nwakobi* v. *Nzekwu* [1964] 1 W.L.R. 1019.
[3] S. 8 (1) Niger Land Transfer Law, W.N. Cap. 82.
[4] (1934) 11 N.L.R. 140 at p. 143.
[5] See *Nwakobi* v. *Nzekwu*, loc. cit.
[6] (1910) 2 N.L.R. 1.
[7] [1956] L.L.R. 61.

happens to have had a specific written grant of the foreshore, were the rights to use it for access to water and for landing and embarking, mooring and handling up canoes'.[1]

> As regards the bed of the lagoon (prior to reclamation) no native law and custom has been established, and there is, therefore, no need to envisage the possibility that any of the chieftaincy families may have been owners of part of the bed of the lagoon.[2]

Accordingly, it is State land by virtue of the cession of the port and island of Lagos under the treaty of 1861.

Beach land is not governed by these decisions; it may be the subject of private ownership.[3]

Management of State Land

State land is public property but, unlike community land under customary law, a member of the public has no right to use State land unless he obtains a grant from the Government. Indeed, an unauthorized use of State land is not only a trespass, it is also punishable by a fine of ₦100.[4] A member of the public has no *locus standi* to challenge an improper disposition of State land. His remedy is political, not legal.

State land in each State, with the exception of those occupied by and vesting in the Federal Government, is vested in the State Governor in trust for the public benefit, and is subject to the disposition of the Governor. Federal lands are vested in the President (now Head of the Federal Military Government) but are subject to the disposition of the Minister (now Commissioner) responsible for land.

The management of State land is regulated by the State Lands Act,[5] now a Federal and State legislation in the case of Federal and Lagos State Governments respectively, the Crown Lands Law of Western Nigeria[6] in respect of the Western and the Mid-Western States, and the State Lands Law of Eastern Nigeria[7] in respect of the Eastern States. The provisions of the various statutes are substantially the same.

State land may not be sold without the approval of the Federal Executive Council, but the Government may grant leases to private individuals.[8] Such leases may be for an indefinite term in the case of a grant to a native of

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[1] *Per* Osborne, C.J., in *Attorney-General* v. *John Holt*, loc. cit., at p. 8. Approved by de Commarmond, C.J., in *Chief Secretary* v. *Attorney-General*, loc. cit.

[2] Ibid, *per* de Commarmond, C.J., at p. 68.

[3] See *Dede* v. *African Association* (1910) 1 N.L.R. 130; *Braide* v. *Adoki* (1931) 10 N.L.R. 15.

[4] S. 36, State Lands Act.

[5] Cap. 45, Laws of the Federation of Nigeria and Lagos.

[6] Cap. 29, Laws of Western Nigeria.

[7] Cap. 122, Laws of Eastern Nigeria.

[8] S. 4.

Nigeria,[1] but the regulations provide that the maximum term that may ordinarily be granted should not exceed 45 years in the case of agricultural leases and 99 years in the case of building or other leases. In the Lagos State, a lease of State land in favour of an alien may not be granted for a term exceeding 25 years,[2] inclusive of any option of renewal. Section 7 also contains some standard covenants and conditions which are deemed to be implied in every lease of State land, unless a contrary stipulation is contained in the lease. One such condition is that the lessee shall not assign, sublet or otherwise part with the possession of the land comprised in such lease or part thereof without the previous consent of the Governor in writing.[3]

In *Esi* v. *Moruku*,[4] Jackson, Assistant J., was of the view that an assignment or sublease in contravention of the statute was illegal, and that no court should lend its machinery in aid of its enforcement. In that case the appellant, a State lessee, granted a sublease to the defendant without the consent of the Government. The defendant went into possession but failed to pay rent. The plaintiff's action for arrears of rent was dismissed by the Magistrates' Court and the decision was affirmed on appeal. This decision was dissented from by Bairamian, J. (as he then was), in the later case of *Harry* v. *Martins*.[5] In that case, the appellant, a State lessee of the plot in question, granted a sublease to the respondent without consent. There was no evidence that the defendant knew that the plot was State land. The appellant re-entered and was sued by the respondent for damages for unlawful ejectment. The appellant's plea that the sublease was illegal was rejected. As the learned judge said, breach of covenant only entitles the Government to sue for forfeiture pursuant to section 16 (now 17). In other words, covenants implied under the statute are to be construed as covenants in an ordinary lease. Similar views were expressed by the West African Court of Appeal in *Marques* v. *Edemantie and Another*.[6] One is inclined to agree with the second point of view, which is consistent with the decision of the Federal Supreme Court in *Solanke* v. *Abed*.[7]

The Governor may also grant licences to private individuals for the temporary occupation of State land[8] for a term not exceeding twelve months.[9] A temporary occupational licence expires on the date given in it, unless it is surrendered or sooner determined under regulation 5. The nature of a temporary occupational licence was considered in two cases. First, in *Attorney-General* v. *Onipede*,[10] it was held that a holder of a temporary occupational

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[1] Ibid.
[2] State Land (Amendment) Regulation, 1971, Reg. 1.
[3] S. 7 b (iii); formerly s. 6.
[4] (1940) 15 N.L.R. 116.
[5] (1949) 19 N.L.R. 42.
[6] (1950) 19 N.L.R. 75 (editor's note).
[7] (1962) N.N.L.R. 92.
[8] S. 4.
[9] State Land (Temporary Occupation) Regulations, Reg. 2.
[10] [1962] 2 All N.L.R. 137.

licence to whom exclusive possession of premises was granted was not a licensee of the Government but a tenant at will. Accordingly the Government could not eject him without complying with the Recovery of Premises Act which protected tenants against unreasonable eviction. Second, in *Udoh* v. *Oshinaike*,[1] it was held that a holder of a temporary occupational licence who remained in possession after the expiration of his licence was not a tenant holding over, but a trespasser.

The Government may resume possession of land granted to State lessees or licensees where the land is required for public purposes, but the occupier is entitled to compensation.[2]

Control of Dispositions to Aliens

Subject to certain exceptions to be noted later, the approval of the Government is an essential element of any transaction in which an alien acquires an interest in land, and the maximum interest which he can acquire is a leasehold interest. The law on the subject dates back to 1900 when the Protectorate of Southern Nigeria was established. The Native Lands Proclamation, No. 1, of 1900 which gave effect to that policy was replaced by an Ordinance in 1908 which was in turn replaced by the Native Lands Acquisition Act of 1917.[3] That Ordinance was re-enacted with minor amendments by the former Western Region as the Native Lands Acquisition Law,[4] which now applies to the Western and Mid-Western States, and by the legislature of the former Eastern Region as the Acquisition of Land by Aliens Law,[5] which now applies to the Eastern States. The Ordinance of 1917 was not applied to the Colony which is now the Lagos State. Even when parts of Lagos State were administered as the Colony Province of the former Western Region, the policy of excluding the Colony from this form of executive control was maintained. However, a new legislation, the Acquisition of Lands by Aliens Edict, 1971, has been enacted for Lagos State and provides for even more stringent controls. The provisions of the various statutes are substantially similar, but there are important points of difference.

Under the respective statutes, an alien cannot acquire an interest in land within the State either from a native of Nigeria or from a fellow alien without the previous approval of the Governor.[6] Any agreement and any instrument (including a will) by or under which an alien purports to acquire any interest in or over land or which forms part of and gives effect to a transaction which has not been approved in accordance with the law is null and void.[7]

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[1] (1965) L.L.R. 203.
[2] S. 24. See also State Lands Compensation Decree, 1968.
[3] Cap. 144, Laws of the Federation of Nigeria and Lagos, 1948 Revision, now an obsolete legislation.
[4] Cap. 80, Laws of Western Nigeria.
[5] Cap. 2, Laws of Eastern Nigeria.
[6] S. 3 (1) and (2) West and East; s. 1 (1) Lagos.
[7] S. 3 (3) West and East; s. 1 (2) Lagos.

Under the Western and Eastern Regional Statutes, the maximum interest which an alien may acquire in land is a lease for 99 years, inclusive of any option of renewal, and the lease may not be granted to commence more than twelve months after the application for approval of the transaction was lodged.[1] In the case of Lagos State, the maximum term that may be approved is one for 25 years, inclusive of any option of renewal, and must not be granted to commence more than one month after the approval of the transaction.[2]

The lease, if approved, must be evidenced by an instrument which contains the covenants stipulated in the regulations. The most important of the covenants is that which stipulates that the rent reserved will be subject to revision on the exercise of any option of renewal or, in the case of the Western and Eastern Regional Statutes, every twenty years. Such revised rent would be fixed by agreement or, in default of agreement, by an arbitrator appointed under the Arbitration Law or Act, as the case may be.[3]

Interest in land, within the meaning of the respective statutes, is wide enough to cover any kind of right in land other than a licence. In *Elkali* v. *Fawaz*,[4] the interest in question was a lease for three years which was held to be void, not having been approved under the Native Lands Acquisition Ordinance. In the *British and French Bank* v. *Akande*,[5] it was held that an equitable mortgage created by the deposit of title deeds was an interest in land requiring approval. The approval not having been given, it was held that the deposit did not create an equitable mortgage. A lease for less than three years has been excluded from the operation of the Lagos Statute.[6] Furthermore, in exercise of the powers conferred by section 6 of the Lagos Statute, a transfer of an interest in land to a banking organization or a building society by way of mortgage has been exempted from the provision as to consent.[7] A similar provision in the Western and Eastern Nigeria Statutes is unnecessary, since a company incorporated in Nigeria is a native within the meaning of the Statute.[8]

The logical implication of the requirement that the agreement or transaction must receive the prior approval of the Governor is that the approval must be obtained before negotiation is concluded, but it is unlikely that the court would take a strict view of the provision, as it is improbable that the Governor would be approached for his approval before the parties had reached a binding agreement on the proposed transaction. The following

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[1] Reg. 4, Approval of Transactions Regulations.
[2] Reg. 4.
[3] Reg. 5 (2) W.N.; Reg. 3 Lagos.
[4] (1940) 6 W.A.C.A. 213.
[5] [1961] 1 All N.L.R. 820.
[6] Acquisition of Land by Aliens (Amendment Edict), 1971.
[7] Legal Notice No. 15 of 1971.
[8] All companies operating in Nigeria are now deemed to be incorporated under the Companies Decree.

observation of Viscount Simmonds in *Dennings* v. *Edwardes*[1] on the construction of a similar provision of the Kenyan Crown Lands Ordinance is instructive. As his Lordship said:

> Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiations would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of the opinion that there was nothing wrong in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till the consent was obtained. After it was obtained the agreement was complete and effective.[2]

It is, however, clear that, until the approval is obtained, the agreement is ineffectual to vest any interest in the land in the alien. In *Elkali* v. *Fawaz*[3] it was held that in the absence of proof of the Governor's approval the court could not grant specific performance of the agreement. For the same reason, it was also held that an action for damages for breach of contract did not lie. Similarly, in *Naham* v. *Odutola*,[4] it was held that an agreement which had not been approved could not confer on the alien purchaser any equitable interest in the land. Thus, where a native enters into an agreement to dispose of land to an alien but conveys the land to another native before the Governor's approval is signified, the native who receives the land enjoys priority irrespective of notice on his part of the earlier transaction with the alien.

The decision to give or withhold consent is at the discretion of the Governor.[5] The Governor is not bound to give a reason, nor will the court query his motives. As Coker, J.S.C., has said:

> In the absence of any allegation of bad faith and in the absence of positive irregularity all the court can do is to see whether the power which is claimed to be exercised is one within the authority of the executive body or person and the court will not inquire into the reasonableness, the policy, the sense or any other aspect of the transaction.[6]

The reservation with regard to bad faith is important, particularly when one bears in mind that the statutory provisions in effect place a serious limitation on the native's freedom of contract, and that the question of abuse of the provisions cannot be ruled out. The type of protection which the court may give is, however, not clear. Certainly, the court cannot compel the Governor to give his approval, and the best an aggrieved party can hope to get is a declaratory judgment.

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[1] [1961] A.C. 245.
[2] Ibid, at p. 253.
[3] Loc. cit.
[4] (1953) 14 W.A.C.A. 381.
[5] S. 7, Lagos State.
[6] *Are* v. *Adisa and Another* (1967) N.M.L.R. 304 at p. 309.

Further Control in Lagos State

We have noted that an alien cannot acquire a freehold interest or right of absolute ownership to land within the State from the commencement of the Edict.[1] The Edict did not divest aliens of such interests already lawfully acquired before the introduction of the new measures. However, section 2 (2) provides that such interest may not be transferred, alienated, demised or otherwise disposed of to any other alien. By an exemption order a conveyance by way of mortgage to a bank has been exempted from the provisions of these two provisions.[2]

Section 2 (3) further provides that where a freehold interest which has lawfully been acquired by an alien becomes liable to be sold under any process of law, an offer must be first made to the Lagos State Government and, if the Government declines, then to a native of Nigeria. 'Any process of law' has not been defined, but it seems that only judicial sales are contemplated.

It is unlawful for an alien to occupy land unless the transaction under which he claims to occupy and the instrument giving effect to it has been approved under the provisions of the relevant statute.[3] Unlawful occupation by an alien is an offence punishable by a fine of ₦200 or imprisonment for twelve months.[4]

Who is an Alien?

An alien is any person who is not a native (indigene) of Nigeria and any company or association or body of persons corporate or incorporate other than those exempted.[5] A company incorporated in Nigeria is a native under the Western and Eastern Regional Statutes. In Lagos such a company is an alien unless the majority of the shares are held by natives of Nigeria.[6] Other bodies of persons exempted are:

(i) a corporate body incorporated under the Land (Perpetual Succession) Act where the corporate body is composed solely of Nigerians
(ii) a corporate body established under enactment relating to local government or education and empowered by that enactment to acquire and hold land
(iii) a co-operative society registered in the State, the majority of the members of which are natives of Nigeria

The Governor may by order exempt any company or body of persons corporate or unincorporate, from the provisions of the statute. We have noted

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[1] S. 2 (1).
[2] Legal Notice No. 15 of 1971.
[3] S. 4., Western Nigeria and Eastern Nigeria; s. 3, Lagos.
[4] Ibid.
[5] See s. 2., Western Nigeria and Eastern Nigeria.; s. 8, Lagos.
[6] Ibid.

that in Lagos banks and building societies have been partially exempted from the provisions of the Edict.[1]

Northern Nigeria

While the establishment of the colonial administration left the land tenure system in Southern Nigeria substantially unimpaired, it has transformed that of Northern Nigeria, where the land has been nationalized since 1910.

As in the case of the Protectorate of Southern Nigeria, British administration in Northern Nigeria was preceded by the administration of the Royal Niger Company, but in Northern Nigeria British hegemony was extended to most of the area by conquest, subsequent to the declaration of the Protectorate. The lands already acquired by the Royal Niger Company, with the exception of the Company's trading posts, became vested in the Government, thus becoming Crown land.[2] The Government also claimed, as successor to the conquered or deposed rulers, the land rights which the notes had claimed for themselves after the jihad.[3] This class of land was described as 'public land.'[4] Unlike Crown land, which was held by the Government in trust for Her Majesty, public land was vested in the Government in trust for the people. This distinction lasted until 1910 when, as a result of a recommendation of a committee set up by the Government in 1908 in response to certain pressures in England, the Government decided to take over the ownership of land. Effect was given to this policy by the Land and Native Rights Proclamation of 1910, which was repealed and re-enacted by the Land and Native Rights Ordinance of 1916.[5] That legislation has recently been replaced by the Land Tenure Law, 1962,[6] which is now the basic law on the subject in the six Northern States.

Section 4 (1) declared all lands in Northern Nigeria with the exception of certain parcels of land enumerated in sections 48 and 49 to be native lands, but those parcels of land which were formerly vested in the United Africa Company, as successors of the Royal Niger Company, have been acquired by the Government under statutory powers and declared as native land.[7] All native land is under the control and subject to the disposition of the Minister (now Commissioner) responsible for land matters, who is required to hold and administer the land for the use and common benefit of the natives.[8] No

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[1] L.N. 15 of 1971.
[2] See Crown Lands Proclamation, 1902.
[3] See McDowell, 'An Introduction to the Problems of Ownership of Land in Northern Nigeria', 1 Nig. L.J., 1965, p. 202, for a detailed historical account of the subject.
[4] See Public Lands Proclamation, 1902.
[5] Cap. 105, Laws of the Federation of Nigeria and Lagos, 1948 Revision.
[6] Cap. 59, Laws of Northern Nigeria, 1963 Revision.
[7] Legal Notice 425 of 1963.
[8] S. 5.

title to the use and occupation of land by a non-native can be validly acquired without the consent of the Minister.[1]

The combined effect of the provisions of sections 4 and 5 is that there are no freehold titles in Northern Nigeria. The individual cannot hold or acquire absolute ownership of land. The maximum interest which he can hold in land is a right of occupancy which is defined by the law as a title to the use and occupation of land, excluding a licence to enter land for the purpose of removing building materials.[2] There are two types of right of occupancy: (i) customary right of occupancy and (ii) statutory right of occupancy.

Customary Right of Occupancy

The customary right of occupancy is defined in the law as the title of a native or native community using or occupying native land in accordance with native law and custom.[3] From this broad definition, it is clear that the nature or quality of a customary right of occupancy is a matter for investigation in each case. It may approximate to ownership under customary law or it may be a lesser interest. It also follows that the entitlement to land and the mode of acquisition of a customary right of occupancy must necessarily be regulated by the customary law of the particular locality. But the law recognizes that a native acquires title to land through a grant from the traditional authority of the community in question. As a customary right of occupancy is defined as the right of a native, it follows that a non-native cannot hold a customary right of occupancy; it is a form of tenure available to natives only. A customary right of occupancy may however be sublet to a non-native. The law is silent on the classification of such a sublease and perhaps it is not a right of occupancy. For the purposes of the land, a native is defined as any person whose father was a member of a tribe indigenous to Northern Nigeria.[4]

Statutory Right of Occupancy

The statutory right of occupancy, on the other hand, is a right of occupancy granted under section 6 or any written law replaced by the law by the Governor, the Minister or a public officer of a native authority which is duly authorized and empowered for that purpose.[5] Unlike a customary right of occupancy, a statutory right of occupancy may be granted to natives as well

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[1] Ibid.
[2] S. 2.
[3] Ibid.
[4] S. 2. But a non-native whose mother was a native may succeed his mother in title upon the death of his mother upon the grant to such non-native of a certificate of occupancy in evidence of his title. In other words, the title would be converted into a statutory right of occupancy.
[5] Ibid.

as to non-natives. The grantee of a statutory right of occupancy is usually required to pay rent to the Government. The right of occupancy, particularly the statutory right of occupancy, has been likened to a lessee,[1] and this view is reinforced by the consideration that covenants and conditions such as are usually found in leases are normally contained in the certificate of occupancy evidencing the right of occupancy. Indeed, a demise of a right of occupancy is described by the law as a sublease.

The statutory right of occupancy may be granted to a native for an indefinite period of time[2] but is usually granted for a term of years which may not exceed 99 years or 40 years in the case of residential plots, granted to a native and a non-native respectively. In the case of commercial and industrial plots the term ranges between 40 years to 99 years, depending on the value of the improvement offered. The Minister may not grant a statutory right of occupancy or consent to the assignment or subletting of a right of occupancy to a person under the age of 21 years, but such a grant may be made to a trustee or a guardian on the infant's behalf. An infant may, however, inherit a statutory right of occupancy whether or not a guardian or trustee has been appointed for him.[3]

A single grant of a right of occupancy to a non-native may not exceed 1,200 acres if granted for agricultural purposes, or 12,500 acres if granted for grazing purposes.[4]

Certificate of Occupancy

Section 10 provides for the issue of a certificate of occupancy in evidence of a right of occupancy, whether customary or statutory. So far such certificates have been issued in respect of a statutory right of occupancy. The application of the provision to customary right of occupancy is impracticable because of the absence of a record of all land holdings. However, if the holder of a customary right wants a certificate, he can take out a statutory right of occupancy over the same piece of land which will be granted rent free, the only charges payable being the survey fees and the cost of the preparation and registration of the certificate.[5]

Certain terms and conditions are implied in a certificate of occupancy:[6]

(i) the obligation to pay to the Minister or to any person or community whose right of occupancy has been revoked in consequence of the grant of a right of occupancy to the holder such sums by way of compensation as the Minister may decide

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[1] See *Majiyagbe* v. *Attorney-General* [1957] N.R.N.L.R. 158.
[2] S. 8.
[3] S. 7.
[4] S. 6 (2).
[5] See *Handbook of the Ministry of Town and Country Planning on Land*, p. 41, para. 116.
[6] S. 11.

(ii) the obligation to pay to the Minister the amount found to be payable in respect of the unexhausted improvement on the land at the date of his entering into occupation
(iii) the obligation to pay the rent reserved or any revised rent

Rights of a Holder of a Right of Occupancy

Exclusive Possession
The holder of a right of occupancy has the exclusive right to occupy the land against all persons other than the Minister. He has the sole rights to and absolute possession of all the improvements on the land which he can sell, mortgage, transfer or remove. However, right over the improvement ceases on the expiration of the right of occupancy, and he is not entitled to compensation.[1]

Restrictions
Every right of occupancy is subject to any easement or road of access affecting the land at the date of the grant or at the date of the commencement of the right of occupancy.[2] In addition, the Minister may request the holder of a right of occupancy to allow a road of access over his land to occupiers of neighbouring land if the Minister considers it to be reasonably required, but compensation is payable.[3] The Minister may also authorize the laying of water pipes, sewers and drains across or upon the land, or enter or authorize any officer to enter for the purpose of carrying out an inspection of the land.[4] In the case of a customary right of occupancy, the Minister may grant to other persons licences to take building materials, subject to compensation being paid.[5]

Alienation of Rights of Occupancy

It is quite legal for a holder of a right of occupancy to alienate his land, either by way of assignment, the grant of a sublease or a mortgage, etc, but certain consents are required:

(i) A holder of a customary right may alienate his land to another native of Northern Nigeria without the consent of the Minister, provided the approval of the native authority has been obtained.[6] But it is unlawful for a native to alienate land held under a customary right of occupancy to a non-native without the prior consent of the Minister.[7]

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[1] S. 20 (2). This is subject to any contrary stipulation in the certificate of occupancy—s. 20 (3).
[2] S. 13 (1).
[3] S. 13 (3).
[4] Ss. 14-15.
[5] S. 16.
[6] S. 27 (b) (ii).
[7] S. 27 (a).

(ii) In the case of a statutory right of occupancy, subject to certain exceptions, alienation, whether to a native or to a non-native, is unlawful unless the prior consent of the Minister has been obtained.[1]

(iii) Finally, a sale of a right of occupancy (whether customary or statutory) in satisfaction of a judgment debt is prohibited without the prior consent of the Minister.[2]

Section 32 provides that an alienation to a non-native in contravention of the provisions of the law shall be null and void. This means that such alienation made to a native is valid, though unlawful, but the Minister may revoke the right of occupancy[3] or impose penal rents.[4]

It is important to bear in mind that the provisions of sections 27 and 28 govern alienation, and not an agreement to alienate. An agreement to alienate does not require ministerial consent.[5] However, specific performance of the contract cannot be granted without proof of the requisite consent, at least in the case of a contract with a non-native. The best the court can do is to grant an injunction to restrain a breach of contract. That in substance, was the decision of the High Court in the recent case of *Edmond Mamiso* v. *Baba Pate*.[6] The appellant had agreed to sell to the respondent a house on a plot of land which was the subject of a customary right of occupancy. The respondent paid the purchase price to the appellant who then submitted the necessary application for the approval of the native authority, as required under section 27 (b) (ii) of the Land Tenure Law. Before the approval was given, the appellant withdrew the application, repudiated the agreement and offered to refund the purchase price. Thereupon the respondent sued the appellant in the Area Court for 'the house which I bought' which was taken, as in the High Court, as an action for specific performance. The trial court ordered the appellant to give up the house to the respondent. His appeal to the High Court was dismissed but the order was varied. The court ordered the appellant to submit the completed form of application for consent to the native authority, coupled with a declaration that the giving and withholding of such consent was at the discretion of the native authority. In the case of an unlawful alienation to a non-native, until the consent is given, the purchaser cannot acquire any interest in the land, whether legal or equitable, and the title still remains in the vendor. Such was the decision in *Martins* v. *Molade*,[7] the facts of which were as follows. The land in dispute was held by the defendant under a statutory right of occupancy and was sold by him to one, Rolfe, who built on the land by virtue of the sale. The Gover-

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[1] S. 28.
[2] S. 27 (b) (i); s. 42.
[3] S. 34.
[4] S. 6 (i) f.
[5] See *Orjiako* v. *Orjiako* (Unreported), cited in *Bisichi Tin Co. Ltd* v. *Okonkwo* [1961] N.N.L.R. 60.
[6] (Unreported) Suit No. HCH/18A/1970 of 3/6/71.
[7] (1930) 9 N.L.R. 53.

nor's consent to the sale was not obtained and accordingly Rolfe was not registered as owner. The plaintiff later obtained judgment against the defendant and proceeded to levy execution on the buildings. Rolfe claimed the buildings as his. It was held that, as the consent of the Governor was not obtained to the sale, Rolfe had acquired no interest in the property and the interpleader was dismissed.

Similarly, in *Bisichi Tin Company Ltd* v. *Okonkwo*,[1] the judgment debtor was the registered occupier of a plot in Jos. The plot was attached by the plaintiffs, the judgment creditors, in execution of the judgment debt. The claimant in these interpleader proceedings claimed that her husband had acquired the property in 1951 but that when he died the consent to the assignment of the property required by section 11 of the Land and Native Rights Act, 1916, had not been obtained. Reed, J., held that the deceased could not acquire any interest, legal or equitable, in the property until the consent required by section 11 had been obtained and, accordingly, that the claimant disclosed no claims to the plot.

Although section 32 declares a disposition without consent to be null and void, it has been held that the obligation therein created is binding as between the owner of the right of occupancy and the person he has put in possession. In *Solanke* v. *Abed*,[2] the plaintiff went into possession by virtue of an agreement for a sublease to him of a plot of land which the defendant held under a certificate of occupancy. The defendant did not obtain the consent of the Governor to the sublease as required by law. In this action the plaintiff claimed damages against the defendant for trespass on account of certain acts done by the defendant. Reed, J., held that although trespass was actionable at the suit of the person in possession, as the agreement under which the plaintiff claimed title was null and void the claim for trespass could not succeed, but the decision was reversed on appeal to the Supreme Court. Unsworth, F.J., observed:

> In these circumstances the Government was entitled to revoke the right of occupancy under section 12 of the Ordinance, and recover possession in accordance with the terms of the right of occupancy. This is not, however, the issue with which we are now concerned. The issue here related to the relationship between the owner of the right and the person who the owner had put into possession. Was the defendant entitled to take advantage of his own wrong as against the plaintiff in this action for trespass and allege that the agreement was null and void or illegal?

The court answered this question in the negative and held that, notwithstanding that the section says that the agreement in question is unlawful, it is not illegal. In support of this decision, the court referred to the East African case of *Denning* v. *Edwardes*[3] concerning the interpretation of a

[1] [1961] N.N.L.R. 60.
[2] [1962] N.N.L.R. 92.
[3] [1961] A.C. 245.

similar provision of the Kenya Crown Lands Ordinance. In that case the Privy Council held that an agreement between parties in respect of land was not void *ab initio* but remained inchoate pending the consent of the Governor. It is submitted, however, that until the requisite consent has been obtained, the purchaser does not acquire any estate, legal or equitable, in the land which is capable of binding third parties under any circumstances. A contrary proposition would run counter to the spirit of the enactment. For example, the Minister may revoke a right of occupancy on the grounds that it has been alienated without consent. If the law were that the purchaser without consent had an equitable interest, it would mean that a subsequent purchaser, approved by the Minister but with notice of the previous sale without consent, might hold his estate subject to that of a person whom the Minister might choose to treat as a trespasser upon revocation of the right which he was claiming.

The decision to give or to withhold consent to an alienation is at the discretion of the Minister. There is no legal machinery compelling him to give his consent. Mandamus does not lie to compel him to do so, nor will the court query his motives.[1]

Ministerial consent is not required for:

(i) the alienation of improvements in excess of the requirement of the certificate of occupancy[2]
(ii) the creation of a legal mortgage in favour of a person in whose favour an equitable mortgage of the same land has been created with the consent of the Minister
(iii) the reconveyance or release by a mortgagee to a holder of a right of occupancy of land which he has mortgaged with the consent of the Minister

However, the Minister's consent to a renewal of a sublease containing an option cannot be presumed from the approval of the sublease.[3]

Revocation of Right of Occupancy

Both the customary and the statutory rights of occupancy may be revoked by the Minister for a good cause.[4] Section 34 (2) and (3) contains a long list of good causes for revocation. The list is, however, not exhaustive. The implication is that if the cause assigned for a revocation is one listed, the decision cannot be challenged. On the other hand, where the cause assigned is not one contained on the list, whether or not the cause is good is a justiciable issue.

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[1] *R.* v. *The Minister of Land and Survey ex parte The Bank of the North* [1962] N.N.L.R. 58.
[2] See S. 20 (1) (C).
[3] S. 28 (proviso).
[4] S. 34 (1).

Among the causes listed in section 34 (2) for a statutory right of occupancy are:

(i) non-payment of rent, rates and taxes, and other breaches of covenant
(ii) alienation of the land in breach of the provisions of the statute
(iii) requirement of the land by the Federal Government or the Government of the State for public purposes
(iv) requirement of the land for mining purposes
(v) abandonment of the land for two years (non-use for the fallow period is not construed as abandonment)
(vi) permitting on the land a contravention of the Cinematograph Licensing Law

In the case of a customary right of occupancy, good cause includes:

(i) the requirement of the land by the State Government or the Government of the Federation
(ii) the requirement of the land for mining purposes
(iii) the requirement of the land for the extracting of building materials
(iv) the requirement of the land for the grant by the Minister of a statutory right of occupancy to a person or body of persons
(v) contravention of the Cinematograph Licensing Law

A native authority may also revoke a customary right of occupancy where the land is required for the public purposes of the local community.[1]

It should be noted that it is not sufficient that the Minister 'approves' revocation; the decision to revoke a right of occupancy must be signified to the holder of the right of occupancy by an instrument executed by or on behalf of the Minister. This point is illustrated by the decision in *Majiyagbe* v. *Attorney-General*,[2] which was governed by the Land and Native Rights Act, 1916. The petitioner, Majiyagbe, failed to pay the rent due under the certificate of occupancy granted to him. The matter was taken up with the Governor who minuted on the file 'revocation approved'. Thereupon a letter was written to Majiyagbe by an official of the Provincial Office, on behalf of the Resident, saying that the Governor had approved revocation. Subsequently the land was sold at a public auction. It was held that the revocation was ineffectual as it was not made on behalf of the Governor, the power to revoke a right of occupancy not having been delegated to the Resident.

Where a right of occupancy is revoked for reasons other than breach of covenant or the provisions of the law, the owner of the right of occupancy is entitled to compensation. The measure of compensation is the value at the date of revocation of the unexhausted improvements on the land and of the inconvenience of disturbance.[3]

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[1] S. 38.
[2] [1957] N.R.N.L.R. 158.
[3] S. 35.

Delegation of Powers

The Minister may delegate his powers and duties under the law to a native authority or local authority.[1] In pursuance of this power, the right to grant or revoke a statutary right of occupancy for residential plots in Jos, New Bussa, Bacita, Kaduna, Kano, Zaria, etc has been delegated to the native authorities. The exercise of the power must, however, be on behalf of the Minister.[2]

[1] S. 46; and see Minister's Statutory Powers and Duties (Miscellaneous Provisions) Law, 1960, Cap. 72.

[2] Native Authority (Right of Occupancy) Regulations, 1951; Land Tenure (Native Authority Right of Occupation) Regulations, 1962.

10 Judicial Proceedings

In the preceding chapters we have been concerned with the facts with which a party to a land dispute may justify his claim to title. This chapter deals with how he may succeed in obtaining judgment in his favour in any judicial proceedings in which his title is in issue. The discussion will be confined to those issues which are either peculiar to, or are frequently raised in, land disputes. But first let us consider two preliminary issues of considerable importance: jurisdiction and the competence of a party to initiate proceedings.

Jurisdiction

It is not every court that has jurisdiction to try land causes or matters,[1] and where a court has jurisdiction it may be restricted to certain categories of causes or matters only. The examination of the problem of jurisdiction is, therefore, of considerable importance to the litigant. The position in respect of each type of court will be considered, beginning with the Magistrates' Courts.

Magistrates' Courts

The Magistrates' Court lacks original jurisdiction in any cause or matter which raises an issue as to title to land or any interest therein.[2] But, in order to oust the jurisdiction of a magistrate, it is not sufficient merely to allege that the cause involves an issue as to title to land. In *Oluwo* v. *Adebowale*,[3] the Supreme Court held that the issue must be raised *bone fide* and that whether the issue is raised *bone fide* or not is an interlocutory matter for the magistrate to decide on the evidence before him. It is, therefore, wrong for a magistrate to decline jurisdiction without first trying this preliminary issue. These

[1] The expressions 'land cause' and 'land matter' as used here mean 'a cause or matter relating to the ownership, occupation or possession of land'.

[2] S. 17, Magistrates Courts Law, 1955, Eastern Nigeria; s. 20, Magistrates Courts Law, 1955, Western Nigeria; s. 14 (2), Magistrates Courts (Lagos) Act, 1955.

[3] (1959) 4 F.S.C. 143 at p. 145.

principles were re-stated in *Badiru* v. *Eletu*.[1] In this case, the plaintiff claimed damages for the defendant's trespass on his land and for the nuisance caused by the defendant to the plaintiff's dwelling house. He also claimed an order for the removal of a structure causing the nuisance to the house. The defendant's counsel objected to the court's jurisdiction on the grounds that the case raised an issue as to title to land, the reason being that 'the defendant's case borders on an easement of light'. After listening to the addresses of counsel, the magistrate held that he had no jurisdiction, and he was later upheld by the High Court. On a further appeal to the Supreme Court, the decision was reversed, as there was no evidence before the learned magistrate upon which it could be truly said that the issue of title was raised *bona fide*, particularly as the plaintiff's case standing by itself did not raise an issue of interest in land.[2]

It must be borne in mind, however, that the magistrate is not required to go into the merits of the defendant's claim. It is not for him to decide whether the claim is good or not. That is a question to be decided when the claim had been adjudicated upon by a competent court. As Onyeama, J., has said:

> . . . the phrase '*bone fide*' . . . relates to the state of mind or motive of the person setting up title. A claim of title honestly put forward does not cease to be *bona fide* because it is weak or because the adversary has a good answer to it.[3]

The true implication of the decision in *Oluwo* v. *Adebowale*[4] is, in the language of Begho, J., that:

> The magistrate must be satisfied that the plaintiff's claim of title is not frivolous, and is not a calculated attempt to obstruct the speedy trial of the case.[5]

Thus, where a magistrate, after hearing the arguments on both sides, was of the opinion that it might well be that the defendant might be able to challenge successfully the title of the plaintiff in a proper suit before the High Court, it was held by Onyeama, J., that that precluded the magistrate from exercising jurisdiction.[6]

Magistrates' Courts in the Northern States have no civil jurisdiction, but the District Court, which has inherited the civil jurisdiction formerly vested in the Magistrates' Court, has some limited jurisdiction in land causes, unlike

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[1] (Unreported) S.C. 48/66, judgment delivered 17 November 1967.

[2] See also *Agbeke* v. *Akike* [1960] W.N.L.R. 12 and *Aburime* v. *Secretary, Assembly of God Mission* (1952) 14 W.A.C.A. 185.

[3] *Fowler* v. *Fowler* [1964] L.L.R. 31 at p. 34, but see *Toriola* v. *Arewa* (1949) 12 W.A.C.A. 505 at p. 508.

[4] Loc. cit.

[5] *Ufua* v. *Oviame* [1964] M.N.L.R. 59 at p. 61.

[6] *Fowler* v. *Fowler*, loc. cit.

its counterpart in the Southern States. This jurisdiction can be exercised where the subject matter of the suit is either a statutory right of occupancy granted by a native authority or a customary right of occupancy, and there is no customary court in the area which has been designated as being competent to try it.[1] The jurisdiction can, however, only be exercised where the capital value of the land in dispute does not exceed ₦1,000. Subject, to the above, a District Court, like a Magistrates' Court in the Southern States, has no jurisdiction in any cause or matter which raises any issue as to title to land,[2] unless the Governor by order directs otherwise or the suit is one which has been transferred to the court from an Area Court.[3]

Customary Courts

Customary courts Grades A and B in the Western State[4] and all Customary Courts in the Rivers and South-Eastern States[5] have unlimited jurisdiction in land causes. Courts below the Grade A Level in Western Nigeria are limited to land of a value ranging from ₦100 to ₦400 depending on their grade. Customary courts have been abolished in the East-Central State[6] and also in the Mid-Western State. Similar reforms in the Lagos State affected the Grades A and B courts but the new courts, those formerly Grade C, seem not to have been given jurisdiction in land causes.[7]

By implication, the jurisdiction of customary courts is subject to two important limitations:

(i) All the parties to the proceedings must be subject to the jurisdiction of customary courts.[8]

(ii) The relationship of the parties in regard to the land in dispute must be governed by customary law, which is the law applied by the court.[9] Thus, where customary law cannot be applied to the issues raised in the case, a customary court cannot properly exercise jurisdiction.

The appropriate customary court is the one exercising jurisdiction in the area where the land is situated.[10] It is provided by the Eastern Nigerian

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[1] S. 41 (3) Land Tenure Law, 1962; s. 13 (1) (d) District Courts Law, 1960.

[2] S. 13 (2) a (i) District Courts Law, 1960.

[3] S. 13 (2) (b) District Courts Law, 1960. 'Area Court' is the new designation for customary courts in Northern Nigeria.

[4] See Customary courts Law (Amendment) Edict, 1972.

[5] First Schedule, Customary Courts Edict, 1966 (E.R.); S.E.S. Customary Courts Edict, 1969.

[6] See Magistrates' Courts Law (Amendment Edict), 1971.

[7] Customary Courts Edict, 1973.

[8] As to persons subject to the jurisdiction of customary courts, see s. 17, Customary Courts Law, Western Nigeria; s. 17, Customary Courts Edict, 1966, Mid-Western State; and s. 11, Customary Courts Edict, 1966, of Eastern Nigeria.

[9] This is expressly enacted in respect of the jurisdiction of Grade A Courts in Western Nigeria.

[10] S. 22 (3) (a) Customary Courts Law, Western Nigeria; s. 23, Customary Courts Edict, 1966, Mid-Western State; and s. 13 (3) Customary Courts Edict, Eastern Nigeria.

Statutes that, where the land in dispute is situated in the area of jurisdiction of more than one customary court, the court appointed by the customary court adviser has jurisdiction.[1] There is no corresponding provision to be found in the Western State legislation, which appears to be an oversight. With regard to the Western State, the provisions of section 18 (4) empowering the Minister to confer additional jurisdiction on any customary court may, however, be invoked in such a situation. This is strengthened by the provisions of section 22 (3) (b) to the effect that a customary court to which jurisdiction has been conferred by the Minister under section 18 (4) shall have jurisdiction.

The legal provisions in the six Northern States are much to the same effect, although the legislative approach is slightly different. Section 19 (3) of the Area Courts Edict, 1967[2] provides as follows:

> Subject to the provisions of any written law, all land causes shall be tried and determined by an Area Court having jurisdiction in the area in which the land is situated and to the extent of the powers of such court.

The qualifications incorporated by reference relate to the jurisdiction conferred by the Land Tenure Law on the District Court, which we have noted, and on the High Court, which we shall consider presently. In short, the Area Court has jurisdiction where the land in dispute is the subject matter of a statutory right of occupancy granted by a native authority or a customary right of occupancy, provided that all the parties are subject to the jurisdiction of Area Courts.[3]

There are four grades of Area Court. The Upper Area Court, which is the highest grade, has unlimited jurisdiction but the jurisdiction of the other grades are limited to land of the capital value of ₦2,000 in the case of Grade I courts, ₦500 in the case of Grade II courts and ₦200 in the case of Grade III courts.[4]

The High Court

With the exception of Northern Nigeria, where the limited jurisdiction of the High Court is expressly spelt out, the High Court ordinarily has concurrent jurisdiction with customary courts in land causes. This jurisdiction may, however, be limited in an appropriate case by the provision of the High Court Law of the respective jurisdictions, excepting Lagos, that:

> The High Court shall not exercise original jurisdiction in any suit or matter which is subject to the jurisdiction of a customary court relating to family

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[1] Proviso to s. 13 (3).

[2] Each State has its separate legislation, but the provisions are uniform. The date in the case of Benue-Plateau State is 1968. Customary Courts in the North are now referred to as Area Courts, rather than as Native Courts.

[3] For persons subject to the jurisdiction of Area Courts, see s. 15 of the Edict.

[4] See First Schedule.

status, guardianship of children, inheritance or disposition of property on death.[1]

The implication of this provision in the context of our present discussion is that where, as it often happens, upon a construction of the pleadings it is found that the claim or defence raises an issue as to family status, inheritance or disposition of property on death, the High Court must decline jurisdiction, as otherwise it would be indirectly doing what the statute prohibits it from doing. An illustrative case is *Nwafia* v. *Ububa*,[2] where the plaintiff sued for a declaration that he was the person entitled under customary law to occupy and possess certain premises which were in dispute. The premises formed part of his late father's estate. It was common law that the *okpala* (i.e. the eldest son) of the deceased was the person entitled to the premises under customary law. In substance, therefore, the defendant's claim was that the plaintiff was not the *okpala* of their family. The defendant objected to the jurisdiction of the court but was overruled. In reaching his decision the learned judge observed:

> In my view the question which I have to ask myself is whether the issue as to who is the *okpala* or first son of the plaintiff's father is the cause or matter before the court. In my view, the cause or matter before me is declaration that the plaintiff is entitled to possession of Obu and Illo Obu according to native law and custom.

The Supreme Court disagreed with him, as it was clear from the admission of the parties that the *real* question in controversy was who was the *okpala* of the family, undoubtedly a question of status.

It must be emphasized that the foregoing does not, by any means, connote that the court's jurisdiction is ousted wherever it is necessary for a party to prove his relationship to his predecessor in title or the course of devolution of the property in dispute since the death of the person whose prior ownership has been established. In order to oust the jurisdiction of the court, the parties must have joined issue on the point in question. In other words, one must be able to say that, in deciding the issue of title to land, the court will, in substance, be adjudicating upon an issue as to the matters excluded.[3]

In Northern Nigeria, the High Court has no jurisdiction in any cause or

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[1] S. 17, High Court Law of Northern Nigeria, Cap. 49; s. 9, High Court Law of Western Nigeria; s. 14, High Court Law of Eastern Nigeria. The provision does not, however, apply where the Governor-in-Council otherwise directs or, in the case of Eastern Nigeria, where the suit has been transferred to the High Court from a Customary Court. The only qualification in the case of Northern Nigeria is that it is subject to the provisions of the Land Tenure Law, which we shall consider presently. The absence of a similar provision in the High Court of Lagos Act is quite understandable, there being no Customary Courts in Lagos.

[2] [1966] N.M.L.R. 219.

[3] See *Etuwewe* v. *Etuwewe* [1967] N.M.L.R. 41, where it was held that a claim alleging a partition of land which the parties had inherited from their ancestor was not a claim relating to inheritance.

matter which raises any issue as to title to land and any interest in land, except insofar as jurisdiction is expressly conferred by the Land Tenure Law.[1] Section 41 (1) of the Law vests jurisdiction in the High Court to the exclusion of all other courts where the land in dispute is the subject matter of a statutory right of occupancy granted by the Governor or the Minister. By section 41 (3) the court has jurisdiction concurrently with the District Court where the land in dispute is the subject matter of a statutory right of occupancy granted by a local authority or a customary right of occupancy, *and there is no customary court which is competent to hear it*.[2]

Right to Take or Defend an Action

Where the title to land claimed by the plaintiff is not vested in the plaintiff in his individual capacity, but in his capacity as a member of a group, and his right to bring the action is challenged, the first important point on which the plaintiff must satisfy the court is his right to bring the action, without which the court will not go into the merits of the case. Similarly, where an action against a land-owning group is brought against an individual member of the group and that member denies his competence to defend the action on behalf of the group, the court will not go into the merits of the matter unless it is satisfied that the plaintiff has established that essential ingredient of his claim.[3] The operation of this principle in relation to co-ownership under English law and family and community property under customary law will now be considered.

Where the Plaintiff is a Co-Owner under English Law

The question whether a tenant in common can sue without joining the other co-tenants was considered in *Laribigbe* v. *Motola*,[4] and answered in the affirmative. In that case the plaintiff claimed the recovery of possession of certain land on behalf of himself and other persons who were tenants in common with him of the property under a deed of gift. The plaintiff did not adduce any evidence that he had the authority of the other co-tenants to bring the action; indeed, the evidence pointed to the contrary. After considering the authorities on the point, Graham Paul, J., held that the plaintiff,

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[1] S. 17, High Court Law, Northern Nigeria.

[2] Emphasis supplied.

[3] Except where he is the head of the family or community which has been sued, a defendant cannot defend an action in a representative capacity without the leave of court. Where leave has not been obtained, a judgment given against the defendant will be set aside. See *Oragbade* v. *Onitiju* [1962] 1 All N.L.R. 17 (concerning a judgment obtained on a counter-claim). It follows that it is the plaintiff's duty to seek the requisite leave.

[4] (1935) 12 N.L.R. 17.

as one of the tenants in common, could bring this action without joining to others; but the action should have been brought in his own name, and any order made in favour of the plaintiff would be in favour of him alone, and not of anyone else. In the exercise of the court's discretion, the writ was amended accordingly. *A fortiori*, a joint tenant can bring an action for the recovery of land without joining his co-tenant, but subject to the limitations indicated in the case considered.

Where the Title is in the Family

Where the title is in the family, the general rule is said to be that only the head of the family, or a person duly authorized in that behalf, may sue or be sued in respect of family land. The rule derives from the principle that the head of the family is the trustee of family land and the person charged with its management. Dr Bentsi-Enchill described this rule as 'a notion which had died very hard', and considered it unsound.[1] In this country it has been qualified almost to extinction. In *Bassey* v. *Cobham*,[2] an action was brought by the plaintiff to recover family land from certain strangers. He was not the head of the family and neither had he obtained authority from the other members of the family to sue. The evidence showed, however, that the family head was a member of a branch of the family which was not interested in the land in dispute, and the person with whom he could have brought the action in the absence of the family head was the second defendant. In answer to the objection to the plaintiff's right to bring the action, Webber, J., said:

> The court has never deprived a beneficiary of his right to bring an action in respect of land vested in a trustee which is the position of communal land, and if the plaintiff were the humblest member of the family, I can see no reason why he should be deprived of claiming his right if the senior members neglect or refuse to assert them.[3]

This case was followed by Jobling, J., in *Akerele* v. *Liye-Labelu*,[4] where the plaintiff, a junior member of the family, sued for a declaration that certain land in the possession of the defendant was her family land. Counsel for the defendant challenged her right to bring the action on the grounds that she was neither the head of the family nor a person authorized by the family to take proceedings on its behalf. The objection was overruled by the learned judge on the grounds that the plaintiff's interest in the subject matter of the case gave her a right to take proceedings when the head of the family neglected or refused to do so. Jobling, J., went further to say:

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[1] *Ghana Land Law*, p. 105. See also Ollennu, *Customary Land Law in Ghana*, Chapter 10.
[2] (1924) 5 N.L.R. 92.
[3] Ibid, at p. 97.
[4] [1956] L.L.R. 35.

It is true that in this matter there is no evidence of neglect or refusal by the head of the family but I think that all that 'neglect' means here is that when the head of the family does not take an action, any member of the family may do so.[1]

There can be little doubt that the principle laid down in these two cases is very sound. It was approved by the Supreme Court in *Sogunle* v. *Akerele*.[2] It is not difficult to imagine a situation in which the head of the family, being a party or privy to an improper alienation of family land, may be unwilling because of his interest to institute proceedings to recover it from the alienee. It would, indeed, be strange if he were enabled to defeat the interests of the family, or of any particular member, by refusing to act or by declining the authorization of an action by other members of the family. Such contrivance would have the indirect effect of validating the alienation, since the purchaser can plead the laches and acquiescence of the family, as was attempted by the defendant in *Bassey* v. *Cobham*.[3] As Onyeama, J.S.C., has said: 'It would be odd if, as a result of an understanding between the appellants and certain members of the family, the respondents could not protect family rights in the land because those members refused to authorize an action.'[4]

The principle laid down in these cases is described as an exception to the basic rule. However, if Jobling, J.'s definition of 'neglect' in *Akerele* v. *Liye-Labelu* is correct, it is submitted that there is nothing left of the so-called rule itself. The rule is destroyed once it is recognized that the fact that an action is brought by a member other than the family head is evidence that the head has neglected or refused to act.

However, the plaintiff, even where he is the family head, cannot take proceedings in his individual capacity, for the simple reason that if he claims the land as his own he will fail to prove his title, the land being family land.[5] The plaintiff must sue in his capacity as family head or family member, as the case may be, and for the benefit of the family. Where, however, the action is commenced in a customary court, different considerations may apply, as in such a court the form is not to be stressed so long as the issues are clear.[6] In *Udugba* v. *Emeruo*,[7] the appellant brought an action in the Urhobo Grade B Customary Court asking for a declaration of title to a piece

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[1] [1956] L.L.R. at p. 36.

[2] [1967] N.M.L.R. 58. The court, however, explained that a judgment in such a case will not bind the family unless the family is for some reason estopped from denying that the decision was binding.

[3] (1924) 5 N.L.R. 24.

[4] *Sogunle* v. *Akerele* [1967] N.M.L.R. 58 at p. 60.

[5] But the family head does not sue in a representative capacity; therefore, it is unnecessary to obtain the leave of court. See *Shelle* v. *Asajon* (1957) 2 F.S.C. 65. The same principle probably applies to an action by a member.

[6] *Chukwuanata* v. *Chuku* (1953) 14 W.A.C.A. 148.

[7] [1966] N.M.L.R. 102.

of land and was granted it. The land was family property. The decision was set aside by the High Court on the grounds that the appellant sued in his own name rather than as a representative of the family. Commenting on this judgment in the Supreme Court, Brett, J.S.C., observed:

> So far as the form of action is concerned, the judge was correct in the view he took but it has been submitted in this court that in a case commenced in the native court or customary court it is proper to look behind the form and that the evidence as a whole shows that it was the title of the family that was in issue. We agree that the court should look to see what the true issues were, but we are also of the opinion that in these days the difference between the effect of a declaration of title granted to an individual and one granted the family or community is becoming more and more widely known and that the courts must be vigilant to ensure that a litigant does not take unfair advantage of the informality of procedure in the customary courts to secure a declaration from which his family will benefit while only risking a decision adverse to himself personally. We suggest that the time has come when in suits involving title to land customary courts, at least those of the higher grades, might make a regular practice of requiring the parties to say explicitly whether they are contesting the action in a representative capacity or not.
>
> The test to be applied is not whether the evidence established the title of the Erumini family, but whether the plaintiff was competent to put the title of the family in issue to stand or fall by the results of the proceedings and whether in fact he did so.[1]

As the court was able on the evidence to answer all these questions in the affirmative, the judgment of the customary court was restored but, instead of granting a declaration that the land belonged to the plaintiff, the court declared that it belonged to the family.[2]

Where the Title is Vested in a Community

As the chief is the custodian of the customary rights of his people over their community land, the principle of customary law is that the chief, and only the chief, is entitled to sue and be sued in respect thereof. A member of a community has no *locus standi* to initiate proceedings for the recovery of community land in the hands of an individual, or to challenge the validity of transactions entered into by the traditional authority of the community. In the case of land vested in the local government council, although nothing is said about it in the respective local government laws, it is clear that the right to bring or defend an action is vested in the council alone. It is a logical deduction from the provisions of the laws that the land is vested in the

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[1] Ibid, at pp. 103-4.
[2] See also *Ojiako* v. *Ogueze* [1962] 1 All N.L.R. 58 at p. 62.

council as owner. The recent decision in *Aderawos Timber Co.* v. *Adedire*[1] illustrates these principles. A concession for the exploitation of certain portions of Ife community timber forests was granted by the Ife District Council to the appellant company. The Oni, the Oba of Ife, was the principal shareholder of the company and he was also the President of the council which made the grant. The respondents, plaintiffs at the trial, brought this action as representatives of Ife taxpayers to set aside the deed of concession on the ground that the Oni, being a trustee of communal land, was guilty of a breach of trust. The Privy Council held that the respondents had no *locus standi* to take proceedings on the grounds that, in the provisions of the Forestry Act[2] under which the grant was made, the power to make dispositions of land is vested in the native authority and land over which a native authority forest reserve is constituted ceases to be communal land and passes under the administration of the native authority.

As alternative grounds for the decision their Lordships observed:

> Apart from these general considerations, their Lordships consider that there is great force in the observations of Kester, J., to this effect:
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> Who are the communal owners? Although the plaintiffs claimed as members of the 'Ife community' there is no evidence before the court as to what constitutes this community. The identity of the 'communal owners' is not clear or certain. Apart from the first plaintiff, there is no evidence whatever about who the other plaintiffs are. No evidence whatever about their identities. . . . In the circumstances, therefore, I am unable to hold that the words 'communal owners' in Exhibit 'A' refer to the unidentified class of persons described as 'Ife community', to which the plaintiffs claimed they belong and by which right they have brought this action.[3]

This is the practical difficulty which is bound to stand in the way of a litigant in every case of this nature. It is difficult to conjecture how a person can definitely prove his membership of a traditional community. Assuming that he is able to do so, how can he then prove his representative capacity? Thus, it does not matter in which authority community property is vested. Whether it is viewed as communal property under customary law or as being owned by the local government council under statutory powers, the right of the individual member of the community is the same or nearly the same: he has no *locus standi* to initiate proceedings. That is the net effect of the *Aderawos* decision.[4] It follows that, with regard to community property under customary law, a chief cannot be made to account for his management of the

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[1] [1963] 1 All N.L.R. 429.
[2] Cap. 72, Laws of the Federation of Nigeria and Lagos, 1958.
[3] Ibid, at p. 440.
[4] Loc. cit.

land through the judicial process.[1] It also follows that where a chief, because of his personal interest, refuses or neglects to take proceedings to protect community property, the members of the community have no legal remedy. There is no rule equivalent to that laid down in *Bassey* v. *Cobham*[2] and *Akerele* v. *Liye-Labelu*[3] in respect of family property. Where, however, the land-owning community consists of a group of families which are easily identifiable, the principles considered in relation to family land apply.

Evidence

The Burden of Proof

The proper determination of the party who bears the burden of proof in a suit is of primary importance because that party will fail if no evidence is given on either side or if the evidence adduced by both sides is either unreliable or inconclusive.[4] The question is of special importance in land cases because the evidence of title is often scanty or confused.

The basic rule is that laid down in section 134 of the Evidence Act, to the effect that the person who asserts the existence of the fact upon which the right in controversy depends bears the burden of proving it. This provision appears, however, to be an over-simplification, because it is not always easy to determine *in abstracto* who makes a particular assertion. The question depends mainly on the issues raised in the pleadings, the substantive law on the subject and the presumption which may be available to one of the parties,[5] for, as Bairamian, J.S.C., has pointed out in a recent case, the effect of a presumption is that 'it saves the party who can invoke it from proving certain facts in the first instance and puts the onus on the other side'.[6] How, therefore, does the substantive law of land affect the burden of proof and what is the scope or effect of the relevant presumptions?

The Rule in Kodilinye *v.* Odu

The basic principle was laid down by the West African Court of Appeal in *Kodilinye* v. *Odu*,[7] where Webber, C.J., declared:

> In an action for a declaration of title to land the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to

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[1] A solution which has been found in Western Nigeria is that the Attorney-General may bring an action. But this is only applicable where the area has been constituted into trust land under the Communal Land Rights (Vesting in Trustees) Law, 1959.
[2] Loc. cit.
[3] Loc. cit.
[4] S. 135, Evidence Act, Cap. 62, Laws of the Federation of Nigeria and Lagos. See also s. 136 and *Elias* v. *Disu* [1962] 1 All N.L.R. 214.
[5] See s. 136, Evidence Act.
[6] *Williams* v. *Akinwumi* [1966] 1 All N.L.R. 115 at p. 119.
[7] (1935) 2 W.A.C.A. 336.

a declaration of title. The plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case. If the onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title for the defendant, he not having sought a declaration. So if the whole evidence in the case be conflicting or confused, and there is little to choose from the rival traditional stories, the plaintiff fails in the decree which he seeks and judgment must be entered for the defendant.[1]

This proposition has been approved and applied in many cases[2] and was recently re-affirmed by the Supreme Court in *Onyekaonwu* v. *Ekwubiri*,[3] where Bairamian, J.S.C., said:

> The proposition is undoubtedly correct that in a case of a claim to land the onus lies firmly upon the claimant. The question in a given case is whether the onus has been discharged.

The proposition is, however, only a half-truth because the burden may lie on the defendant in some special circumstances deduced from substantive law or prescribed by the Evidence Act.

Burden of Proof in Special Circumstances

(a) *Suits in Respect of Community or Family Land*

In *Eze* v. *Igiliegbe*,[4] the West African Court of Appeal held that, where the dispute is over whether a piece of land is communally owned, the onus is on the person who claims that he himself or his section of the community had a title to the exclusion of the community to prove his claim. In that case, the plaintiff claimed on behalf of two-quarters of the community an account of rents derived from some portions of land said to belong to the community as a whole. The defendant's answer was that the land was owned exclusively by his own quarter. It was held that it was for the defendant to prove that the land was not communally owned. The reasoning proceeded on the assumption that 'land belongs to the community, the village and the family, not to the individual'.[5] The effect of this case is that this proposition, which is undoubtedly inaccurate in its general application, has been rendered innocuous through being erected into a rebuttable presumption of law. Thus, the party who asserts the communal ownership need not initially prove any-

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[1] (1935) 2 W.A.C.A at pp. 337-8. The proposition that judgment must be for the defendant where the plaintiff fails to discharge the onus of proof has been qualified by later decisions.

[2] See *Brempong* v. *Brempong* (1952) 14 W.A.C.A. 13; *Oladeinde* v. *Oduwole* [1962] W.N.L.R. 41 at p. 43.

[3] [1966] 1 All N.L.R. 32.

[4] (1952) 14 W.A.C.A. 61.

[5] *Per* Lord Haldane, L.C. in *Amodu Tijani* v. *Secretary, Southern Nigeria* [1939] A.C. 399 at p. 404. See also *Ovie* v. *Onoriobokirhe* [1957] W.R.N.L.R. 169.

thing. The burden is on the person who asserts the negative to prove it. This may be achieved either by proving that the land has ceased to be communal property because of an absolute grant of it by someone competent to make such a grant; or, as was suggested by Onyeama, Ag. J., in the case quoted above, by proof that the rule which Lord Haldane, L.C., declared to be applicable throughout West Africa did not apply to his own community.[1] Failure to prove either of these results in a judgment for the party asserting the communal title.[2]

The same principle has been held by the Supreme Court to be equally applicable where the land in dispute is admitted by both sides to be originally family land. The case in question was *Adenle* v. *Oyegbade*,[3] where the appellant sued the respondent for a declaration that a certain parcel of land in the respondent's possession was the property of the family of which he was head. The respondent was also a member of the family and it was common ground that the land originally belonged to the family and that the respondent had been in occupation of the land since 1934, having continued his father's occupation. The question was whether the grant to the respondent's father was outright or whether it was merely an allotment for occupation. The appellant asserted that the grant was not outright. Somolu, J., held that the onus was on the plaintiff to prove his case that the family had not divested itself of its ownership, but the Supreme Court disagreed with him and held that the onus was on the defendant to prove that the land had ceased to be family land.

Although the court proceeded on the analogy of the reasoning in *Eze* v. *Igiliegbe*,[4] it is submitted that the decision was more consistent with the proposition, which is undoubtedly correct, that it is for a party who claims a grant from a landowner to prove his case and not for the owner to disprove the grant.[5] It follows that the burden is on the party claiming that family property has been partitioned[6] to prove his claim, and that where the character of a grant is in issue, the burden is on the grantee to satisfy the court that the grant to him was absolute.[7] It also follows that where the validity of a disposition of family property is in dispute, the burden of upholding its validity is on the purchaser. Thus, as a sale of family property is valid only where it has been carried out with the consent of the head and principal members, if consent is in issue the purchaser bears the burden of proving that the requisite consents were obtained. In *Taiwo* v. *Ogunsanya*,[8] the Western State Court of Appeal held that the burden of proving that the person who sold

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[1] Ibid, at p. 170.
[2] See *Aderemi* v. *Adedire* [1966] N.M.L.R. 398.
[3] [1967] N.M.L.R. 136.
[4] Loc. cit.
[5] See *Ochonma* v. *Unosi* (1965) N.M.L.R. 321.
[6] *Idowu* v. *Hausa* (1936) 13 N.L.R. 96.
[7] *Ochonma* v. *Unosi*, loc. cit.
[8] [1967] N.M.L.R. 375, 378.

to him was in truth the family head at the time of the sale to him lies on the purchaser if that fact is disputed. However, because of the rule that a sale carried out by the family head is voidable, the burden of proof on the purchaser is *prima facie* discharged only if he proves a sale with the consent of the family head. Thus, in *Elias* v. *Disu*[1] it was held that in an action to set aside a voidable sale of family property, the burden is on the plaintiff to prove absence of consent of the principal members.[2]

(b) *Presumption of Ownership Under Section 145, Evidence Act*
The rule in *Kodilinye* v. *Odu*[3] is also subject to the important qualification prescribed by section 145 of the Evidence Act which provides as follows:

> When the question is whether any person is owner of anything which is shown to be in his possession, the burden of proving that he is not the owner is on the party who affirms that he is not the owner.

The section was applied by the Supreme Court in *Onyekaonwu* v. *Ekwuribi*[4] in the following circumstances. Both the plaintiffs and the defendants claimed ownership of the land in dispute. In support of their case the plaintiffs claimed that they had been farming on the land unchallenged from ancient times. The defendants did not dispute the plaintiffs' act of possession but claimed that they had allowed the plaintiffs to farm on the land upon receipt of customary gifts, which had not been brought after the farming season of 1950 and the land had lain fallow from then until 1960 when the defendants themselves cultivated it in the exercise of their rights as owners. It was the defendants' coming to the farm in 1960 that was the cause of the action. Egbuna, J., dismissed the action on the grounds that the plaintiffs had failed to prove their ownership, but the Supreme Court allowed their appeal and held that the burden was on the defendants to disprove the plaintiffs' ownership presumed under section 145.

It is not too clear from the section what meaning is to be attached to 'possession'. While it may not point to long possession, it seems evident from the case just considered that where it is shown that the plaintiff has dispossessed the defendant, it is the defendant's earlier possession that will count for the purposes of the section. Thus, while 'possession' definitely means more than a right to possession, it does not necessarily mean being actually on the land when the proceeding commenced.

The section applies only in cases where ownership is in dispute. Accord-

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[1] [1962] 1 All N.L.R. 214.
[2] For a more detailed consideration of the burden of proving consent in a suit in which a disposition of family property is challenged, see Olawoye, 'Disposition of Family Property: Burden of Proving Consent', *Nig. J. Contemp. Law*, Vol. I, 1970, p. 157.
[3] Loc. cit.
[4] Loc. cit.

ingly, in *Thomas* v. *Holder*[1] it was held by the West African Court of Appeal that the burden under the section was discharged if the party bearing it traced his title to a person whose ownership was undisputed. Having done that, the onus shifted to the party in possession to prove that that possession was of such a nature as to oust the title of the plaintiff. As Coker, J.S.C., has said:

> It is not open to argument that a party who seeks to rely on equitable pleas is under a duty to satisfy the court that he is entitled to the benefit of those defences as against the claim of the true owner.[2]

The rule in *Thomas* v. *Holder* is subject to the important qualification laid down in the recent decision in *Bamigbala* v. *Alade*,[3] where the Supreme Court held that the rule did not apply where the two parties derived their titles from the same source. In that case both parties claimed to have bought the land in dispute from the Alashe family who were the undisputed original owners. The defendant, who was in possession, claimed to have bought the land through one, Ajayi Alashe, and the question was whether Ajayi Alashe was in fact authorized to sell. Morgan, J., held that the plaintiff having traced his title to the undisputed owners, the burden was on the defendant either to prove a prior valid sale or to show that his possession was of such a nature as would oust the plaintiff's title. It was, however, held on appeal that the burden was wrongly placed on the defendant because, on the facts of the case, the burden which section 145 placed on the plaintiff was to prove that the defendant in possession was not the owner, which he could only discharge by proving that the earlier sale to the defendant was not authorized.

(c) *Suits in Respect of State Land*

Section 30 of the State Land Act[4] puts the burden of proving that occupation is lawful on the party sued by the Government for unlawful occupation of State land. It also provides that in any suit or proceedings *by* or *against* the Government in which title to land is in issue, 'the averment that any land is [State] land shall be sufficient proof, unless the defendant proves the contrary'.

The first part of the section does not require further elaboration. The second part was considered in *Williams* v. *Aromire*[5] but was not applied because the land was not properly averred to be State land. The plaintiff bought a parcel of land from the defendant who represented that it was family land. When the plaintiff sought the approval of the Commissioner for Lands to build on the land he received a letter from the Commissioner

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[1] (1947) 12 W.A.C.A. 78.

[2] *Odutan* v. *Kaiyaoja* (Unreported) S.C. 49/65 of 23/6/65. See also *Dada* v. *Chairman, LEDB* (Unreported) S.C. 412/63 of 28/5/65.

[3] (Unreported) S.C. 327/64 of 11/3/66.

[4] Cap. 45, Laws of the Federation of Nigeria and Lagos, 1958 Revision, formerly s. 29.

[5] (1938) 14 N.L.R. 34.

stating that the land was averred to be State land. In this action, which was for a rescission of the contract of sale, paragraph 6 of the plaintiff's statement of claim merely stated that the Commissioner of Lands claimed the land as State land. Kingdon, C.J., held that an averment in the section must be made in the pleadings and that neither the letter written by the Commissioner of Lands nor his sworn statement at the hearing amounted to an averment within the meaning of the section and that paragraph 6 of the statement of claim fell far short of the averment envisaged by the section. In other words, an averment within the section must be a positive statement in the pleadings that the land in question is State land.[1]

An averment properly made cannot be objected to on the grounds that it lacks particularity. In *Commissioner of Lands* v. *Abraham*,[2] Bairamian, J. (as he then was), observed that the material facts on which the averment is based need not be pleaded, and that the fact that counsel for the State chose to lead evidence at the trial did not relieve the opposing party of the burden placed on him by the section. It is clear, however, that if by such evidence a defect is shown in the Government's title, that evidence by itself may be sufficient to rebut the presumption raised by the averment.

(d) *Presumption as to Documents Twenty Years Old*

The party who bears the initial burden of proof may be assisted by section 129 of the Evidence Act, which provides for a rebuttable presumption of the correctness of recitals, statements and descriptions of facts, matters or parties contained in deeds, instruments, statutes or statutory declarations which are twenty years old *at the date of the contract*. This provision was taken from section 2 of the English Vendor and Purchaser Act, 1874,[3] and that fact, coupled with the express mention of the date of the contract, would lead to the suggestion that the section does not apply in the context of rival claims to land. But judicial opinions have been to the contrary, although there seems to be a conflict of opinion in the Supreme Court as to the real scope of the provision.

The section was considered in *Omosanya* v. *Anifowose*,[4] which was an action for a declaration of title to land, but was not applied as the document was not of the requisite age. The court avoided the issue as to its application in such cases by stating that a recital 'cannot operate as an estoppel against a stranger to the contract that he has a better title than the person stated in

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[1] It is difficult to see how the section could have availed the plaintiff in this case. From the provision itself, it is only the Government that can make the averment in a suit brought by or against it. The section cannot shift the ordinary burden of proof where, as in this case, the action is brought by a private person against another private person. In such a case, if the plaintiff 'avers' that the land is State land, he must prove it.

[2] (1948) 19 N.L.R. 1.

[3] See *Omosanya* v. *Anifowose* (1959) 4 F.S.C. 94 at p. 97.

[4] Loc. cit.

the recital to be seised in fee simple'.[1] The suggestion that the section could not apply in such cases was, however, positively rejected in *Odeneye* v. *Savage*,[2] and also in the more recent decision in *Williams* v. *Akinwumi*.[3] In the latter case, the land in dispute was conveyed to the appellant's father in 1927 and the conveyance contained a recital that one, Gboyin, the vendors' ancestor, was seised of the land in fee simple. The trial judge found that the land was originally family property as claimed by the respondents and accordingly held that the burden was on the appellant to prove that Gboyin had become the owner of the land in his lifetime. The decision was reversed on appeal on the grounds that by section 129 Gboyin's ownership must be presumed.

In arriving at that conclusion the Supreme Court relied on an unreported decision of the Privy Council in *Maurice Goualin Ltd* v. *Aminu*,[4] the facts of which were as follows. One, Desalu, had mortgaged his land to a company and the mortgage deed contained a recital that he was siesed of the land in fee simple. The land was eventually sold and conveyed to the respondent by the successors in title of the mortgagees. The appellant, on the other hand, derived his title by a conveyance from the Oloto family and the conveyance recited that the Oloto family were the original owners of the land. The Privy Council held that section 129 of the Evidence Act threw the burden of proving that Desalu was not the owner of the land on the appellant; the recital in his own conveyance had no probative value because it had not acquired the requisite age. While this decision cannot be supported, it did not go so far as the decision of the Supreme Court. At least there was a contract to which the application of the section could be related, which was not the case in *Williams* v. *Akinwumi*. The court appreciated this point, but justified its decision on the grounds that 'the age of the deed created the presumption' and that 'the probative value of the old deed is wholly independent of any subsequent contract or conveyance'. This view of the section cannot be reconciled with *Omosanya* v. *Anifowose*, where the Federal Supreme Court rightly pointed out that the first point to note was that the instrument containing the recital must be twenty years old at the date of the contract, i.e., the contract which resulted in the conveyance to the plaintiff.[5]

The effect of the judgment in *Williams* v. *Akinwumi* is that it is sufficient if the document containing the recital is twenty years old at the date of the proceedings, reference to the date of the contract being rejected, perhaps, as mere surplusage.[6] The decision was followed in *John* v. *Adebanjo*[7] but came

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[1] Ibid, at p. 97.
[2] [1964] N.M.L.R. 115.
[3] [1966] 1 All N.L.R. 115.
[4] (Unreported) P.C. Appeal No. 17 of 1957 decided on 24/7/58.
[5] See also *Randle* v. *Gbogboade* [1965] L.R. 190 at p. 194.
[6] The decision has been criticized. See *Nigeria Lawyers Quarterly*, Vol. III, 1969, p. 55 (Chief F. R. A. Williams), p. 60 (E. A. Molajo), p. 63 (F. Sasegbon). Mr Sasegbon supported the judgment.
[7] (Unreported) S.C. 46/66 of 6/6/69.

under severe criticism in the more recent decision in *Johnson* v. *Lawanson*[1] in which it was not followed. In that case the land in dispute was originally owned by the Oloto family. In proof of his title, the appellant relied on a deed of conveyance executed in 1933 in favour of his predecessor in title by the trustees of the will of one, Salu Ariyo, which contained a recital that Salu Ariyo was seised of the land in fee simple in possession free from incumbrances. The respondent, on the other hand, traced his title to one, Madam Edun, who bought the right title and interest of the Oloto family in the land in a judicial sale in 1946. Relying on *Maurice Goualin Ltd* v. *Aminu* and *Williams* v. *Akinwumi* it was contended for the appellant that he was entitled to the presumption contained in section 129 of the Evidence Act, thereby implying that the land should be presumed to have become vested in Salu Ariyo prior to the judicial sale. He relied on *Maurice Goualin Ltd* v. *Aminu*[2] and *Williams* v. *Akinwumi*.[3] The trial judge rejected the contention, and preferred to follow the decision in *Omosanya* v. *Anifowose*,[4] and his decision was upheld on appeal. In coming to that decision Coker, J.S.C., made the following observation about the Privy Council judgment:

> It is difficult to resist the conclusion that the decision in that case had been arrived at *per incuriam* or that the court had overlooked the words of the section which undoubtedly prescribe that the age of the recital should be measured [by] reference to a determinate contract.

Later in the judgment, the learned judge also said:

> The decision in *Maurice Goualin Ltd and Another* v. *Wahabi Atanda Aminu* was followed and it is signified that, throughout the meticulous consideration of the implications of that section by the Supreme Court, not one word was mentioned concerning the real meaning and effect of the operative words of the section—'at the date of the contract'.

It was finally held that the Privy Council decision, and the Nigerian cases leased on them, were wrongly decided and they were therefore overruled. The court did not, however, consider the injustice of compelling a purchaser, in the event of a dispute with a stranger, to accept a title which would not avail him. This consideration seems to have impelled the court in the cases overruled to adopt an interpretation which, as the court rightly said in this case, was obviously perverse.

Evidence of Title

In order to discharge the burden of proof, the party who bears it must adduce satisfactory evidence which shows he became the owner or from which this inference may be drawn.

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[1] (Unreported) S.C. 44/68 of 12/2/71.
[2] Loc. cit.
[3] Loc. cit.
[4] Loc. cit.

Where the transaction by which he derived his title is documented, his task is easy, provided that the title of his vendor to make the grant is not disputed. It must, however, be shown that such instrument has been registered under the Land Registration Act, 1924,[1] as section 15[2] of that Act renders inadmissible in evidence an unregistered instrument affecting land unless it is not the one by which the interest was created[3] or unless it is produced not as affecting the land but as evidence of the personal obligation of the parties.[4] In typical cases, however, the real question in controversy is the right of the claimant's vendor to convey. In such cases, apart from the presumption which may arise under section 129 of the Evidence Act,[5] the instrument may be of no avail to him. The claimant must prove that his vendor derived his title from the original owner or a person claiming through or under him. The title of such original owner need not necessarily be in writing, as the essence of a claim to original title is that it has not been granted. Even where a title by grant from an original owner is claimed, unless it is a recent grant it is not likely to have been in writing. Indeed, production of a document may make the case suspect. In many cases, the question is one of pedigree and these are also not documented. Thus, the only evidence available may be evidence of family or communal tradition of an ancestor settling on the land and the course of its devolution or transmission ever since. Necessarily, the events cannot all be within living memory and would have been handed down from generation to generation. Ordinarily such evidence would be excluded as hearsay, but the courts admit it on the ground of expediency[6] and the reception of such evidence has been made statutory by section 44 of the Evidence Act. But the section cannot be construed as affording a general licence for the admission of hearsay in land cases. Thus, in *Eletu* v. *Omojewoniya*,[7] the witness confessed under cross-examination that he knew very little of the story of the family and that his testimony was based on what he had been told by his sister. Dickson, J., held that the evidence was not traditional but hearsay and it was rejected.

The inherent danger in this type of evidence is not only that it might have been concocted, but also that, in the course of its transmission from generation to generation, mistakes may occur without any dishonest motive whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago.[8] It has been held that the

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[1] Cap. 99, Laws of the Federation of Nigeria and Lagos, 1958 Edition. The Western and Eastern Nigerian counterparts are styled Land Instruments Registration Law.

[2] S. 16, in the case of the Western Nigerian legislation.

[3] See *Coker* v. *Ogunye* (1939) 15 N.L.R. 57; *Ogunbambi* v. *Abowab* (1951) 13 W.A.C.A. 222; *Djukpan* v. *Orovuyouhe* [1967] N.M.L.R. 287.

[4] *Fakoya* v. *St Paul's Church, Shagamu* [1966] 1 All N.L.R. 74.

[5] See pp. 186-8 above.

[6] See *Commissioner of Lands* v. *Adagun* (1937) 3 W.A.C.A. 206.

[7] [1962] 2 All N.L.R. 13.

[8] See *Kojo II* v. *Bonsie and Another* (1957) 1 W.L.R. 223 at p. 226.

'acid test' of the truth or otherwise of a traditional story is to see how far it is supported by the evidence of other living people about acts within their own knowledge.[1] This approach was approved by the Privy Council in *Kojo II* v. *Bonsie and Another*.[2] The rule requires some explanation. First, it does not mean that the plaintiff will succeed only if he proves acts within living memory; the suggestion to the contrary by the trial judge in *Abinabina* v. *Eyindu*[3] was rejected by the Privy Council on further appeal. Second, although it is clear that the further the evidence goes back into history the more it will be difficult to believe, it has been held that it is not right for a judge to discredit traditional evidence on the grounds that it is old, or that it is history handed down. As Coker, J.S.C., said in a recent case:

> Traditional evidence to be of any weight at all must be of some age and must, of necessity, have been handed down, and that fact, *eo ipso*, should not destroy whatever effect it may otherwise have.[4]

In assessing the value to be attached to traditional evidence, a judge is entitled to use his own knowledge and in the light of such knowledge to decide whether a story is probable or not. For example, in *Okiji* v. *Adejobi*[5] the defendant in an action for a declaration of title claimed that the plaintiff's ancestor made an outright grant of the land to his own ancestor by way of sale some two hundred years before the proceedings. It was admitted that the defendant's ancestor was not a native of the area. The Supreme Court held that the trial judge was right in disbelieving the story on those grounds, as it has been decided in a number of cases that land was not sold in the past, particularly to strangers.

The Rule in Ekpo *v.* Ita

The burden of proof may also be discharged by evidence of user if such evidence is strong enough to raise the inference of ownership. This principle was first formulated by Webber, J., in the leading case of *Ekpo* v. *Ita*:[6]

> In a claim for a decree of declaration of title, the onus is on the plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—*if the evidence of tradition is inconclusive the case must rest on question of fact.*[7]

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[1] *Commissioner of Lands* v. *Adagun*, loc. cit.
[2] Loc. cit., cited with approval by the Supreme Court in *Agedegudu* v. *Ajenifuja* [1963] 1 All N.L.R. 109 at p. 115.
[3] (1953) 14 W.A.C.A. 171.
[4] *Olunde* v. *Awijo* (Unreported) S.C. 12/65 of 10/6/66.
[5] (1960) 5 F.S.C. 44. See also *Okuojevor* v. *Sagay* [1958] W.R.N.L.R. 70 at p. 71; *Obasi* v. *Oti* [1967] N.M.L.R. 74 at p. 75.
[6] (1932) 11 N.L.R. 68.
[7] Ibid, at p. 69. Emphasis supplied.

The effect of this rule was explained by Brooke, J., in the West African Court of Appeal in *Abdulai* v. *Menue*.[1] In that case the plaintiff traced his title to the original owners of the land in dispute and the trial judge granted the declaration sought, following which the defendants appealed. One of the grounds of appeal was that the learned trial judge was wrong in finding for the plaintiff when the plaintiff failed to prove a single act of ownership over a period of 25 years, as laid down in *Ekpo* v. *Ita*. It was held that the rule did not apply in a case of that nature. As Brooke, J., explained:

> That case seems to have been misunderstood as going further than it in fact does, owing possibly to the too general terms of the wording of the judgment. It is clear that the dictum does not apply where, as in this case, the plaintiff relies upon and proves title by grant; the onus as to acts of ownership is only thrown upon the plaintiff where the other evidence of title is inconclusive or entirely lacking.[2]

The rule was restated by Idigbe, J.S.C., in the recent case of *Aderemi* v. *Adedire*:[3]

> As was decided in Ekpo's case, in a claim where as in this case the evidence of 'traditional history' given by the plaintiffs in an attempt to establish their ownership of the land in dispute is *inconclusive*, a court may yet determine ownership of the disputed land in their favour if they succeed in establishing acts of ownership, numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants.

Numerous and Positive Acts of Ownership

'Numerous' certainly refers to the number of times the act of ownership has been exercised. While it is not clear how many such acts would be regarded as sufficient, it is clear that an isolated act of ownership is not enough.

Positive acts of ownership are those which are unequivocally consistent with the claim of ownership and adverse to the claim of the other party. For example, where the plaintiff claims to be owner and the defendant's answer is that the plaintiff is his tenant, evidence to the effect that he (the plaintiff) has been farming the land for a very long time, or has otherwise improved it, may not be regarded as positive enough as by itself it is not inconsistent with the defendant's claim.[4] Thus, in *Aderemi* v. *Adedire*,[5] the evidence of acts of ownership adduced by the plaintiff consisted of the occupation of a few villages on the land in dispute, measuring about 100 square kilometres,

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[1] (1945) 10 W.A.C.A. 172.

[2] Ibid, at p. 174. See also *Thomas* v. *Holder* (1946) 12 W.A.C.A. 78 at p. 80.

[3] [1966] N.M.L.R. 398 at p. 403; *Ekpo* v. *Ita* was approved by Privy Council as stating the law correctly. See *Umeli* v. *Ezechi* [1964] 1 W.L.R. 701.

[4] *Akinloye* v. *Eyiyola* [1968] N.M.L.R. 92.

[5] Loc. cit.

which the defendant claimed to be communal land of the Ife community, to which the plaintiff belonged. The Supreme Court held that such evidence could not be regarded as positive enough to warrant the inference that the plaintiff's family was at any time in possession of the entire area of the land in dispute to the exclusion of the Ife community. Such occupation by the plaintiff's family was not inconsistent with the land being communally owned. Similarly, in *Okiji* v. *Adejobi*,[1] it was held that evidence led to show that the defendant was doing shifting farming on the land in dispute was not conclusive evidence of ownership. On the other hand, in *Asiyanbi* v. *Adeniji*,[2] it was proved that the defendant had been collecting *ishakole* from all the tenants on the land—including those claimed by the plaintiff to be his tenants—for upwards of some 20 to 30 years. This was accepted as a positive act of ownership on the part of the defendant.

Possession as Act of Ownership

> 'Acts of possession may also be taken as acts of ownership if the circumstances are such that the person in possession ought to be regarded as owner, but more is needed than is required to support a claim for trespass.[3]

In *Adekunle* v. *Ayinke*[4] it was pointed out that a person who relies on possession as circumstantial evidence of ownership is not relieved by section 145 of the Evidence Act of the necessity of proving acts of ownership or possession extending over a sufficient length of time under the rule in *Ekpo* v. *Ita*. We have seen that in *Onyekaonwu* v. *Ekwubiri*,[5] Bairamian, J.S.C., relied on the section in awarding ownership to the plaintiff, but the learned judge expressly accepted *Ekpo* v. *Ita* as laying down the correct principle. The decision in that case could have equally been founded on the act of possession, which had been undisputed for three generations. In the words of Brett, J.S.C., in *Adekunle* v. *Ayinke*:[6] 'The section has never been treated as modifying the well-known rule laid down in *Ekpo* v. *Ita*, as explained by *Abdulai* v. *Manue*. . . . '

The distinction drawn by the court between possession as *prima facie* evidence of ownership under section 145, and possession as circumstantial evidence of ownership under the rule in *Ekpo* v. *Ita*, may be illustrated as follows, assuming the following facts:

(i) The plaintiff in possession claimed a declaration of title. Section 145 cast the burden of proving that the plaintiff was not owner on the defendant.

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[1] (1960) 5 F.S.C. 44.
[2] [1966] N.M.L.R. 106.
[3] *Per* Brett, J.S.C. in *Adekunle* v. *Ayinke* (Unreported) S.C. 18/67 of 17/1/67.
[4] Loc. cit.
[5] [1966] 1 All N.L.R. 32.
[6] Loc. cit.

(ii) The defendant traced his title to a person who was admitted to be the original owner under the doctrine in *Thomas* v. *Holder*[1] and thereby discharged the burden.

(iii) The plaintiff affirmed that that person, or his successor in title, had made an absolute grant of the land to his predecessor in title previous to the sale to the defendant or his predecessor in title, but the evidence of tradition led in discharge of that burden was inconclusive and the plaintiff relied on acts of possession as circumstantial evidence of ownership by purchase. He could not succeed if the evidence failed to meet the requirement laid down in *Ekpo* v. *Ita*.

It is only in the light of this illustration that *Adekunle* v. *Ayinke* can be reconciled with the views expressed by Brett, J.S.C., in the earlier case of *Alade* v. *Bamigbala*.[2]

Acts of possession may be evidence not only of ownership of the land over which they are exercised, but may also raise the probability of ownership of an adjacent parcel of land if the two portions are connected with each other in the circumstances provided for under section 45 of the Evidence Act. A good illustration of circumstances in which the rule may be invoked occurred in the recent case of *Akinloye* v. *Eyilola and Others*,[3] where the land in dispute was a small area within a very large area of land demonstrated as belonging to the plaintiffs. The decision in *Okechukwu* v. *Okafor*[4] is also instructive. There the trial judge visited the *locus in quo* and found some pillars erected by the plaintiffs outside the area in dispute. The existence of the pillars had at first been denied by the defendants and by a large number of their witnesses, but was later admitted by them when the judge visited the land. The section was held to apply. It seems that the factor which weighed with the court was the earlier denial of the existence of the pillars, which was apparently construed as an admission by the defendants that such evidence was materially adverse to their claim. However, it should be borne in mind that such an act of possession is not conclusive evidence of ownership. As Coussey, J.A., explained in *Archibong* v. *Ita*,[5] 'it is a probability, not a presumption of ownership'. In that case the court declined to draw the inference of ownership from the evidence of isolated user proved by the plaintiff.

Standard of Proof

The standard of proof required of the plaintiff in an action for a declaration of title is slightly higher than that required in other civil cases. In the words of Brett, Ag. C.J.F.:

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[1] (1947) 12 W.A.C.A. 78.
[2] (Unreported) S.C. 327/64 of 11/3/66.
[3] [1968] N.M.L.R. 92.
[4] Loc. cit.
[5] (1954) 14 W.A.C.A. 520 at p. 522; but in *Okechukwu* v. *Okafor* [1961] 1 All N.L.R. 685, Taylor, F.J. (as he then was), referred to it as a 'presumption'. It is submitted that the view of Coussey, J.A., is to be preferred.

It is not enough for a plaintiff in an action for a declaration of title to set up a case which is 'a little more probable' than the case put forward by the defence, or of which the highest that can be said is that 'in the absence of better evidence' there are 'some grounds' for accepting it.[1]

Thus, in *Nwaokafor* v. *Udegbe*[2] it was held that the finding that the plaintiff's witnesses were unreliable precluded the trial judge from making the declaration sought.

It should be noted, however, that although the law is that the plaintiff must succeed on the strength of his own case, a judge is not entitled to enter judgment against the plaintiff after the close of his case merely because the case is weak or because the evidence is unsatisfactory. As Kingdon, C.J., has rightly said: 'It not infrequently happens that, although the plaintiff's evidence discloses a weak case, yet when all the evidence is heard it is converted into a very strong case.'[3] In other words, 'the defendent's case may itself support the plaintiff's case and contain evidence on which the plaintiff is entitled to rely'.[4] But, where the defendant elects not to call evidence but to rely on the plaintiff's case, a judgment entered against the plaintiff will not be disturbed.[5]

Description of the Land

'It is the first duty of a plaintiff who comes to court to claim a declaration of title to show the court clearly the area of land to which his claim relates.'[6] In order to discharge that duty the courts have held in a number of cases that a plan must be filed. As Berkeley, J., said in *Sowa* v. *Amachree*,[7] 'it is impossible to make a declaration of title without a plan to which such declaration can be tied'. Thus, it is not sufficient for the plaintiff to claim vaguely 'a declaration of title to all that piece or parcel of land situate and being at Odogun in Isheri District',[8] or merely to prove his title to an undefined portion of the land in dispute,[9] even where the defendant's claim does not extend to that portion.[10] Where, however, the only fault with the plaintiff's plan is that it includes a portion owned by some other persons, the proper

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[1] *Nwaokafor* v. *Udegbe* [1963] 1 All N.L.R. 104 at p. 107.
[2] Loc. cit.
[3] *Aduke* v. *Aiyelabola* (1942) 8 W.A.C.A. 43 at p. 44.
[4] *Per* Unsworth, F.J., in *Akinola* v. *Oluwo* [1962] 1 All N.L.R. 224 at p. 227.
[5] *Sobanjo* v. *Oke* (1954) 14 W.A.C.A. 593.
[6] *Per* Webber, J., in *Baruwa* v. *Ogunsola* (1938) 4 W.A.C.A. 159. Followed in *Udofia* v. *Afia* (1940) 6 W.A.C.A. 216.
[7] (1932) 11 N.L.R. 82 at p. 85. See also *Alade* v. *Dina* (1943) 17 N.L.R. 32.
[8] As in *Baruwa* v. *Ogunsola*, loc. cit.
[9] See *Odesanya* v. *Ewedemi* [1962] 1 All N.L.R. 320.
[10] The court observed that it was for the plaintiff to ensure that the defendants' plan was superimposed on his before the trial so as to enable any surveyor to 'pinpoint' the area. See also *Rufai* v. *Ricketts* (1935) 2 W.A.C.A. 75.

approach is to excise that portion from the area claimed and to grant the declaration sought in respect of the area left.[1]

There can be no doubt that, where the land is described by reference to a plan, proof of the judgment will be facilitated should any dispute again arise between the parties.[2] This is not to say, however, that a plan is absolutely necessary in every land case. Thus, in *Etiko* v. *Aroyewun*[3] the Federal Supreme Court held that where there is no difficulty in identifying the land a declaration may be made without its being based on a plan. It follows that proof of boundaries by reference to a plan is only necessary where there can otherwise be no sufficient or satisfactory description of the land. Where this is not the case, there can be no justification for throwing on the plaintiff the expenses of producing a plan which will not assist the description, but only confuse it if wrong.[4]

Non-Suit or Judgment for the Defendant

In conclusion, let us consider the type of order which the court may make where the plaintiff fails to satisfy the court that he is entitled to the declaration which he seeks.

In *Kodilinye* v. *Odu*[5] it was said that the judgment must be for the defendant. Although such judgment decrees no title in favour of the defendant, it certainly will create *res judicata* and may thereby cause great hardship to a plaintiff who failed only because no plan was produced or because the plan produced was not satisfactory. In order to avoid such hardship, in *Umeli* v. *Ezechi*[6] the Privy Council, approving the Supreme Court, decreed that the rule in *Kodilinye* v. *Odu* should only apply where the plaintiff failed to prove any title at all, and that in a case such as that one, where the plaintiffs proved a joint interest with the defendants, the proper order should be one for a non-suit.[7] Such was the case in *Yesufu and Family* v. *Dele and Family*,[8] where the plaintiff proved a proprietary interest to an undefined area of the land in dispute and, in fact, had some tenants there. But in *Egbunike* v.

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[1] *Sogunle* v. *Akerele* [1967] N.M.L.R. 58; *Ezeokeke* v. *Uga*, loc. cit.

[2] See *Chiekwe* v. *Obiora* (1960) 5 F.S.C. 258 at p. 262, where it was held that the declaration obtained in an earlier suit could not sustain the plea of *res judicata* because the land was vaguely described.

[3] (1959) 4 F.S.C. 129. See also *Ebile* v. *Onwugbomu* (Unreported) F.S.C. 124/62, quoted and applied in *Garba* v. *Akacha* [1966] N.M.L.R. 62 at p. 64.

[4] As to the admissibility of plans, see s. 23 of the Survey Act, Cap. 194, Laws of the Federation of Nigeria and Lagos, 1958 Edition (in the case of Western Nigeria, s. 3, Survey Law, Cap. 121, Laws of Western Nigeria) and see *Adewumi* v. *Oyediran* [1964] L.L.R. 80, where it was held that a registered conveyance is inadmissible without the plan and that the plan and the conveyance must stand or fall together. See also *Rosanwo* v. *Rewane* [1962] W.N.L.R. 25.

[5] Loc. cit.

[6] [1964] 1 W.L.R. 701.

[7] Or one for a new trial as in *Akubueze* v. *Nwakuche* (1959) 4 F.S.C. 262.

[8] [1966] N.M.L.R. 105.

Muonweoku,[1] where the plaintiff sued for a declaration of title to a piece of land *to the exclusion of* the defendants and the evidence showed at the best a joint interest with the defendants, it was held that the proper order was one of dismissal since the plaintiff had failed to prove his claim. In *Nwaokafor* v. *Udegbe*,[2] the court also declined to order a non-suit when the plaintiff failed because his witnesses were unreliable. It follows from the last two cases that the court will not order a non-suit or a new trial in order to enable the plaintiff to rearm himself.

[1] [1962] 1 All N.L.R. 46.
[2] [1963] 1 All N.L.R. 104.

Table of Abbreviations

A.C.	Appeal Cases (English)
All E.R.	All England Reports (English)
All N.L.R.	All Nigeria Law Reports
App. Cas.	Appeal Cases (Old Series) (English)
Ch.D.	Chancery Division (English)
E.N.L.R.	Eastern Nigeria Law Reports
E.R.	English Reports
F.S.C.	Federal Supreme Court Reports
J.A.L.	Journal of African Law
K.B.	King's Bench (English)
L.L.R.	Law Report of the Federal Territory of Lagos
L.R.H.L.	House of Lords Reports (English)
M.N.L.R.	Midwest Nigeria Law Reports
N.B.J.	Nigerian Bar Journal
Nig. J. Cont. Law	Nigerian Journal of Contemporary Law
Nig.L.J.	Nigerian Law Journal
N.L.R.	Nigerian Law Reports
N.M.L.R.	Nigeria Monthly Law Reports
N.N.L.R.	Northern Nigeria Law Reports
Sarb. F.C.L.	Sarbah, Fanti Customary Law
W.A.C.A.	West African Court of Appeal Reports
W.L.R.	Weekly Law Reports (English)
W.N.L.R.	Western Nigeria Law Reports

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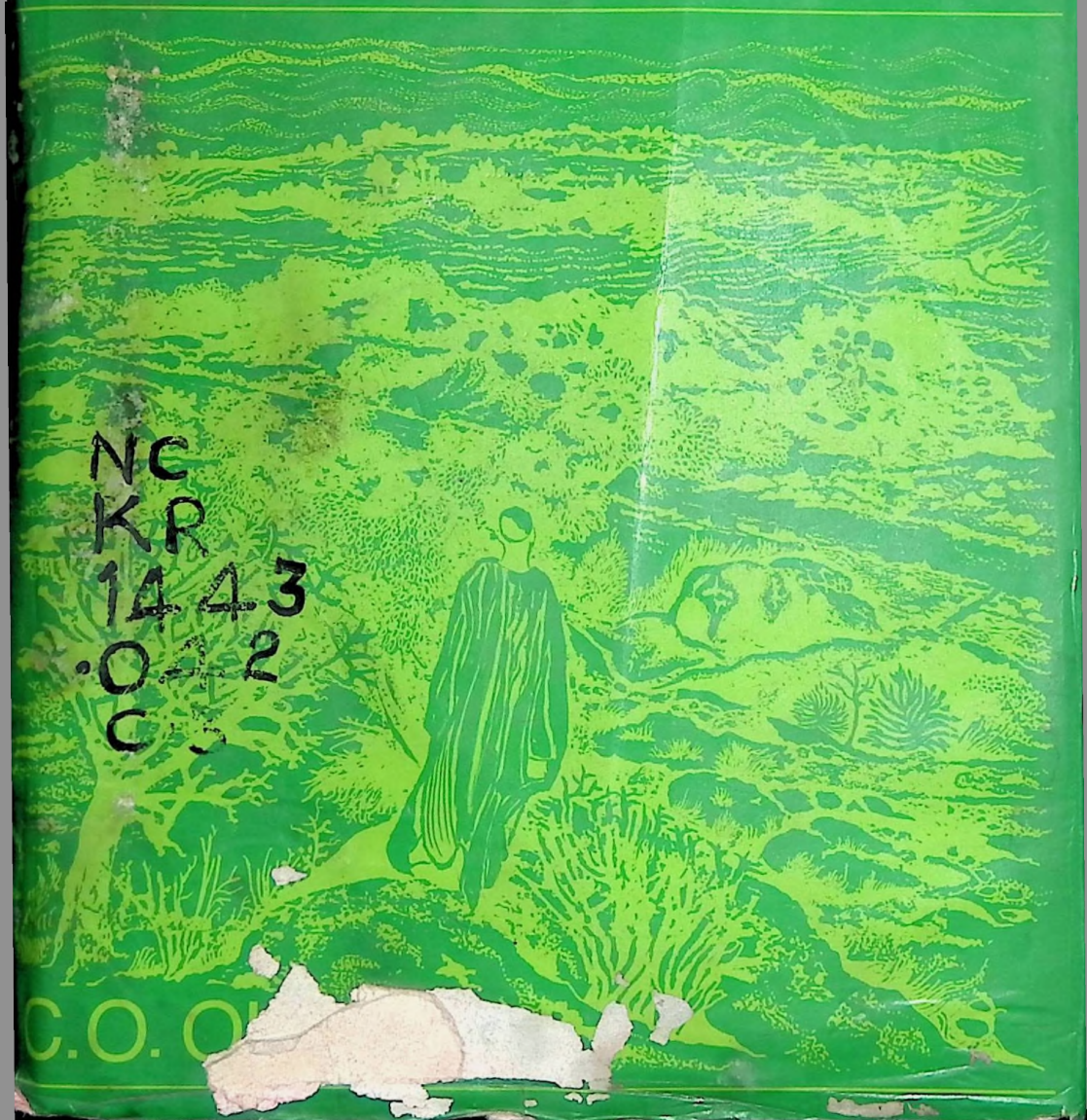

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