THE LAW RELATING TO LANDLORD AND TENANT IN NIGERIA

Being a Thesis submitted for the Degree of Ph.D.

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ABSTRACT.

The law relating to landlord and tenant is of special economic and social importance in contemporary Nigeria. At the same time a form of grant by the issue of "a right of occupancy" (analogous to a lease) has been the preferred means imposed by Statute for the public regulation of the use and alienation of land in the Northern Region which comprises three-quarters of the land area of Nigeria. Except in Lagos, an alien cannot acquire a better title to land than by way of a lease for up to a maximum period of 99 years.

The Nigerian law of landlord and tenant is at the same time an extremely complex one, since the law comprises several distinct bodies of rules, traceable to different origins, which have to be compared and reconciled, both for academic study and for practical application. This law includes the common and statute law of England, Nigerian legislation amending the English law, special enactments such as the Acquisition of Land by Aliens Law of Eastern Nigeria; and many different systems of unwritten customary law.

In this thesis an attempt has been made to restate the main principles of the applicable laws, and at the same time to make a jurisprudential comparison of the institutions,

concept, rules and techniques of the different bodies of law, with a view to their explanation and harmonization.

Chapter 1 gives a historical sketch of the laws applicable in Nigeria and describes the courts which operate these laws.

Chapter 2 deals with the land laws of the country in general.

Chapter 3 analyses the concept of the relation between landlord and tenant and distinguishes it from other similar relationships.

Chapter 4 gives an account of the usual methods of creating tenancies and Chapter 5 examines the scope of the grant once a valid tenancy has been created.

The duties imposed on landlords and tenants are dealt with in Chapter 6.

Chapter 7 discusses the determination of tenancies while Chapter 8 examines the restrictions imposed upon landlords by two pieces of legislation which have been applied more or less in the same way as the English Rent Acts.

The thesis concludes with a description of Succession to the rights and duties of landlords and tenants.

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ABBREVIATIONS OF WEST AFRICAN LAW REPORTS.

E.N.L.R. .... Eastern Region of Nigeria Law Reports.

F.N.L.R. .... Selected Judgements of the Federal Supreme Court of Nigeria.

L.L.R. .... Law Reports of the High Court of Lagos.

N.L.R. .... Nigeria Law Reports, 1884 - 1954.

R.C.J. .... Report of Certain Judgments of the Supreme Court, Vice Admiralty and Full Court of Appeal of Lagos, 1884-1892.

Ren. .... Renner's Gold Coast Reports 1864 - 1914.

S.F.L.R. .... Sarbah's Fanti Law Reports.

W.A.C.A. .... Selected Judgments of the West African Court of Appeal.

W.A.L.C. .... West African Lands Committee

W.A.L.R. .... West African Law Reports.

W.N.L.R. .... Western Nigeria Law Reports.

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	S.58	459
	S.67	459, 460.
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1892	Conveyancing Act, S.3	436
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1922	Law of Property Act	321
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1925	Administration of Estates Act	52, 668
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THE LAW RELATING TO LANDLORD AND TENANT IN NIGERIA.

PART A: INTRODUCTORY.

CHAPTER 1. INTRODUCTION.

Historical Background:

A full appreciation of the problems involved in the law relating to Landlord and Tenant in Nigeria can only be gained if the historical background on which they are based is briefly explained.

Nigeria, which became an independent[1] country within the Commonwealth on 1st. October, 1960, was a creation of the British who, together with other European nations, were originally attracted to West Africa by the prospect of trade[2] first mainly in pepper, gold, ivory and palm oil[3], and later in slaves. But when slave trade was made illegal early in the nineteenth century4, the British remained there largely for the purpose of effectively putting down the illegal trade and establishing lawful commerce.

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1. Nigerian Independence Act, 1960, 8 & 9 Eliz. 2 Ch.55, L.N. 175 of 1960.
2. Niven, C.R., A Short History of Nigeria, 1952,pp.136-142. Dike, K.O., Trade and Politics in the Niger Delta, 1956, pp. 1 - 18. Burns, A.C., History of Nigeria, 4th. ed., 1948, Chap. vi.
   Lugard, Lady, A Tropical Dependency, pp. 222 - 355.
3. Niven, C.R., op. cit. p. 139.
4. Denmark declared the slave trade illegal in 1802 and in 1804 the United States of America prohibited the import of slaves; in 1807 the British Parliament passed an Act

4 cont. prohibiting the carriage of slaves in British ships and their landing in British Colonies. In 1811 slavery was made a felony in England, in 1824 it was declared a piracy and was abolished in British West Indies in 1834: Niven, op. cit. p. 143;
Burns, op. cit. p. 73.

The most significant landmarks in the attempt to establish a more permanent contact were (i) 1849, when an English trader, John Beecroft, was appointed Consul for the Bights of Benin and Biafra with headquarters at Fernando Po[5], an island south of Nigeria; (ii) 1862, when Lagos was annexed as a "Colony and Settlement of the Crown"[6]; and (iii) 1891, when effective steps were taken for the establishment of a system of government over the coastal districts extending from the west of the Niger Delta to the Cameroons. This coastal district had been declared a Protectorate in 1885.[7] The Oil Rivers Protectorate was extended over the Hinterland by an Order-in-Council[8] in 1893 and renamed the Niger Coast Protectorate.[7] And further under the leadership of Sir George Taubman Addie who had bought out other rival European merchants, the territories in the centre and along the River Niger formed another division distinct from both the Colony and Protectorate of Lagos and the Niger Coast Protectorate.

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5. Dike, op.cit. p. 95.
6. A summary of the history of Lagos is given by Osborne, C. J. in A.-G. v. John Holt & Co. & Ors. (1910), 2 N.L.R. 1, pp. 2 - 6, and in Oduntan Onisiwo v. A.-G. (1912) 2 N.L.R. 79, at p. 808 and by Lord Haldane in Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 A.C. 399 at p. 406.
7. The Protectorate was known as Oil Rivers Protectorate: Burns, op. cit. p. 159.
8. Meek, Land Tenure, p. 6.

This third division came under the administration of the National African Company, Limited, which was granted a Royal Charter[9] on 10th. July, 1886 and the name of which was soon afterwards changed to the Royal Niger Company, Chartered and Limited.[10]

Numerous treaties, some of them of doubtful legal validity,[11] were at various times concluded with the Kings, Chiefs and other local Headmen, either on behalf of the Crown or of the Company. In some cases military expeditions were required to subjugate the local Chiefs and their Councils.[12] Finally, at the end of 1899 the Company's Charter was revoked and the Colony of Lagos and the Protectorates of Southern and Northern Nigeria were declared[13] and brought under direct British administration.

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9. The provisions of the Charter are very interesting for in administration of Justice: "Careful regard shall always be had to the customs and laws of the class, tribe, or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer, and disposition of lands and goods, and testate or intestate and other rights of property and personal rights."
10. Lady Lugard, *op. cit.*, p. 356 - 372.
11. Lord Hailey, *Native Administration*, Part III, p. 89; Lugard, *Political Memoranda*, No. 16.
12. Lady Lugard, *op. cit.*, pp. 417 - 448; Burns, *op. cit.* pp. 146 - 7; Niven, p. 209.
13. Nigeria Order-in-Council, 1899; dated Dec. 27, 1899.

The name "Nigeria" was first suggested in The Times newspaper by a correspondent[14] who in a letter dated 8th. January, 1897, urged that

> "it may be permissible to coin a shorter title for the agglomeration of pagan and Mahommedan States which have been brought by the exertions of the Royal Niger Company within the confines of the British Protectorate and thus for the first time in their history be described as an entity.... The name 'Nigeria' applying to no other portion of Africa may, without offence to any neighbours, be accepted as co-extensive with the territories over which the Royal Niger Company has extended British influence, and may serve to differentiate them from the British Colony of Lagos and the Niger Protectorate on the coast and from the French territories of the Upper Niger." 15

This suggestion was restricted to the present Northern Region but the British Government in adopting it applied the name to cover both the Colony of Lagos and the Niger Coast Protectorate as well as the "pagan and Mahommedan States". Thus on 1st. January, 1900, the present Nigeria was officially born as a nation - a nation whose systems of land tenure was bound to fascinate and puzzle lawyers of different generations.

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14. Miss Flora Shaw, who later became Lady Lugard: see Meek, Land Tenure and Land Administration in Nigeria and Cameroons, 1957, p. 7.
15. The Times, Friday, 8 January,1897, p.6 para.3. From 1897 onwards the Chronicler of the Annual Register (London, Longmans, Green & Co.) started to describe events in this part of West Africa under the headings Lagos, Nigeria, and Niger Coast Protectorate - thereby substituting "Nigeria" for "Royal Niger Company's territory" (i.e. present Northern Nigeria) in the earlier volumes: See Annual Register, 1897,p.383;c.f. in 1896 edition, pp.378-9, also 1895 ed. pp.370-371.

Lagos became the capital of the whole country, but in spite of the centralisation of administration, the Colony, the Southern and Northern Provinces continued to be regarded as separate units for many purposes, particularly for purposes of land administration. In 1906, the Colony of Lagos was joined with the Protectorate of Southern Nigeria under a single government.[16] with headquarters at Lagos, but with divisional headquarters at Warri and Calabar for the Central and Eastern Provinces respectively. The administration of Southern and Northern Nigeria was amalgamated in 1914[17], but in spite of this there was no unification of the legislature.

The Governor in Council enacted Ordinances that applied to the Colony and Southern Provinces but the Governor, in theory at least, ruled the North by means of personal decrees, though in practice many of these Proclamations (as the laws were called) were extensions of the Ordinances of Southern Nigeria to the North.[18] This duality continued until the constitutional reforms of 1947 which unified the legislature. The effect of the dual system of legislation is most visible in the fundamentally different nature of legal interests in land which a native acquires in the South from those of the North.[19]

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16. Niven, op.cit.p.173; Burns, op.cit. p. 201.
17. Niven, op.cit.p.238. Burns, op.cit. p. 203. Letters Patent of 29th.Nov. 1913, and Nigeria Protectorate Order-in-Council,1913,dated Nov.22, 1913.
18. Elias, Groundwork, pp.22 - 3.

19. This is due to the Land and Native Rights Ordinance, 1916, now Land Tenure Law, 1962, for which, see below.

From February, 1924, both the Northern and Southern portions of the old German Cameroons were administered as integral parts of Nigeria, but Southern Cameroons opted to quit the Federation of Nigeria after a plebiscite in 1961, but Northern Cameroons is now a part of the Federation.[20]

From 1st. April, 1939, the Southern Provinces were divided into two separate entities called the Western and the Eastern Provinces respectively.[1] From 1947, when a revised Constitution was introduced,[2] three Regional Houses of Assembly were established[3] and by various other amendments a federal form of government was set up in 1954 so that on the eve of independence on 1st. October, 1960, Nigeria comprised four legislative and judicial units:[4]

(a) The Federal Territory;

(b) Eastern Nigeria;

(c) Western Nigeria;

(d) Northern Nigeria. (from 1st. June, 1961, this includes the former Northern Cameroons.)

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20. Nigerian Constitution First Amendment Act, 1961, - No. 24 of 1961.
1. But see Report of the Native Courts (Eastern Region), para. 8.
2. Nigeria (Legislative Council) Order-in-Council, 1946, No. 1370, Part I (ii); Government Publications, Lagos. Ezera, Kalu, Constitutional Developments in Nigeria, 1960, p. 68 ff.
3. But they were not autonomous at this period: Report by Conference on the Nigerian Constitution, 1953, Cmd 8934, para. 7.
4. The Nigeria (Constitution) Order-in-Council, 1960, No. 1652, Second Schedule, Cap. 1. ss 2 & 3.

THE LEGAL SYSTEM.

As already hinted, the law relating to Landlord and Tenant in Nigeria cannot be studied in isolation from other laws applicable in the country: it is deeply connected with the whole legal system, a system which itself is so complex that its description must form a background to an exposition of any branch of Nigerian Law.

The whole body of modern Nigerian law derives from three different systems of law, viz:-

(i) Customary laws;

(ii) Islamic law;

(iii) English law system, which is the basis of the General Law.

The indigenous systems might not, under Austin's imperative theory, come within the definition of law, but his interpretation of law is now generally regarded as outmoded.[5] Before the British came to Nigeria there was no central machinery for the administration of justice throughout the country: the practice varied within the different localities and was partly based on the social organisation.

In Eastern Nigeria, where the main inhabitants are the Ibos, judicial administration lay in three bodies:

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5. See e.g. D. Lloyd; Introduction to Jurisprudence.

(a) The extended family or umunna as the Ibos call it.

(b) The village or Ogbe.[6]

(c) The town or Obodo.[7]

Customary political and legal authority was vested in the Elders; a system of appeals in land[8] matters lay from umunna to Ogbe, thence to the Obodo.[9]

In Western Nigeria, according to Ajisafe,

> "every tribe[10] has its own form of government. The King is the paramount[11] ruler..... There are chief advisers to the King, who form the executive or Privy Council,....The towns and villages are governed by the subordinate chiefs." (12.)

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6. "Ogbe" may also connote a geographical rather than social group.
7. Lord Hailey implies that among the Ibos each village was an independent political unit - Native Administration in the British African Territories, Pt.III p. 152. Miss M.M. Green states expressly that "each village is largely an independent unit managing its own affairs" - Land Tenure in an Ibo Village, p. 3. c.f. Burns, op.cit. p. 54. With greatest respect to these and other writers of this school, the statement is inaccurate. See Meek, C.K., Law and Authority in a Nigerian Tribe, 1950 ed. pp.88-90 for a fairly accurate description of Ibo political organisation though Dr.Meek did not discover that political author ity may ultimately lie, not in the Obodo, but in Ebo Mba - a federation of Obodos. For the difficulty involved in analysing Ibo social organisation see "Lineage and Locality among the Mba-tse Ibo" by E. Ardener, (1959) 29 Africa, 113 ff.
8. In criminal cases it may lie to Ebo Mba.
9. For the 'House System' peculiar to the Rivers and Calabar Provinces of Eastern Nigeria, see Dike, K.O., Trade and Politics in the Niger Delta 1830-1885 pp.34-7; 136-7. For cases in which actions were brought by or against a House see Etim Okon Umana v. Ekeng Ansa Ewa (1923) NLR 24 In re Effiong Okong Atta (1930) n 10 NLR 65, and Archibony v. Archibony (1947) 18 NLR 117.
10. Ajisafe's use of "tribe" shows that he means a section of the Yoruba tribe: c.f. with Ebo Mba of the Ibos.
11. Up to the early part of the 19th. century the suzereignty of Alafin of Oyo as the Head of all Yoruba was recognised, except by the Ijebu and Edo who were under Benin: see Johnson, The History of the Yorubas,

11 cont. 1921, p. 71.
<u>Amodu Tijani v. Sec. Southern Nigeria</u> (1921) 2 AC 399 at p. 406, gives an account of the extension of Benin Kingdom to Yorubaland. See also Talbot, P.A., <u>Peoples of Southern Nigeria</u>, 1926, Vol.1 pp.155-6.
Dike, K.O., <u>Trade and Politics</u> pp. 21-2.
Lord Hailey, <u>Native Administration</u>, Pt. III pp.106-7.

12. Ajisafe, <u>Laws and Customs of the Yoruba People</u>, 1924, p. 5.

And he says in another passage that

> "cases may be heard and decided anywhere, from the lowest bush shed to the King's Court, and that at any time (day or night).
>
> In case of petty family troubles the head of the family supported by his friends hears and decides the case. If either of the two parties is not satisfied with the decision, the case is brought before the head of the district or town, supported by his friends and colleagues; should there be no satisfactory decision again, then it is finally taken before the King in Council." (13)

The indigenous systems of Northern Nigeria were in substance the same as those of the Ibos and the Yorubas. In what Meek called the "unconsolidated" village groups[14] judicial administration was similar to that of the Ibos but in the "consolidated" groups and the Kingdoms[15] the village was used as an administrative unit of the district. The Kingdoms consisted mainly of the Hausa States which were established long before the introduction of Mahommedanism in the thirteenth century.[16]

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13. ibid. p. 39.
14. Meek, C.K., The Northern Tribes of Nigeria, 1925, Vol. 1. pp. 244, 247-8. c.f. Meek's description here with Obodo of the Ibos, and also Ězi of Nupe in Nadel, F.S., A Black Byzantium, 1942 pp. 34, 44f.
15. Meek, ibid. pp. 249-258.
16. Niven, op.cit., p. 42.

ISLAMIC LAW.

Although the Northern Nigeria Native Courts Law, 1956, defines Customary Law as including Moslem Law,[17] the provision is undoubtedly a statutory extension of indigenous law. Historically there is no doubt that with the advent of Islam in the thirteenth century a new system of law was introduced in Northern Nigeria in form of the Maliki Code of the Islamic Law. Under the Islamic system, law was regarded as the direct word of Allah - sacred and immutable - that if a dot, if a single punctuation was altered, it may disrupt the whole provision of the law.[18]

Under Moslem influence class government developed, the society being divided into royalty, nobility, commoners and slaves.[19] The position of the Ruler was, at least in theory, absolute. The government was centred at the capital and local divisions, which might comprise a section of a tribe or various tribes, were administered by district heads who were liable to summary dismissal at the sovereign's will.[20] The Emir was the final judge in all matters of major importance and, subject to the principles of Islamic Law, had final control over the disposal of all lands within his Emirate.[1] But day to

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17. Native Courts Law, 1956, S.2. (N.R.)
18. c.f. Kitab ul Umm, Shafe'i, 4, 118. cited by A.S.Tritton The Caliphs and Their Non-Muslim Subjects, 1930 ed. O.U.P., pp. 15-16.
19. Meek, Northern Tribes of Nigeria, Vol. 1. p. 251.
20. Lord Hailey, Native Administration, Part III, p.46.
1. Lord Hailey, Ibid., p. 90.

day administration of justice was entrusted to specially trained judges known as Alkalai.[2] The judiciary was therefore, to this extent, completely separated from the executive. Under the Fulani Empire a right of appeal lay from all courts to the Sarkin Musulmi[2] at Sokoto, who may order a retrial or the removal of any local Alkali who had given an unjust decision.[3]

The essential difference between the legal system in the Moslem Emirates and all other indigenous systems in Nigeria lay in the separation of the judiciary from the executive. Among the Yoruba Kingdoms, for instance, adjudication was by the Chief-in-Council and both the Chief and his counsellors were as much members of the executive as of the judiciary. It was the introduction of the Northern Nigeria system without substantial modifications in Eastern and Western Provinces that presented the earliest British officials with their greatest administrative problems.

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2. Alkali (El Kadi) is Arabic for "Judge" - plural Alkalai. Sarkin Musulmi - Chief of the Moslems - title of Sultan of Sokoto, the Religious Leader of Moslems of Western Sudan.
3. Report of the Native Courts (Northern Provinces) p. 7. Political Memoranda, 1906 ed.

EFFECT OF BRITISH ADMINISTRATION.

The speed of the winds of change in a legal system is sometimes so slow and imperceptible that it assumes the delusive appearance of absolute immobility; at other times it is so sudden and catastrophic that it sweeps over the face of a people with the force of a tornado. Such was the effect of the introduction of British administration on the indigenous legal systems. The customary systems were in some cases merely modified but in other cases almost completely abrogated by the British officers who introduced Indirect Rule. The pattern was set by the native form of government of the Moslem Fulani-Hausa States but considerable difficulties were encountered in attempting to apply the feudalistic system to the more democratic peoples of Eastern and Western Nigeria.

In Eastern Nigeria, as already explained,[4] traditional authority ultimately lay in the Elders of the town. On the establishment of the Oil Rivers (later the Niger Coast) Protectorate, disputes between natives were still settled in the customary way but Consular Courts were set up by Orders-in-Council and as a result of local treaties[5] to settle disputes between natives and Europeans. These Consular Courts administered English Law.

4. See pp. 7 - 9 above.
5. Report of the Native Courts (Eastern Region) Commission of Inquiry, 1953, para. 7. Lord Hailey, Native Administration in the British African Territories, Pt. III pp. 156-7.

When the Protectorates of Southern and Northern Nigeria were declared in 1900, native tribunals were set up in the Southern territories, then divided into Eastern, Central and Western Provinces.[6] A proclamation,[7] repealing an earlier legislation[8], empowered the High Commissioner to establish in any district native courts, known as Native Councils, and subordinate tribunals to be called Minor Courts. This proclamation was repealed in 1906 by the Native Courts (Protectorate, Central and Eastern Provinces) Proclamation, 1906,[9] which remained in force until the judicial reforms initiated by Lord Lugard in 1914 when it was repealed and superceded by the Native Courts Ordinance, 1914[10], which applied to the whole of the Protectorate of Nigeria.[11]

Members of these tribunals consisted of natives nominated by the Administration, with the District Commissioner no longer as the Chairman which he had been before 1914. As Native Councils, they were authorised to make Rules embodying or modifying any customary law or providing for the welfare of the natives within their jurisdiction.[12].

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6. *ibid*. para. 8.
7. No. 25 of 1901.
8. No. 9 of 1900.
9. No. 7 of 1906; Lord Hailey, *op.cit*. p. 157.
10. No. 8 of 1914.
11. *Report of Native Courts (Eastern Region)*, para. 8.
12. Lord Hailey, *op.cit*. p. 158.

These court members came to be known as Warrant Chiefs and although in many cases before the selection of any member

> "his anticedents, and sometimes his genealogy, were inquired into and the Chiefs and people of his town were called upon to confirm their choice," 13

the courts "were in effect the Courts of Deputy Commissioners," for

> "there was inevitably a tendency to appoint persons of intelligence with some understanding of European ways, so that more pushing men tended to gain Warrants although they may have had no hereditary or customary status." 14

The autocratic manner in which some of them wielded their newly-acquired power, backed sometimes(as they were) with official 'big stick', coupled with systematic speculation which the officials scarcely understood, earned for these "small boy" Chiefs[15] the greatest dislike of the natives and secured for the Government the suspicion of the more progressive elements in the community.[15a] Things, however, worked fairly well enough to give the Government a sense of satisfaction until the introduction of taxation in the late 1920's ignited the smouldering discontent and caused that great conflagration - the Women's Riots of 1929 - in which much property belonging to the

13. Sessional Paper, No.28 of 1930, Annexure 1, Appendix III (i)
14. Lord Hailey, op.cit. p.158. cf. Report of Native Courts. (E.R.) para. 36.
15. Report of Native Court (E.R.) para. 67.
15a. See e.g. the Resolution moved by Mr. K. Ata-Amonu, the Hon. Member for Calabar in the Legislative Council on Feb. 16, 1926: Leg.Co. Debates (1926) pp.48-9.

Government, Native Authorities, Commercial Companies and the Chiefs was destroyed and many lives lost among the rioters. Investigations made afterwards helped to reveal the seat of traditional authority thereby providing a more secure basis for the establishment of the Native Court System.

If the introduction of native administration[16] in Eastern Nigeria was rendered difficult by the political organisation of the people which was not easy to understand, the indigenous social and political institutions of the West did not provide for rapid and effective application of the Indirect Rule as was possible in the North.[17] Modification of the indigenous system in the West followed a similar pattern as in the East.

After the annexation of Lagos in 1862, a number of treaties[18] for prevention of slavery and promotion of lawful trade was entered into between the Governor of Lagos and the Chiefs of Western Nigeria.[19] As in the Eastern Region, disputes between the natives and

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16. Miss L.Mair contends that to regard the appointment of Warrant Chiefs in Ibo Land as introduction of Indirect Rule or setting up of Native Authority is a "strangely ingenuous" proposition and "as a version of Nigerian... history.....unpardonably inaccurate": West Africa, March 3, 1962, p. 238. But see the equally strongly worded reply of Mr. M.Crowther, West Africa, March 24, 1962, p. 322.
17. There were risings in Iseyin in 1916, in Egbaland in 1918 and riots in Warri in 1928 - all connected with local government and taxation: See Niven, C.R., A Short History of Nigeria, pp. 240 - 1.
18. There were some 80 of these treaties - Report on the Amalgamation of Northern and Southern Nigeria, Cmd 468 (1920)
19. Lord Hailey, op.cit. pp. 108 - 9.

the British were referred to the Consul "for settlement as may be deemed expedient" but matters concerning the natives themselves remained in the traditional hands of the Chiefs. The cancellation of the Charter of the Royal Niger Company and the declaration of the Protectorate of Southern Nigeria[20] united the administration of all territories making up the Eastern and Western Nigeria. Proclamation No. 9 of 1900 and No. 25 of 1901 which provided for Native Councils and Minor Courts subordinate to them applied equally to Western[1] as to the Eastern Region. From this time on the history of the influence of British policy on indigenous systems became one for the whole of Southern Nigeria until the establishment of a federal system of legislature.

There are thus five periods in the history of Native Courts. First, the tribunals were not interfered with in any way at all, except that in conformity with treaty obligations they were required to administer only such native law and custom as was not repugnant to ideals of humanity and justice. Secondly, Native Courts were set up in the form of Native Councils with the District Commissioner as the President and Minor Courts with a system of appeals from the latter to Native Councils and an appeal from

20. The Southern Nigeria Order-in-Council, 27th. December, 1899
1. Report of the Native Courts (Western Provinces), 1952, paras. 8-20, especially para.13.

the Native Councils to the Supreme Court[2], thus bringing the Native Courts under the control of the Supreme Court. Thirdly, in 1914, there was created a dual system of administration of justice as a result of the establishment of provincial courts which ran on parallel lines with the Supreme Court. Political officers were in control of the Native Court system at this period.[2] Fourthly, the 1933 judicial reforms introduced a system of appeals to a Native Court of Appeal and in a specified number of cases to the High Court and Magistrates'Courts. Also, Administrative Officers were given powers of review, and it became possible to appeal to the District Officer where there was no endorsement on the warrant establishing the Native Court that an appeal lay to the Native Court of Appeal or to the Magistrates or High Court.[3] Fifthly, on the establishment of a Federal Constitution for Nigeria each Region was entrusted with the responsibility for its own Native Courts.[4] A new element was introduced in the membership of the Court for in the Western Region, for the first time, men trained in English Law were allowed to sit on the

2. Report of Native Courts (E.R.), para. 106.
3. Report of the Native Courts (Northern Provinces) pp.14-18; Western Provinces pp. 8-10; Eastern Region pp.11-16
4. The Federal Constitution was introduced in its permanent form in 1954.

Bench of the highest grade of the Courts and legal representation was permitted.[5] But apart from this innovation, the structure was in substance that set up as a result of the 1933 reforms and is represented by the diagram attached at the end of this chapter. Throughout all these periods the Courts were divided into grades.[6] Each grade was empowered to decide causes relating to ownership, possession or occupation of land, held under customary tenure within its jurisdiction and, except in the highest grades, the powers of the Courts in this respect were limited.[7]

NORTHERN NIGERIA set the pattern for Indirect Rule on which the policy for Native Court System was based. On the establishment of the Protectorate on 1st. January, 1900, the general policy pursued by the Administration was

> "To increase their [i.e. Native Court] influence and to make them in every way effective instruments of justice by supervising them to the extent of seeing that the old abuses should cease and 'by teaching the Alkalis the principles of British justice, and of the elementary rules of evidence,' and by increasing their number, so that complainants might be able to obtain redress without travelling prohibitive distances." 8

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5. Customary Courts Law, 1957. S.28 (W.R.) In the Eastern Region limited legal representation which originally allowed under Customary Courts Law, 1956 S.32(1) proviso, (E.R) was later abolished.
6. There were four grades: A, B, C,D, with progressively diminishing powers in that order.
7. In Eastern Region there are now only two grades with unlimited powers of jurisdiction in land causes: see below.
8. Report on Native Courts (Northern Provinces), 1952; pp. 7-8 c.f. Political Memoranda 1906 ed.

The earliest legislation relating to Native Courts in Northern Nigeria was Proclamation No. 5 of 1900, and as amended by subsequent legislations[9], it provided that the Resident might set up Courts at towns selected with the Head Chief or Principal Emir, if any, and with the approval of the High Commissioner.[10] The members were to be appointed by the Head Chief or Emir and where there was no such Chief or Emir, by the Resident.[10] They had civil and criminal jurisdiction in cases where natives only were parties, and their powers could be enlarged or reduced by the Warrant under which they were set up.[10] The special requirements of Northern Nigeria necessitated establishment of three types of these Courts, which were as follows:-[11]

(i) The Alkali's Court presided over by a locally trained native judge who was learned in Moslem Law only.

(ii) 'The Judicial Council' - Emir's Court - of which the Emir was president.

(iii) Pagan Courts, "a crude form of tribunal" established in the districts where neither of the others could be set up.

The Alkali's and the Emir's Courts were considered

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9. Proclamations No. 11 of 1904; No. 1 of 1906; No.10 of 1908; No. 1 of 1911; No. 8 of 1914.
10. Report on Native Courts (Northern Provinces), 1952 pp. 7 - 8 para. 24
11. Ibid. para. 23.

necessary in the large townships and cities and the Pagan Courts in the rural districts. Provisions were made for removal of Alkalai found guilty of peculation. Counsels or any other representatives were not allowed in these Courts without the Resident's leave in writing.[12] In this respect, it is humbly submitted, that the Administration failed to take into account the procedure in the Customary legal system which in many cases permitted representation, especially of women by their husbands or of persons in potestatis by their family heads.[13]

No provision was made for appeals to English Courts and Native Courts ran on parallel lines with them, connected only by such powers of review and transfer as administrative officers might choose to exercise under Proclamation No. 9 of 1902. The judicial reforms of 1933, however, provided that for every Native Court there should be a Court of Appeal, thus bringing the first-class Courts under the High Court. The 1933 Ordinance applied to the whole country and is the basis for the present Regional Native Court Laws, although there are some differences in details.

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12. ibid. para. 25.
13. Cf. Meek, Northern Tribes of Nigeria,1925,Vol.I p.264. Allott, Essays in African Law, 1960. But Lord Lugard was probably right in thinking that appearance of Counsel in his days might lead "to the fomenting of litigation by lawyers' agents, especially in land cases, with disastrous results to the ignorant people who had spent their substance in bootless litigation": Report on Amalgamation, 1912-19, para. 50. The position has been altered now - see below.

21.

THE PRESENT POSITION.

TO-DAY, under the Federal Constitution, each Region has enacted laws[14] regulating Native Courts within its territory. In the Eastern and Western Regions they are now called "Customary Courts" but the term "Native Court" is still retained in the Northern Region. The legislation of the Eastern Region states that

> "'Customary Law' means a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question." 15

The enactment of the Western Region states that

> "'Customary Law' includes any declaration of local Customary Law made and approved under the provisions of Section 77 (16) of the Local Government Law, 1957, or the provisions of Part II of the Chiefs Law, 1957." 17,18.

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14. Eastern Region, Customary Courts Law, 1956.
    Western Region, Customary Courts Law, 1957, No. 26 of 1957; now Cap. 31 of 1959.
    Northern Region, Native Courts Law, 1956, No.6 of 1956.
    A diagramatical illustration of the systems of appeals together with a synopsis of the Law of Eastern Region is given at the end of this section. For fuller information see the recently published Judicial and Legal Systems in Africa, (ed. Allott) Butterworth, 1962, pp. 44-75.
15. Customary Courts Law, 1956, S.2.
16. S.77 referred to empowers the Governor-in-Council to provide that a Local Council may make declaration and modifications of Customary Law. If such a declaration or modification is approved it will become the Customary Law applying to the matter or the area. This interesting provision introduces a new stage in the evolution of Customary Law.
17. S.4 of the Chiefs Law, 1957, empowers the Committee of a

21a.

17 cont. competent Council of Chiefs to make declarations of Customary Law relating to selection of Chiefs. By S. 9 such declarations shall be deemed to be the Customary Law to that effect to the exclusion of any other customary usage or rite.

18. Customary Courts Law (W.R.) 1957, S. 2.

The relevant Statute of the Northern Region simply says that

"'Native Law and Custom' includes Moslem Law".[19]

In all the Regiona the Courts are to be established by warrant: under the hand of a Minister in the East;[20] by a Minister subject to confirmation by the Governor in the West;[1] by the Resident, subject to Governor's confirmation in the North.[2] The authority of the Court is in all the Regions limited by the warrant setting it up. A litigant may be represented by a legal practitioner before a Grade A Court in the Western Region,[3] and it is also provided that

> "A Customary Court may permit
>
> (a) the husband, wife, guardian, servant, master or inmate of the household of any party, who shall give satisfactory proof that he or she has authority in that behalf; or
>
> (b) a relative of a person administering an estate subject to the jurisdiction of the Court,
>
> to appear for any party before a Customary Court." [4]

In the Eastern Region,

> "no legal practitioner may appear for or assist any party before a Customary Court,"

but representation in the customary manner by the husband, guardian or family head is permitted.[5]

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19. Native Courts Law (N.R.) 1956, S.2.
20. Last Note 15, S.3. 1. Last Note 18, S.3. 2. Last Note 19 S.3
3. Last Note 18, S. 28 (i). 4. *ibid.* S.28 (4).
5. Last Note 15, S. 32 (i).

It was originally provided that

> "a person whose mode of life is not that of the local community shall be entitled to be represented by a legal practitioner before a Customary Court and where such person is so represented the Court may allow any other party in the same cause or matter also to be represented by a legal practitioner whether such a party is a person whose mode of life is that of the local community or not;" [6]

but this was later repealed in 1957.

In the North no legal practitioner may appear to act or assist any party before a Native Court but representation in the customary manner is allowed.[7]

Four grades of the Courts exist in both the Western and Northern Regions but only two grades in the Eastern. In all the Regions the first class (Grade A) Court has unlimited jurisdiction in causes or matters concerning ownership, possession or occupation of land, but the lower grades[8] have jurisdiction limited to a specified value of land.

In the Eastern Region the persons subject to the jurisdiction of the Court are (a) persons of African descent provided that the mode of life of such persons is that of the general community and that such persons are in their country of origin subject to African Customary Law howsoever that Customary Law may be modified or applied;

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6. <u>ibid.</u> S.32(i), proviso.
7. Native Court Law, 1956, S. 28.
8. In the North Grade A has unlimited jurisdiction, Grade B (limited) jurisdiction where the value is not more than £500; Grade C, £100; and Grade D £50. In the West Grade B has unlimited jurisdiction, Grades C. and D,

(b) any other persons whatsoever whom the Governor in Council may direct to be within the jurisdiction of the Court; (c) anybody whatsoever who institutes proceedings in Customary Courts.[9]

In the Western Region the Courts have jurisdiction over all Nigerians.[10] The jurisdiction in the North is over all persons permanently resident on land within the area of the Court and

> "Whose general mode of life is
> that of the general native community:"

and in all other cases, where the persons involved in the action have given consent.[11] In all the Regions the Court has jurisdiction over land matters within the jurisdiction of the Court.[12]

In both the Eastern and Western Regions a new element is introduced into the Nigerian Customary Law by the possibility of legal representation by a professional practitioner.[13] The possibility of representation in the customary manner, now introduced in all the

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9. Customary Courts (Amendment) Law, 1957 (No.12 of 1957),E.R
10. Customary Courts Law,1957,S.17 W.R."Nigerian" is defined in S.2.
11. Native Courts Law, 1956, S.15, N.R.
12. Eastern Region, Cust.Ct.Law,1956,S.21(3); Western Region, Customary Cts.Law,1957, S.22(3). Northern Region: Native Courts Law,1956,S. 19(3)(4); Laniyan v.Isaac (1958) N.N. L.R.,119. But not if the land is governed by the Recovery of Premises Ordinance: Patrick Ede v.Ayi Sabongari (1960) N.N.L.R. 83.
13. In the Northern Region a Native Courts Adviser has right to be heard as amicus curiae in the Moslem Court of Appeal and in the High Court: Moslem Court of Appeal Law, 1956, S.24(3).

Regions, is a wise statutory recognition of procedure in Customary Law. The Customary Courts Laws of all the Regions provide that the Native Law and Custom to be applied is that "prevailing in the area of the jurisdiction of the Court" so far as it is not repugnant to natural justice, equity and good conscience nor incompatible with any written law for the time being in force.

It is not easy to explain what is meant by "prevailing in the area of the jurisdiction of the Court"[14] but in a criminal case[15] Ademola, J. (as he then was) held that "prevailing" means "predominant." He said that the expression does not refer to the law of the majority tribe or to the Native Customary Laws actually found in the area but to the single predominant system of law - in the particular case Mahommedan criminal law.[16] Considering the argument

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14. See Allott, Essays in African Law, 1960, pp.160-1 for a learned general discussion of the topic.
15. Regina v. Illorin Native Court ex.p. Aremu (1953) 20 N.L.R. 144.
16. But it must be Mahommedan Law of the particular locality - i.e. Maliki Code applying in Nigeria not, e.g., Sunni Law although both are branches of Mahommedan Law:
See Sulia Ayoola v. Folawiyo (1942) 8 WACA, 39.

put forward the learned Judge said:

> "It is further pointed out that to adopt the argument of the learned legal Secretary would mean that in criminal cases a Yoruba man in the area would be tried under Moslem Law but in civil cases Yoruba Customary Law would apply to him. Let me say at once that I see nothing unusual in this since civil matters relate to relationship between individuals and not the State as such." 17

With respect, this is a most valuable opinion and it seems that in civil matters, especially in land cases, indigenous Customary Law in the area applies. Such approach accords with the practice existing generally throughout the Northern Region for as Professor Anderson has correctly observed,

> "it is in the matter of land tenure that Native Law and Custom has won the most decisive victory over the general ascendency of the Sharī'a in the Muslim Emirates of Northern Nigeria." 18

Many other questions naturally arise from some of the provisions of the Laws. Thus, one may ask what are the criteria for measuring "mode of life"

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17. at p. 145.
18. Anderson, J.N.D., Islamic Law in Africa, 1954, p. 184.

of the general community and that of an individual? Does this mode of life depend on what the majority of the people now observe even though it may not be indigenous or does it depend on the indigenous custom even though it is only a minority of the population who now follow it? In the case of an individual, does his mode of life depend on his education, religion, wealth, political outlook, or on some or all of them? And what kind or extent of each does a man require in order to be taken out of the operation of Customary Law? Some of these problems will be examined later but the general law will now be considered, after summarising the present system.

SUMMARY OF THE PRESENT SYSTEM OF COURTS.

(i) EASTERN NIGERIA.

The PRIVY COUNCIL.
(Appellate)

↑↑

FEDERAL SUPREME COURT
(Appellate but original in inter-Regional disputes)

↑↑ S. 60 (d),

HIGH COURT
(Original, Appellate & Transferred.)

↑↑ S. 60 (c).

MAGISTRATES' COURT
(Original, Appellate & Transferred.)

↑↑ S. 60 (b).

COUNTY COURT
(Appellate or Transferred Jurisdiction only)

↑↑ S. 60 (a).

CUSTOMARY COURT GRADE A or B
(Original & Transferred Jurisdiction only.

Transfer by direction of Customary Court Adviser under S.35 (d). (Customary Court → High Court)

Transfer under S.35(b). (Customary Court → Magistrates' Court)

⟶ Civil Cases (Appeal).

⟶ Appeal in Criminal Cases.

Synopsis of the Main Provisions of the Customary Courts Law, 1956. (E.R.)

S. 2 gives a definition of the principal terms used.

S. 3 authorises the Minister to establish Customary Courts.

SS.4 - 5 provide for appointment of the personnel by the Minister after he has consulted the inhabitants of the area in which the Court is situated and taking into account the opinion of the Customary Courts Adviser.

S. 6 empowers the Minister to appoint the President, who must be a person literate in English, and provides that the decision of the Court shall be by majority opinion.

S. 7 provides that Court Members are to take the oath as laid down in the Schedule before they assume office.

S.10 prohibits adjudication without authority and makes it a criminal offence punishable with six months' imprisonment or £50 fine but arbitration in civil cases is allowed if the parties agree.

S.12 lays down that the officers of the Court, consisting of the Registrar, Clerk, Bailiffs and Messengers are to be appointed by the Council, with the approval of the Minister and their dismissal must be likewise approved.

S.16 exempts Ministers of the Court and Officers from liability incurred in bona fide exercise of their jurisdiction.

S.17 provides that fines imposed by Customary Courts should not exceed £50 and that sentence of imprisonment should not be more than 6 months.

S.18 makes corruption of and bribery given to or received by a Member or Officer of the Court punishable by 2 years' imprisonment or £200 fine.

S.20 specifies that the jurisdiction of each Court should be that stated in the Warrant setting up the Court.

S.21 lays down that the venue in criminal cases is the place where an alleged offence was committed and if it was partly within the area of two Courts the Customary Courts Adviser or the Minister will decide which Court is to have jurisdiction.

S.23 authorises the Customary Court to administer the law prevailing in the area of its jurisdiction as well as any other law or Ordinance which it is specifically empowered to administer.[19]

S.25 provides that in guardianship of children the welfare of the child should be the paramount consideration.

SS.27-28 empower Customary Courts to promote reconciliation in civil cases and also in criminal cases of assault or other offence not amounting to felony.

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19. The Customary Courts Law (Jurisdiction) (Order-in-Council) No. 304 of 1958 empowered Customary Courts to administer (1) The Age of Marriage Law, 1958; (2) Part II only of the Finance Law, 1956; (3) Limitation of Dowry Law, 1956.

SS.29-30 prohibit passing of any sentence of whipping and provide that a procedural defect shall not avoid the Order of the Court if substantial justice is done.

SS.31-32 provide that proceedings shall be conducted as laid down in the law and that no legal practitioner shall appear but that customary representatives may appeal. A person whose mode of life is not that of the local community is entitled to be represented by a legal practitioner and if he has one then the other party is also entitled to legal representation.[20]

SS.33 lays down that proceedings ahll be in public in an open Court.

S.35 gives the Customary Courts Adviser power to direct transfer of a case from a Customary Court to the Magistrates' Court or to the High Court.

S.38 empowers Customary Courts to make transfers as they deem necessary.

S.41 limits the powers of the Court to £50 fine or six months' sentence of imprisonment.

S.42 empowers the Court to order a restoration of property unlawfully obtained.

S.45 provides that the Court has power to summon witnesses and impose punishment for false evidence.

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20. This seems to mean that lawyers may appear before Lay Judges. Presumably the Customary Courts Adviser may in such cases order transfer of the case to the Magistrates' Court or the High Court under S.35. This provision in the Principal law was later removed by the Customary Courts Amendment Law, No.12 of 1957, S.5, so that now no legal representation in any form is allowed in the Eastern Region.

S.51 lays down that the judgement of the Court may be executed by seizure and sale of the property of the person condemned.

S.54 authorises the Court to grant interim orders.

S.56 provides that monthly returns of the work of the Court are to be sent to the Customary Courts Adviser.

S.57 empowers the Adviser or his Assistant to have access at all times to District and County Courts and to be heard as *amicus curiae*.

S.59 gives the Minister power to set up District Courts of Appeal.

S.60 provides for appeals as shown in the diagram above.

S.68 authorises the Minister to make Rules for Customary Courts.

The First Schedule prescribes the limits of Criminal and Civil jurisdiction of the Court. A Grade A Court can pass sentence of imprisonment for a term of six months but in cases of theft of farm produce or of livestock it can impose a sentence of 12 months' imprisonment. It can also impose a fine of up to £50, and juvenile offenders may be sentenced to not more than 12 strokes. Grade B Courts in Criminal cases may not impose more than half of the limit of punishment of Grade A Courts except that they can sentence a juvenile offender to 12 strokes.

In Civil matters both Grade A and Grade B Courts have unlimited jurisdiction in land causes. The jurisdiction of Grade A Courts in matrimonial issues is also unlimited. Grade A Courts have jurisdiction in debt, demand or damages and in cases of succession to property up to £50 and Grade B Courts in those cases up to £25.[1]

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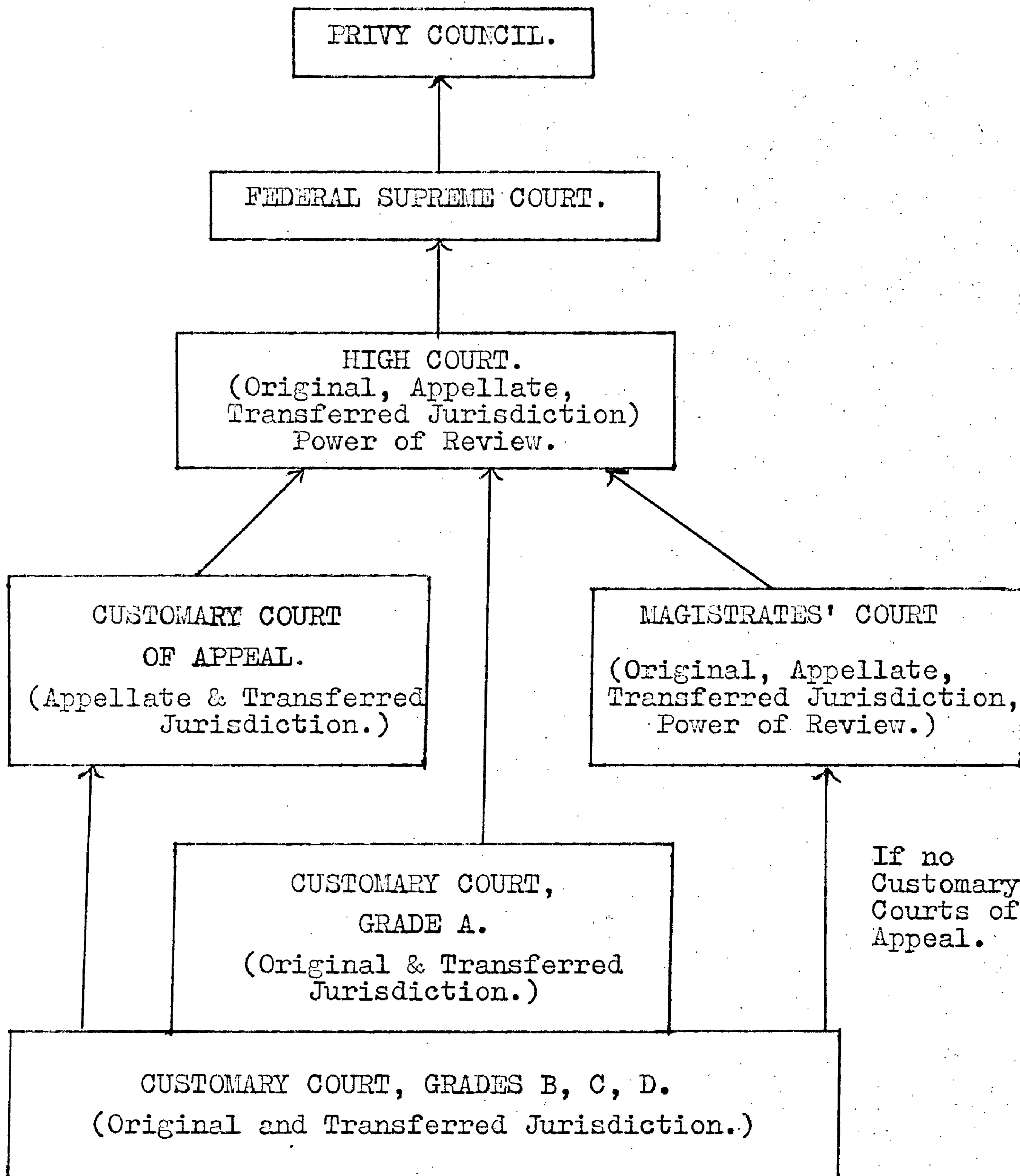
1. In a Western Nigerian case, Alhaji Alli Imam and ors. v. Oseni Balogun J.D.G.A./10 C.L.A./59, decided at Ijebu Ode Grade A Customary Court on 3rd. March, 1961, His Honour, Adedeji Okubadejo, interpreting this provision in the Customary Courts Law of the Region said,

> "In my opinion, 'the value of the subject-matter must be construed to mean the rental value per annum of the land for the purpose of assessing Court fees. It does not mean that a Grade D Court must not try a case in which the land involved exceeds £25 in value. If it were so, it would be difficult for a Grade D Court to try any case involving land at all, as the price of land varies and fluctuates from place to place."
>
> (From Folio 21a.)

With respect, this argument is non sequitur. One may ask whether the 'rental value' does not vary and fluctuate from place to place. It is submitted that the Law means what it says and that the £25 refers to the value of the land, not the rental value.

34.

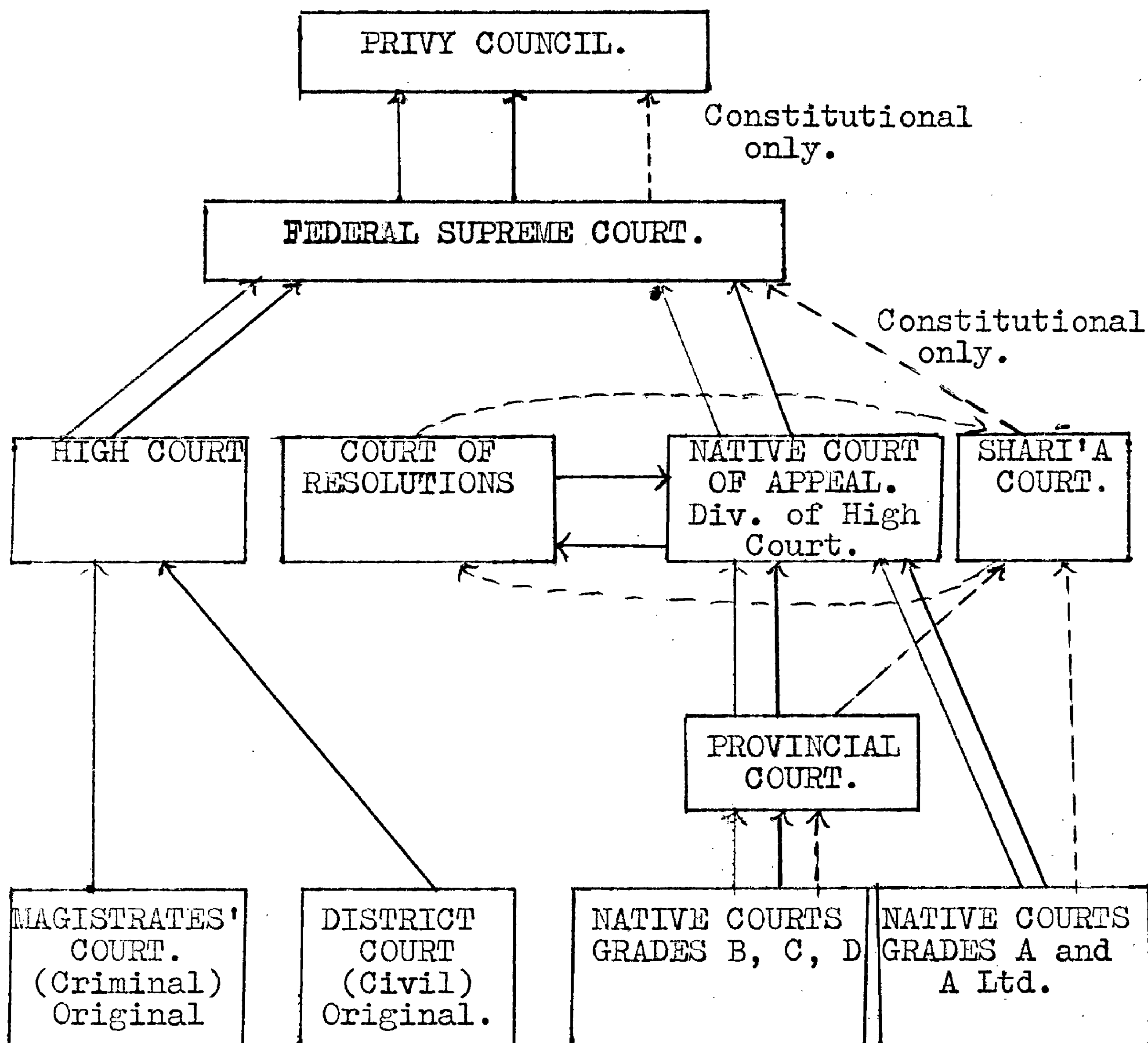
(11) WESTERN NIGERIA.



The Present Court System of Western Nigeria.

The main difference with Eastern Nigeria is that Grade A Customary Courts in Western Nigeria are manned by professionally qualified lawyers and that legal practitioners may appear in such courts, and also that there are four grades of the Court in the Western Region and only two in the East.

(111) NORTHERN NIGERIA.



The Present System of COURTS in Northern Nigeria.

——— Criminal cases. ——— Civil Cases.

- - - - - - - Moslem Personal Cases.

Present System of Courts in Northern Nigeria.[2]

All the Native Courts have original civil and criminal jurisdiction in all types of cases but Grades A and A Limited Courts have higher powers and Appeals lie from them to Native Courts of Appeal in civil and criminal matters but to the Sharī'a Court in Moslem personal matters.[3]

Appeals from Grades B, C, and D go to the Provincial Court and thence to the Native Courts of Appeal. The judges in Native Courts of all grades and in the Provincial Courts are not professionally trained, except insofar as the Alkalai are learned in Moslem Law.

The Magistrates' Court exercises criminal jurisdiction only and appeal lies from thence to the High Court. The jurisdiction of the District Courts is civil only, in cases not involving Moslem Law.

The High Court has jurisdiction in all criminal cases and also in civil cases not involving Moslem Law.[4] Appeal lies from the High Court to the Federal Supreme Court and thence to the Privy Council.

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2. For a more detailed account see Allott's Judicial and Legal Systems in Africa, 1962, pp. 65-74.
3. Shari'a Court of Appeal Law, 1960 (No.16 of 1960), S.11. A Bill was recently introduced to enable the Sharī'a Court, before hearing an appeal, to transfer the appeal (with consent of the Chief Justice) to the High Courts. See Sharī'a Court of Appeal (Amendment) Law, 1962.
4. The High Court has no original jurisdiction in suits relating to title to land: N.R. High Court Law S.2(c).

The Sharī'a Court is a Court of Appeal for all cases involving Moslem personal law coming from Native Courts Grade A and A Limited and the Provincial Courts.[3] It is a final Court of Appeal in all Moslem personal cases, unless the issue involves interpretation of Nigerian Constitution, in which case an appeal lies to the Federal Supreme Court and thence to the Privy Council. The President of the Sharī'a Court is called the Grand Kadi.[5] When an issue comes before the Sharī'a Court and a dispute arises on whether it is a Moslem personal matter or not, the Sharī'a Court is Bound to send the dispute to the Court of Resolutions which decides on whether or not it deals with Moslem Law.[6] The Court of Resolutions then sends back the matter to the Sharī'a Court if it decides that it concerns Moslem Law or to the Native Court of Appeal, if the issue is not concerned with Moslem personal law.

The Native Court of Appeal hears appeals in all criminal matters coming from Native Courts Grades A and A Limited and from the Provincial Courts, as well as all appeals in civil matters coming from those Courts if the matters do not involve Moslem personal law. Where there is any dispute as to whether the matter involves Moslem personal law or not, the Native Court of Appeal, like the

5. N.R. High Ct.(Amend.No.2) Law, 1961 says that "judge" also includes a judge of the Sharī'a Court of Appeal sitting as a member of the High Court. Sed querre whether he can so sit.
6. Daily Times, 'Survey of the North', July 14, 1961, p.7. See also Court of Resolutions Law,1960,No.17 of 1960,S.5.

Shari'a Court, sends the dispute to the Court of Resolution for deciding which Court - Shari'a or Native Court of Appeal - is to have jurisdiction. All appeals from the Native Court of Appeal go to the Federal Supreme Court and thence to the Privy Council.

The General Legal System.

The term "general legal system" as used here means the whole system of Nigerian Law which is not of customary origin. It is general because it is applicable to all the people generally, whether they are natives or not, whereas Customary Law is confined only to the natives of a specified area within which such Law operates. Since the establishment of a federal structure, Nigerian general law is to be taken to include

(a) Federal Ordinances and Acts of the Federal Legislature;

(b) Regional Laws; in other words, except for Federal legislation, there is no longer a single system of general laws applying throughout Nigeria as a whole.

As defined above, the sources of the general law include:

(i) Legislation: Federal and Regional.

(ii) English Common Law, doctrines of equity, and Statutes of general application imported into Nigeria by local legislation.

(iii) Precedents.

(iv) Legal Writings.

(i) The Legislation comprises:-

(a) Imperial Statutes.

(b) Local (i.e. Nigerian) enactments.

The Imperial Statutes were specifically made to apply to Nigeria by the Imperial Legislature or introduced into the country by express local enactment. Thus, the Regimental Debts Act, 1893[7] and the Copyright Act, 1911,[8] are among the Imperial Statutes so made to apply by local legislation, and the British Nationality Act, 1948, by the imperial legislature.[9]

Local legislation was provided for early in the history of the country because after the annexation of Lagos in 1862 the Royal Commission[10] appointing H.S. Freeman the Governor, and the Royal Instructions [11] to him, both dated 13th. March, 1862, empowered the Governor to set up a Legislative Council. The whole body of law passed under this and subsequent powers comprised what is popularly known as the "Laws of Nigeria" and is made up of[12]:-

(1) Ordinances of the Settlement of Lagos, 1862-74.

(2) Ordinances of Gold Coast, 1874-86, when Lagos was administered as a part of the Gold Coast Colony.

(3) Ordinances of the Colony of Lagos, 1886-1906.

(4) Proclamations of the Protectorate of Southern Nigeria, 1900 - 6.

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7. By SS.56-8 Part VIII of Administrator-General's Ordinance, 1938, now Cap.4 of the Laws of the Federation of Nigeria, 1958.

8. By Copyright Ordinance, 1918; now Cap.40 of 1958.

9. Elias, T.O., Groundwork, p. 21.
10. Ordinances of the Settlement of Lagos, London, 1874, p. 196.
11. ibid, p. 199.
12. c.f. Allott, Essays, p. 206 for Ghana, and Elias, Groundwork, pp. 21 - 2 for position in August, 1953.

(5) Proclamations of the Protectorate of Northern Nigeria, 1900 - 13.

(6) Ordinances of the Colony and Protectorate of Southern Nigeria, 1906 - 13.

(7) Ordinances of the Colony and Protectorate of Nigeria, 1914 - 54.

(8) Ordinances of the Federation of Nigeria, 1954 - 60. (12)

(9) Laws of the three Regional Houses of Assembly, 1951 - date.

(10) Acts of the Parliament of the Federation of Nigeria, 1960 - date. (13).

There are also a number of Royal Instructions to Governors, Orders-in-Council, Rules and Regulations made by the Governor or Governor-in-Council, - all of which form part of the legislation.

(ii). English Common Law, etc.

British trade connections with West Africa date, at least, from the fifteenth century[14] and it is stated that

> "in 1553 the first English ships reached Benin river, and the long British connexion with Nigeria was begun. From the time when English merchants first began acquiring areas for trade, the relationship between the natives and these merchants as well as with the merchants *inter se*, was regulated by English law as a result of extension of the theory that English settlers took English law with them wherever they settled." (15)

Lagos was one of these "settlements."[16] When slavery, which was the main trade in the early period, was made illegal early in the nineteenth

12. The last of the Ordinances was the Interpretation (Amendment) Ordinance, No.55 of 1960 assented to on 16th.September,1960: Fed.Gazette 1960,p.A 331.

13. The first Act of Parliament was the Supplementary Appropriation (1960-61) No. 2 Act, 1960, assented to on 19th. January, 1961: see Fed. Gazette 1960, p. A 333. Now any Ordinance, Law, Regulation or Order having the force of law in respect of a matter within the Federal legislative competence is now to be read as an Act passed by the Federal Parliament: Designation of Ordinances Act, 1961.(No.57 of 1961) S.2
14. Burns, A.C., History of Nigeria, 1948, p.64.
15. Ollennu, N.M., The Influence of English Law on West Africa, [1961]. J.A.L., p. 21.
16. As Ollennu has correctly stated the British did not actually settle in West Africa: see last note.

century, treaties for the establishment of lawful commerce were entered into between African Rulers and British authorities, the English law continuing to apply in all cases where a merchant was involved. Impressed by the British system on the one hand and cowed into accepting it by show of force of the British officers on the other, English law gradually extended beyond the Settlements so that in 1842 a Select Committee reporting to the British Government stated that

> "a kind of irregular jurisdiction has grown up, extending itself beyond the limits of the Forts (17), by the voluntary submission of the natives themselves, whether Chiefs or Traders, to British Equity; and its decisions, owing to the moral influence, partly of our acknowledged power, and partly by the respect which has been inspired by the firmness with which it has been exercised..... have generally been carried into effect without the interposition of force." (18).

To regularise the position

> "an Act[19] to enable Her Majesty to provide for the Government of Her Settlements on the coast of Africa and in the Falkland Islands"

was passed on the 11th. April, 1843, providing that the Queen in Council may make laws and constitute Courts as well as make regulations for the proceedings in such Courts. This Act was amended by 6 & 7 Vict.

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17. i.e., the trading posts - the "Settlements".
18. Cited by Ollennu, N.M., op.cit., p. 22.
19. 6 Vic. C.13; Ordinances of the Settlement of Lagos, 1862 - 70, p. 265.

C.94 of 24th. August, 1843[20]-

> "An Act to remove doubts as to the exercise of power and jurisdiction by Her Majesty within diverse countries and places out of Her Majesty's Dominions, and to render the same more effectual."

It provided that the power acquired by Her Majesty in countries out of Her Dominions shall be held on the same terms as Her Majesty's Authority in the Crown Colonies. The acts done in pursuance of any such powers or jurisdiction of Her Majesty were to be of the same effect as if done under local laws.

An Order-in-Council of the 26th. February, 1867, set up the first West African Court of Appeal to hear and determine appeals from the Settlements of Gambia, Gold Coast, and Lagos. The judges of this new Court of Appeal were the judges of the Supreme Court of Sierra Leone.[20]

From 1849 (when a Consul was first appointed), each Consul was empowered to exercise jurisdiction within the sphere of his office. The Courts of Equity set up for such purposes had no well-defined judicial or administrative powers but an Order-in-Council of 1872 regularised their position.[1]

After the formal annexation of Lagos in 1862 one of the first Ordinances passed by the newly constituted

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20. Ordinances of the Settlement of Lagos, 1862 - 70, p. 266. pp. 274-5.
1. Elias, Groundwork, p. 57.

Legislative Council was No. 3 of 1863.[2] S. 1 of this Ordinance provided that Statutes which were in force in England on first January, 1863, not being inconsistent with any local Ordinance shall be deemed to be in force in the Colony and shall be applied in the administration of justice, so far as local circumstances permit. It is noticeable that no mention was made here of English Common Law or doctrines of Equity. This provision was superseded and extended by the S.14 of the Supreme Court Ordinance, 1876,[3] which was applicable to Gold Coast Colony of which Lagos was part. The Supreme Court Ordinance, 1876, continued to apply to Lagos after its administration had been separated, in 1886, from that of the Gold Coast Colony.

S. 14 of the 1876 Ordinance was made applicable to the newly created Protectorate of Northern Nigeria by s. 34 of the Protectorate Courts Proclamation, 1900,[4] and by Ordinance No. 17 of 1906 to the Colony and Protectorate of Southern Nigeria which was constituted one unit in that year. The Supreme Court Ordinance, 1876, was repealed and re-enacted, on the amalgamation of Northern and Southern Nigeria, by the Supreme Court

2. See Ordinances of the Settlement of Lagos, 1862-70, pp.10-11
3. No.4 of 1876. This, in turn, derived from the old Hong Kong Civil Procedure Code of 1873, which was itself, to a great extent a reproduction of the Indian Civil Procedure Code (Act.No.8) of 1859: see Redwar, H.W.H., Comments on Some Ordinances of the Gold Coast Colony, 1900 London; Sweet & Maxwell.
4. No. 4 of 1900.

Ordinance, 1914, which remained in force until the setting up of a federal form of government when each Region established its own High Court and enacted laws regulating its administration of justice.

An important provision in S.14 of the Supreme Court Ordinance is still retained to-day in all[5] the Regions. This provision (as laid down in the Federal Ordinance) is as follows:-

> "Subject to the provisions of this section and except in so far as other provision is made by any Federal Law, the Common Law of England and the doctrines of equity, together with the Statutes of general application that were in force on the first day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation." 6.

Further, each High Court Law empowers the Court

> "to observe and enforce Native Law and custom which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force." 7

Such Customary Law shall be deemed to apply where the parties are natives and in causes between natives and non-natives where it would appear to the Court that

5. This is not strictly true of the Western Region because of the Law of England (Application) Law, 1959.
6. Interpretation Ordinance (now Cap.89 of 1958 ed.) S.45(1) c.f.Eastern Region High Court Law,1955 (No.27 of 1955), S.14. Northern Region High Court Law,1955 (No.8 of 1955) S.28.Northern Region District Court Law,1960 (No.15 of 1960) S.23. Western Region High Court Law, (No.3 of 1955 S.14-54 now modified by Law of England (Application) Law, SS.2 & 3.

7. High Court of Lagos Ordinance, *supra*, S.27 (1).
High Court Law (Eastern Region), *supra*, S. 22 (1).
" " " (Northern Region), *supra*, S. 34 (1).
" " " (Western Region), No. 30 of 1955, S.17 (1)

substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable.

Customary Law is excluded, however, where it appears either from express agreement or by the nature of the transaction giving rise to the action that the parties contracted for their obligations to be exclusively regulated otherwise than by Native Law and custom or where such transaction is unknown to Customary Law.[8]

No definition of Common Law, Equity or Statutes of general application is given in any of the Statutes. The term, "Common Law" is used in England in contradistinction to Statute Law, and thus denotes unwritten law of legal, but not equitable, origin.[9] This unwritten law derives its authority, not from express declaration of the legislature, but from the recognition given by the Courts to these rules, customs and principles of conduct previously existing among the English people and which they regard as binding upon them. The provisions of this Common Law were formerly enshrined in the memory of suitors, legal practitioners and judges but they are now contained in the recorded decision of the judges.[9] But "Common Law" may also denote that part of English Law, whether written or

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8. Last note 7: Federal, S.27 (2),(3); Eastern Region S.22(2)(3). Northern Region, S.34 (2),(3); Western Region, S.17 (2),(3).
9. Jowitt, Dictionary of English Law.1959 ed.,Vol.I p.426. Kiralfy, English Legal System.

unwritten which, before the Judicature Acts 1873-75, was administered by the Common Law Courts.

It is submitted that in the context of S. 45 of the Interpretation Ordinance the meaning of the term "Common Law" is more restrictive than in England, where the term may denote the whole corpus of unwritten law, whether of legal or equitable origin. If the meaning is co-extensive with this English construction, it will be unnecessary for the Ordinance to include expressly the "doctrines of equity" in S. 45, because even if this means enacted doctrines, they will be covered by the term "Statutes".

Doctrines of Equity.

The phrase "doctrines of equity" in S. 45 (1) of the Interpretation Ordinance[10] means the technical equity as applied in English Courts. "Equity" in this context bears a different meaning from what it means in "equity, and good conscience" in S. 27 (1) of the High Court of Lagos Ordinance,[11] where, it is submitted, it should be given a wider and more popular construction - i.e., natural justice.[12]

An interpretation of the provision for the application of Customary Law leads to the conclusion that in any action between a Nigerian and a European, English Law or any other foreign law can only be applicable by express or implied contract between the

10. See note 6 above; 11. See last note 7 above.
12. c.f. Kadir v. Nepean (1898) I.L.N.26, Calcutta 1, where the P.C. treated the term "justice, equity and good conscience" as equivalent to "abstract justice".

parties, and only where the contract could be construed to mean that the parties, agreed to be bound *exclusively* by English or any other foreign law, and not partly by that law and partly by Customary Law. If by the proper law of the transaction foreign law[13] is excluded, then Customary Law is applicable as long as it is not repugnant to natural justice or incompatible with any Nigerian enactment.

Even in cases where by the proper law of the contract foreign law[13] is applicable to actions between Nigerians and foreigners, Customary Law will be preferred if in the opinion of the Court, strict adherence to the foreign law[13] would cause either the foreigner or the Nigerian to suffer substantial injustice.

This principle also applies to Nigerians who have undertaken to be bound by a system of law different from native law and custom. In all cases where there exists no rule of law, customary or foreign,[13] the Court must decide the issue according to principles of natural justice.

S. 27(3) of the High Court of Lagos Ordinance[14] uses the word *exclusively*. This is most essential in interpreting leases and all other documents in

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13. 'foreign law' in this context includes English Law.
14. See last Note 7 above.

which Nigerians are parties. As the sub-section lays down that the parties must have contracted that the transaction should be "exclusively regulated otherwise than by Native Law and custom", there is no doubt that a transaction which contemplates a mixture of the rules and incidents of both customary and foreign law[13] is, despite such mingling, subject to Customary Law.[15]

The High Court Laws also provide that in cases of conflict between the rules of equity and the rules of Common Law with reference to the same subject matter, the rules of equity shall prevail.[16] This, it is submitted, means that the rules of equity shall prevail over the rules of Common Law but not over an enactment. After discussing this provision, however, Elias concluded:

> "In England, equity prevails over such an enactment. It is tempting, but probably plausible to say: ergo, the colonial enactment ought to be superseded." 17

With greatest respect, this statement must either be a regrettable misprint or an unfortunate misunderstanding of basic principles. Neither in England nor in Nigeria[18] can the omnipotence of the Parliament be overridden by rules of equity.

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15. cf. Redwar, op.cit., on similar provisions of the Gold Coast Ordinance,1876, S.14. Per contra, Jibowu Ag.F.C.J. in Cole v. Folami; (1956) 1 F.N.L.R.66; sed quaerae.
16. High Court of Lagos Law, S.15.
    Eastern Region High Court Law, 1955, S.21 (3).
    Northern " " " " , 1955, S. 30.
    Western " " " " , 1955, S. 21;(1959 ed.) S.16.

17. Elias, T.O., British Colonial Law, London, Stevens & Sons, p. 220.

18. It is possible for an enactment to be declared *ultra vires*. The Nigerian Legislature (e.g. The Commission and Tribunals of Enquiry Act, 1961 (No.26 of 1961) were declared null and void by the Federal Supreme Court: see West Africa (1961) pp.1209 and 1219. but this is not on principles of equity but upon the express provision of the Constitution.

'STATUTES OF GENERAL APPLICATION' cannot be easily defined. As Allott correctly observes, "each case must be decided on the merits of the individual statute or rule under consideration"[19] A number of Statutes have been construed by Nigerian Courts to see whether they are of "general application".

The first of these cases was Halliday v. Alapatira (No. 1).[20] The issue depended on whether the mere handing of a printed circular to a man who cannot read it and without translating it or explaining its contents to him constituted sufficient notice of an Act of Bankruptcy so as to deprive the illiterate of the protection of S.94 (1) of the Bankruptcy Act, 1869. In a judgement delivered on the 20th. April, 1881, the Full Court of Appeal held that "the Bankruptcy Act is not in force in this Colony." [1]

Webber, J. considered the meaning of the term in Chief Young Dede v. African Association, Ltd.[2] and in his judgement delivered on the 11th. July, 1910, in the Divisional Court at Calabar, said:

> "All the learned judges have taken this section (3) to refer to all Statutes of general application in England as if the section reads'...the Statutes of general application in England and which were in force on...' in other words they have held that the transposition of the words "in England" to the principal sentence after the word "application" does not alter the meaning of the section which according to their construction refers to Statutes of general application in England.

19. Essays, p.3. 20. (1881) 1 N.L.R.1. 1. per Smith, J. at p.5. This decision was applied in Davies v. Williams (1889) R.C.J 31, C.A. 2. (1910) 1 N.L.R. 130.

3. i.e. S. 14 of the Supreme Court Ord., 1876.

> "The Statute of Limitation may be of general application in England but I cannot admit that they are Statutes of general application in the truest sense of that term." 4

Two guiding principles emerge from examination of the opinion of Webber, J.:

1. "All Statutes, if there be nothing pointing to the contrary intention, must be taken to apply to the United Kingdom, i.e., Great Britain and Ireland, and all Statutes applying to the United Kingdom are Statutes of general application. There are Acts of Parliament whose application is limited and their limitation varies in extent." 5.

2. The Statutes will apply only where from the evidence the transaction is to be governed exclusively by English Law.[6]

A further guide is afforded by the opinion of Osborne, C.J., in A.-G. v. John Holt & Ors.[7] in which the contention was (inter alia) that the Nullum Tempus Act,[8] being in the nature of the Statute of Limitations, cannot apply to the dispute because Statutes of Limitation are not Statutes of general application within the meaning of S.14 of the Supreme Court Ordinance. The learned C.J. after stating the provisions of S. 14 observed,

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4. at p. 131 - 2.
5. ibid, at p. 132.
6. ibid. p.134. cf. Sunmonu v. Raphael (1927) A.C. 881, and Malomo & Ors. v.Olusola (1955) W.N.L.R.12.
7. (1910) 2 N.L.R.1.
8. Also called Crown Suits Act, 1769.

> "This, he[9] contended, means Statutes which were of general application, not in England, but in the Colonies. If this be the meaning, it becomes the duty of the Court, before applying any English Statute, to ascertain in what parts of the Empire it is in force; but the Court has no means of ascertaining this. Moreover, it has been held in this Court and on the Gold Coast, where an analogous provision is in operation, that the Statutes of Limitation, which are essentially Statutes founded on public policy, and not mere Statutes regulating procedure, do apply." 10

The C.J. concluded his argument by citing Ex Parte Joseph, delivered on 26th. January, 1910:

> 'No definition has been attempted of what is a Statute of general application within the meaning of S.14, and each case has to be decided on the merits of the particular Statute sought to be enforced.' 10

It has been decided recently that where a Statute of general application in force in England on 1st. January, 1900, was repealed after 1900, the repeal does not prevent it from continuing to apply to Nigeria.[11]

On the principle of construing each Act separately, the following have been held to be Statutes of general application in Nigeria:

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9. i.e. the A.-G.
10. at p. 21.
11. Gazal & Coy. Ltd. v. Soufan & Sons (1961) N.R.N.L.R.39.

The Fraudulent Conveyancers Act, 1571;[11] Limitation Act, 1623;[12] the Statutes of Distribution 1670 and 1685;[13] the Statute of Frauds, 1677;[14] Wills Act, 1837;[15] the Fatal Accidents Act, 1846;[16] the Partition Act, 1868;[17] Forfeiture Act, 1870;[18] Infants Relief Act, 1874;[19] Conveyancing Act, 1881;[20] Settled Land Acts, 1882-90;[1] Real Property Limitation Act, 1894;[2] and the Land Transfer Act, 1897.[3] But it has been decided that the Administration of Estates Act, 1925, did not apply so as to prevent a widow's one-third interest in real property from being attachable,[4] and that the English Bankruptcy Acts do not apply in Nigeria.[5]

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12. Oloto v. A.-G. (1957) 2 F.N.L.R. 74; Are & Ors. v. A.-G. (1958) W.N.L.R. 126, over-ruling Chief Dede v. African Association (1910) 1 N.L.R.31.
13. Cole v. Cole (1898) 1 N.L.R. 15.
14. Okoleji v. Okupe (1939) 15 N.L.R. 28: but not where the transaction is between natives.
15. Apatira v. Akanke (1944) 17 N.L.R. 149.
16. Lawal & Ors. v. Younan & Sons (1959) W.N.L.R. 157.
17. Williams v. Williams (1946) 18 N.L.R. 66.
18. Owarey v. Macaulay (1941) 16 N.L.R. 61.
19. Labinjoh v. Abake (1924) 5 N.L.R. 32.
20. Shorummu v. Dophon (1940) 15 N.L.R. 87. Raji v. Williams (1941) 7 W.A.C.A. 147; Sanusi v. Daniel (1956) F.N.L.R. 93; Bt. Bata Shoe Co. V. Abizakhen & Kamal (1960) W.N.L.R.190. Adesina v. Otunba (1948) 19 N.L.R.13; Sunmonu v. Onayemi (1955) 21 N.L.R.45; Thomas v. Nabham, infra; c.f. Fasma v. Noureldine (1952) 14 W.A.C.A. 23, S'Leone.
1. Thomas v. Nabhan (1947) 12 W.A.C.A. 299.
2. Green v. Owo. (1936) 13 N.L.R. 43; Roberts v. George (1936) 13 N.L.R. 108.
3. Young & Anor. v. Abina & Ors. (1940) 6 W.A.C.A.180; Thomas v. Nabham (1947) 12 W.A.C.A. 229, both overruling Webber, C.J. in re Estate of James Sholu (1932) 11 N.L.R. 37.
4. Johnson v. U.A.C. Ltd. (1936) le N.L.R. 13; c.f. Adm. G. v. Egbuna (1945) 18 N.L.R. 1.
5. In the Matter of J.P.L. Davies, A Bankrupt (1881) R.C.J. 36; Davies, v. Williams (1889) R.C.J. 31.

Precedents.

The doctrine of judicial precedent operates in Nigeria in the same way as in England in the sense that the decisions of a higher tribunal on a point of law are binding on the lower Courts. A problem which is of academic interest is how far the decisions of English Courts on principles of Common Law or doctrines of equity are binding on Nigerian Courts. Allott, after an examination of various authorities, came to the conclusion that

> "decisions of English Courts on principles of Common Law or doctrines of equity given before the date (6) when a territory received its English Law are of binding authority in the Courts of that territory." 7

This, with respect, is a valuable conclusion. But it is equally arguable that decisions given after 1st. January, 1900, are binding on Nigerian Courts. This is because historically the date of reception of English Law referred only to Statutes of general application. The punctuation also shows that the date refers only to the Statutes, not to Common Law or doctrines of equity, and is supported by the fact that the Western Region in removing the provision for Statutes of general application has removed the date while retaining the provision for

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6. For Nigeria, this date is 1st. January, 1900: see Interpretation Ordinance S.45 (1).
7. Essays, p. 31: italics mine.

application of English Common Law and doctrines of equity. Further, there is in England no date for application of Common Law and rules of equity, a rule of Common Law laid down in 1962 declares the law as it has always been from time immemorial. In practice, decisions given after the operative date are usually cited and treated by both Bench and Bar as authority in support of their arguments.[8] There is no legislation either in England or Nigeria establishing the principle of stare decisis; the rule has evolved, over the years, out of the general practice of the Court and was designed to prevent the chaos which might arise by judges constantly changing the law.[9]

LEGAL WRITINGS.

A glance through the law reports reveals the great extent to which the Courts in Nigeria depend on text-books, legal and non-legal, both English and local, as a guide in assessing the evidence or as authority in establishing a principle of law. Standard works on Landlord and Tenant, such as Woodfall, Foa, Hill & Redman, and the omnibus volumes of Halsbury's Laws of England, are constantly referred to. Authors on purely Nigerian matters

8. cf. Sir Kenneth Roberts-Wray, Q.C., in [1960] J.A.L. 66, especially pp. 69-70.
9. For general treatment of the principle of stare decisis in England, see Kiralfy, A.K.R., The English Legal System, 1960 ed. pp. 79-107. Halsbury's Laws of England, 3rd. ed. Vol. 22, pp. 796-807.

usually cited include Ward Price, Meek, Folarin Evgharevbe and Elias. Of these only Elias and Folarin are trained lawyers. The danger which lies in accepting a textbook statement per se as authority is that it may set down a questionable principle of law which the Court, by giving its blessing, will perpetuate. Thus after citing Elias's Nigerian Land Law and Custom, Stuart, J. concluded:

> "The wide research and deep learning of Mr. T.O. Elias entitle his views to the greatest respect and I regard him as an authority." 10

Unfortunately, the matter in this case concerned the principles of customary pledge which, it is respectfully submitted, the learned author did not state correctly.[11]

The General Law Within the Federation.

Under the Federal Constitution first introduced in 1954, separate and autonomous legislatures are provided for each of the sections of Nigeria - East, West and North - called Regions - reflecting to some extent the ethnic divisions of the country. Each of these legislatures is called the House of Assembly, and has a second Chamber known as the House of Chiefs. A separate legislature, the Parliament, (with the

10. Jimo Amoo v. Rufayi Adigun (1957) W.N.L.R. 55 at p.56.
11. See Chapter 2 below on the nature of Customary Pledge.

Senate as second Chamber) exists for the Federal Territory of Lagos and for the whole Federation for certain matters. The systems in all these territories follow the pattern of the general legal system described above. Statutes passed by the Parliament are known as Acts, those passed by the Regional Houses as Laws. Two Legislative Lists exist:[12] the Parliament may make laws relating to matters on the exclusive list but has co-ordinate powers with the Regional Houses to legislate on matters in the concurrent list. In case of conflict the Acts of Parliament prevail.[13]

Unlike the constitutions of some other Commonwealth Countries,[14] the Nigerian Constitution nowhere contains any express provision relating to the exercise of residuary legislative powers. It is submitted, however, that the items contained in the Legislative Lists are exhaustive for *expressio unius est exclusio alterius*; moreover, in view of Sections 66 and 67 of the Second Schedule which give the Parliament powers, in the circumstances therein specified, to make laws for a Region in respect of the matters not included in the Legislative Lists,

12. The Nigeria (Constitution) Order-in-Council, 1960, S.64 and 2nd. Schedule. Schedule.
13. *ibid*. S.64 (3).
14. e.g. Canada: British North America Act, 1867, S3 91 and 92.

and taking into consideration the decisions reached at the Conference leading to the establishment of the Federation,[15] the residuum of powers lies with the Regions and, therefore, land which is not included in the Lists, is a Regional matter.

The power of the Parliament to legislate on the enumerated topics carries with it power to make laws on any matter incidental or supplementary to any matters referred to in the Lists.[16] This opens the door quite wide and an extensive field exists for litigation on what is "incidental or supplementary". Now, suppose the Parliament makes laws under the Federal Powers of controlling immigration[17] permitting immigrants to settle in a Region and the Regional Government in its disapproval of the immigrants enacts that no citizens of the State to which the immigrants belong may occupy land in the Region, which of these laws will prevail? And can the Federal Government compel a Region to let some land to the immigrants or, what is nearly the same thing, can the Federal Government compulsorily acquire the land under the Public Lands Acquisition Ordinance and then lease it to the immigrants? This is a crucial question because it seems that a Regional Government can render ineffective the exercise of some of the Federal

15. e.g. Report by the Conference on the Nigerian Constitutio[n] August, 1953, para. 8. But on strict traditional principles of interpretation the history of a Statute is not taken into account in construction of its provisions.
16. Nigeria (Constitution) Order-in-Council, 1960.
17. ibid, ~~item 6 of Part II~~. Second Schedule Schedule, item 18

Government's powers to control immigration. And if a commercial or industrial combine develops a large estate in a Region can an Act of Parliament passed under the Federal Government's power to control combines and trusts,[18] nullify a Regional Law passed to acquire compulsorily the estate of such a combine?

A detailed analysis of these and other problems will not here be attempted, but it is submitted that in such cases (as e.g. of allowing immigrants to settle) the incidental and supplementary powers are wide enough for an Act of Parliament to over-ride the Regional Laws forbidding immigrants settling in the Region. This, it is submitted, is the correct approach because power to legislate on the matters included in the Lists carries with it a provision that the Regional Executive are prevented from exercising their powers so as "to impede or prejudice the exercise of the executive authority of the Federation or endanger the continuance of Federal Government" in Nigeria.[19] But, it is further submitted that, although the Regional Law will in such a case be ultra vires, the Federal government cannot compulsorily acquire land in a Region, against the wishes of the

18. ibid, item 6 of Part II.
19. cf.the Canadian Case, Union Colliery Coy.v.Bryden (1899) A.C.580,P.C.,which decided that a Provincial Statute prohibiting Chinamen from employment in underground coal working was ultra vires in view of S.91(25) of the British North America Act,1867, which gave exclusive legislative jurisdiction to the Dominion Parliament with regard to naturalisation and aliens.

Region, for purposes of settling immigrants. And even if the Federal Government takes a lease of land for matters intra vires[20] and later ceases to occupy it for such purposes but instead lets it to an individual or a company, the Regional Government may amend its law so as to divest the individual or the Company of the use and occupation of such land, subject to payment of adequate compensation [1]. This is so because land being within the competency of the Regions, any law[2] it makes for the occupation of land within its territory is intra vires and can, therefore, effectively deprive anybody of such land and any Federal Act to the contrary will be void, irrespective of the justice or injustice of the Regional legislation.[3]

Apart from problems of this type which are of a general nature there are others of at least equal importance which arise as a result of the Federation. Thus under the Constitution each Region has enacted its own High Court Law. The enactments of the Federal Territory, the Eastern and the Northern Regions laid down (inter alia) that Statutes of general application in force in England on 1st. January, 1900 shall be in force within the jurisdiction of the Court. In the

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20. e.g. such as air-port - item 3 of the Legislative List.
1. The Nigeria (Constitution) Order-in-Council, 1960, Second Schedule, S.30(1). Any existing laws not providing for compensation will now be regarded as modified under S.3 of the Constitution: cf. Kanda v. Govt. of Malaya (1962) 2 WLR. 1153.
2. As long as it does not conflict with occupation by the Federal Government.

3. cf. again the Canadian case McGregor v. Esquimalt Railway (1907) A.C.462 in which the P.C. held that a Provincial Legislation which directed that a grant in fee simple and without any reservation as to mines and minerals should be issued to the Ry. Coy. by the Dominion Government, did not relate to the public property of the Dominion, but to property and civil rights of the Province and, therefore, intra vires.
See also Chief Commissioner, Eastern Provinces v. Ononye & Ors. (1944) 17 N.L.R. 142.

Western Region this provision has been expressly abolished.[4] This means that in certain circumstances English Statutes of general application will still continue to be in force in the Western Region regardless of the Regional legislation.

On the other hand the interpretation of legislative provisions has not been very delightful. Thus the High Court of Lagos Ordinance lays down that the jurisdiction of the Court in divorce and matrimonial causes and proceedings may, subject to application of Customary Law, and to rules of Court,

> "be exercised by the Court in conformity with the law and practice *for the time being* in force in England." [5]

The phrase "for the time being" has been interpreted by the W.A.C.A. to mean the date of the commencement of the Ordinances.[6] This interpretation, with respect, is questionable and although the meaning of the phrase may vary according to the circumstances, it is submitted that in the context it means the present time - the time of decision of the case.[7] One would prefer the view recently expressed by Hurley, Ag. C.J. who was of the opinion that the current English Law of three-year

4. Law of England (Application) Law,1959, SS. 2 & 3.
5. High Court of Lagos Ordinance (Cap 80 of 1958 ed.) S.16 Italics mine. cf. Regional Courts (Federal Jurisdiction) Ordinance,1958, (no. 12 of 1958) S.4.
6. *Flora Godwin v. Naomi Crowther* (1934) 2 W.A.C.A. 109 at pp. 110-111, per Macquarrie J., on a similar provision of the Sierra Leone Ordinance.
7. cf. Lord Buckmaster in *Wankie Colliery Co. v. I.R.C.* (1922) 2 A.C. 51 at pp. 57, 58: a revenue case.

residential qualification applied to Northern Nigeria under the above Section.[8]

Further still, Butler Lloyd J. held in Johnson v. U.A.C. Ltd.[9] that the provision of S. 36 of the Marriage Ordinance relating to the distribution of the estate of a deceased intestate according to English Law meant English Law as at the date of enactment of that Ordinance, i.e., 31st. December, 1914. This decision, again, is not easy to understand because S. 14 of the Supreme Court Ordinance [10] provides expressly for the application of Statutes in force on 1st. January, 1900.

The conclusions to which this analysis leads may be stated as follows:-

1. The current English Common Law and doctrines of equity apply in Nigeria.
2. The current English Law - Common Law, doctrines of equity and Acts of Parliament - apply to all divorce, matrimonial causes and proceedings throughout the Federation.

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8. Okonkwo v. Raymond Eze (1960) NNLR 80 at p.82. But the learned Ag.C.J's decision on domicile is (with respect) questionable: to bring in rules relating to succession and legitimacy which were not in issue to decide an issue of matrimonial domicile is inelegant.
9. (1936) 13 N.L.R. 13.
10. Now S.45(1) of the Interpretation Ordinance, Supra.

3. English Statutes of general application as on 1st. January, 1900, are in force in the Federal Territory as well as the Eastern and Northern Regions but in the Western Region only as far as the matter in issue is within the exclusive competence of the Federal legislature.

If, however, Allott's interpretation of S. 14 is preferred, then

4. The English Common Law and doctrines of equity as on the 1st. January, 1900, apply throughout the Federation with exception of the Western Region where the current English Common Law and doctrines of equity apply in any case.

Finally if both Macquarrie [11] and Butler Lloyd, J.J.[12] be right in the cases considered above, then,

5. In divorce and matrimonial causes and proceedings throughout the Federation, and in probate matters in the Eastern and Northern Regions as well as the Federal Territory, English Law and practice as on 31st. December, 1955,[13] applies.

6. In cases involving succession to the rights of landlords and tenants coming within S.36

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11. In Flora Godwin v. Naomi Crowther (1934) 2 WACA 109, supra.
12. In Johnson v. V.A.C.Ltd. (1936) 13 N.L.R. 13, supra.
13. The date of the commencement of the Ordinance.

of the Marriage Ordinance, English Law as on 31st. December, 1914, applies.

This uncertainty as to the application of English Law caused by the legislation of all the territories (except the Western Region) presents an intolerable situation. The express provision importing Statutes as on 1st. January, 1900, is undesirable not only because of the progressive difficulty of discovering what that law was but also because the changing social conditions necessitate the application of an up-to-date system of Law.[14] One might suggest that if it is at all necessary to import English Law, it should be expressly laid down that current English Law shall always be applicable. In this respect the Western Region has gone a long way to make its laws more certain than those of the other Regions. It cannot be contended, however, that unlimited enactment of English Statutes relating to land and other property is a very desirable course to take since the social and economic conditions which gave rise to those Statutes were different from the conditions existing in Nigeria to-day.[15] The almost

14. cf. Simpson, S.C., Report on Registration of Titles to Land in Lagos, para. 32. ~~para. 32~~.
15. cf. Northern Nigeria Lands Committee, para. 8, cited Irving, Titles to Land in Nigeria, p. 333; Simpson, S.R. Supra, para. 34.

verbatim reproduction of English Property Acts[16] by the Western Nigeria Legislature ignores this important fact.

The escape provided for Nigerian lawyers by the residual clause importing English Law seems to have led not only to a virtual abandonment of any effort to discover and record the indigenous Laws of the various parts of the country but also to minimise the need for any attempt at making original legislative provision embodying the best principles of both the Customary Law and of other systems of law. The introduction of English Law has created some new problems. For example, what are the criteria for assessing whether or not a matter is regulated by English Law only? Can a transaction be governed partly or for some time by English Law or partly by Customary Law, and vice versa? This sort of problem which presents endless difficulty in discovering the law relating to landlord and tenant will be examined in due course[17] but it is necessary first to consider the general principles of land tenure in Nigeria.

16. The enactments include Wills Law,1958,(No.28 of 1958, now Cap.133 of 1959 edition) almost a carbon copy of the English Wills Act, 1837; Landlord and Tenant Law, 1959,(No.32 of 1959,now Cap.58); a reproduction of various English Acts relating to Landlords and Tenants Property and Conveyancing Law,1959,(No.21 of 1959, now Cap.100): a copy of the English L.P.A., 1925.

17. See Chapter 5 below.

CHAPTER TWO.

LAND LAW OF NIGERIA IN OUTLINE.

GENERAL.

In Euro-American jurisprudence the two original forms of Land Holding were

1. Allodial[1], under which the holder had entire and absolute dominion of the land which he could dispose of at his pleasure during his lifetime or transmit to his children on his death;
2. Feudal, under which the holder had only a conditional dominion, but acknowledged a superior lord, upon whose goodwill his tenure depended and without whose consent he could do nothing on the land.[2]

In approaching Nigerian Land Law it must be emphasized that even if it is impossible to break away entirely from the European concept, the use of English or European terminology is not technically correct and if from a desire to avoid excessive use of Nigerian customary terms, the nearest English equivalents are resorted to, their meaning in the customary system must be qualified by the fact that

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1. Earl Jowitt, the Dictionary of English Law, Vol.1, 1959, p. 102. cf. Allott, Essays, p. 16 and A.-G. v. Nobi bin Ndugumbi & Ors. (1954) 21 E.A.C.A.43 cited therein.
2. Cheshire, G.C., The Modern Law of Real Property, 8th.ed. 1958, pp.8-16; Jowitt, ibid., pp.797-8.

such terms are only mere approximations.[3] The Land Law of Nigeria will be considered under two headings:

(a) Customary Systems of Land Tenure.

(b) Tenure under the General Law.

A. 1. Customary Systems of Land Tenure:

ALTHOUGH Nigeria is made up of many ethnic groups, each with its own customs and laws, it is possible to discern some general principles of Customary Land Tenure. Theoretically the ownership of land does not belong to man. Land is owned by God[4], or what is almost the same thing, Land is God. What human beings have is the use (or as the Ibos put it, the "eating") of the land. This approach is part of the political philosophy of the people in general who hold the view that the State is a theocracy and that the benevolent character of the theocrat is manifested in fertility of the earth and all that is and grows on it. Any heinous act inimical

3. cf. Viscount Haldane in Amodu Tijani case, (1921) 3 N.L.R. at p. 52. See also Rowling, Land Tenure in Ijebu Province, paras. 14-17. Meek, Land Tenure, p.114; Elias, Land Law, p. 92. Northern Nigeria Lands Committee para. 8, in Irving, Titles to Land in Nigeria, p.333. Talbot, P.A., The Peoples of Southern Nigeria, Vol.III, 1926, p. 682.

4. Ward Price, Land Tenure in the Yoruba Provinces, para.105 Meek, A Sudanese Kingdom, p.332. Meek, Land Tenure and Land Administration in Nigeria, p.113; Law and Authority in a Nigerian Tribe pp.24-32; Abrahams, The Tiv People, 1933, p.67. Liversage, Land Tenure in the Colonies, p.4, for universal view in the "Colonies" W.A.L.C. 1047, para. 13475: by Yoniba Chief. cf. Talbot, The Peoples of Southern Nigeria, 1926, Vol. III, p. 682.

to the society is, therefore, in the words of the Ibos again, "Nso Ala" - defilement of the Ground, which must be removed by propitiatory sacrifices.[5]

But this philosophical conception is not jurisprudential. In native legal thinking land is regarded as very valuable property. Dr. Johnson states that

> "There is no subject in which the Yoruba man is more sensitive than in that of land. These normally quiet and submissive people can be roused into violent action of desperation if once they perceive that it is intended to deprive them of their land." 6

Miss Green gives the same opinion among the Ibos of whom she says that "the subject of land was a jumpy one." 7

The basic legal principle of customary land tenure is contained in the words of Gboteyi, the Elesi of Odogbolu,[8] who in his evidence to the West African Lands Committee said,

> "I conceive land belongs to a vast family of which many are dead, few are living and countless members are still unborn." 9

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5. See Note 4 above.
   Basden, Niger Ibos, p. 267.
   Meek, A Sudanese Kingdom, p. 332.
6. The History of the Yorubas, 1921, p. 96.
7. Green, M.M., Land Tenure in an Ibo Village, 1941, p.2., cf. Talbot, The Peoples of Southern Nigeria, Vol.III p. 682.
8. A Yoruba Chief.
9. W.A.L.C. 1048, p. 183.

The dominant, but by no means the only conception, is that land belongs to the community.[10] The Privy Council emphasized this by accepting as "substantially" true a statement of Rayner, C.J., in the Report on Land Tenure in West Africa, 1898, that

> "Land belongs to the community, the village or the family, never to the individual. All members of the community, village, or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is 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 land to cultivate or build a house upon, goes to him for it..... This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas." 11

Analysis of the nature of interests of the village, the family or the individual will be postponed[12], but for the moment it will be necessary to consider what is meant by "ownership", "community" and "trustee".

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10. Meek, Land Tenure and Land Administration in Nigeria, p. 115. Anderson, J.N.D., Islamic Law in Africa, 1954, p. 184. Johnson, ibid.p.96. Ajisafe: op.cit.p.6, para.3. Talbot, P.A., The Peoples of Southern Nigeria, Vol.III, 1926, pp.680 & 682. It will be interesting to know the meaning of the words "land", "belongs", and "community" but none of them has been judicially defined in Nigeria. In Nsirem v. Nwakerendu (1955)15 W.A.L.A.71 it was held that the word "owner" is loosely used in West Africa

10 cont. and in the case before the Court meant those who have a right of occupancy according to Native Law and custom. For maaning of "land" see p.282.

11. _Amodu Tijani v. Secretary, Southern Nigeria_ (1921) 2 A.C 399, at p. 404.
(1921) 3 N.L.R. pp. 53 - 4. Italics mine.

12. See pp. 144 _et seq._

2. Ownership:

Under English Law it has never been felt necessary to work out any concept of ownership comparable to the Roman dominium.[13] Austin's definition of ownership as a right "over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration"[14] will not fit squarely to Nigerian land tenure because, in customary law at least, power of disposition is greatly restricted. Similar objections can be raised to other English definitions and it has been continuously emphasized by text-writers[15] and the Courts[16] that English technical terms should be used with the greatest caution in describing the complex customary system. This warning was recently repeated by Foster Sutton, P., who said that

> "the term 'owner' is loosely used in West Africa. As the Board said in Kwesi Enimil & Ors. v. Kwesi Tuakyi & Anor. (17) 'Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to rights of occupancy.'" 18

13. Vinogradoff, P., Historical Jurisprudence, Vol. II, 1922, pp. 197-8. Dias & Hughes, Jurisprudence, 1957, p.336. cf. Geldart, W.M., Property, Its Duties and Rights, 1922, p. 208.
14. Jurisprudence, 7th. ed. p.264. cf. Dias & Hughes, ibid. p.340; Turner, J.W.C., (1941) Can. Bar Rev. 343ff.
15. Lugard, Dual Mandate, p.316 ff. Rowling, Ondo, para.150. Kano, para. 13; Allott, 'Towards a Definition of Ownership," (1961) 5 J.A.L., 99.
16. Amodu Tijani Case (1921) 3 N.L.R. at p. 52.

17. (1950) 13 W.A.C.A. 10.

18. <u>Nsirem v. Nwakerendu</u> (1955) 15 W.A.C.A., 71, at p. 72.

Allott's suggestion is that we should speak of "absolute owner" rather than in abstract terms of ownership both because in everyday legal language one speaks of many different kinds of owner, e.g. "limited owner" and also because it is much easier to specify what an owner may do rather than lay down the qualities of an abstract concept.[19] This suggestion is of great importance because one can readily point out those features which characterise a Landlord or Tenant in Nigeria. The Lagos Town Planning Ordinance[20] states that an

> "'Owner' means the person for the time being receiving the rent of the land or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person or as receiver (not being appointed by or on behalf of a mortgagee) or who would receive the same if such land or premises were let to a tenant, and shall include a mortgagee in possession."

This definition is of limited value because it includes both an original landlord and a tenant who has sub-let the premises: each receives the rent (or is entitled to receive it) on his own account. Furthermore, the use of receipt of rent as an index of ownership ignores the fundamental principle that neither in English Law nor in Customary Law is

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19. 'Towards a Definition of "Absolute Ownership"'(1961) J. A. L. 99.
20. Cap. of 1959. 3.

payment of rent a necessary feature of the relation of landlord and tenant. In English Law (and therefore under the General Law of Nigeria) the mere acceptance of the lease is sufficient consideration for creating the obligation and in Native Law and custom grants of land could be gratuitous.

Unlike the English theory under which all land is owned by the Crown, Nigerian Customary Law did not develop a legal concept relating to all land and the Government of the Eastern Region has stated categorically that

> "the theory of the ultimate right of the Crown to all lands does not exist"

in the Region.[1]

The ownership of each plot of land must, therefore, be considered separately from that of the neighbouring land. Approached from this angle every piece of land under consideration has an owner who can be easily identified. This owner is a person (whether an individual or a corporate group)

(a) to whom the law (or the society of which he is a member has granted or guaranteed[2] interests in the land and these interests are not defeasible

1. Policy for Land, Sessional Paper, No. 3 of 1955, para. 12.
2. cf. Allott, 'Towards a Definition of "Absolute Ownership"', supra. Dias & Hughes, op.cit., p.342ff. Turner, J.W.C., 'Some Reflections on Ownership in English Law, (1941) Can.Bar.Rev.343. Vinogradoff, Historical Jurisprudence, Vol.II, p. 197.

or determinable upon the occurrence of any future event, and

(b) who has, or whose successors will have the residue of all powers to possess and use the land[3], and

(c) who has, or whose successors will have the ultimate rights, privileges, powers and immunities[4] allowed by law[5], in respect of the land.

It is the person to whom these rights are accorded by law that the term "owner" will be applied to for the purposes of this thesis. It may be, as Elias says, that

> "The average occupier has something analogous to a possessory title which he, however, enjoys in perpetuity (6) and which gives him powers of user and disposition scarcely distinguishable from those of an absolute freeholder, except that he cannot alienate his holding so as to divest himself and his family of the right to ultimate title." 7

but it is respectfully submitted that power of alienation need not be the test of ownership since this power may be restricted both in respect of the occupier and of the 'freeholder', and that in

3. cf. Salmond, Jurisprudence, 11th. ed., p.303, footnote by Glanville Williams.
4. cf. Salmond, ibid.p. 300; Dias & Hughes, ibid., p.341.
5. Pollock, Jurisprudence, 5th. ed.,1923, p.179, describes ownership as "the entirety of powers of use and disposal allowed by law", but see the Comment of Turner, (1941) Can.Bar.Rev., p. 344.
6. Sed.qu. whether the learned author means "indefinitely" and not "in perpetuity".
7. Nigerian Land Law and Custom, 2nd. ed. 1953, p. 93.

considering the ownership of land in Nigeria it will be necessary to look for the person or persons who have the "ultimate right - the right which has no right behind it" - with respect to the land.

3. Community:

The word "Community" is not a term of art and when it is said that land belongs to the community two interpretations, at least, are possible:

(i) It may mean that all members of a group possess and use a piece of land as a group for the common benefit of the group - they may plant crops or feed cattle belonging to the group or live in houses built in common on the land by all the members as a body.[8] As far as the available evidence goes, there is no such type of community ownership in Nigeria.

(ii) It may mean that individual members of a political or social group have certain claims, powers, privileges and immunities in or over the land *vis-a-vis* the political authorities or other members of the group.[9] It is in this later sense that it is possible to

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8. Early Christian Communism of this type, and its failure is described in The Acts of the Apostles 4. 32 - 5. 12. cf. Prof. Hobhouse, L.T., Property, Its Duties and Rights, 1922, pp. 24-33.

9. cf. Allott, Essays, p. 70.

consider rights possessed by a member of the group in the land of which he is not the owner. Land may therefore be said to belong to the community only in the general sense that "community" is used as a shorthand description of a group which considers itself, and is regarded in law or by the society, as a corporate entity.[10]

This group may be a tribe[11], a town,[11] a village, an extended family or even a family, and members of the group enjoy certain rights of possession and use in the land. The matter will be considered later on in the appropriate places but it is in this sense that communal ownership will be used in subsequent pages.

4. Trustee.

In English Law a trustee is the legal owner of property and is bound to administer the trust property on behalf of the beneficiary[12]. In Customary Law the head or heads of a political or social groups are bound to control the land belonging to the group for the benefit of the members. It is only in this respect that their position resembles that of a trustee but it will not be correct to equate these heads to

10. Allott, Essays, p. 70.
11. Tribal ownership is very unusual and ownership by a town is rare. Town here means, of course, the 'Obodo' of the Ibos. Town ownership is still possible in Atani, near the Niger, south of Onitsha.
12. Cheshire's Modern Law of Real Property, 1958, p.326.

trustees since trustees hold the legal title to the property whereas the heads have no title whatever vested in them.[13] As Rayner, C.J. correctly states a headman has control of the land, but not the ownership. He is a caretaker and his position is more like that of an agent.

The learned C.J. states that whereever individual owners are found, as in Lagos, it is due to the introduction of English ideas. With the greatest respect, there is no evidence to support such an assertion. There is no doubt, of course, that contact with Britain hastened private ownership of land but to attribute individualisation only to the introduction of English ideas not only ignores the historical process of Law of property in general but also fails to "take account of the instinct of acquisitiveness and of individual claim grounded thereon."[14] As Professor Malinowski points out, "the real problem is not 'either-or'

> of individualism and communism but the relation of collective and personal claims." 15

A piece of land may belong to a man in his personal

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13. The Government of Eastern Nigeria in Policy for Land, Sessional Paper No. 7 of 1953, para.3, after correctly stating that the village head has no proprietary right or ownership in the modern sense runs into the error of saying that he holds the land in trust for the present and future generations. Similarly, Sessional Paper No.3 of 1955, para. 3.
14. Dean Roscoe Pound, An Introduction to the Philosophy of Law, p. 235. De Coulanges in The Origin of Private Property in Land, 1891 ed. gives a very useful examination of the historical evidence on which the theory of communal ownership is based, and while not rejecting

14 cont. that <u>some</u> lands may belong to a group, concludes that the historical facts on which the idea is based are inconclusive.

15. Coral Gardens and Their Magic, Vol. I pp. 379-80.

rights, at the same time he may have some interests in other lands as a member of a family, or village, or any other social or political group. A useful method of approach may be to ask

1. Which land is in question?
2. Who have rights in it?
3. What rights have these persons in the land?

Rowling states that among the Yorubas of Ijebu Province there are eight types of land, namely,

1. 'State' land; 2. 'Stool' or 'Title' land;
3. 'Common' land; 4. 'Village' land;
5. 'Quarter' land; 6. 'Ebi' ('Family') land;
7. Land held by the '*Ojumu*' or 'branch' of an *ebi*;
8. Bona fide personal property.[16]

Meek's classification for Nigeria[17] in general and the Ibos[18] is somewhat different but all tend to the same effect. Dr. Meek speaks of 'tribal lands'[19] but from his analysis one discovers that he means a *section* of a tribe.[20] Land can be said to belong to a tribe only in the sense that land in England belongs to the English and not to the Germans. But in legal terminology there are no tribal lands

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16. Rowling, C.W., *Land Tenure in Ijebu Province*, 1957, paras. 22-3.
17. Meek, C.K., *Land Tenure and Land Administration in Nigeria*, 1957, p. 115.
18. *Law and Authority in a Nigeria Tribe*, pp. 100-4.
19. *Land Tenure and Land Administration in Nigeria*, p.118ff.
20. Adopting the learned author's definition of 'tribe' given in *Northern Tribes of Nigeria*, 1925, p. xv.

in Nigeria.[1] But there are public lands[2]- sacred groves, market-sites, churches and mosques and lands surrounding them, in which members of a political or social community have a common interest and to which they have a common right of use for purposes for which they are set apart. Also there are places where grazing or farm lands belong to a political or village community **as** a group but the normal unit of landholding is the family,[3] though there is now a progressive tendency towards individualisation.

Political or social groups acquired their lands by occupation of unoccupied lands, by conquest or forfeiture of property of a member who was expelled from the group, by escheat and/or by direct acquisition. One principle of customary law is of universal application, namely, that he who first clears a forest for purposes of his occupation and use acquires permanent rights over the area so cleared.[4]

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1. Elias, Nigerian Land Law and Custom, p. 94.
2. Ajisafe, op.cit., Chap.IV, paras.21 (a)(b)(c). Ward Price, op.cit., para. 28. Meek, Law and Authority, p. 100. Nadel, op.cit. p.91, Elias, Nigerian Land Law, p. 93.
3. Elias, Nigerian Land Law, p.94. Coker, Family Property. Green, Land Tenure in an Ibo Village, pp.6-15. Jones, Ibo Land Tenure in Africa, Oct.1949. Meek, Land Tenure and Land Administration-p.128ff. Rowling, Kano, para. 8.
4. cf.Laws of Manu, India;"He who clears a piece of land is the owner thereof"(IX.v.44) Vinogradoff, Outlines of Historical Jurisprudence Vol.II p.216 for similar position in Ancient Greece.

Labour created rights, thus the fact that a man has expended labour over a forest or neglected land gave him permanent rights over it.

But under Nigerian Customary Law land cannot be without an owner.[5] It may be that exercise of rights over the land may be dormant for a long time, it may be that the boundaries are uncertain, it may be that the people have no immediate need for the land yet in the eyes of the Law the land is regarded as held by some person or persons.[6] To-day the natives may still be heard to say that such and such land belongs to nobody: what they really mean in such cases is that no one among the members of the community has private rights over such lands; it is held by the group because the totality of the rights therein is vested in a body of persons as a group,[7] and even if the exact limitation of this body, like Voltaire's God, cannot be found, when the rights of the group are infringed, its agents sooner or later come forward to seek a remedy.

It is often stated that it was contrary to custom to sell land.[8] Such a statement is questionable because in early times the present socio-economic factors necessitating dealings in . . . .

5. Policy for Land: Sessional Paper, No.7 of 1953, para.4; Eastern Region)
6. Meek, Land Tenure, p.114. W.A.L.C., 1048, p.160.
7. Rowling, Ijebu, para. 15.
8. Green, M.M., Land Tenure in an Ibo Village, p.7. Meek, C.K., Land Tenure and Administration in Nigeria, p.218. Policy for Land, Sessional Paper No.7 of 1953, para.5. Eastern Region.

land were absent and therefore people may not have heard or known of any cases of sale of land. But it is one thing to say that at Customary Law land cannot be sold and quite another thing to say that in early society land was plentiful, the requirements of the people moderate and therefore the need for buying and selling land was not felt[9].

But it seems that the theoretical conception of land as belonging to God has impinged itself on Customary Law at least in one respect,[9] namely that an owner of land cannot transfer all his rights therein by sale. Where there is what is usually termed an outright sale, the owner of the land or his successors still retains some intangible and dormant right so that if the purchaser or his successors die intestate and without an heir, the land sold outright does not, at Customary Law, become a res nullius which the political community can claim but will be considered accruing for the benefit of the former vendor in view of the right which was not completely transferred at the time of the sale. A case[10] in Nigeria has, however, been

9. cf.Ward Price,Land Tenure in the Yoruba Provinces,para. 103. Sakariyawo Oshodi v. Brimah Balogun & Ors.(1936) 4 W.A.C.A. 1,at p.2, by the Privy Council. cf.Kwesi Abessibro v. Kofi Ama (1893)S.F.L.R.78,per Hayes Redwar,J.
10. Okafo Egbuche and anor.v.Chief Idigo & ors.(1934) 11 N.L.R. 140.

decided on the basis that by a sale an owner of land divests himself of all title to the land. In that case[10] the plaintiffs claimed in the Provincial Court of Onitsha a declaration of title to certain land known as Otu-Ocha Umuleri, in Onitsha District, Eastern Nigeria. To prove their title they relied *inter alia* upon an Agreement of 1898 under which their ancestors had conveyed the land in question to the Royal Niger Company. The Provincial Court gave judgement in favour of the plaintiff, basing the decision on the Agreement of 1898 as evidence of an overt act of ownership by the plaintiff's ancestors.

HELD, by Graham Paul J., on appeal to the High Court, that the plaintiff's ancestors having by the Agreement of 1898 divested themselves of all right or title competent to them no longer had any right or title to the land, and their claim to the title should have been refused. Dealing with the argument put forward, the learned judge said:

> "Counsel for the respondents[11] made some attempt to pray in aid native law and custom whereby he suggested abandonment by a grantee revived title in the grantor. I am unable to uphold that argument. No such custom is proved; nor in my view could there be a native custom dealing with the transfer under the agreement to the

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11. i.e. the plaintiff.

> to the Company or with the transfer under the Ordinance.[12] to the Crown. Such transactions were obviously not within the purview of native law and custom."[13]

An examination of this case reveals that native law and custom which must be specifically pleaded and proved as a fact before the High Court was not so proved and that the judge proceeded on the principle of English Law. Therefore, it is submitted that this case does not affect the principle of Customary Law enunciated above. Ollennu J., it is submitted, correctly grasped the principle of Customary Law when he decided in a Ghana case[14] that land alienated absolutely will escheat to the grantor in the event of its becoming bona vacantia either from voluntary abandonment or through death of the grantee without a successor.

Customary sale of land takes two forms: conditional sale and 'outright' sale. In conditional sale there is an implied proviso that the vendor may at any time repurchase the land by repayment of the purchase price. This form of sale must not, however, be confused with pledge of land which is described later. In outright sale a goat must be killed among the Ibos of Oba to set a seal to the

12. i.e.Niger Lands Transfer Ordinance,1916 by which all the lands formerly vested in the Royal Niger Company became vested in the Crown.
13. (1934) 11 N.L.R. at p.143.
14. Essien v. Duncan (1956) W.A.L.R. 155.

transaction.[15] A similar custom exists in many parts of Yorubaland.[16] In Northern Nigeria sales of land existed, especially around the Lake Chad district and among the Tangale and the Waja long before the British occupation[17] and in spite of the Land and Native Rights Ordinance[18] sale of land has become common in populous areas of Hausaland.[19] When the sale is outright the vendor has no right to repurchase the land and as long as the purchaser uses it or grants the uses thereof to anybody whatsoever the vendor has no interest therein but if the purchaser or his successor abandon the land, the dormant right of the vendor is revived. In this sense the Customary Law approach is similar to Muslim theory which made a distinction between the corpus ('ayn) and the usufruct ('manfa').[20] The approach is rather anomalous; it is, in substance the granting of absolute interest, but in theory the receiving of a limited one.[1]

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15. Field, J.O., Man, Vol. XLV, No.47 of 1945.
    Chubb, L.T., Ibo Land Tenure, para. 45. But a dog is killed and a piece of cloth given in addition to the cash in the Ndoki; at Owerri a cock is killed and its blood sprinkled on the land.
16. But in Yorubaland a kola nut is split to mark conclusion of the bargain.
17. Meek, Northern Tribes of Nigeria, p. 279.
18. For which, see below.
19. Rowling, C.W., Report on Land Tenure, Kano Province, paras. 23,24 & 27. Cole, C.W., Report on Land Tenure, Zaria Province, p.67, and para. 133.
    Meek,CK., Northern Tribes of Nigeria,1925,p.279.
20. Tyabji,Kamila, Limited Interests in Muhammedan Law, London, Stevens,1949, p. 3.
1. cf.Tyabji - ibid. pp.1 & 146.

Further under Native Law and custom land may also be pledged[2] or leased for a definite or indefinite period.

5. TREES.

A further principle of customary law is that economic trees may be owned separately from the land on which they stand and may be transferred apart from the land.[3] Dr. G.B. A. Coker[4] in his brilliant work maintained, however, that

> "the maxim quicquid plantatur solo, solo cedit which is a maxim of most legal systems is also part of Yoruba Native Law and custom." [5]

This is a most important statement and because of the far-reaching effects to which it can give rise in practice, it will be examined at some length. Let it be stated at the outset that the existence of plantations in the modern sense was not known to Native Law and custom[6] and that the best picture can be got by considering the position under customary situation and the trend of the development in customary law.

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2. See below for the nature of this form of transaction.
3. Meek, Land Tenure and Land Administration in Nigeria, pp.172-3, Chubb, Report on the Ibo Land Tenure, paras. 101-3. Nadel, S.F., A Black Byzantium. Ajisafe, A.K., op.cit. p.11. Rowling, Report on Land Tenure Ondo Province paras. 13 & 14. Ijebu Province, para.66. Elias, T.O., Nigerian Land Law, pp. 176, 179, 183.
4. Now Mr. Justice Coker.
5. Family Property among the Yorubas, 1958, p.40.
6. cf. Okoh v. Olotu & ors. (1953) 20 N.L.R. 123 at p.124 per Mbanefo J. and Green, M.M., op.cit.

First the cases cited by the learned author to support his statement must be examined.

In Baillie & ors. v. Offiong & ors.,[7] a case relating to the customs of the Efiks of Eastern Nigeria (not Yorubas of the West), the facts were that one Baillie, a tenant at Customary Law, left the demised premises in 1917 and his house subsequently fell down. In 1920 the defendants entered upon the land and claimed the right to resume possession.

Held by the Full Court of Appeal, that upon the evidence adduced Baillie had not abandoned the premises.

> Held further that even if Native Law and custom requires a native who has been permitted to build a house on another's land and has allowed that house to fall down, to obtain permission of the grantor before rebuilding, such a custom does not apply to an area granted, not merely for the purpose of building a house, but for the purposes of occupation generally, as in this case.

The case, therefore, is not concerned with the maxim at all. Similarly, Lewis v. Bankole[8] did not deal with the maxim either expressly or by

7. (1923) 5 N.L.R. 29.
8. (1908) 1 N.L.R. 82.

implication. The substance of the case was the various rights of surviving members of a family at the death of the founder of the family, in the property which the founder left.

Francis v. Ibitoye[9] dealt with the maxim. In that case the parties had been negotiating for sale of land (in Ebute Metta, Lagos) by the defendant to the plaintiff. No contract was concluded but £26 had been paid on account of the price of the land. The plaintiff built a house on the land without the defendant's knowledge, leave or licence. The plaintiff claimed from the defendant the cost of the erection of the building and the £26 paid on account.

Held, by Graham Paul, J., that the maxim applied to defeat the claim as regards the cost of erecting the building. It is submitted, however, that there is no evidence in the Report to show that the case dealt with Yoruba or any Customary Law at all. Under the rules, Customary Law must be specially pleaded and proved and the Report gives the impression that English, not Customary Law was applied.[10]

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9. (1936) 13 W.L.R. 11.
10. Dr. Elias submits that the plaintiff would have been entitled to have pulled down the building and taken away his materials subject to payment of compensation for any damage done to the defendent's land in the process: (Nigerian Land Law pp.202-3) With this submission we respectfully agree. See also, Elias, T.O., Nature of African Customary Law, p.166. cf. Ajisafe, op.cit. 12, para.19 (e) who says that in olden days the house of a tenant might be razed to the ground if he is quitted but in modern times

10 cont. reasonable compensation may be paid for the house or the tenant may sell it to anyone approved by the overlord.

Oloko v. Giwa,[11] like Lewis v. Bankole,[12] did not deal with the principle. On the other hand Fixon Owoo & Ors. v. Robert Owoo & Ors.[13] concerned the Customary Law of the Ga of Ghana. In that case family rooms which were actually occupied were given up for a building to be erected over the grave of the founder of the family by a member who used his own money and materials for the building. On the death of this member the dispute was whether this house was the member's or family property.

Held, that it was family property.

With much respect, this case does not support the principle not only because of the special facts but also because it concerned the Ga, not the Yoruba, and in spite of certain remarks made obiter by McCarthy, J., it is submitted that the correct general principle of Customary Law relating to this matter is contained in a judgement of Strother Stewart, J., (to which others concurred) in the West African Court of Appeal in Santeng v. Darkwa.[14] The learned judge observed:-

> "The question of the remaining house, namely one described as a store, is more difficult. The learned trial judge gave the Plaintiff-Respondent a

11.(1939) 15 N.L.R.31. 12. Supra.
13. (1944) 11 W.A.C.A. 81.
14. (1940) 6 W.A.C.A. 52 at pp. 54-5; italics mine.

> declaration that he was entitled to the house, and is therefore family property.
>
> "I cannot agree with this reasoning. No custom was proved that when a house is built on the ruins of a family house it becomes family property, and I know no such custom.....I can find no authority for the proposition that mere using of the site brands the house with the stamp of family property, although, of course, the site on which the house is built remains family land."

In considering the principle under modern Customary Law it may be useful to examine

1. The nature of the thing attached to the land.
2. The nature of the land to which the thing has become attached.

In the first case if the thing is affixed to the soil without expenditure of human labour, it belongs to the owner of the land. Thus palm trees, iroko, kola plants which grow wild and minerals in the ground[15] belong to the owner of the land. Similarly trees planted by the owner belong to him and the land may be transferred independently of the trees. If trees are planted or a house built with the knowledge and consent, express or implied, of the owner of land, he cannot in Native Law and custom claim the ownership thereof. On the principle that labour creates rights even if trees are planted or house built without

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15. Meek, C.K., Land Tenure and Land Administration in Nigeria, p. 41.

consent, by a trespasser, the trespasser will be entitled in Customary Law to remove the trees or the house provided he does no damage to the land.[16]

In the second case if the land is held by virtue of an office, or is 'title' or 'status' land, trees planted and houses built by the holder of the office are considered to have been planted or set up for the benefit of the office and therefore are part of the land. Again if the nature of the land was such that at the time of its being leased or transferred it is identifiable with the fixtures on it, the transfer will be deemed to pass the fixtures to the transferee. On the other hand if the fixtures become attached to the land after the transfer, on principles explained above, the transferee will be entitled to remove them on the determination of his period of occupation of the land. Thus in Chief Uwani v. Nwosu Akem[17] the Full Court of Appeal, in a case

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16. Green, M.M., Land Tenure in an Ibo Village. Rowling, Ijebu, para.65. But the trespasser's motive may tilt the balance: Rowling, ibid. But a Ghana case, Acquainoo v. Abiram (1910) Earn.43 held to the contrary, cited Allott, Essays, p.306. Ajisafe states that the tenant is entitled to remove the structure or sell them to a person approved by the landlord - Ajisafe, op.cit, p. 12, 5 (e) It is realised that this refers to a tenant not a trespasser, but it is submitted that the principle is not affected. Ward Price states that a tenant who plants permanent crops without consent can continue to reap them on his quitting the land, or the lessor will have to pay compensation for them: Ward Price, Land Tenure in the Yoruba Provinces, para. 131 (b).

17. (1928) 8 N.L.R. 19.

dealing with forfeiture of tenancy under Customary Law upheld the finding of fact by the Provincial Court that

> "The Ano community[18] in the event of such action[19] would be entitled to remove all crops that they have planted." 20

In Moore v. Jones[1], Webber, J. in the Divisional Court at Calabar made a declaration of title to a house apart from the land on which it stood. There is also abundant evidence[2] both from professional men and lay writers confirming the principle that fixtures are treated differently from the land to which they attach. An examination of the authorities and the available evidence leads to the inevitable conclusion that the maxim, quicquid plantatur solo, solo cedit, does not apply to Yoruba or any other customary system of law in Nigeria[3] and that the statement of Dr. Coker was made per incuriam.

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18. i.e. the tenants.
19. i.e. their quitting the land.
20. (1928) 8 N.L.R. at p. 22. cf. this with the Ghana case Wood v.Adjua (1887) S.F.L.R.51 where Francis, J., held that the owner of land can remove houses and other buildings of an occupier on the termination of the tenancy. This impliedly admits that the buildings cannot revert to the owner. See also the observations of Mbanefo,J.in Oko v.Olotu & Ors. (1953) 20 N.L.R.123.
1. (1926) 7 N.L.R. 84.
2. To cite only a few of the authorities see, e.g.,: Johnson, The History of the Yorubas,1921,p.95., Ajisafe, op.cit., pp.10-12; Rowling, Ondo,paras.81 & 151; Ijebu,para.103, and the important case, Shagamu 2/'36 cited by Rowling in footnote 133 of Ijebu. cf. Aladenika v. John Dabi, No.O.29/61, decided on 13th. April, 1961, at Akure Grade B Customary Court. Green's Ibo Land Tenure, pp.24-9;

2. cont. Meek, Northern Tribes of Nigeria, pp.278-282, especially the last paragraph in p. 278.
Nadel, A Black Byzantium, 1942, pp. 187-190;230-240.
Lord Lugard, Political Memoranda, p. 353.
cf. Osman Omer v. Idris & Ors. (1958) S.L.J.R.62 in which the Court of Appeal of Sudan upheld the custom in Merowe District of the Northern Province that on determination of a tenancy an owner of land planted with date trees by another is entitled to a share called Hag el Ard amounting (where the land is fertile) to one half of the fruit of the trees and where the land is fasad (i.e. arid) to one third of the fruit. See also "The Relationship Between Civil Law, Custom, and Shari'a" by C. d'Olivier Farran, in (1959) S.L.J. R 103.

3. Except in the case of things growing naturally on the land, but this is hardly within the maxim. See also Ige v. La Compagnie (Supra)

The land holders are practically all men but women and other persons who are not sui juris have certain customary rights in land. Their rights will be examined in the next chapter but the influence of Islamic Law on the indigenous systems of land tenure will now be considered.

6. Influence of Islamic Law on Customary Land Tenure. [4]

It is only in Northern Nigeria, which comprises over 75 per cent of the total land area of Nigeria and contains almost 60 per cent [5] of the peoples, that the influence of Islamic Law is significant. In many areas land holding is still governed by Customary Law although there are local variations. Professor Anderson sums up the position admirably:-

> "it was in the matter of land tenure that native law and custom has won its most decisive victory over the general ascendancy of the Sharī'a in the Muslim Emirates of Northern Nigeria. Yet even here the victory is not complete, and the situation remains somewhat fliud." 6

A little later on he repeats this in a different way:-

> "In the Muslim areas, also, custom in fact reigns supreme, with minor but interesting exceptions." 7

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4. See generally Cole, Zaria, pp. 74-80.
5. Ezera, Kalu, Constitutional Developments in Nigeria, 1960, p. 3.
6. Anderson, Prof. J.N.D., Islamic Law in Africa, 1954, p.184 cf. Rowling, Kano, para. 14.
7. ibid. p. 185. cf. Report on Native Courts (Northern Provinces) p. 80: "Mahommedan Law sometimes tried to oust Customary Law but failed to do so and the Emirs favoured the latter."

The incompleteness of the victory is due to the theory (put forward by Wazirin Zaria and the Chief Alkali of Zaria)[7a] that whereas land in those parts of Northern Nigeria not conquered by force by the Fulani at the time of the jihad[8] should be regarded as ushr[8a] land, those in the conquered parts of the Region became Kharaj land, passing as waqf in favour of the Muslim community or the State.[9]

As a result of the Holy War various parts of land were parcelled out into estates which were held by the leading members among the conquerors as fiefs.[10] But whether the land was waqf or fief, every individual whether he belonged to the victorious or vanquished community, was considered, in law, as having an inherent right to occupy as much land as he may need for his support.[11] Therefore although a fief-holder may grant rights of user to strangers, he cannot do so to the exclusion of the members of the indigenous community.[11] But the result was almost the same; with the exception of the fief-holders, all other occupiers of land or their successors had only a right

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7a. Cole, Zaria, para.117
8. i.e. Holy War.
8a. i.e. Private land. McPhee, op.cit., p.17 explains that the Emirs and the ruling class were few in numbers compared to their subjects, hence the dominance of the Hausa concepts of land tenure.
9. Cole, Zaria, pp.118-120.
10. This is against the true Maliki Law for it is laid down in T'limu Radthi that cultivated lands captured in war cannot be disposed of as private property but must remain as waqf. Its use may, however, be assigned: Anderson, op.cit., p.185.
11. Meek, C.K., Land Tenure, p.99.

of user.

But if the above theory relating to conquest by force is correct, the advent of the British further complicated the issue for whereas, in the case of Katsina, for instance, the Emir submitted by treaty at the time of the *jihad*, yet the British captured parts of Northern Nigeria by force, and if the argument holds, the land passed to the subsequent conquerors in such cases, while in the case of Zaria, for example, conquered by force during the *jihad*, the British were admitted by treaty, and if so, the *status quo* was preserved.[12]

No general rule can therefore be laid down to cover all the land in the Muslim areas. In Kano Emirate use of land may not be sold without the Emir's permission, but the customary law of inheritance prevails because only males normally succeed to land and Houses[12], to the exclusion of females.[13] In Katsina Emirate, on the other hand, local jurists maintain that land may be owned privately and may be freely alienated by sale or bequest and the Islamic law of succession prevails.[14] Similarly in the Lake Chad district land is privately owned

12. Anderson, *op.cit*, p. 185.
13. This is contrary to Shari'a.
14. But this view was strongly rejected by the Emir in the 1939 Chiefs' Conference and he maintained that it was only with his permission that land can be dealt with.

and freely alienable. In Bauchi the population is scanty, land plentiful, and private rights exist only in houses, which may be alienated with the Emir's consent, while the land, on the death of the principal member of the family group, continues to be cultivated as family land. In many townships[15] houses are private property and may be alienated[16] by the individual owner.

The divergence between the theory of Islamic Law and the normal practice of fragmentation of holdings by succession coupled with the problem of the right of women to hold land often give rise to much litigation[17] in the Native Courts and the Land and Native Rights Ordinance has not in practice provided a solution. C.W. Cole, who was a Resident in the Region, gave a valuable suggestion as to how to deal with the situation:

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15. e.g. Jos and Zaria. In Kano many houses are owned by the Native Authority. See Rowling, Kano.
16. Rowling, Plateau Province.
17. But alienation of houses will incidentally involve occupation of land and raise complicated problems relating to the Land and Native Rights Ordinance.
17. Prof. Anderson, op.cit., p. 187, states that "the two points of major significance which everywhere emerge are firstly that cases concerning land seldom find their way to the Courts at all." With the greatest respect, out of a total of 22,312 Native Court Cases on land and trespass in Nigeria and Cameroons in 1949, 10,917 came from the North, 10,164 from the East, 1,216 from the West and 15 from the Colony. In the North 3,895 came from Sokoto Province alone: See Appendix to the Report of the Native Courts Commission of Inquiry, p. 7.

> "In a province in which practically half the population is pagan there should be left no shadow of doubt in the mind of the Native Authority as to the status of the Moslem in land matters. Customary Law is the only law which is acknowledged and this is the law which must be administered by the Courts. The argument that Moslem Law is the Customary law (18) is not tenable and cannot be admitted. There can be no question of an Alkali deciding a land case in accordance with customary law only if such law is acceptable to the Moslem Sharī'a. He must only decide a land case according to customary law and if any circumstances should arise necessitating, in the Alkali's opinion, a deviation from this law because the latter is not acceptable to the Sharī'a then the case must be transferred to the Emir's Court to be dealt with according to the customary rules." 19

This useful suggestion, however, meets two difficulties: firstly, a fundamental principle is involved because a Moslem will hardly accept this approach and the issue may therefore become political rather than legal;[20] secondly, customary law suffers to a great extent from uncertainty and minute local variations because it is not yet recorded and unless the Courts have a *prima facie* guide of what that law is, its application may not be possible. And further, in view of the rapidly changing social and economic conditions it is

18. But the Native Courts Law, 1956, now in S.2 defines Customary Law as including Islamic Law.
19. Report on Land Tenure in Niger and Zaria Provinces, pp. 51 & 55.
20. See e.g. the wider universal nature of the problem as well shown by Anderson, J.N.D. & Coulson, N.J., in "The Moslem Ruler and Contractual Obligations"(1958) N.Y.Univ Law Rev. 917-933, esp 920 -21.

doubtful whether Customary Law per se will be elastic enough to cope with the alternating currents of the individual and public requirements of the present day. Perhaps what is really needed is a comprehensive recording of customary Land Law serving as a guide to the Courts together with a simple code of procedure showing in what circumstances customary or Islamic Law will apply and when the General Law will be invoked and what will happen in case of conflict between them.

B. GENERAL LAW RELATING TO LAND.

It was the introduction of British administration rather than Islamism that effected substantial changes in Customary Land Law. The general policy was to prevent undue exploitation of the indigenous land owners by aliens, and where land was taken for purposes of the Government to pay some compensation to the original land holders.[1]

Owing to the piecemeal method by which the British rule was extended to the various parts of the country,[2] the Statutes regulating the acquisition and disposition of interests in land differed with regard to the Colony of Lagos, the Protectorate of

1. McPhee, The Economic Revolution in British West Africa, 1926, pp. 168, 177.

2. See Chap. 1 above, pages 1 - 5

Owing to the piecemeal method by which the British rule was extended to the various parts of the Country,[2] the statutes regulating the acquisition and disposition of interests in land different with regard to the Colony of Lagos, the Protectorate of Southern Nigeria (now the Eastern and the Western Regions), and Northern Nigeria respectively. It will be convenient for the moment to consider the general law relating to these areas separately.

THE COLONY.

As explained earlier[3] English Law was introduced into Lagos by Ordinance No.3 of 1863, but in the Commission to the first Governor of the Colony, dated 13th March, 1862, Queen Victoria directed as follows:-

> "We do hereby authorise and empower you to make and execute in Our name and on Our behalf, under the said Public Seal, grants and dispositions of any lands which may be lawfully granted or disposed of by Us within Our said Settlement." [4]

In exercise of this and other powers contained in the Commission on Ordinance [5] was passed

> "for appointing certain Commissioners for the purpose of ascertaining the true and rightful owners of land within the Settlement of Lagos."

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2. See Chapter 1.
3. Cahpter 1.
4. Ordinances of the Settlement of Lagos.
5. No. 9 of 1863.

The Commissioners had powers to issue a certificate of title to anybperson who appeared to have good title according to the evidence. These certificates became the origin of the system of various types of "Crown Grants". The Ordinance could have had a most beneficial effect if each certificate had indicated the quantum of interests of the holder because those who received Crown Grants included private owners, devisees, grantees from King Docemo, usufructuaries and ordinary occupiers. Had the exact nature of

the interests been recorded most of the problems which later arose and much of the litigation could have been avoided; and finally it would have been impossible for the recipiants of the grants to claim, as many of them later did, that the grants conferred on them the absolute title to the land granted.

Another Ordinance of 1863[6] required the owners of swamp lands on the Island to reclaim them and empowered the Governor to sell the land by auction and pay the purchase money to the owner if the swamp land was not reclaimed within a certain time. This Ordinance shows that private rights existed even in swamp lands; the recognition of such rights was confirmed by the Public Lands Acquisition Ordinance, 1876[3] which provided _inter alia_ that the Colonial Secretary may

> "agree with the owners of any lands required for the service of the Colony of Lagos and with all the parties having any estate or interest in such lands, for the absolute purchase for a consideration in money of such lands, or such parts thereof, as he shall think proper, and of all estates and interests in such lands of what kind soever, paying such reasonable compensation therefor as may be due to the owners thereof, or parties having interest therein,

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6. No, 19 of 1863. 3 No. 8 of 1876.

~~7. Amendment No. 2 of 1894.~~

> and all such lands so purchased
> and taken shall be vested in and
> held by the Colonial Secretary for
> the time being in trust for
> Her Majesty." [8]

The 1863 Ordinance was repealed and re-enacted by No. 15 of 1877. By 1869 the Government had assumed ownership of certain public lands in Lagos (i.e. previously vested in the traditional ruler) for Ordinance No. 7 of that year gave it power to charge rent on any erection situated on land belonging to the Government.[9]

Ordinance No. 9 of 1863 appointing Land Commissioners was intended to last till 1st. April, 1864 but its operation was extended by two later Ordinances[10] to 5th. August, 1866. The Commissioners issued some 300 other grants however between this later date and 3rd. March, 1868.[11] No. 9 of 1863 was replaced by No. 9 of 1869, concerning which Sir Mervyn Tew said:

> "Sections 3 and 4 are unintelligible
> except on the theory of ownership
> by the Crown of all land in the
> Settlement of Lagos. Every Crown
> grant issued under the currency of
> this Ordinance purports to convey
> an absolute title and in no case
> are any conditions attached to the
> grant." [12]

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8. S.3. Such lands become Crown Lands, now regulated by the Crown Lands Ordinance, Cap 45 of the Laws of the Federation. See below for the provisions.
9. S. 2.
10. No.10 of 1864 and No. 9 of 1865.
11. Tew, Sir Mervyn, Report to Title to Land in Lagos, 1939 Sessional Paper, No. 2 of 1947) para. 44.
12. Report, op.cit. para. 48.

On the whole it appears that the Commissioners misunderstood the intention of the Legislature, because the purpose of the Ordinance under which the grants were issued was

> "to settle claims to land within the Settlement of Lagos and its Territories, and to insure to the owners, holders or occupiers thereof a good and valid title thereto." 13

It is evident that the powers confered were quasi-judicial and that the aim was ascertainment and recording of the nature of interests which the various occupiers of land in Lagos then had. "A good and valid title thereto" could comprise the interests of an owner, a lessee, a licensee or perhaps even of a bona fide occupier of the land. After a number of grants had been issued the Ordinance was repealed by No. 13 of 1877.

Between 1867 and 1868 many Egba refugees poured into Lagos and to settle them there Captain Glover approached Chief Oloto, the head of a land-owning family, for some land. The Chief gave land for their settlement: nothing was paid for the land and it has been suggested that the Chief "appears to have accepted the position that he himself was merely a tenant of the Crown."[14] With the greatest

13. Preamble; italics mine.
14. Meek, C.K., Land Tenure and Land Administration in Nigeria, p. 60.

respect, such an opinion is misleading because it ignores the real nature of Customary Law of landlord and tenant, the statement made by the British Government in the House of Commons in 1862 after the cession of 1861 that ownership of the lands in Lagos was in the Chiefs,[15] and that if Oloto "was merely a tenant of the Crown" the Crown would have been entitled to settle the refugees on the land without asking the Chief for the land.

The large areas of land obtained from Chief Oloto was divided into plots and vouchers evidencing rights of occupancy were issued to the allottees. These "Glover Tickets," as the vouchers were called, like the Crown grants already mentioned, were subsequently regarded as conferring titles which the holders could freely transfer.[16]

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15. House of Commons Debates, 1862.
16. In Onikoyi Chieftaincy Family v. Chief Secretary to the Government (1944) 10 W.A.C.A. 10 the Privy Council held that if portions of land lay within the area covered by Crown Grants and notice of acquiring such lands compulsorily had been published, if no claim was made under the Public Acquisition Ordinance by the original owners of the land, a conclusion should be arrived at that from and after the date of the Ordinance, the owners of Crown Grants approved under the Ordinance had acquired an indefeasible title to the land covered by their Grants and the Crown had acquired a similar title to any land which remained unclaimed; accordingly the original owners had no interest in the land compulsorily acquired. Thus by laches or ignorance or even illiteracy a landlord may lose his rights and a tenancy be converted into absolute ownership!

Between 1881 and 1888 some 112 further Crown grants were made[17] under a Government Scheme which required the grantees to fill up, within six months, certain swamp areas to which the grant related. As the Ordinance No. 9 of 1869 was repealed in 1877, there was no statutory authority for the issuing of these grants and it seems that if any of the lands had been below high water mark before the reclamation they would have vested in the Crown in accordance with the Privy Council decision in A.-G. v. John Holt & Ors.[18] The Crown Lands Ordinance of 1908 put a stop to the practice of issuing Crown grants but between 1863 and that date about 4,000 such grants had been issued, some 75% of them relating to land in Lagos Island.

The introduction of Crown grants was revolutionary and conflicted with the terms under which some of the grantees occupied the land in Customary Law. As Smalman Smith, J. observed in 1892:

> "A Crown grant was merely the formal recognition by the Crown of the rights already acquired by the grantee." 19

Lord Haldane upheld this view in 1921 when he said that the introduction of the system of Crown grants must be regarded as having been brought about mainly,

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17. Meek, Land Tenure, p.61.
18. (1915) A.C.599; 2 N.L.R.1.cf Tew, Report, para.56.
19. Ajose v. The Queen's Advocate & Ors. (1892) R.C.J.p.47 & 49.

if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.[1a] The confusion was so widespread that as late as 1934 Lord Blanesborough remarked in Idewu Inasa & Ors. v. Saka Oshodi[20] that even when the grants were issued to Family Heads they still became

> "a source of misunderstanding, as each grant on its face purported to be a disposition in absolute terms in favour of the grantee."

The misunderstanding was caused not only by the administration but initially, at least, contributed to by the Courts, which did not seem to understand clearly the exact nature of the rights of the Chiefs and Family Heads in the lands belonging to their community. For example, the distinguished judge, Smalman Smith, C.J., observed in Ajose v. The Queen's Advocate & Ors.[1]

> "The absolute ownership of land has never, as far as my experience teaches me, been acknowledged in Yorubaland as inherent in sovereignty of the Kings of the country," 2

yet he goes on to say,

> "but there is undoubtedly a national proprietary right which is vested in the King and his chief or Council as respecting the community who elect or appoint them originally and who conjointly may exercise the right of alienation." 2

20. (1934) A.C.99 at p.101.
1a. Amodu Tijani v. Sec.Southern Provinces (1921) 3 N.L.R. at p.56.
1.(1892) 2.C.J.47. 2. at p.48.

With the greatest respect, this explanation of the rights of a Chief sounds obscurum per obscurius. It is submitted that what is vested in the King or his Chiefs or Council is not "a national proprietary right" but administrative control. They have no title to such lands at all but only the control of its use and this control must be exercised in accordance with native law and custom.

The problem of Crown grants was further complicated by the fact that the Government assumed that unoccupied lands in the Colony were res nullius[3] and therefore Crown property which could be granted in fee simple. The root of this problem lay in the effect of the Treaty of Cession. The West African Lands Committee had said that

> "The Government maintains the position that these treaties constituted actual cessions of land, and that no private ownership of land referred to in them can exist except under grants from the Crown." 4

At the same time Stoker J., in Onisiwo v. A.-G.[5] observed that

> "The Crown has in the last fifty years, since the Cession, by its Acts, Deeds and Ordinances, steadfastly recognised rights of private ownership in every possible way." 6

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3. But as Talbot correctly states, "There is no vacant or unclaimed land - not a single yard of the country but is the property of some people or other, though in thinly populated regions the boundaries may be vague and ill-defined." The Peoples of Southern Nigeria, Vol. IIIp.680.
4. Report, para.1047, page 124.cf.Weber, S.in The Commissioner of Lands v. The Oniru (1912) N.L.R.72.C.A.
5. Odutan Onisiwa v.A.-G.(1912) 2 N.L.R.77.
6. at p. 18.

Three years after this decision the Privy Council held that the Cession of land to the Crown did not imply surrender of sovereignty and jurisdiction alone, to the exclusion of property, but that the rights of the previous occupiers remained unaltered unless and until modified by later legislation.[7]

It was only in 1921 that the Privy Council demonstrated that the radical title passed to the Crown was in substance limited to rights of administrative interference[8] - and following this view to its logical conclusion, this right must be exercised in accordance with law, and therefore, even where the Crown purports to grant unqualified fee simple title, that title is nevertheless limited only to the nature of the interest which the grantee could hold under the customary law relating to the land.[9]

The confusion created by the Crown grants was so great and the litigation so frequent that delivering the judgement of the Privy Council in 1934, in Brimah Balogun & Ors. v. Oshodi:[10]

> "Their Lordships think it right to express the opinion that the wide differences of opinion of learned Judges as to titles to land in Lagos disclosed in the present case and in a number of

7. A.-G. v. John Holt & Ors. (1915) A.C.599, 2 N.L.R.1.
8. Amodu Tijani v. Secretary of Southern Nigeria (1921) 2 AC 399.
9. Oyekan v. Adele (1957) 2 A.E.R.785.
10. (1934) P.C.(No.46 of 1934) Decision.

> cases to which reference has been made, and the frequent actions in the Courts to which these doubts give rise, make it desirable to deal with these questions by legislation." 11

In view of this suggestion the Government invited Sir Mervyn Tew to inquire into the title of land in Lagos. As a result of some of his recommendations[12] four Ordinances were enacted, including:

(i) The Crown Grants (Lagos Ordinance, 1947.[13]

S.3 of this Ordinance declared and confirmed the validity of certain grants[14] made between 12th. June 1963 and 18th. April 1918 together with grants made under the provisions of the Epetedo Lands Ordinance,[15] and the Arotas (Crown Grants) Ordinance,[15] and also declared that

> "each of such grants shall be deemed to have vested in the grantee an estate free from competing interests and restrictions, recognised by native Law and custom, as at the date of the grant affected such estate."

S.5 provides that where such estate has been dealt with in such a way as to free it from the operation of Native Law and custom then it shall be deemed to be free from the application of customary Law. This enigmatic provision, as will be seen later,

11. At p. 7.
12. Report on Title to Land in Lagos, 1939.
13. No.18 of 1947, now Cap.44 of Laws of the Federation, 1958, vol. 2 p.1019.
14. Listed in the Schedule thereto.
15. See the paragraphs after the next.

constitutes one of the major problems of interpretation for the Ordinance gives no clue as to what will be taken

> "to free such estate from any interest or restriction which by native law and custom affected the same."

(ii) The Arota (Crown Grants) Ordinance, 1947,[16] related to grants made to an "arota" or "

> "any person who has attached himself to the household of a Chief and who occupies land subject to the control of such Chief" 17

The Ordinance declared and confirmed the validity of Crown grants to these arotas but by S.4 preserved the customary reversionary rights of the Chief on the

> "family of the successor in title to such an arota failing or becoming extinct, the Chief to whose household the arota named in the grant was attached, or the successor in title to such a Chief."

(iii) The Epetedo Lands Ordinance, 1947,[18] validated[19] the grants made in Epetedo District of Lagos and provided for the enfranchisement of the tenements of those grantees who were not paying rent to the Chief in respect of their tenements. Such enfranchisement takes place upon the grantee paying a sum equal to 2½ per cent.[20] of the capital value of

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16. No.19 of 1947, now Cap.14 of 1958, Vol.1, p.105.
17. ibid. S.2.
18. No.20 of 1947, now Cap.61 of 1958, vol.2, p. 1220.
19. SS. 3 and 4.
20. No.21 of 1947, now Cap.75 of 1958, Vol.3, p. 1539.

the land, including any buildings thereon. On payment being made, the Chief or Commissioner of Lands in certain cases was bound to execute a deed of enfranchisement in the prescribed form and the tenement shall be discharged

> "from all incidents of tenure under native law and custom which operate in favour of Chief Oshodi." 1.

(iv) The Glover Settlement Ordinance, 1947[2], dealt with lands which were the subject of "Glover Tickets" explained above. The Crown was divested of any title or claims of title to the land, referred to therein, and it was provided that certificates of title shall be issued in cases where claims were proved.[3] Unproved or conflicting claims were to be referred to the High Court of Lagos, which, if

> "not satisfied that the claimant's right to the use and occupation of the land the subject of the claim is derived from a predecessor in title to whom a Glover Ticket was issued,"

after taking into consideration all the circumstances, including long continued and undisturbed possession, may issue a provisional order for a certificate,

> "unless before the expiration of such period as the Court may specify in the Order, any person other than the claimant then before the Court has claimed title to such land." 4

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1. p. 102, Chapter 2.
2. S.16.
3. S.6.
4. S. 8 (3).

The Public Lands Acquisition Ordinance and the Crown Lands Ordinance apply in the same way to Lagos as to other parts of Southern Nigeria and these two Ordinances will therefore be explained in the next section. The legislations so far described have gone a long way, but not all the way, to removing the difficulties created by the interaction of customary systems of land tenure with the introduced English system. It seems that any bold reformer of the land law must go right back to the intentions of the legislature of 1863 and ascertain "the true and rightful owners of land in Lagos" and any interests existing therein and then provide a permanent record of such finding by a modern system of compulsory registration.

Indeed a Commission recently appointed after a careful examination of the situation recommended[5]

(1) The enactment of a simple law of prescription and limitation on the lines which experience from early time has proved to be both necessary and fair.

(2) The provision of a process of systematic "adjudication" of titles to land with a view to the registration of all titles in the Federal Territory.

(3) The amendment of the Registration of Titles Ordinance so that it will provide a firm basis on which all titles will rest while at the same time

5. *A Report on the Registration of Titles to Land in Lagos*, 1957, paras. 57-59, 65-70.

making proper provision for the conduct of all the matters which properly concern Lagos landowners in connection with their lands.

These recommendations are very useful and as long as adequate provision is made for the protection of family lands on the Register an enactment based on them will solve much of the present confusion relating to lands in Lagos. One difficulty must, however, not be overlooked: in customary law prescription was unknown and any proposal for enactment of a simple law of prescription must be preceded by a wide public education of its usefulness otherwise the issue may become political and not legal.

C. SOUTHERN NIGERIA.

This territory covers the present Eastern and Western Regions which, as explained before, was first constituted into the Protectorate of Southern Nigeria by the Order-in-Council of 29th. December, 1899.

In pursuance of the policy of preserving the land for the natives the first enactment of the Southern Nigerian Protectorate was the Native Lands Acquisition Proclamation, 1900.[6] In spite of various amendments,[7] the provisions of this Proclamation have not been altered in principle and now form the substance of the law relating to land in Eastern and

6. No. 1 of 1900.
7. Amended by No. 1 of 1908, No.3 of 1908, No. 32 of 1917; Cap.44 of 1948.

Western Nigeria on the establishment of the Federation. In the Eastern Region it exists as the Acquisition of Land by Aliens Law, 1958,[8] and in the West as the Native Lands Acquisition Law, 1952.[9] Both of these Laws provide that aliens are not to acquire land or any interest or right in or over any land from a Nigerian unless such alien has been approved in writing by the Minister[10] or Governor,[11] and then only under an instrument which, and the terms whereof, have also been so approved. And where such right or interest has been lawfully acquired by an alien, it cannot be transferred or transmitted or otherwise disposed of, or be sold to any other alien under any process of law without such approval.[12] Any instrument and any transaction under which an alien purports to acquire interest in land and which has not received the necessary approval is null and void and of no legal effect.[13] An alien who occupies land unlawfully shall be guilty of an offence and on conviction shall be liable to a fine of £100 or imprisonment for 12 months.[14]

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8. No. 11 of 1958.
9. No. 4 of 1952 as amended by No.6 of 1958.
10. Acquisition of Land by Aliens Law, 1958, E.R. S.4.
11. Native Lands Acquisition Law, 1952, W.R. S.3 of 1958. (Now Cap.80 of 1959).
12. E.R. S.4(2); W.R. S.3(2). *Sed quaere* whether the alien can transfer to a non-alien without such consent. It is submitted that he may do so without infringing the law.
13. E.R., S.4(3) W.R., S.3(3). 14. E.R., S.6. W.R., S.4(2).

Where any alien appears to be in unlawful occupation of land ejection proceedings may be instituted by the Regional Attorney-General[15] or other officer duly authorized. The term "alien" means

"(a) any individual other than a Nigerian, and

(b) any company or association or body of persons corporate or unincorporated other than

(i) a body corporate established specifically by or under any Ordinance or Law which empowers that body to acquire land;

(ii) a corporate body incorporated under the provisions of the Land (Perpetual Succession) Ordinance or any other Ordinance or Law containing general provisions for incorporation where such corporate body is composed solely of Nigerians.........

(iii) a co-operative society composed solely of Nigerians........."[16]

It appears that the proviso (b)(i) is not limited by subsequent provisos (b)(ii) and (iii) and, <u>ergo</u>, a limited liability company registered in Nigeria under the Companies Ordinance,[17] even though its membership is made up solely of aliens, may nevertheless lawfully acquire land without seeking or getting any approval

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15. E.R., S.7. W.R., S.5.
16. E.R., S.2. W.R., S.2.
17. Now Cap. 37 of 1958 of Laws of the Federation.

of the Minister or Governor because such a company has general powers to hold land under Section 18(2) of the Ordinance. If this view is correct, it is submitted that the proviso (b)(i) should have more expressly provided that the corporate body therein referred to means a body composed solely of Nigerians. It seems odd that the Legislature can effectively protect natives against individual aliens but not against a powerful corporation made up solely of aliens. The fact that in practice such companies apply for permission does not invalidate the argument that they may still effectively acquire land lawfully without obtaining any approval.

2. CROWN LANDS.

Under the Crown Lands Ordinance[18]

> "'Crown Land' means all public lands[19] in Nigeria which are for the time being subject to the control of Her Majesty by virtue of any treaty, cession, convention or agreement, or by virtue of Her Majesty's protectorate, and all lands which have been or may hereafter be acquired by or on behalf of Her Majesty for any public purpose or otherwise howsoever and land acquired under the provisions of the Public Lands Acquisition Ordinance but does not include lands subject to the Lands and Native Rights Ordinance." 20.

Before the establishment of the Protectorate of Southern Nigeria in 1900, the Royal Niger Company had

18. Now Cap.45 of 1958, of Laws of the Federation.
19. But this does not include "public lands" under Customary Law.
20. Crown Lands Ordinance, S.2.

acquired lands in Southern Nigeria under various agreements made with local Chiefs. In 1906 the Niger Lands Transfer Ordinance[1] was passed, transferring to the Government most of the lands so acquired, as specifically shown in the Schedule to the Ordinance. By this means extensive areas of land in Southern Nigeria became Crown Lands. But the Niger Company's titles were in many cases of doubtful legal validity[2] and many of the lands included therein contained villages whose members were unaware of any transfer either to the Company or to the Crown, neither of whom in fact ever exercised any proprietary rights over some of the lands. Moreover some of the areas covered were not identifiable.[3] In 1945, therefore, an Ordinance[4] was passed to the effect that the Government might by Order divest itself of the lands held under the Niger Lands Transfer Ordinance of 1906. If an Order is made the land reverts as though it had never been transferred to the Royal Niger Company. Some of the Orders[5] made to this

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1. No. 5 of 1906.
2. Lord Lugard, Political Memoranda, No. 16: "Titles to Land
3. ibid.
4. The Niger Lands Transfer (Amendment) Ordinance,1945, No. 22 of 1945.
5. e.g. Nos. 28 and 29 of 1948, and 3' of 1950 - all relating to lands in the Onitsha District of Eastern Nigeria.

effect have given rise to protracted litigation[6] because some of the natives who settled on the land during the period of the Company's occupation and later transfer to the Crown were now faced with eviction by the owners.

Apart from these lands transferred by the Ordinance of 1906, other lands purchased or leased for public purposes under Public Lands Acquisition Ordinance[7] first enacted in 1876 were included in Crown Lands as were other lands which passed to the Government by treaty of cession or in any other way. All these lands were governed by the Crown Lands Management Proclamation, 1906,[8] which, with various amendments,[9] has now become Crown Lands Ordinance, 1958. As it stands at present the Ordinance provides that

1. Any Crown Lands shall not be sold without the consent of the Secretary of State,[10] now the Minister of Lands.[10a.]

2. Leases may be granted thereof for any term, or to natives for an indefinite term,[11] and surrender of leases may be accepted and covenants may be wholly or partially remitted.[12]

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6. e.g. Kodilinye v. Anatogu (1955) 1 W.L.R. 233, and Idoko Nwabisi & Ors. v. Idigo & Ors. (1959) J.A.L.182 both in the Privy Council.
7. See below
8. No.8 of 1906.
9. Nos. 13 of 1908; 7 of 1918; 27 of 1935; 2 of 1941; 3 of 1947; 131 of 1954; 47 & 76 of 1955.
10. ibid. S.3.
10a. See: Assignment of Responsibility to Members of the Council of Ministers under the Constitution: Govt. Notice No. 117, in Vol.42, No.4 of Gazette, 13th. January 1955, p. 68.
11. S.4.
12. S. 5 (a).

3. Licenses for taking of building materials may be granted but licenses so granted shall not be transferable.[13]
4. Certain covenants are implied in the grants, such as covenant not to assign or sublet without consent, and for periodic revision of rents. Buildings erected on the leased premises may pass to the Crown on determination of the lease but if the term is less than 30 years, such buildings may be removed by the lessee or purchased by the Government.[14]
5. Rights over water, foreshore or minerals are reserved unless the conveyance expressly confer such rights.[15]
6. If Crown Land is sold or leased it can be resumed at any time without compensation for the land but for the buildings or any crops destroyed.[16]
7. Crown Lands must be surveyed before sale or lease and the purchaser must at all times maintain the boundary mark.[17]
8. It is an offence to occupy Crown Land unlawfully and the offender is liable to a fine of £50.[18]
9. The Attorney-General may recover by process of law any Crown Lands in unlawful occupation.[19]

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13. S.6. 14. SS.7-16. 15. SS. 20-23.
16. S.24. 17. SS. 26-28. 18. S.36, but see <u>A.-G. of Western Nigeria v. C.F.A.O.,Oshogbo</u> (1958) W.N.L.R. 6.
19. S. 29.

10. The Ordinance does not apply to Northern Nigeria,[20] because the lands there are governed by the Land and Native Rights Ordinance.[1]

The Township Ordinance[2] empowers the Governor to set aside any Crown Lands which may be required by a Township Council or local authority,[3] and Crown Lands may be transferred to a local government Council established under the Local Government Law.[4]

Apart from the above Ordinances covering the whole of Southern Nigeria, Local Authorities are empowered to make Bye-Laws[5] for the occupation of land within the areas of their jurisdiction. A number of these Bye-Laws has been passed[6] to the effect that transactions relating to land between a native of the area and a non-native or between non-natives must satisfy the conditions laid down in the Bye-Law, otherwise the transaction will be null and void. "Native of the area" means any person who is eligible by local customary law to inherit land or the use of land within the area.

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20. Crown Lands Ordinance, S.2.
1. See below, p. 120ff
2. No 29 of 1917, S.25
3. In the Eastern Region Port Harcourt, Aba, Umnatria and Enugu are administered by the Local Authority.
4. E.R. Local Government Law, 1955. S.81., 1960 S. 182
5. E.R. Local Government Law, 1955, SS.81, 86., 1960 S85
6. e.g. E.R. Igbo Etiti District Council (Alienation of Land) Bye-Law, 1959, No.356 of 1959.
Izi District Council (Alienation of Land) Bye-Law, 1959.

But the Bye-Laws do not apply to transactions governed by the Acquisition of Land by Aliens Law and the Native Lands Acquisition Law.

The upshot of the whole issue is that if a non-Nigerian wishes to acquire land in Southern Nigeria he must comply with the Acquisition of Land by Aliens Law; a Nigerian must comply with the Alienation of Land Bye-Law of the Local Authority of the area in which the land is situated unless he is a native of that area or unless such a Bye-Law does not yet exist.

D. NORTHERN NIGERIA.

On the establishment of the Protectorate of Northern Nigeria one of the first steps taken was to see that the Emirs and Chiefs surrendered to the Government, by virtue of accepting Letters of Appointment, the customary rights which they possessed over land.[7] A distinction was drawn between Crown Lands on the one hand and Public Lands on the other.

Crown Lands were considered to be the absolute property of the Government and included lands taken by the Government for public purposes such as administrative headquarters and also lands acquired by the Government of Northern Nigeria from the

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7. Lugard, Political Memoranda, 1918, p. 344.

Royal Niger Company under an Agreement dated 28th. August, 1900. The Company claimed to have held these lands privately in their commercial capacity, not in their administrative status as a chartered company. Lord Lugard says of the areas so acquired:

> "These lands are, by presumption the absolute property of the Government, though, as a matter of fact, native towns are situated upon them, the inhabitants of which, so far as I am aware, have no knowledge that their rights in the lands have ever been alienated. Since, moreover, the greater part are situated in pagan districts, where rights in land are communal, it is doubtful whether they were in point of fact, alienable by any Chief, under any treaty." [8]

The Crown Lands Proclamation, 1902,[9] charged the High Commissioner of the Protectorate with management, control and direction of all Crown Lands and authorized him to

> "sell, lease, or otherwise deal with the same in such a manner as he may consider most conducive to the welfare and prosperity of the Protectorate."

Public Lands comprised all the other lands which the Government managed in its administrative capacity. The first enactment relating to these lands was the Land Proclamation of 1900[10] which prohibited the acquisition of any right or interest

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8. Political Memoranda, No.16. "Titles to Land."
9. No. 16 of 1902.
10. No. 8 of 1900.

over any land in the North without the Governor's written consent. An enactment of 1902[11] empowered the High Commissioner to declare as Public Lands all lands which were the property of deposed or conquered rulers, or lands which were not occupied by persons who have an original or derivative title under any law or custom.

The evidence reveals that even at this time the Government did not claim ownership of all lands in Northern Nigeria. Before 1910 the clear distinction between Crown Lands which belonged to the Government absolutely, and Public Lands which it controlled in its administrative capacity, continued to be recognised. The official attitude to the latter is summed up in Lord Lugard's own words:

> "The recognition of the advantage of individual occupation rights, combined with the right of government, as Suzerain and conqueror, to dispose of lands not in actual occupation, and to control all lands leased to aliens was not disputed. The rights of a native to acquire such rights in land, as were his by native law and custom, and to dispose of them, even to an alien, was not denied in principle, but in order that the Government might be the sole landlord of all aliens, and to protect the natives in their

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11. No. 13 of 1902.

> "dealings with them, no non-native could acquire land except with the consent of the Governor, and the land would be acquired by the Government and disposed of (by lease only) to the intending purchaser. No rentals were charged to native occupants, and all rents from non-natives were paid into Revenue." 13

It is noticeable that the principle involved here was the same as in the South - i.e., recognition of the rights of the natives as owners of the land and governmental control of alienation to strangers; but the application of this principle differed in the North from its application in the South. The existence of such a difference which eventually resulted in a sharp divergence of the concept of the nature of legal rights of a native in the land in the North from those of the Southerners was perhaps an accident of legislation.

In 1908 the general interest in the subject had developed to such extent that the Secretary of State appointed a Committee to examine the whole system of land tenure in Northern Nigeria and to advise on the legislative and administrative measures to be adopted. As a result of their recommendations[14] a most revolutionary piece of kegislation, the Land and Native Rights Proclamation, 1910,[15] was passed.

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13. Political Memoranda, p. 350. italics mine.
14. Report on the Northern Nigeria Lands Committee, Cd.5102, 1910.
15. No.9 of 1910.

The then Governor, Sir Percy Girouard, described the principles embodied as

> "in substance a declaration in favour of the nationalisation of the lands of the Protectorate." 16

The Proclamation of 1910 was later revised and became the Lands and Native Rights Ordinance, 1916,[17] which with various amendments now forms Cap. 96 of the Laws of the Federation of Nigeria, 1958.

The Preamble gives the purpose of the legislation:

> "Whereas it is expedient that the existing customary rights of the natives of the Northern Provinces ....to use and enjoy the land of the Protectorate and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected, and preserved;
>
> "And whereas it is expedient that existing native customs with regard to the use and occupation of land should, so far as possible, be preserved;
>
> "And whereas it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the boundaries of the Northern Provinces of the Protectorate........and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law;"

the Ordinance then proceeds to lay down, with certain exceptions,[18] that

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16. Cd.5102, No.3, para.10.
17. No. 1 of 1916.
18. The exceptions relate to lands granted to non-natives before the 25th.April,1916,and the lands referred to in the Second and Third Schedules of the Niger Lands Transfer Ordinance.

> "the whole lands of the Northern Provinces....whether occupied or unoccupied, are hereby declared to be native lands." 19

Section 4 makes the important provision:

> "All native lands, and all rights over the same, are hereby declared to be under the control and subject to the disposition of the Governor, and shall be held and administered for the use and common benefit of the natives; and no title to the occupation and use of any such lands shall be valid without the consent of the Governor." 20

But the Governor in exercise of the powers conferred on him shall have regard to native laws and customs[1] and he has power to grant rights of occupancy to natives and non-natives[2], to demand rent for the use of the land granted to natives and non-natives, and to revise the rent at specified intervals.[2]

Land granted to non-natives for agricultural purposes shall not exceed 1,200 acres, or 12,500 acres if granted for grazing purposes.[3] The grantee has exclusive rights of occupancy against all persons other than the Governor, but the grant is subject to all mining and mineral oils laws and way leave licence and permission to survey.[4] Rights of occupancy may not be alienated without the previous consent of the

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19. S. 3.
20. Italics mine.
1. S.5.
2. S.6. See below for definition of "native".
3. S.9.
4. SS. 10 - 11.

Governor, and any alienation or transmission without such consent shall be null and void,[5] and the right of occupancy may be revoked[6] for good cause, including breach of covenants and need for public purposes, and the acceptance of rent does not operate as a waiver of forfeiture.[7] The Governor may delegate his powers to any native or local government Council and may make regulations for the purpose of carrying the Ordinance into effect.[8] An occupier has right to the improvements which he effected and he may remove such improvements before the termination of his right of occupancy.[9]

In the definition section the Ordinance states that

> "'A right of occupancy' means a title to the use and occupation of land and includes the title of a native or a native community lawfully using or occupying land in accordance with native law and custom."
>
> "'Native' means a person whose parents were members of any tribe or tribes indigenous to the Northern Provinces.....and the descendants of such persons, and includes
>
> (a) any person one of whose parents was a member of such a tribe, and
>
> (b) any person who shall obtain a certificate in the form in the Second Schedule..."
>
> "'Non-native' means a person other than a native as above defined." 10

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5. S.12; Stephen v. Pedroch: (1959) N.N.L.R. 76.
6. There must be actual re-entry or an action for recovery of possession, per Bairamian, S.P.J., in Olat Majiyagbe v. A.-G. & Ors. (1957) N.N.L.R.158.
7. SS.13 & 14.
8. SS.27-28. Regulations have been made authorising Local Authorities to divide a native reservation (not required

Various terms have been used by commentators in describing the Ordinance. It was said to amount, in effect, to an act of "expropriation".[11] Lord Hailey says that

> "There is something incongruous in declaring that no title shall be valid unless recognised by the Government when in practice a title derived from native law and custom is everywhere recognised in the Native Courts and the contents of the title are left to be determined not by the Government, but by the practise of the Courts." 12

And recently Baldwin described its operation as "cumbersome"because those who are responsible for management of agricultural projects

> "had no direct control over the workers (13) on the farms and had to rely on the indirect means by recommendations to the Native Authorities." 14

Only a few observations need be added. It can be said that the Ordinance, by its express provisions, succeeded in preserving the land for the natives, but

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11. See Geary, Sir W., Nigeria under British Rule, pp.240-1, Lord Lugard, Dual Mandate, pp.287 ff. At p.292 Lugard says his opponents termed it "Confiscation of the land."
12. Native Administration in the British African Territories Pt. III, p. 92½ 13. i.e. the tenants.
14. Baldwin, K.D.S., The Niger Agricultural Project, Basil Blackwell, Oxford, 1957, p. 28.
    Mc Phee, op.cit., p. 178, says that it "is probably unique in the annals of the history of the Colonies to find the seed of the Ricardian Theory of Economic Rent germinating in the brain of an African pro-consul and blossoming forth in the proposal of a Socialistic Land Tax." With respect, the principle is of Indian origin: See Northern Nigeria Lands Committee, 1910, Cd.5103, paras 7-21, especially paras. 9,15 & 16. The author adds (at p.179) that "The scheme was certainly

14 cont. magnificent in conception; unfortunately its accomplishment was impossible apart from a scientific Doomsday Book of inquiry."

it cannot be said that the existing customary law relating to land was completely preserved, because under Native Law and custom the natives have not merely "rights of occupancy" as defined in S.2 of the Ordinance[15]; although in practice they are not charged any rent for the occupation and use of the land, it is expressly provided that they may be charged rent.

Again the term "native lands" is not defined, but it seems that by declaring that all lands in the Northern Provinces are native lands[16] it was implied that ownership of all the lands there is vested in all the people of the Region or at least that all Northern Nigerians have the same rights in all the lands - such rights, for example, as a member of a family in Southern Nigeria has in family lands. If so the legislation, it is submitted, ignores the fact that private ownership existed long before the coming of the British and was recognised until about 1910.

Furthermore, by the definition, only persons who are indigenous to Northern Nigeria come within the term "natives" and a Southern Nigerian is as much a non-native as a German or a Russian. This seems harsh on Nigerians because in the South no such

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15. cf. Report of the Native Courts (Northern Provinces) para. 313.
16. S.3.

restriction is placed on Nigerians. This is, of course, more of a political than legal criticism and has provided a weapon for politicians.[17] The fact that a lease or other disposition of land in the North cannot be made without consent of the Governor places Northern Nigerians at some disadvantage because any disposition of land which they make without consent of the Governor is absolutely void.[18] This, apparently, includes disposition to a Northern Nigerian. Yet, in practice, both natives and non-natives, especially in the townships, are daily subletting lands which they occupy without asking for or obtaining the required consent, and the law seems to be more honoured in its breach. It seems that if the law is to be respected in this case, it must take into account the modern conditions and provide, at least, for the validity of leases to all Nigerians.

The construction of the Ordinance has been far from easy. Thus in a Kano case,[19] the plaintiff, a Syrian, claimed return of a plot of land illegally taken from him in execution of judgement. The Native Court declined to try the case because it

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17. See e.g. Azikiwe, B.N.Ø, Land Tenure in Northern Nigeria A Study of Treaty Rights of the Royal Niger Company, Lagos, 1942.
18. S.12: also Ayo Solanke v.Abraham Abed & Anor.(1961) N.N.L.R. 7.
19. Cited in Report of the Native Courts (Northern Provinces 1952, para. 313.

had no jurisdiction over aliens. The Supreme Court refused jurisdiction because the matter concerned land over which Native Courts only had jurisdiction.[20] Again, in Kosoko v. Nakoji[1] the plaintiff, a Yoruba Muslim, now living in Onitsha in Eastern Nigeria, claimed that he had acquired land in Bida from one Chief Kuseidu under Native Law and custom. He had built a house on the Land and lived there until 1957 when the defendant entered upon and took possession of the house. The plaintiff claimed damages for trespass and asked for an order of ejectment of the defendant. Bate, J. in Minna High Court held, *inter alia*, that the suit was in respect of a right arising under a customary right of occupancy as defined in S.2 of the Land and Native Rights Ordinance. With respect, the decision on this point is not entirely easy to understand. "A right of occupancy" as defined in S.2 does not include the right of a non-native acquired from a native, and even if the plaintiff was a native, it is submitted that in view of the express provision of S.4 that

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20. It is submitted that now the Native Courts would have jurisdiction under the Schedule of the Native Courts Law, 1956. But it seems also that under S.22(2) the High Court has jurisdiction: cf the Report cited in last footnote. But Bate, J. in Kosoko v. Nakoji (1959) N.N.L.R.15, refused jurisdiction in view of S.16 of the Northern Region High Court Law, 1955.

1. (1959) N.N.L.R. 15.

"no title to the occupation and use of any such lands shall be valid without the consent of the Governor"

such a title cannot be conferred even on a native without such consent and that the "customary right of occupancy" does not exist.

It is interesting to note that where consent is required under the Acquisition of Land by Aliens Law and the Land and Native Rights Ordinance any transaction without such consent is null and void under both enactments but whereas it is an offence for an alien to acquire Native Lands in the South without consent, an acquisition by a non-native in the North carries no criminal sanction. Perhaps that may be one reason why so many transactions take place sub rosa.[2] Also in cases governed by the Crown Lands Ordinance[3], subletting by the grantee, without the Governor's consent, is valid, although it may be a ground for forfeiture,[4] but in cases

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2. cf. Anderson, Prof.J.N.D., Islamic Law in Africa.
3. Supra
4. Harry v. Martins (1949) 19 N.L.R. 42.
   Esi v.Moruku (1940) 15 N.L.R.116 held to the contrary but it is submitted that this decision is made per incuriam. Yet a holder of a temporary occupation licence under the Crown Lands (Temporary Occupation) Regulations is not a tenant and, therefore, any partition of property made by him has no legal validity; Ukejianya v. Uchendu (1950) 13 W.A.C.A. 45.

regulated by the Acquisition of Land by Aliens Law[3] and the Land and Native Rights Ordinance[3] such sub-letting is absolutely void.[5]

E. PUBLIC LANDS ACQUISITION ORDINANCE / MINERALS ORDINANCE.

(i) Public Lands Acquisition Ordinance.[6]

This Ordinance brings out clearly the difference between the general law relating to lands in the North and in the South. The Ordinance, first enacted in 1876[7] and then applying to the Colony of Lagos, now also applies to lands in Southern Nigeria but not to the "native lands" of the North. Its aim is to empower acquisition of lands required for public purposes but S.2 states that

> "'Land' means such lands as are not native lands under the Land and Native Rights Ordinance, and includes any estate or interest in such land."

The main provisions are as follows:

1. "Where any lands are required for a public purpose of the Federation or for the public purpose of a Region the Governor-General in the former case and the Governor of the Region concerned in respect of any lands within the Region in the latter case

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5. Land and Native Rights Ordinance SS.4,6 & 12; <u>Ayo Solanke v.Abraham Abed & Anor</u>.(1961) N.N.L.R. 7. <u>Kosoko v.Nakoji</u> (1959) N.N.L.R.15 seems to suggest that a native may lawfully grant some right of occupancy without asking for consent. <u>Sed.qu</u>.
6. No.9 of 1917,now Cap.167 of 1958.
7. No.8 of 1876.

"may acquire such lands for an estate in fee simple or for a term of years as he may think properconsideration or compensation as may be agreed upon or determined under the provisions of this Ordinance." 8

2. Lands so acquired become Crown Lands.[9]

3. The Governor-General or Governor or any persons authorised in their behalf is empowered to enter upon and survey the land as a preliminary step to acquisition.[10]

4. Due notice of intention to acquire the land must be given. 11

5. Persons who are "seized, possessed of or entitled to any lands or any estate or interest therein" or their legal representatives have power to convey the land so acquired and Head Chiefs may sell and convey lands which "are the property of a native community." 12

6. Disputes as to compensation and title are to be settled by the High Court and a report of Government officers "as to the value of the lands or any buildings or trees or crops shall be evidence thereof." 13

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8. Public Lands Acquisition Ordinance, S.3(i).
9. But the Governor-General is not empowered by the Ordinance to acquire Crown Lands compulsorily; he should simply allege that the land to be acquired is already Crown Land: per in Chief Secretary v.A.-G.& Ors.(1954) 21 N.L.R.
10. S.4.
11. SS.5 & 8. But if no claim is made within the prescribed time the land will automatically be decreed to be Crown Land: Bakare Ajakaiye & Ors.v.Lt.Governor Southern Provinces (1929) 9 N.L.R.1. Onikoyi Chieftaincy Family v.The Chief Secretary (1944) 10 W.A.C.A. 10: both Privy Council decisions.
12. SS. 6 & 7.
13. SS.10 & 12. Amounts paid on a previous occasion of compulsory acquisition for land in the area may be evidence of the value of the land being acquired, per Ademola,C.J.,in Chief Aminu Are & Ors.v.A.-G. (1958) W.N.L.R.126; and if payable,the compensation will be the value of the land at the time of the acquisition,not at the time of action,per Jibowu, Ag.F.C.J., de Lestang and

13 cont. Abbott, F.J.J., concurring, in Oloto & Ors. v. A. - G. (1957) 2 F N.L.R. 74, C.A.

7. "No compensation shall be awarded in respect of unoccupied land" (3) and for the purposes of the Ordinance "land shall be deemed to be unoccupied land where it is not proved that the beneficial use thereof for cultivation, (14) habitation, the collection or storage of water, or for any industrial purpose (15) has been had for a continuous period of at least twelve months in the period of seven years immediately prior to the publication of notice of intention to acquire." 16

8. No person shall be compelled to sell or convey part of a building if he is willing and able to sell and convey the whole thereof. 17

9. The principles for assessment of compensation[18] are that

   (a) no allowance shall be made on account of the acquisition being compulsory. 19

   (b) The value of the land or any interest therein shall be such value as it will fetch if sold in the open market by a willing seller. 20

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14. William Lewis v. The Colonial Secretary (1887) 1 NLR.11.
15. Dr.Akinola Maja v.Chief Secretary to the Govt.(1952) 12 W.A.C.A. 395, P.C.
16. S.13. 17. S. 14. 18. S. 15.
19. Chairman, L.E.D.B. v.Sanni Tovolawi Joye & Anor.(1939) 15 N.L.R.50; Commissioner of Lands v.Daniel (1939) 5 W.A.C.A.125, C.A. But each claim must be heard and adjudicated upon separately, and there is no power to arrange adjustments of property as part of such adjudication:
In re Oban Group Reserve (1931) 10 N.L.R. 24.
20. But this value should not be on the principle of "deferment" - i.e. the estimation of the market value of the land when put to the best use in future: per Verity, C.J. in Abiodun v. The Chief Secretary (1949). ~~Supra~~.12 W.A.C.A. 525, C.A.; Affirmed (1949) 12 W.A.C.A 530, P.C. Nor is the value necessarily based on the amount of rent received if this is out of proportion with the capital value:
Chairman, L.E.D.B. v. Joye. Supra.

(c) Where part only of the lands or any interest therein is acquired under the provisions of the Ordinance the Court may take into account any enhancement of the value of the residue by reason of the proximity of any improvement or works made or constructed or to be made or constructed by the Government.

(d) The Court may also have regard to the injury sustained by the owner by reason of the severance of such lands from other lands belonging to such owner.

10. Parties in possession of lands or in receipt of rents as owners thereof shall be deemed to be lawfully entitled to such lands and on payment of compensation to them or into Court the Governor-General is exonerated. 1

11. Where the lands acquired belong to a native community any compensation paid shall be distributed by the Head Chief to whom it is paid among the members of such community, or applied or used for their benefit in such proportions and in such manner as the Governor-General shall approve. 2

These provisions of the Ordinance reveal that private proprietary rights in land as well as rights belonging to a political or social group as such, are recognised by the Government, in Southern Nigeria. This contrasts sharply with the provisions of the Land and Native Rights Ordinance applicable to Northern Nigeria which provides only for compensation

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1. SS. 21 & 22.
2. S. 23; Amodu Tijani v. Secretary, Southern Provinces (1921) 24 C 399, 3 N.L.R. 21, at p.59. P.C.

for disturbance in cases where the land is required for public purposes,[3] and, therefore, impliedly denies to the natives any form of proprietary rights in the land. And it is equally significant that in the South the provisions for compensation laid down in S.15 of the Public Lands Acquisition Ordinance are exhaustive and no account is to be taken of disturbance or for a claimant's outlay in the past or for interference with his plans for the future in regard to the land acquired.[4]

(ii) Mineral and Mining Laws.

The Law governing minerals and mines is contained in two Ordinances - viz. the Minerals Ordinance[5] and the Mineral Oils Ordinance.[5a]

By S.3 of the Minerals Ordinance the control of and property in all minerals and mineral oils in, under or upon any lands in Nigeria and of all rivers, streams and watercourses throughout Nigeria, is and shall be vested in the Crown. Both Ordinances provide that no person shall prospect or mine on any lands in Nigeria or divert or impound water for purpose of mining operations except under licence.[6] Nothing in the Minerals Ordinance

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3. Land and Native Rights Ordinance, S.15 (2).
4. Dr.Akimola Maja v. Chief Secretary to the Govt.(1952), 12 W.A.C.A. 395, P.C. per Lord Normand.
5. No. 55 of 1945, now Cap.121 of 1958. 5a No.17 of 1914, now Cap.120 of 1958.
6. Minerals Ordinance, S.4; Mineral Oils Ordinance, SS.3-5.

sanctions mining operations on sacred areas or injury of sacred trees and other objects of veneration;[7] but it is submitted that the licensee may persuade the worshippers of the object to move its place of abode - if need be on payment of compensation to the persons in charge to cover the cost of the transfer and other inconvenience they might have incurred.[8] A licensee or lessee of mining rights is not allowed to assign such rights without consent.[9]

It is to be noticed that in Customary Law villagers or even individuals may claim proprietary rights over waterways[10] and fishing grounds but under the Common Law[11] (which the Courts apply by virtue of the High Court Laws) and under S.3 (1) of the Minerals Ordinance property in and control of all rivers, streams and watercourses are vested in the Crown, and even reclaimed land, not being the result of natural accretion, is vested in the Crown as the owner of the foreshore.[12] Now, therefore, fishing within tidal waterways is free to all inhabitants of the country.[13]

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7. Minerals Ordinance S.7.
8. cf the Eastern Nigeria example cited above.
9. Minerals Ordinance, S.13.
10. Ajisafe, op.cit., p.14.SS.(e) & (f); Rowling, Ijebu, paras. 73-78. Fowler, Report on Land Tenure in the Colony Districts paras.38,70.
11. Amachree v.Daniel Kalio & Ors.(1914) 2 N.L.R.102.
12. A.G. of Southern Nigeria v.John Holt & Co.(liverpool)Ltd. (1915) A.C. 599, P.C.
13. Chief Braid & Ors.v.Adoki & Ors.(1930)10 N.L.R.15. Leki v.Gegenu Okorogigen (1958) W.N.L.R. 155.

PART B.

CLASSIFICATION AND CREATION OF TENANCIES.

CHAPTER 3. MEANING AND CLASSIFICATION OF TENANCIES.

1. General Principles.

The law relating to landlord and tenant came into existence in the infancy of civilization and by gradual development through the centuries, has come to be one of the most extensive and far-reaching branches of the law today.[1] Its early origins lay in the dim past when man first started to distinguish between "thine" and "mine",[2] and though its significance may not be of equal importance in all states, yet even in Russian countries where land belongs to the State,[3] personal rights in houses with the use of a small plot of land attached thereto and the inheritance thereof, is recognised in law.[4]

Generally in most systems of law, and in particular in Anglo-American systems, the relation of landlord and tenant is always created by contract, express or implied,[5] But the relation may also be created by Statute.[6] In popular language a distinction

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1. cf. 32. Am.Jur.; Landlord and Tenant, S.1.
2. Schlatter, Prof. Richmond, Private Property, George Allen & Unwin, 1951, p.9.
3. McDougal, Myres Smith in Property, Wealth & Land, Michie Casebook Corp., U.S.A., 1948, p.23 states that the Constitution of the U.S.S.R. by Art. 6 declares that, "The land, its natural deposits, waters, forests, ... are State property, that is, belong to the whole people."
4. Constitution of U.S.S.R. Art. 7, cited by Mc.Dougal, op. cit. p.21
5. Foa, General Law of Landlord and Tenant, 8th ed. p. 1; 32 Am. Jur., S.2. Woodfall, Law of Landlord and Tenant, 16th ed. 1898, S.1.
6. L.P.A., 1922, S.137; L.P.A., 1925, SS.149(6) & 220.

is made between a lease, which has been defined as "a document creating an interest in land for a fixed period of certain duration, usually in consideration of the payment of rent"[7] and tenancy which is "the relation of a tenant to the land which he holds. Hence it signifies the estate of the tenant."[8] This distinction is not, however, technical and both text writers[9] and the Courts in general regard the term lease and tenancies as more or less synonymous. As Chitty, J., observed:

> "It may fairly be said that a distinction is constantly made between a 'tenancy' and a 'lease', and I daresay, many solicitors speaking to their clients talk of a 'lease', in the sense of meaning a lease which the law requires to be by deed; but I am unable to say that I can introduce this same loose parlance into the rule."[10]

Whatever may be the theoretical distinction, if any, for the purposes of this thesis no line will be drawn between the use of the terms 'lease' and 'tenancy' and the two terms will be used interchangeably.

The general rule in English law is that the relation of landlord and tenant arises when a lessor confers on a lessee exclusive possession[11] of the land demised for a period of time which is either

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7. Megarry & Wade: The Law of Real Property, 1959 ed., p. 602. Italics mine. cf. "If the owner land consents by deed that another person shall occupy the land for a certain time, that is a lease," per Bayley, J., in St. Germains (Earl) v. William (1823) 2 B & C, 216, at p.220. Italics mine.
8. Jowitt, Earl, The Dictionary of English Law, Vol. 2, 1959 ed. p. 1728. Byrne, W.J., A Dictionary of English Law, 1923, p. 863. Italics mine.
9. e.g. Megarry & Wade, ibid. as above.
10. Re Negus (1895) 1 Ch. 73, at p.79.
11. But this is not enough. See Foa, op. cit. p8 and authorities cited. Also, Denning, L.J. in Isaac v Hotel de Paris (1960) 1 A.E.R. 348 at p.352.

definite or can be made subject to a definite time limit by either party.[12] Also the lease must have a certain beginning and a certain end otherwise it will be invalid.[13] The essential difference between a tenancy in customary law and one under the English and the general law of Nigeria[14] lies in this definiteness of the term. In customary law the tenancy may be for a definite or indefinite period.[15] The emphasis of customary law is on the intention[16] of the parties. It is this intention which, in a broad sense, determines the duration of the tenancy. If, for example, the intention is that the grantee shall use the land for growing seasonal crops, this is prima facie evidence that the tenancy is meant to last for a short period - for a planting season, unless it is expressly stated otherwise. If on the other hand the use is for building a dwelling house, or in these days, for a kola or cocoa plantation, the tenancy will be presumed to be for a long period and indefinite in duration. In order not to confuse the relation of landlord and tenant with other transactions similar thereto, the meaning of that relationship will first be examined.

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12. Hill & Redman, Landlord and Tenant, 1960 ed. pp. 3 - 4. Cheshire, G.C. The Modern Law of Real Property, 1958 ed., pp. 339-40.
13. Lace v Chantler (1944) K.B. 368.
14. Giving a lease the same meaning in the general law of Nigeria as in English law.
15. Allott, Essays, p. 293; Elias: Nig. Land Law, p.184. Liversage, Land Tenure in the Colonies, p.16; p.16; Meek: Land Tenure, p. 209. Although it is possible to grant a tenancy for a period which is not initially definite, in English law, yet the principle of id certum est quod certum reddi potest, such a tenancy will be valid if it is capable of determination.
16. In English law intention is relevant in deciding whether a tenancy is in existence, but in customary law in deciding the period of its duration.

SECTION ~~PART~~ I.

Definition of the relation of landlord and tenant.

Although the meaning which is attached to the relation of landlord and tenant in English law may not completely fit the position in customary law, it will undoubtedly afford, at least, a basis for comparison. Littleton, one of the earliest authorities on English law states that

> "The lessor is properly where a man lets to another lands or tenements for term of life or term of years, or to hold at will, he who makes the lease is called the lessor, and he to whom the lease is made is called the lessee."[17]

The general treatment of Littleton and of English law is based on the doctrine of estates of freehold and other lesser forms of tenures, as well as on grants created by the force of a written document, the lease. Estates of freehold and written instruments were unknown in traditional customary law, therefore a definition based on them cannot be satisfactory Woodfall's view is that

> "The relationship of landlord and tenant may be described as the relationship which exists between parties to a demise and their respective assigns. The relation is one of tenure, and although in former times it existed between freeholders, where the owner of a freehold granted thereout a lesser estate of freehold (such as an estate for life), in practice at the present day the relationship of landlord and tenant arises where the owner of an estate in land grants to another an estate less than freehold and less than he himself possesses in the land."[18]

17. Co. Litt., L830 ed., S.42b.
18. Woodfall on Landlord and Tenant, 26th ed., 1960, p.l. cf.1898 ed. p.lx.

A similar view is taken by Foa who states that

> "The relation of landlord and tenant may be generally described as that which exists when one person (the lessor or landlord) being possessed of an estate or interest in real property, whether freehold or not, has granted, or is deemed to have granted, to another (the lessee or tenant) an estate or interest therein which is less than freehold or less than the estate of the grantor."[19]

It is true to say that in Nigerian customary law, as in English law, the landlord always grants to the tenant an interest less than that which the lessor himself has got in the land, but the above descriptions do not fit squarely into the customary context not only because of the absence of freehold estates under native law and custom, but because the descriptions fit other transactions, like pledge of land, which do not give rise to the relationship of landlord and tenant, Cheshire says that

> "A term of years and the relation of landlord and tenant is created whenever one person, called the landlord, confers upon another, called the tenant or lessee, the right to exclusive possession of certain land for a period that is definite or capable of definition."[20]

One feature of tenancies granted under English law is that the tenant has exclusive possession of the land. This feature is present in grants regulated by customary law but in such cases the exclusiveness of possession relates only to the purpose for which the grant is made. Customary use of land being more or less concurrent in nature the tenant cannot claim to exclude the grants (or ?) from the land if

19. Foa's General Law of Landlord and Tenant, 8th ed., 1957, p.l. cf Hill & Redman: Law of Landlord and Tenant, 13th ed., 1960, p.l.

20. Cheshire, G.C., Modern Real Property, 8th ed., 1958, p. 342. cf Jowitt, The Dictionary of English Law, vol. 2, 1959. p.1057.

his use of the land is not being jeopardized by the grantor's entry thereon. Neither in English law[1] nor in customary law is mere exclusiveness of possession the final test because in the customary pledge, at least, exclusive possession is granted, yet the pledgee is not a tenant.

Bayley, J. in St. Germains (Earl) v. Willan[2] holds the view that

> "If the owner of land consents by deed that another person shall occupy land for a certain time, that is a lease."[3]

On the other hand in Camberwell and South London Building Society v. Holloway,[4] Jessel, M.R. said,

> "The word 'lease' is in law a well-known legal term of well-defined import. No lawyer has ever suggested that the title of the lessor makes any difference in the description of the instrument, whether the lease is granted by a freeholder or a copyholder with the licence of the land or by a man who himself is a leaseholder. It being granted for a term of years it is called a lease. It is quite true that where the grantor of the lease holds for a term the second instrument is called either an underlease or a derivative lease, but it is still a lease."[5]

These judicial definitions stress the essentiality of a written instrument as well as of a definite period of time in determining whether or not a lease exists, but neither of these factors is essential in customary law in establishing the relation of landlord and tenant.

The approach of both the legislatures and the courts in Nigeria is similar to that of the English authorities cited above.

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1. See Foa, op. cit. p.8, Lloyd & Montgomerie: Rent Control, 1955, p.23, and the authorities therein cited.
2. (1823) 2 B & C 216.
3. at p. 220.
4. (1876) 13 CL.D. 754.
5. At p. 759.

Thus the Western Nigeria Landlord and Tenant Law[6] states that in that Law

> "'Landlord' means any person who under a lease or other contract of tenancy is, as between himself and the lessee or tenant, for the time being entitled to the rents and profits of the demised premises payable under the lease or other contract of tenancy.[7] 'Tenant' means any person entitled in possession to the holding under any lease or other contact of tenancy."

The definition correctly states the existence of a contract as an essential factor in establishing a landlord and tenant relationship. The contract may be express or implied; but the emphasis in tracing the landlord is on receipt of rents or other profits: but these are not essential, though they are quite a common feature of the relationship.

The Federal Recovery of Premises Ordinance[8] in the definition section states that

> "'Landlord' in relation to any premises menas the person entitled to the immediate reversion of the premises or if the property is held in joint tenancy or tenancy in common, any of the persons entitled to the immediate reversion, and includes the attorney or agent of any such landlord, and also any person appointed to act on behalf of the Crown in dealing with any lands, buildings, premises in corporeal or incorporeal hereditaments vested in the Crown:[9]
> "'Tenant' includes any person occupying[10] premises whether on payment of rent or otherwise but does not include a person occupying premises under a bona fide claim to be the owner of the premises."

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6. No. 32 of 1958, now Cap. 58 of 1959.
7. Ibid S.2.
8. No. 39 of 1945, now Cap. 176 of 1958, of Laws of the Federation.
9. Recovery of Premises Ordinance, S.2.
10. In Akinosho v Enigbokan & Anon. (1955) 21 NLR 88. Abbot, J. held that the word "occupying" means "lawfully occupying" so that a mere treaspasser in occupation does not come within the term "tenant'.

Here, as elsewhere, it is correct to say that in both customary and general law the landlord always has a reversion of the land demised, but as stated already a tenant need not pay any rent at all and this will not invalidate the existence of the relation of lessor and lessee. Furthermore, the exitence of a reversion is not per se conclusive evidence of tenancy, nor even the fact that it is coupled with occupation by the tenant for a villager may occupy village lands the reversion to which is in the village as a corporate body but, as will be shown later, the village member in occupation is not a tenant.

The relevant Nigerian opinion which is on all fours with the English view is given in the National Bank of Nigeria Ltd. v Compagnie Frassinet.[11] In that case the Bank appealed under the Registration of Titles Ordinance, from the decision of the Registrar to register the Bank's lease but to do so subject to Frassinet's lease as an incumberance under Section 12 W of the Ordinance. Reviewing the arguments put forward, Bairamian, Ag.J. (as he then was) said:

> "One is that Frassinet's document is no more than an agreement to let in view of the words 'The lessor agrees to let and the lessees agree to take'. When one looks at pages 547-548 of Williams on Real Property (1920) and Duxburg v. Sandiford, 80 L.T. 552, and Pinero and Others v. Fudson, 31 R.R. 338, one sees that those words were good enough to create a lease in the days before a deed was required: and they are good enough now; and one gathers that 'any words indicating an intention to give possession of the lands for a determinate time will be sufficient.' Here we have a document beginning with the words 'This lease made'; in the third paragraph the lessees covenant in respect of 'the term hereby created', which are sufficient

11. (1948) 19 N.L.R. 4.

to establish a lease according to Duxbury v. Sandiford; the covenants on either side speak of 'the tenancy', the lessor undertakes to deliver the premises before the 31st May, 1946; and finally both sides sign and seal - as plain an indication as one could wish that both meant the document to be a lease."[12]

This decision reveals three elements which are necessary in establishing the relation of landlord and tenant under the general law: agreement, intention, document. In customary law both intention and agreement are necessary, but a document was virtually unknown. Also the mere existence of evidence of agreement and intention may not be sufficient in customary law for whereas in English law a document duly executed will give the grantee an interest in the land, in customary law the grantee must do something more: he must enter into possession or at least do some overt act unequivocal and attributable to an intention to enter into occupation of the land.

The definitions in the general law of Nigeria (incorporating English law)[13] contain three basic principles:

1. The lessee must acquire lawfully the right of possession of the land or other premises to the exclusion of the lessor.[14]
2. The duration of the tenancy must be definite, and however long it may be, it cannot be limited in perpetuity or for a period that will not be readily determinable.[15]

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12. At p. 4 - 5.
13. For other English definitions to the same effect see
    Jowitt, Earl, The Dictionary of English Law, vol. 2, 1959 ed., p.1069
    Megorry & Wade, The Law of Real Property, 2nd. ed., 1959, p.
    North, J., in Re Knight (1887) 34 Ch. 518, at p. 520-1.
    Chitty J., in Re Negus (1895) 1 Ch.73, at pp.78-9.
14. cf L. & N. Rly. v Buckmaster (1874) 10 A.B.70, at p.76.
15. Sevenoaks, Maidstone & Tunbridge Rly. Co. v. London etc. Rly. Co. (1879) 11 Ch. V. 625 at p. 635-6; Lace v. Chantler (1944) KB 368.

3. The lease or any agreement therefor must be evidenced by an instrument in writing,[16] or there must be sufficient act of part performance.[17]

In customary law only the first principle is essential, but it is not the determining factor because of other relationships which confer exclusive possession and yet do not create the relation of landlord and tenant. These relationships will now be considered.

Distinction between tenancies and similar transactions.

The relationships which on the surface look like those existing between a landlord and tenant include the relationship between

(a) member of a community and the land-holding group.

(b) Parties to a pledge of land.

(c) " " " redeemable 'Sale' of land.

(d) " " " 'Gift' of land.

(e) " " " licence.

(a) (i) Distinction between the interest of a member of a community and that of a tenant.

In the last chapter it has been shown that in spite of the modern tendency towards individualization of landholding, some lands are still held by social or political communities as corporate groups. The community may be a family, a village, or a town. The control of such lands may be in either the Chief or a central authority (as among the Yorubas[18] and the Nupe[19]) or in the village or local territorial

16. L.P.A. S.40, replacing the Statutes of Fraud (1677) 2 Car. 2, Cap. 3.S.4.
17. Maddison v. Alderson (1883) 8 App. Cas. 467.
18. Ajisafe, op. cit. p.6; Meek: Land Tenure, pp.118-9, 155-159.
19. Nadel, A Black Byzantium, 1942, p. 183.

unit on the one hand, or on the other hand under the control of a village head or group of elders (as among the Ibos[20] and the Tiv.[1]) In general, the unit of land-holding is the family.[2] But whoever is the controlling authority, the legal position of a member is clear: he is entitled to a grant of some land during the period of allocation and if no grant is made to him without his own fault, he has a right of action under native law and custom against the land-controlling authority.[3] The distinction between his position and that of a tenant is that the tenant has no right in law to have the grant made to him:[4] his right depends on the agreement between him and the land-owning group acting through the controllers.

It is sometimes said that a member is a tenant.[5] This is an inaccurate description of his legal position : he is not a tenant of the Chief, or headman or any other controller of the land. Nor is he

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20. Green, Op. cit.
1. Meek, Land Tenure, pp. 145-149.
2. Coker, Family Property, Chapter 2, and the authorities cited therein. McPhees The Economic Revolution in British West Africa, 1926, pp. 161-166.
3. Policy for Land, Sessional Paper No. 7 of 1953, para. 3. No. 3 of 1955, para. 5. (Eastern Region) Bohannan, P. Tiv Farm and Settlement, 1954, p.32.
   cf. Tongi v. Kalil (1953); 14 WACA 331, C.A., where the West African Court of Appeal, in a judgment delivered by Foster Sutton, P., held that under the native customary law of Sierra Leone, where land has been allocated to a member of a tribe, he acquires a right to occupy it.
   And Cole, Niger Province, para. 132: "An underlying principle and, in fact, a cardinal feature of all these systems is that membership of the local community carries with it a right to share in the use and occupation of that community's land."
4. Bohannan, P.O. Tiv Farm and Settlement, p. 38.
5. McPhee; ibid, p. 161.

a tenant of the community or land-owning group either. To state the position in a simplified way, a member is one of the many dead, the few living, and the countless unborn who, in law, are the "owners" of the land.[6] Members for the time being have co-ownership only in the sense of having a common right to possess and use parts of the land. In law this right to use is confined only to the adult members[7] of the group; but it is equally true that in law the children of these members have the same rights although the exercise of such rights may be postponed.[8] The interests of members are in some respects similar to the interests of joint-tenants in English law; this is because as long as the land is not partitioned their rights are identical and they can jointly alienate the land. But the difference between the interests of a member, whether of a family or a village or any other social or political group and that of a joint-tenant in English law is that in English law the entirety of rights is vested in the joint-tenants for the time being r regardless of their issue but in customary tenure the rights are not confined to the "joint-tenants" for the time being to the exclusion of their issue. The grown-up descendants of a deceased member get the same rights of use as the original members as long as the land is not

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6. Policy for Land, Sessional Paper No. 7 of 1953, para. 3, No. 3 of 1955, paras. 3 & 4 (Eastern Region).
7. In family lands, at least, both males and females, among the Yoruba, acquire some interests therein, but the females do not acquire the same rights as males: Lopez & ors. v. Lopez & Ors. (1924) 5, N.L.R. 4 7. See also the section on women below.
8. cf. Ward Price, Land Tenure in the Yoruba Provinces, para. 104.

partitioned.[9] Also by the pre-1926 English law which still applies in some parts of Nigeria,[10] a joint tenant in property held under English law, may sever his interest[11] but he cannot do this in case of land held by his family or any other social or political group of which he is a member unless the land has been permanently partitioned. If there is no partition, no one member has any separate interest which can be alienated outright,[12] and a *fortiori*, a servant[13] of a member cannot alienate any family or village land granted to him by the master. Again, in land held jointly in English law disposition thereof by one of the joint-owners without the concurrence of the others is void because it will be deemed fraudulent,[14] but if a member of a group disposes of the land which is allotted to him such a disposition is voidable,[15] not void,[16] and if it is not avoided within a reasonable time, it may bind the other

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9. But on partitioning of such lands descendants of the original members take *per stirpes*. Coker, *op. cit.*, p.45, says that in case of members of a family, the interests are identical in duration, not in size.

10. In the Federal Territory, Eastern and Northern Regions: See Chap. 1 above.

11. *York v. Stone* (1710) 1 Salk, 158. *Re Pollard's Estate* (1863).

12. *Caulcrick v Harding* (1926) F.N.L.R. 48, *Kadin Adagun v. Fagbola & Ors.* (1932) 11 N.L.R. 110, *Kasumu Aralawon v Aromine & Ors.* (1940) 15 N.L.R. 90, *Oshodi v Momodu* (1952) 14 W.A.C.B., 83 - All dealing with *family* land only, but the principle is the same.

13. *Sakariyawo Oshodi v Brimah Balogun* (1936) 4 W.A.C.A. 1, P.C. *Chief Obanikoro v Chief Senu & Ors.* (1925) 6 N.L.R. 87; *Erikitola v Alli & Ors.* (1941) 16 N.L.R. 56; *Musa Aina & ors. v. Ogabi* (1958) W.N.L.R., 188.

14. *Worthington v Morgan* (1849), 16 Sim. 547.

15. *Agagram v Clushi* (1907) 1 N.L.R. 67; cf Lokko v Konklefi (1907) R.G.R. 450 at p. 453.

16. But in a Ghana case the W.A.C.A. held that the head of a family must join in a conveyance of family land and the principal members must concur therein. A conveyance purporting to transfer family land, without these essentials, is void *ab initio*: See *Agbloe II & ors. v. Sappor & Anor.* (1947) 12 W.A.C.A. 187.

members.

The family, village or any other group which holds a piece of land, may be likened to a corporation[17] created by the fact that the members regard themselves, and are regarded by others, as a unit with reference to the land in question.[18] But this analogy must not be pushed too far because whereas in legal theory members of a corporation exist independently of the corporation and have no interest in its property, members of a family are one with this "corporation" and may be entitled to do acts in law which will be _ultra vires_ members of an ordinary corporation as known in the general law.

There are some similarities between the rights and duties of a tenant and those of a member. Both are, in customary law, entitled to the _improvements_ they have made on the land granted to them. Thus, a tenant as well as a member is entitled to remove the house he has built on the land. But the fact that a member alone has improved the land which belongs to the family[19] or village does not thereby confer upon him absolute rights therein. A member must take full part in community labour of the village or family, pay his usual contributions in respect of activities concerning the group as such; a tenant may also in customary law be required to fulfil similar obligations. The important

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17. Meek: _Land Tenure_, p. 129 says that "the lands of a lineage are held as by a corporation."
18. For the various theories: Realist, Fiction, and Concession, relating to corporations and objections thereto, see Lloyd, _Unincorporated Associations, 1938._
19. _Shelle v Chief Asajon_ (1957) 2 F.N.L.R. 65, C.A.

The important distinction between the duties of a member and those of a tenant lies in the fact that a member is bound, in customary law, to contribute to the costs of litigation concerning the land and if he fails to do so his rights may be forfeited but a tenant is not under an obligation to make such contributions,[20] and in certain circumstances his voluntary contribution may be refused. This is to prevent his claiming identical rights with the members. An Ibo saying illustrates this: Mbia-mbia adighi ebu isi aja ala - a stranger does not lead in land disputes.[1]

It is sometimes stated that a member of a political or social group has usufructuary rights belonging to the group. This term is convenient but legally it is not strictly correct for the member's rights are in many respects different from those of a Roman usufructuary who has only jus in re aliena.[2] The member's right is joint and indivisible and co-extensive in time with the rights of other members. A deceased member leaves no separate interest capable of being transmitted to his successors, but if he is allotted a portion for indefinite occupation,[3] his descendants will normally be entitled

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20. cf with the same position in Ghana as stated in Kakrah v Ampofoah & Ors. (1957) 2 W.A.L.R. 303 by Adumna-Bossman, J.

1. cf. Bohannan,P., Tiv Farm and Settlement, p. 38. Bohannan does not regard these grantees as tenants but this seems to be due to his view that tenancy necessarily involves residence and/or payment of rent.

2. Buckland, A. Manual of Roman Private Law, 2nd. ed., pp.162-5.

3. Such a portion cannot be taken from the member as long as he fulfils his civic duties or other obligations to the group and he may even lease part of the land, with or without reference to the controller thereof, according to the purpose or length of the lease.

to succeed thereto but if he dies childless, the portion reverts to the group. Where no allocation has been made the death of a member causes no change in the interests of the other living members.

The interests of a member as described so far relate to occupation and use of the land. But he has another type of interest in some lands which he has no right in law to occupy. Rowling[4] calls these lands 'State' and 'Title' lands. These are not the same as 'public' lands, such as market-sites, quarries and dumping grounds, to which member's rights are similar to those of a licensee, except that the licence cannot be terminated as long as he fulfils his obligations and also that his licence is conferred by law as a result of his being a member. The 'State' or 'Title' land is occupied by the holder of an office for the time being. The office may be political, such as that of a Chief or an Emir, or it may be religious such as that of a Head priest, or it may be social such as the Headman of an extended family or family.

The occupation and use of the holder of the office are for purposes of his office and the land must be handed on intact to his successor in office who may be entirely different from the successors to his self acquired land.[5] Such 'status' land among the Ibos are called ala ofo, literally "sceptre" land, the ofo being a little wooden sceptre symbolic of the existence and solidarity of the group[6] who own it. Among

4. Land Tenure in Ijebu Province, paras. 23-31.

5. cf. Iperu 49/'35: "There is an acre of farmland reserved for the head of the family. His son does not inherit is as personal property: cited Rowling, Ijebu, op. cit., para. 31.

6. Normally an individual, a family or an extended family, or village has its own ofo. For ofo generally, see Meek: Law & Authority, pp.105-111.

the Ibos it is the height of abomination to alienate Ofo land. In general the interest of a member in such a case is to protect misuse of the land by the holder of the title. Permanent crops such as kola trees planted on it are in law planted for the benefit of the office and devolve on the successor in office. The customary idea is that the use of the land will be lost to subsequent holders of the office if each present holder owns such crops. A stranger-tenant has no interests in such lands.

By way of summary it may be stated that the rights of a member of community in the land belonging to the group depend on law, owing to the fact that he is a member, the rights of a tenant depend on the agreement between him and the grantor.

(ii) Distinction between the rights of a Chief, etc. and those of a landlord.

The Chief or a Headman[7] may act in different capacities with regard to the lands which he controls. Firstly he may be a custodian preventing unathorized appropriation of the vacant lands which are held by the group over which he is in charge and in his capacity as a caretaker he will be responsible for allocation of parts thereof to the members of the political community[8] or to strangers who are approved. Thus at

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7. Generally more than one Headman acts together but this does not make any difference in their position.

8. This is not because he is regarded as the owner but because he is entrusted with a duty in order to avoid confusion which will arise if everybody made claims without control. Nigerian situation differs radically with the position in some East and Central African territories where the Chief is regarded as the owner of the land: e.g. in Uganda all the land is said to belong to the Kabaka by right of conquest - see Haydon, E.S.: Law and Justice in Buganda, 1960, p.127-8. By the introduction of the "mailo" system subordinate chiefs became freeholders: ibid, p.141-2.

Atani, among the Ibos of Eastern Nigeria all the farmland is held corporately by members of the town and the position of the Headmen is that of a caretaker responsible for allocation to members or grant of leases to stranger-tenants. Among the Yorubas the Awujale of Ijebu is said to hold the land in the neighbourhood of Mamu in trust for the use of all the Ijebus,[9] and giving evidence of the situation in Northern Nigeria Sir M.R. Menendez, C.J. said,

> "According to native law and custom lands are vested in the Chiefs as trustees for the communities under them. Under no circumstances can the trustee part with the fee-simple. This can only be done with the consent of the Community."[10]

In strict legal sense the Chief or Headman is neither an owner nor a trustee at all: he has no legal title to the land and he cannot pass any to a purchaser. His authority is that of a controller[11] but in dealings with non-members he may be regarded as the agent of the community in the sense that his authority derives from the tacit assent

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9. Rowling, Ijebu, para. 33; cf Bradbury, R.E., The Benin Kingdom, 1957, p. 44. Meek, Land Tenure & Land Administration in Nigeria, p.162.

10. Northern Nigeria Lands Committee, Cd. 5103, p. 31. cf Webber, J., in Chief Omagbemi & Ors. v. Chief Dore Numa (1923) 5 N.L.R. 17. "Now the Olu never owned Jekri land as an individual. The land belonged to the community and the Olu was trustee. In him as trustee was vested the land." at p.19.

11. Nadel, op. cit. p.185 calls his authority one of "administrative control only". Eastern Nigeria Government in Policy for Land, Sessional Paper No.7 of 1953 states in para 3. that,

> "In some areas land is vested in the hands of the village or compound head. It is his sacred duty to administer and control it. He distributes it to his subordinate relatives or members of the same family unit for farming and residential purposes. Each member of such community has a just claim to as much land as he could conveniently cultivate or occupy as if he had an absolute title in fee simple. This village head has no proprietary right or ownership in the modern sense but holds the land of his ancestors in trust not only for the present generation but also for their descendants unborn."

of the members but if he exceeds this authority the agency can be revoked by the members taking steps to avoid the act. Thus the Chief or Headman is not the landlord of the members of the political or social group under him.

Secondly, the Chief or Headman in his capacity as political or religious leader may occupy and use certain "State" and/or "title" lands attached to his office. Among the Yorubas, for example, ile oba[12] is occupied by the Chief in his official capacity[13] and at Oba, in Eastern Nigeria, the village headman in charge of Idemili deity occupies the land attached to the diety in his capacity as a religious leader. In this respect the position of the Chief or headman is compatable to that of a corporation sole in English law. The use is for purposes of the office and on his death the land descends to his successor in office,[14] not to the successor to his private property as such. But here again no title is vested in the Chief and although the duty of care and diligence imposed upon him is similar to that of a trustee, he is not a trustee in the legal sense. If the Chief or headman offends the customary law concerning the use of the land he may be forced to abdicate or even, among the Yorubas, to commit suicide.

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12. See p. 75 - 77 above.

13. cf Smalman Smith, C.S. in Ajose v. Efunde and Ors. (1892) RCJ "The absolute ownership of land has never, as far as my experience teaches me, been acknowledged in this Yoruba-land as inherent in the sovereignty of Kings of the Country." Similarly Taylor, J., in Salavu Oyeboma v Thomas Ajani (1959) W.N.L.R. 213. Ward Price, H.L., Land Tenure in the Yoruba Provinces, para. 80.

14. Chief Awodiya v. John Apoesho & Anor. (1959). W.N.L.R. 221.

Thirdly the Chief may, as head of his own family, compound or quarter, have the control of the land belonging to members of the group as such and at the same time he may have a right to use it just like any other member. Here again he is not the landlord of the members or of strangers granted parts of the land.

Finally, the chief may have his private land,[15] either acquired as a result of partition of land belonging to the social or political group under him, or inherited from his ancestor, or purchased by him.

It should be remembered that the same chief can be in charge of a political group, such as a town or village, and also of a social unit such as an extended family or a section of it. Each of these groups or units may hold land corporately; this land may be used by its members, including the Chief or head. The group may also hold 'state' or 'title' lands which are occupied and used by the Chief alone in his official capacity. It will be apparent, therefore, that in an extreme cases where the control of all such lands is in the hands of one person the headman could, in such a case, have rights in land in at least eleven different capacities. In none of these cases is he a landlord. Even if the land is granted to strangers the real landlord, in law, is the corporate group.

The Chief, however, in his capacity as caretaker of the lands is the agent through whom all negotiations take place;[16] in consultation with his Council he or his delegate allocates the land to the members of

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15. Salavu Oyebona v Thomas Ajani, supra.

16. See Viscount Haldane in the Amodu Tijani case.

the community. When permanent allocation has been made the members retain the occupation and use of the portion they received for an indefinite period. In areas where land is plentiful the head is obliged to grant to a member as much land as he reasonably needs.[17] A man is presumed to need as much land as he and the members of his household can occupy and cultivate for their living.

Customary grants to strangers, may only be made with the consent (express or implied) of the Council or the senior members of the group. If payments are made in consideration for the grant such payments are shared by all[18] the adult members of the land-holding groups or are applied to the common benefit of the group. Such payments must be distinguished from customary tribute given to the Chief or head as a mark of respect or of loyalty.[19]

There are cases where certain powerful chiefs or other headmen have arrogated to themselves proprietary title to the land they control.[20] Thus the Obu of Benin is said to be "in every sense the supreme landlord of his kingdom",[1] and Dr. Nadel says that the Ersu of Nupe land has

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17. It must be stressed that the system of allocation is not general in all parts of Nigeria.

18. But among the Etsako of Benin Division it may be shared by the ward and village elders alone, presumably because it will be too small to go round all the members entitled: See Bradbury, R.E., The Benin Kingdom, 1957, p.106.

19. For various payments made in respect of rights in land see Chapter 6.

20. cf Elias's Land Law, pp. 95ff.

1. Meek, C.K. Land Tenure, p. 158.

"absolute and permanent ownership" of the 'Royal Estates'.[2] Such claims are not based on law but on the naked fact that the King or Chief, by his power, can force or cajole the community into acquiescence even when some of their customary rights are infringed. In law the King has no title whatsoever to such lands. As the West African Lands Committee rightly observed.

> "No ruler, king or chief is sole proprietor of tribal land....... The Yoruba prefix 'oni' (owner, possessor) does not and cannot confer on Yoruba Kings any possessory[3] rights over lands."[4]

And of the position in Northern Nigeria Menendez, C.J., said:

> "The idea underlying tenure in the native community is that land is property of the people, and that their chief is a trustee for the people, and that every head of a family, every freeman in the community, is entitled to as much land as he can reasonably require to support himself and his family, and is entitled to keep that land as long as he cultivates it, as long as he uses it for the purpose for which it was granted, and as long as he behaves himself."[5]

It should be emphasized that in places where supreme authority is vested in a genontocracy of elders, the legal position of the Council of Elders is exactly the same as that of the King, Chief or other ruler, with regard to the land. The position is the same among the various ethnic groups where no single person claims over-all supremacy[6] and no better

2. Nadel, Black Byzantium, 1942, p.198. cf. Annual Reports N. Nigeria 1900-1911, para. 31.

3. Except as indicated above.

4. W.A.L.C. 1048, p. 220.

5. Northern Nigeria Lands Committee Cd. 5103, p.66.

6. For Tiv see Meek, Land Tenure, p. 143ff.

description can be given to illustrate this than in the trenchant words of an Ibo headman:

> "I am the head chief of Umunede, the land around my town belongs to the people of Umunede: the power to give the land is vested in me."[7]

It should be added that the customary relation of Chiefs and other headmen to the land they control has been radically altered in cases coming within the Public Lands Acquisition Ordinance which in S.7 provides that

> "When lands required for public purposes are the property of a native community the recognised head chief of the community may sell and convey the same for an estate in fee simple notwithstanding any native law and custom to the contrary."

The effect is that in cases where a sale would have been avoided because the conveyance was without the necessary customary consultation and approval of the Chief's Council, the force of themenactment validates the sale and none of the members of the community can therefore avoid it. But the capacity of a chief to convey a title which is not vested in him should not blur the fact that in normal conditions he is only a controller of such lands. If some analogy could be drawn from English law, the fact that a sole director of a limited company can convey the property vested in the company does not thereby make the director the owner of such property. By way of summary it may be stated that although there is much resemblance between the powers of a chief and an owner,[8] and between his duties and those of a trustee, the

7. W.A.L.C. 1048, p. 169.

8. In the Amodu Tijani case (supra) the Chief originally confused the issue by claiming as beneficial owner and only abandoned this claim because of a correction by the Full Court of Appeal.

chief is neither the owner nor a trustee of the land of the community which he controls. He is only a caretaker.

Distinction between the rights of members and persons of slave origin.

Although slavery has long been abolished its incidents with regard to land still continue to appear. In the words of Mary Slessor, "The fundamental fact underlying all tenure of land is freedom of birth. A slave cannot hold land."[9] This statement made in 1912 related to Calabar Division of Eastern Nigeria but the principle involved was of general application. The position of slaves could be considered at two stages. At the first stage when they were completely under their master they were not different from an ordinary servant who lives on his master's premises. They would have no legally enforceable interest in the land. At a second stage when they acquire a measure of freedom they may be given land for growing their own crops or erecting their own houses; at this stage their position is not different from that of stranger tenants to whom a grant has been made. If a slave is adopted by or assimilated into the family of his master his position becomes the same as those of the descendants of the master.

But granting a slave his freedom or some land does not, by fact of the grant, elevate him to the position of a member: he cannot dispose of such land,[10] and a fellow slave can bring an action restraining any unauthorized alienation of land granted to the slaves of a man's household[11]; in native legal theory the grant to the slave was dependent on the willingness, on the agreement, between the grantor and the grantee

9. W.A.L.C. 1048, p.199.
10. Ashogbon v Oduntan (1935) 12 N.L.R.7. Akeju v Suenu & Ors. (1925) 6 N.L.R.87. Erikitola v Alli & Ors. (1941) 16 N.L.R.56.
11. Samusi Alaka v Sinadu Alaka & Ors. (1904) 1 N.L.R.55. cf. similar rights of a member: Bassey v. Cobham & Ors. (1924) 5 N.L.R.90.

for a freed slave was free to return to his own home or more away to somewhere else. On the other hand the right of a member depends in law by the fact that he is a freeborn. Abolition of slavery has not affected the position of persons of slave origin in this respect. As Tew, J., said,

> "When an Aroba[12] was settled by his master in a compound, he acquired for himself and his descendants a right to live there in perpetuity subject to good behaviour. It is unthinkable that that right should be lost simply because the overlord's descendants cease to take any interest in the arota or the compound."[13]

Among the Ibos there were two classes of slaves: the "ohu" and the "osu".[14] The ohu was the normal domestic slave, acquired in war or by purchase or by a free person being pledged for debt. Ohus were treated as freemen and they could purchase their freedom. They could be given land on which to live and farm in payment of small annual dues[15] or oftentimes for no consideration at all. In that respect a relation of landlord and tenant is established between the ohu and the grantor who may be his master or the group of which the master is a member. The Osu, on the other hand, was a slave dedicated to some deity.[16] All the osus in a community formed a distinct class and in general, were allocated part of the land dedicated to the deity

12. i.e. A slave.
13. Oshodi v. Dakolo (1928) 9 N.L.R. 13 at p.16.
14. For detailed description see Basden, Niger Ibos, pp. 343-258.
15. Meek, Land Tenure, p.170.
16. But Mbanefo J. held in Nwachukwu v Nnoremele (1957) 2 ENLR 50 that since Osu System did not obtain throughout Eastern Nigeria, and had a local connotation where it did obtain, it was essential for the plaintiff to prove that a defamatory meaning would be placed on the expression "Osu" by those to whom the word was published and that he had failed to do so. Sed qu., especially in view of the express provision of S.8. of the Abolition of Osu System Law, 1956.

or if the osu population increased, part of the communal land. The master of the osus was the head priest of the deity to whom they were dedicated but owing to the fact that they were considered sacrosanct, they sometimes over rode all codes of conduct, acquiring for themselves special privileges and surpassing the members of the community and their masters in wealth as well as authority. An osu could not redeem himself[17] and all his descendants are osu by birth.[18] His position was the lowest form of human status. In Oba, for example, his stepping over the legs of a free person was a defilement which must be atoned by the freeman performing some sacrifice, his shadow falling on the food of a titled man defiled the food and he must not eat it, and an osu breaking the kola nut for freemen to partake in eating was a grave insult to them. He could not take part in a special funeral dance called abia.

The status of osu or ohu was abolished[19] in Eastern Nigeria in 1956 by legislation[20] and it is now a criminal offence to boycott a person on account of his being an osu.[1] The person may also bring an

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17. Daryll Ford & G.I. Jones, The Ibo and Ibibio Speaking Peoples of S.E. Nigeria, 1950, p.23.
18. Meek, Law and Authority in a Nigerian Tribe, p. 204.
19. British administration put end to slavery in the 19th century and early 20th century but this did not remove the social stigma attached to persons of slave origin. They are still regarded with contempt in spite of the 1956 legislation.
20. The Abolition of Osu System Law, 1956.
1. Ibid., S.4.

action if he is called osu but it has been held that in order to recover he must prove that a special defamatory meaning would be placed on the expression "osu" by those to whom the word was published.[2] Eastern Nigerian Law says nothing of the land granted to an osu or ohu. Does such land become the absolute property of the grantee or has the grantor and his successors a right of reversion therein? It could be argued that because the osu has been in long possession of the land he has therefore acquired indefeasible title thereto but it is submitted that this will be a question of evidence and that the original grantor was not intended to be expropriated of the reversionary title to the land and therefore that the legislation has only dealt with the social status of the slaves and not the property rights in land of the descendants of their former grantors.

In Lagos the position of persons of slave origin with regard to land acquired by Crown Grants is now governed by the Arota (Crown Grants) Ordinance[3] which provides that

> "All grants of land situate within the Town of Lagos which purports to have been made by or on behalf of the Crown to an arota shall be deemed to have been validly made; and each such grant shall be deemed to have vested in the arota named in the deed of grant an estate free from the competing interests and restrictions, save only such interests and restrictions as are recognised by native law and custom and are vested in, or operating in favour of, the family of such arota or chief to whose household such arota was attached."[4]

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2. Nwachukwu v Nwooremele (1957) 2 E.N.L.R. 50, per Mbanefo J.

3. Cap. 14 of Laws of the Federation, 1958.

4. S. 3.

It is also provided that if the family of an arota or his successors become extinct the family or chief to whose household the arota was attached shall be entitled to right of reversion as if the land had not been granted to the arota.[5]

This legislation therefore has turned the relationship of master and arota to that of landlord and tenant. As in Eastern Nigeria, so here, it could be said that the status of slavery has been abolished but its groans still fill the air. It is suggested that a bold social reformer should urge for legislative provision that rights in land of persons of slave origin should be exactly the same as those of all other members of the community. Until that is done the anguish of these unfortunate victims of circumstance has scarcely been touched upon.[6]

In Northern Nigeria, on the other hand, the incidents of slavery with regard to land has been abolished because under the provisions of the Land and Native Rights Ordinance rights of occupancy only are recognised[7], and the recognition is without consideration of social class.

Relation of Women to the Land.

By native law and custom an adult woman was not expected to remain unmarried. Thus Ajisafe says of the Yorubas:

> "There is no spinster in the country, every woman being married,"[8]

5. S.4.
6. Cf. the Minority Report submitted by I.W.E. Dodds, in Tew, Sir M.L. Report on Title to Land in Lagos, pp.57-9.
   It is not denied, however, that some slaves may by force of their personal character and perseverance, attain a position of wealth and importance. Chief Mabinnori, of the famous Lewis v. Bankole, (1909) 1.N.L.R. 100, was once a slave.
7. See pp.81ff above; cf. Meek: Land Tenure, p. 171. But even there, as Prof. Anderson correctly observes, "No enactment can obliterate at a stroke the social status of slavery in public opinion, or some of the implications of that status in religious law," op. cit., p. 215.
8. Ajisafe, op. cit. p. 5.

and Dr. Basden makes a somewhat similar observation about the Ibos:

> "The Ibo woman shrinks from the prospect of being husbandless: she knows only too well the disgrace that is attached to that unfortunate condition."[9]

Before marriage a woman is under the guardianship of her father, uncle, or senior brother and therefore had no need for separate allotment of land and after marriage she is under the guardianship of her husband. But although women do not normally exercise any private rights in land,[10] in many Nigerian societies it is incumbent on the husband to provide his wife with some plots of land for her own farming. In such a case the woman is not a tenant of the husband because this right which she acquires in her husband's land is imposed by law on her acquiring the status of a wife and not created by any agreement between the husband and wife as such.

On the other hand some wealthy women are able to acquire and hold land by purchase just as any other individual.[11] On the death of such a woman the land is inherited by her children, or if she has no children, by her relatives, not by her husband or his relatives.[12] Among the Yorubas a daughter has equal claims with a son to inherit the self-acquired land of their deceased father,[13] though in some cases this is

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9. Niger Ibos, p.231.

10. Bradbury, R.E., The Benin Kingdom, 1957, p.106.
 Rowling, Notes on Land Tenure in the Benin. para. 50.
 Ward Price, Land Tenure in the Yoruba Provinces, para. 99.
11. D. Forde & G.I. Jones, op. cit., p.23.
12. Meek, Land Tenure, p.116.
13. Rowlings Ondo, paras. 24, 41, 75. and Ijebu, paras. 110-120.
 Meek, Ibid. p. 136; Richardo v Abal (1926) F.N.L.R. 58.

limited to her own life so that her children would not inherit from her.[14] A woman may, if her husband has not sufficient land, "borrow" some farming plot from any of his relatives. In such a case the relation of landlord and tenant is established between her and the grantor.

In some particular localities[15] there is woman-to-woman marriage. The woman "husband" is normally a wealthy married woman who has no son and her "marrying" a 'wife' is with the intention of getting a son by her in order to secure her position in the house. Her 'wife's' children are classified as her own children but if she has children of her own they will be regarded, for purposes of property of her husband, as children of their own mother and thus entitled as a separate branch in succession matters. The husband of the woman "husband" is in fact the husband of the "wife" and is responsible for her maintenance. Any land allotted to her is in respect of the legal liability to provide for her and she is not a tenant of the husband because of the allotment.

Under pure Islamic law daughters are entitled to share in their deceased father's estate but they take half of the shares or their

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14. Rowlings Ondo, para. 41; But in other cases a daughter's children step into her shoes: Ijebu, para. 118.

15. e.g. among some Ibo people of Eastern Nigeria, see N.W. Thomas, Anthropological Report on Ibo-Speaking Peoples of Nigeria, Part IV, 1914, pp. 83 - 85.
For similar practice in Dahomey, but with the children being regarded as the woman-husband's see, A. Phillips: Survey of African Marriage and Family Life, 1953, p. 128.

their brothers. Orthodox Maliki rules of succession are applied as far as moveable property is concerned[16] but inheritance of land varies in detail from one area to another. Thus in Kano, Sokoto and Awandu Emirates females are excluded from succeeding to rights in land but in Bornu, Islamic rules of inheritance prevail, though in most cases females are excluded from actual succession but receive (perhaps) compensation from other assets,[17] and in an unreported case, Ames, J. held in the High Court at Kano, that the finding of the Chief Alkali that a Christian daughter was excluded from inheritance was contrary to natural justice.[18]

Today woman's right to land may be affected by the type of marriage she contracts. Thus if a woman marries under the Marriage Ordinance and her husband dies intestate, her rights in any self-acquired property which he leaves in the Federal Territory is regulated by English law.[19] It seems that the express provision that Section 36 applies to the Colony implies that her rights to any property left by the husband outside the Colony will be regulated by customary law. But it has been held by Ames, J. in the Administrator-General v. Onwo Egbuna[20] that on the principles of Cole v. Cole,[1] the rights of the widow of an Iboman,

16. Anderson, op. cit. p. 216.

17. Ibid. p. 185-6.

18. Mallam Abba v. Mary T. Baikie (K/20A/1943), cited Anderson, op. cit. p. 216.

19. Marriage Ordinance, S.36.

20. (1945) 18 N.L.R.1. 1. (1898) 1 N.L.R. 15. Doubt has been cast on the correctness of this decision by Ainley, C.J. in Onwudinjoh v. Onwudinjoh (1957) 2 E.N.L.R.1.

who died intestate in the Protectorate leaving property in the Protectorate, must be regulated by English law. With the greatest respect, this decision is questionable because Section 36(2) lays down that before the registrar of marriages issues his certificate in the case of an intended marriage, he shall explain to the parties, if any of them is subject to native law and custom, the effect of the provisions as to the succession to the property as affected by the marriage. It can be inferred, therefore, that such explanation will warn the party to make a will as to his property in the Colony. He or those entitled to succeed to his property under customary law cannot be intended to be worse off because he was not warned of the effect of the marriage on the property left outside Lagos, as the learned judgment seems to imply. It is submitted therefore that the legal position at present is that a woman's right in land in all cases is regulated by native law and custom as described above, except where she marries under the Marriage Ordinance and her husband dies intestate leaving property in Lagos or, where he dies having made a will which is interpreted that his property is devised according to English law.

Relation of Infants and persons of unsound mind to the land.

A principle which is of general application is that minors cannot hold land.[2] This is due to the fact that they cannot use it effectively and because a father or guardian is responsible for the maintenance of the infant. But infancy does not depend upon the

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2. Ajisafe, op. cit. p. 4 and p.7. para. 9; Meek; Land Tenure: p.187. Green, Land Tenure in an Ibo Village. Chap. IV.

arbitrary rule of being under the age of 21: it depends on the demonstrable evidence of not reaching the age of puberty or not being married. An infant's interest in the land belonging to the group of which he is a member is merged in the interest of his father or guardian and if even the infant is allotted a separate plot by the father or guardian it is neither a gift nor is he a tenant because the occupation and use are on behalf of the father. The duties of a guardian are in many respects similar to the duties of a trustee but he cannot be said to hold the land on trust[3] because in native law if it is land to which the infant will be ultimately entitled, the guardian is bound to act in accordance with the reasonable wishes of the infant, whereas in English law a trustee is bound to act according to the terms of the trust deed.

On the death of a father the guardian of an infant is in normal cases his adult senior brother, or if he has no such brother, his paternal uncle but where there are no suitable male agnatic relatives, maternal uncles may act as guardians. In the Moslem areas of Northern Nigeria, Islamic Courts may appoint a guardian and a chief as the Great Guardian may himself take charge of destitute children or even of married women who disagree with both their husband's and their own relatives.

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3. Elias; Land Law, p. 161, says that the "incapacity of the minor to hold land........ only implies that an adult relative, usually the father or senior brother, will hold it for the minor on trust until the attainment of puberty". With respect, this trust relationship must be qualified.

The rights of a person of unsound mind are exercised by his relatives who are also responsible for his maintenance; but as allocation of shares of the communal land depends on the power to use such shares effectively no action lies to compel the controller of the land to set aside a portion for the patient unless it is shown that his relatives can use such portion to his benefit and also that they fulfil on his behalf such obligations as payment of community dues or clearing of paths demanded of all adult male members of the society.

The control or care of the land during the period of infancy or mental illness does not thereby make the minor or patient the landlord nor the caretaker a tenant because the duty is one imposed by law and not as a result of agreement.

(b) Distinction between Pledge and tenancy.

A person who is in need may, under customary law, pledge (or as it is often called 'pawn') whatever he has. Fruit trees, land or (in the past) human beings could be so pledged.[4] As Elias correctly observes:-

> "Pledge is a kind of indigenous mortgage by which the owner-occupier of land, in order to secure an advance of money or money's worth, gives possession and use of land to the pledge creditor until the debt is fully discharged."[5]

With respect, it is incorrect to say, as Fowler did,[6] that pledge was

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4. Meek, Land and Authority, pp. 103-4, 205.

5. Elias, T.O., Nigerian Land Law and Custom, 1953, p. 178. cf. Mitchelin J in Adjei v Dabanka & Anor. (1930) 1 W.A.C.A. 63 at pp. 66-7; and Sarbah's Fanti Customary Law at p. 261.

6. W. Fowler, op. cit., para. 33. See also W.A.L.C. 1048, p. 173.

unknown in Nigeria before the advent of the British for however true the statement may be with regard to areas where land was plentiful and therefore had no exchange value it does not correctly represent the facts existing in the various places where pressure of population has substantially reduced the amount of valuable land.

Pledge may be of two types: (i) Self-liquidating, and (ii) Non-self liquidating. Both should be distinguished from advance sale which is a transaction similar to the self-liquidating pledge but of different legal effect. In cases of advance sale of crops the owner of crops or fruit trees sells the anticipated yield for a defined period to a purchaser. The purchaser reaps the produce for that period only and at the end of the stipulated time he must give up any rights over the trees whose produce was sold to him, and the vendor then, but not until then, retakes possession. The yield of the trees or crops covers the amount received in advance from the purchaser and the vendor is not intended to repay this sum even if the yield of the crops does not cover the sum paid nor is he entitled to any excess if the yield more than covers the advance payment. <u>But if the transaction is a pledge the yield covers only the interest and not the capital.</u> Smalman Smith, C.S., however, held in <u>Kuahen v Avose</u>[7] that where palm trees were pledged as security for a loan of 1360 bags of cowries (about £340), the amount of the yield must be taken into account and some portion of it set aside annually in order to liquidate the original debt, and that any native law

7. (1889) R.C.J.

and custom to the contrary in that particular case was 'unjust and inequitable and opposed to natural justice'. With the greatest respect, this seems to mean that justice and equity may vary with the amount of knowledge of native law and custom possessed by a judge. It was open to the Court to find that the particular transaction was sale in advance according to customary law and not a pledge at all:[8] the law must govern the transaction and not the label attached to it by the parties.[9] Advance sale is like the old kind of mortgage known as vivum vadium (living pledge) in early English law. In that case the English lender enters into possession of the land and takes rent and profits in discharge of both the principal and the interest on the amount lent.[10] The available evidence does not show that this form of pledge of land exists in Nigeria. Nigerian customary pledge is more akin to mortum vadium or dead pledge because the debt itself was not paid off by operation of of the pledge. In view of the growing importance of modern plantations

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8. Elias, op. cit. p. 181 seems to have misinterpreted a passage in para. 97 of W.A.L.C. which he cites as supporting Smalman Smith J's decision. With respect, if the transaction was not a sale in advance, the decision that the yield must be taken into account in repaying the capital is contrary to customary law and unless there was a principle on which it could be supported the mere statement that it was 'unjust and inequitable and opposed to natural justice' is unconvincing.

9. cf Rowling : Ondo, para. 40, and Olat Majiyagbe v A.G. & Ors. (1957) N.N.L.R. 158 where Bairamian S.P.J. held that a Certificate of Occupancy granted under the Land and Native Rights Ordinance was, in substance, a lease and that the proviso for re-entry contained therein must be determined under the law appertaining to leases. Also, Facchini v Bryson (1952) I.T.L.R. 1368, C.A. Addiscombe Garden Estates, Ltd. v. Crabbe (1957) 3 A.E.R. 563, C.A.

10. For English principle see Holdsworth, The History of English Law, III, p. 128. Plucknett, A Concise History of Common Law, 5th ed., pp. 603-9. For customary principles see Meek, Land Tenure, pp.201-208. Chubb; Ibo Land Tenure, para. 68.

it is of great moment that parties should specify correctly the nature of their transactions if the inference of sale in advance is to be rebutted in normal cases.

The main features of customary pledge are:

1. The pledgor grants the pledgee possession and use of the land until the loan is repaid. This does not, however, make the pledgee a tenant because the delivery of possession here is due to a right created by law that the borrower should pay interest and later repay the capital.

2. Except in modern development of the self-liquidating pledges possession and use of the land are considered as interest on the loan, not as repayment of capital on any part thereof.[11]

3. Unless the economic trees on the land are expressly included in the bargain, they are reserved to the pledgor.[12] It has been shown above that economic trees may be owned independently of the land - and they may be pledged separately from the land.

4. A pledgee is not entitled to erect permanent buildings or plant permanent crops without the permission of the pledgor.[13] This is to avoid the pledgee claiming that the transaction was a sale.[14] In strict

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11. Cf Ajisafe, Op. Cit., p. 70. para. 1 (b): "The labour of the pawn is no part payment of the debt; it is taken as interest on the capital." per contra in some Moslem areas: Anderson, op. cit. p.190.

12. "A pledgee must not cut down or injure economic trees growing on the land or otherwise play havoc with the property" - Ajisafe, op. cit. p. 9. Rowling, Ijebu, para. 89.

13. G.I. Jones, "Ibo Land Tenure", Africa, Oct. 1949, p. 319. Rowling, Ijebu para. 89; Chubb, Ibo Land Tenure, para. 60.

14. Rowling, ibid. footnote 118.

customary law where a pledgee effects such improvement he is entitled to remove them on the pledgor redeeming the land.[15] Under modern conditions, however, the Courts may invoke the equity of long possession and simply allow the pledgee to remain in possession, paying some rent to the pledgor and thereby converting the relationship to one of landlord and tenant.[16]

5. Pledged land is perpetually redeemable,[17] or as the Ibos say it, "a pledged thing is never lost." This point is illustrated by a dictum of Mbanefo J. in Ikeanyi and Ors. v Adighogu and Ors.[18]

> "The issue between the parties is whether or not the land was given on pledge or as a gift. If it was pledged to the defendants the plaintiffs would have the right of redemption and it does not matter for how long the land had been pledged, for, *in native customary juriprudence as in English Law, once a pledge always a pledge.*"[19]

But in this respect delay raises an equity in favour of the pledgee and the pledgor may not be able to get back the land without sufficiently convincing reasons.[20] Thus in the case under consideration the learned Judge held further that

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15. cf. Green, Land Tenure in an Ibo village, p.
16. Rowling, Ijebu, paras. 99-102.
17. Chubb, Ibo Land Tenure, para. 59.
18. (1957/58) 2 E.N.L.R. 38. Cf. Kuma & Ors. v. Kofi & Ors. (1956) 1 W.A.L.R., 128.
19. at p. 39, italics mine.
20. D. Forde & G.I. Jones in The Ibo & Ibibio Speaking Peoples of S.E. Nigeria, 1950. p. 22. say that "If (pledged) land is not actually redeemed by the third generation, the rights of the pledgor's descendants cannot usually be substantiated, some Native Courts holding that the rightful occupiers are those who have been in occupation for the past generation."

> "The defendants having been on the land from time immemorial, if the plaintiffs want to dispossess the onus would be on the plaintiffs to establish their right of redemption. The evidence they have produced is far from convincing or sufficient to shift that onus."[1]

The defendants were allowed to remain in possession as customary tenants of the plaintiffs on payment of tribute.[2] In this case and in all other cases of pledge, the right of redemption endures for the benefit of the pledgor's successors and is enforceable against the successors of the pledgee. Again a pledgor is bound to give the pledgee adequate notice, if the pledgee is actually using the land, to allow him to remove the crops,[3] on repayment of the capital but normally a pledge could be redeemed even a few days after the conclusion of the transaction but Rowling notes that in parts of Yorubaland there is a growing tendency to fix a limitation period within which the land may not be redeemed unless capital with interest is repaid.[4]

6. A pledgee cannot compel the pledgor to redeem the land. If he is in short of money, he is bound to call on the pledgor to redeem and if the pledgor cannot do so, then the lender may re-pledge the land to another lender but not for more than the original loan. When the original pledgor eventually wishes to redeem, he pays his lender who is bound to repay the second pledgee.[5]

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1. Ikeanhi & Ors. v. Adighogu & Ors. (1957/58) 2 E.N.L.R. p. 38., at p.42.
2. cf. Rowling, Ijebu, paras. 99-102.
3. Chubb, Ibo Land Tenure, para.
4. Ibid., para. 94.
5. Chubb, Ibo Land Tenure, para. 62.

7. Family land or land belonging to any other group cannot be pledged by a member without the consent of the family or group. If he does so the pledge is voidable, and the member may, by such action, lose his rights in the land. On the other hand a member is entitled to redeem the land pledged by his family or social group and if he does so he is entitled to use it privately until he is reimbursed by the other members.[6] During this period of user he is in the same position as the original pledgee.

The above general principles are subject to some local variations. In Ijebu Province, for example, the pledgor may be allowed to remain in possession provided he pays some annual interest to the lender but he may be evicted if he defaults.[7] Nowadays pledge agreements may be reduced into writing. This raises a number of questions because it may be possible to contend that the transaction is no longer governed by customary law and should be considered as a mortgage in the English sense,[8] or on the other hand it could be argued that the memorandum is merely a record of a customary agreement. This question will be considered under registration of leases.

There is no provision in the general law of Nigeria to govern customary pledge of land but many local councils in Southern Nigeria have made regulations concerning land matters, including pledging and mortgaging of land. In Northern Nigeria the problem is of no legal importance because a pledge of land is invalid under the Land and Native Rights Ordinance,

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6. Fowler, op. cit. para. 149; Meek: Land Tenure, p.205; Rowling: Ijebu, para. 92.
7. Rowling: ibid. para. 95.
8. For similar problems in Ghana, see Allott: Essays, Chap. 10. especially pp. 256 ff.

but in fact, as Professor Anderson notes, many land transactions still take place sub rosa.[9]

To recapitulate: pledge is similar to a lease in that in both cases possession and use of land is given to someone who is not entitled as of right to such land, but whereas in a pledge this delivery of possession is due to the previous existing legal liability of the pledgor to pay interest on the money borrowed and to repay the capital, in a lease no such previous liability exists and the grant is made because of the agreement between the parties.

Distinction between a "Sale" of land and a lease.

Two kinds of transaction are both designated as sale in customary law, and they may be termed "inperfect" and "complete" sale. In an imperfect sale the owner of land transfers ownership but with an implied condition that he may repurchase it by repaying the amount for which he sold it. The implication arises because no ritual ceremony was performed to seal the sale. It differs from pledge, however, because the purchaser can at any time, before the vendor buys back the land, sell it to anybody he likes without consulting the vendor. In case of complete sale, however, a ritual ceremony such as killing of a goat is performed to seal the bargain.[10]

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9. Islamic Law in Africa, 1954, p. 186.

10. J.O. Field, Man, No. 47 of 1945.
Chubb, Ibo Land Tenure, para 47: In Ndoki a dog is killed and cloth given in addition to cash.

Distinction between 'Gift' and tenancy of land.

Gift of land may take two forms: revocable and irrevocable. The normal form of gift is revocable because the donor may revoke it at any time, but until this is done the donee can alienate the land and if he does so the donor is completely expropriated. If the gift is irrevocable,[11] the donor immediately loses his interest from the moment of the gift. A revocable gift may be converted to an irrevocable one by the death of the donor. The distinction between gift and tenancy lies in the fact that the donee can, by his act of alienation, completely expropriate the owner of the land whereas a lessee cannot do that.

Distinction between licence and tenancy.

As in English law,[12] so in customary law, it is often a matter of great difficulty to determine whether a transaction creates a tenancy or a licence. Many non-legal writers on Nigerian land law often classify leases and licences together[13] and this problem is not confined

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11. cf. Ikeanyi & Ors. v. Adighogu & Ors. (1957/58) 2 E.N.L.R. 38.
12. For the position in English law see the learned discussions of
    Prof. F.E. Crane, (1952), 16 Conveyance, N.S., 323.
    Prof. A.D. Hargreaves, (1953), 69 L.Q.R. 446;
    H.W.R. Wade, (1952) 68, L.Q.R. 337.
    Professor G.C. Cheshire, (1953) 16 M.L.R. 1.
    L.A. Sheridan, (1953) 17 Conveyance, N.S. 440.
13. Mr. Meek says that "Under the customary law leases of land were in the nature of licences to occupy".
    cf. Rowling, Ondo, para. 39.

to laymen nor to Nigeria because it was no less a distinguished Judge than Earl Loreburn who said in a Ghana case,

> "The occupier of lands in the Gold Coast under licence, or tenancy, or whatever term is most applicable, from a Chief has some interest. It would be quite superfluous to describe the interest, nor is it necessary to dwell upon the peculiarities of the law applicable to the Gold Coast, in which, perhaps, there may be more kinds of interest, in the nature of tenancy than one."[14]

The problem is much more complicated because customary law, unlike English law, does not require a tenancy to be for a definite time. Where, however, only a licence is given it is not intended that the licensee shall occupy and use the land: thus, if an owner of land and oil palm trees allows someone to come on the land and reap the fruits, he is a licensee because he has no right to remain on and use the land. In English law his interest is not in the land itself and his coming thereon is only incidental to the primary purpose of reaping the fruits. Subject to contrary evidence as to the precise nature of his right to occupy, a family-member's right to occupy rooms in his family house similarly carries no interest in the house itself.[15]

Some relevant factors in deciding whether a tenancy or a licence exists are:

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14. Ohai & Ors. v. Yao Ntikora (1913) Ren. 706.

15. Ward Price: Report, op. cit. para. 95.

I. Possession and use of the land. Customary tenancy depends mainly on the fact of possession and use of the land. Where, therefore, possession or use of the land has not been given, the relation of lessor and lessee cannot exist; and where possession is not exclusive the occupation by the grantee will be inconsistent with tenancy and will provide evidence of a mere licence.[16] Thus where Sobo people are given the right to come upon land only for purposes of tapping palm wine or of reaping fruit trees they are not tenants of the land but mere licensees,[17] But exclusive possession is only one index, not conclusive evidence of tenancy for, as already shown above, a person in such possession may be a pledgee of the land.

2. Purpose of the grant. Tenancy in customary law, as in English law, depends on the intention of the parties. The important question always is quo animo the grant? If from the circumstances it can be shown that what was intended was that the occupier should have no more than personal privilege and not any interest in the land he will be considered a licensee. For example, under native law and custom a stranger is usually granted part of his host's house to live in for a trial period during which he is presumed to be under the care and protection of his host. Such a grant to him does not create a customary

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16. Fasoro v. Milbourne (1923) 4 N.L.R. 83; Balogun v. U.A.C. & Anor. (1958) N.N.L.R. 77.

17. Rowling in many sections of his Reports on Land Tenure in Benin, Ondo, and Ijebu Provinces mentions the problems created by Sobo Licencsees who are permitted to exploit palm bushes.

tenancy: the stranger is only a licensee who could be turned out at any time.

3. Relationship of the parties. It has been shown above that certain relationships create a liability in which one person is bound to maintain another who is under him. In such cases grant of the land does not create landlord-and-tenant relationship. Thus, where the head of a house grants land to his wife, servant, or ward the grantee is not a tenant because the relationship of the parties gives rise to a presumption that the grant is made in respect of the duty to care for the grantee.

4. Grantor's ownership of some interest in the land. If the grantor has no separate interest in the subject matter of the grant he cannot validly create a customary tenancy. Thus, for example, a member of a family has no separate interest in the family land and if he purports to create a tenancy, it may amount, according to the surrounding circumstances, to nothing more than a licence.

5. Terms agreed upon by the parties. The terms of the bargain struck by the parties are relevant in deciding whether a tenancy has been created. Thus, although rent is not a necessary ingredient of customary tenancy, periodic payment in the nature of rent may afford evidence that the transaction is a lease.

The fine distinctions in English law between a licence coupled with an interest and a bare licence do not present much difficulty in customary law because land can be owned independently

of what is on it, and where there is a customary licence coupled with an interest the licensee may, with the consent of the licensor, assign his interest; if the licensor ceases to own any interest in the land, that does not *ipso facto* determine the licence, because alienation of interest in the land itself does not thereby automatically transfer to the alienee the rights over all things that are on the land. Thus licence to reap fruit trees may exist as an over-riding right and may continue to be exercised even though the original licensor has alienated his interest in the land on which the trees stand, but not his rights over the trees.

It may be necessary to add that an owner of land or of any interest therein may be under a customary legal obligation to allow the public or owners of adjacent lands to come to or pass through his land or exercise hunting rights thereon. These obligations which the law imposes independently of the desire of the owner should not be confused with licences which can be determined at any time on giving the licensee reasonable notice which may be express or implied from the circumstances such as tying young palm leaves around trees or around land.[18]

Definition Proposed: Having examined the various transactions which are similar to tenancies granted in customary law it is now necessary to attempt a working definition of the relationship of landlord and tenant.

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18. Meek: *Law and Authority in a Nigerian Tribe*, p. 228.
Jinadu Okunda v. Toriola (1957) W.N.L.R. 9.

It is an accepted fact that no definition can be totally satisfactory in all circumstances[19] because words are like sign-posts: they point to the direction through which a traveller has to go but they say nothing of the scenery during the whole journey. It is not intended here to produce an infallible definition but only a pointer to the route which the traveller must take in his legal adventure of discovering the relation between the Nigerian landlord and tenant. For the purposes of this thesis it may be said that the relationship of landlord and tenant arises where a person who has a right to possession of land grants (or is deemed to have granted) this right to another who is not legally entitled to use the land, the grant not being incidental to any other existing relationship between the parties, but for a specified period or for some definite or general purposes, with the intention that the use of the land shall revert to the grantor at the end of the period or on accomplishment of the purpose.

A few of the words used must now be explained.

1. Possession of land. The difficulty involved in the use of the term "ownership" or "owner" with regard to Nigerian land tenure has been referred to in the last chapter.[20] Apart from this difficulty it is not always that a tenancy is granted by the "owner" of the land but it could be safely asserted that anyone who has a right to possession may grant such right to another and hence create the landlord and tenant

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19. See Hart, Prof. H.L.A., "Definition and Theory in Jurisprudence". (1954) 70 L.Q.R. 37. for a discussion of the problems in definition of legal terms.
20. Cf. Coker, op. cit., p. 29.

relation. Possession alone, however, is not conclusive evidence of tenancy.

2. Not Legally entitled to use the land. This is a cardinal feature which distinguishes a customary tenancy from some relationships similar to it. Some people are given possession and use of land because they have a prior legal right to such a grant. For example, a member of a social group has a legally enforceable right to be granted part of the community land of the group every time a general allocation is made to the members. Such a member is not a tenant of the land-holding group. Similarly a wife who has been "shown" land by her husband, for planting her own crops, is not a tenant because her status as his wife gives her a legal right to the grant. Anybody, therefore, who is entitled to grant of land as of prior right cannot be regarded as a tenant notwithstanding that the grant could be revoked if he failed to perform his civic obligations within the land-holding group.

3. Not being incidental to any other existing relationship between the parties. By this phrase it is meant that the grantor owes no other legal duty apart from the agreement of tenancy, which makes it necessary that he should give possession and use of the land to the grantee. Where, therefore, the purpose of the grant is to secure the payment of money borrowed by the grantor from the grantee (as in a customary pledge) the grantee's occupation is incidental to the existing relationship of pledgor and pledgee and, therefore, does not create the relation of landlord and tenant.

4. Specified Period. The emphasis in English law of tenancy is on definiteness of a period of time.[1] The lease must have a certain beginning and a certain end. This principle has been incorporated into the general laws of Nigeria in cases where the lease is not governed by the Crown Lands Ordinance or by the Land Tenure Law. Where a grant is made for a definite period of time but with some reversion left in the grantor, the relationship of landlord and tenant is created under the general laws.

5. Purposes. Available materials reveal that no analysis of this feature of tenancy has ever been made in any of the existing works on land tenure in Nigeria but an examination of the statements of text writers and the cases before the Courts reveals that it is a principle of customary law that the grant which creates a landlord and tenant relation must be for some purposes, specific or general, and whether express or implied. In customary law time is not computed with the strictness of English law. The emphasis in native law and custom and is always on the purpose of the grant.[2] If the purpose of the grant is such that it requires the grantee's exclusive possession of the land, the relation of lessor and lesee will be assumed to be established. Where, therefore, a landholder allows a farmer to plant crops on the holder's land, the relationship is established from the moment the

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1. Anon. (1674) 1 Mod. 180.

2. Baillie & Ors. v. Offrong (1923) 5 N.L.R. 28.

farmer reasonably takes possession of the land in pursuance of the purpose of the grant and ceases as soon as that purpose is achieved - after the harvesting of the crops unless there are circumstances to imply that the grant is for more than one purpose. Again where the grant is for purposes of building, there is an implication that the grantee shall remain on the land for an indefinite period as long as he complies with other terms of the grant.[3] If, on the other hand, a farmer is allowed to enter upon some land and reap the fruits of the trees on it, even if for an indefinite period, the relationship does not exist because his coming upon the land is only incidental to the purpose of the grant of the fruit trees. But the problem may be much more complicated than this for it may happen that the trees or any other object of the grant may be identifiable with the land. For example, a grant of right to harvest a cocoa farm may appear to be a grant of the land on which the trees stand. It is submitted, however, that in such cases customary law will turn its attention to the purpose of the grant. If a grantee in position of the farmer may reasonably require exclusive possession of the land in order to effect the purpose of the grant, then it will be considered that the grantee should possess the land, and, therefore, become a tenant, otherwise he will remain only a licensee.

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3. Eyamba v. Iquo Holmes & Moore (1924) 5 N.L.R. 83.
   Baillie & Ors. v. Offiong (1923) 5 N.L.R. 28.

8. <u>Revert to the grantor.</u> The right of reversion retained by the grantor distinguishes tenancies from similar transactions such as outright gifts.[4] In customary law this right crystallises as soon as the purpose for which the grant was made is achieved. Therefore, unless there is express stipulation as to time, the grantee is bound to deliver up the land if the purpose is achieved sooner than was previously intended by the parties. For example, if a landholder grants a farmer some land, under native law and custom, stating that the period of the grant is for one year and both parties agreeing that the purpose is for growing cassava, if the crops are reaped within nine months, the grantor will be within his customary rights to claim possession as soon as the harvesting is over for the purpose of the grant has then been exhausted. Contrariwise, if for reasonable causes the crops are not reaped till after one year the grantor's reversion will not srystallize until the farmer harvests the crops, or, at any rate, should have reasonably done so.

Where there is no intention of the land ever reverting to the grantor, the transaction will not create a tenancy but may be an outright gift or a sale, according to the circumstances. On this basis it is submitted that the decision of the West African Court of Appeal in <u>Wobo v A-G.</u>[5] is easier to understand on customary law principles than

4. cf. "The essence of a reversionary interest is that the owner has parted with an estate less than absolute ownership and that upon the termination of that estate it reverts to the owner": per Verity, Ag. P. in <u>Suleman & Anor. v. Johnson</u> (1951) 13 W.A.C.A. 213, at p.215.

5. (1952) 14 W.A.C.A. 132.

under English law. In that case an agreement for the sale of land provided for an

> "immediate payment of the sum of £7,500 and thereafter a sum of £500 per annum payable on the 18th day of May in each year commencing on the 18th day of May, 1928, and continuing for all time thereafter."

It was contended on the vendor's behalf that the purchaser was only a tenant at will until the payment of the final instalment. In rejecting this argument Foster Sutton, P., said,

> "There is nothing to prevent a vendor of land from agreeing to accept a lump sum down and an annual sum from the purchaser in perpetuity instead of a larger lump sum down."[6]

On English principles on which the proceedings were fought the transaction seems to have imposed only a perpetual contractual obligation on the purchaser; the annual payment was not charged on the land and, therefore, cannot be a rent-charge. Seen from the vantage point of customary law which the vendor knew well it becomes clear that at the time of the agreement he did not intend to retain any reversion to the land and, therefore, the contention that the relation of landlord and tenant was created could not be sustained.

General Principles of Customary Tenancy.

In former times as well as today one of the commonest methods customarily adopted to obtain land has been by "borrowing" from a corporate group or an individual who has some plot to spare. Two situations

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6. At (1952) 14 W.A.C.A. 135.

should be considered. In the first place strangers to a political or social group have no legal right to grant of any portion of the communal land of the group. But in practice strangers are often welcomed and after staying within the community for a probationary period[7] they are "shown" land to occupy provided that their good character is vouched for by a a respectable member of the district or village and that they are prepared to fulfil the normal duties require of members of the community. Where these strangers are "incorporated" in the society to which they have come, the grant is of indefinite duration and usually without any economic rent or services, except that, in order to preserve evidence that the grantees are not absolute owners, they are required to render customary tribute to the grantors.[8] Among some Ibo peoples the customary tribute may even be altogether dispensed with and the grantor's reversion is preserved by his performing an annual ritual known as 'ikpuba ani' on the land. A general principle is that wherever a stranger or a group of strangers is granted land, the grant creates a landlord and tenant relationship unless there are very exceptional circumstances to prove an outright gift.

In the second place where private rights in land have been established, a person who is short of land may be "shown" some plot to occupy and use, by a member of his own group who has established private

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8. Meek, in Land Tenure and Land Administration in Nigeria, p.147 says that, "Whereas the rights of members of the lineage are permanent rights, which can be reclaimed after an absence however long, those of strangers or adopted members of the compound are of a purely temporary character."

7. Green, Land Tenure in an Ibo Village, p. 16.
Meek, Land Tenure and Land Administration in Nigeria, pp.188-90.

interests therein either by purchase or inheritance or in any other manner.[9] The interest so established by the grantor may be absolute or limited but such grant to a member of his group creates the relationship of landlord and tenant between the parties. The grant may be of a short duration: for one or more planting seasons, or for an indefinite period. Normally no rent is demanded or paid but the grantee makes occasional gifts to keep alive the cordial relationship existing between the parties and where the grant is for a long period he may be required to render customary tribute to the grantor at feast times.

One basic principle of customary tenancy is that the grantee should not sublet or assign the land or any part thereof.[10] This is a legal rule and is in contrast with the position in English law where a lessee may sublet or assign unless he has, by his contract, covenanted to the contrary. But as in English law a customary tenant must not deny his landlord's title.[11] If he denies the title the landlord may take immediate steps and evict him. Further, the tenant under native law and custom is bound by law not to use the land otherwise than for the purpose of the grant. The basis of this rule is to prevent the tenant from dealing with the property in such a manner

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9. Green, op. cit.

10. Uwani v. Akom (1928) 8 N.L.R. 19.

11. Eghugbayi, Chief Oloto v. Dawuda & Ors. (1904) 1 N.L.R. 58.

as to give rise to an implication that the land is his absolute property a breach of this implied term is a ground for forfeiting the lease. Also the tenant must not abandon the land.[12] Furthermore, without express or implied agreement it is a breach of customary term of tenancy for the grantee to plant permanent trees or effect substantial improvements on the land. But an implication that he may do so may arise according to the purpose and duration of the grant. Where such implication arises or where the tenant obtains the grantor's permission to plant such trees, they will continue to belong to him even on the determination of the lease;[13] if he has put up a house he is entitled to remove the structure or sell the house to someone approved by the landlord at the end of the term.[14] Thus the law relating to fixtures is well settled and does not present any problems in customary tenancy. This is an important and interesting difference between leases in native law and custom and grants under the general law of Nigeria.

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12. Omovaka Ovie v. Omoriobokirhie & Ors. (1957) 169.
Cole, Report on Land Tenure, Niger Province, para. 33.

13. In Uwani v. Akom, Supra, it was stated in the report of the Provincial Court that if the Ano community, i.e. the tenants, were evicted they "would be entitled to remove all crops that they have planted". It is submitted that the crops in that case meant economic trees.

14. Ajisafe, Op. Cit.

SECTION II.

CLASSIFICATION OF TENANCIES.

A. Types of Tenancy at Customary Law.

One general difficulty in the study of customary law is lack of precision in terminology. Attention has been drawn to this in discussing such terms like 'ownership' and 'communal'. This difficulty is all the more glaring in cases of classification of the different types of interest which a tenant can acquire in land. The problem, however, is only of academic interest for both the natives and the Courts are not much bothered with it.[1] For the present purpose two methods of classification of customary tenancies may be adopted: viz.

(1) Classification according to length of the term granted.

(2) Classification according to the nature of the consideration given by the grantee.[2]

Classified according to length of the term tenancy may be of three types

(a) Periodic tenancy.

(b) Tenancy for a definite term of years.

(c) Indefinite long-term tenancy.

If classification is made according to the consideration given by the grantee the following types of tenancy exist:

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1. See eg. Earl Loreburn in Ohai & Ors. v. Yao Ntikora (1913) Ren. 706.

2. The term 'consideration' is used here as meaning the quid pro quo given by the grantee, apart from the acceptance of the lease itself, which is, in law, a sufficient consideration for the grant.

(i) "Rent-free" or "Gratuitous" tenancy.

(ii) Service tenancy.

(iii) Share tenancy.

(iv) Cash tenancy.

(v) "Kola" tenancy.

(a) Periodic Tenancy. This type of tenancy repeats itself from one period to another as long as the holding continues. The parties at the outset agree that the grant is for a purpose which can be accomplished within a short definite period. The purpose is normally recurrent so that the grantee with the express or implied consent of the grantor can continue in occupation on the determination of each period in order to continue using the land for the original purpose of the grant. The commonest example of this type of tenancy is a grant for purposes of growing seasonal crops. Customary periodic tenancy should not be considered as being on all fours with periodic tenancy in English law, because native law does not compute the duration in the technical sense adopted by English law. In its equitable, if informal approach to transactions entered into by the parties, customary law will reckon that a grant takes effect from the time when a grantee should reasonably require the land for purposes of the grant.

Where a grant is made for agriculture the tenancy starts as soon as the grantee reasonably enters into possession at the beginning of the farming season and continues until the crops are harvested or

reasonably ought to have been harvested. If repeated, the tenancy again lasts from the beginning of the farming season to time of harvest. It is possible that within the period between the end of harvest and the beginning of the next planting season the grantee may not be in exclusive possession of the land yet his tenancy will not be considered as determined if from the circumstances it can be inferred that he will be entitled to sole occupation during the next planting season.

Periodic tenancy is similar to indefinite long-term tenancy in that the former could continue for a much longer period than originally contemplated by the parties for achieving the purpose of the grant but it differs from long-term tenancy by the fact that it is determinable at the end of each period of use for the original purpose. It appears from some of the decided cases that many of the indefinite long term tenancies originally started as periodic leases.

The precise type of tenancy, in the absence of any definite evidence to what the parties agreed upon, is a question of fact depending upon the circumstances of each case but the purpose of the grznt affords a presumption that the tenancy is of the character necessary for achieving the purpose.

(b) Tenancy for a definite term of years.

In this type of tenancy the grantee has a definite period of time during which he is to occupy and use the land. It could be

a planting season or a number of years.[3] Once again, however, the definiteness of time is not reckoned with the same precision as in English law. The elasticity of customary law allows a reasonable margin of latitude to enable the purpose of the grant to be achieved or to prevent the grantee unnecessarily restricting the grantor's use of the land after the purpose has been achieved. A customary grant for one year for the purpose of growing yams may be of a different duration from a similar grant for cultivating cassava. In case of agricultural leases of this type the term is for a definite period in the sense that both its beginning and end are certain because planting and harvesting seasons are well known. But the introduction of writing has resulted in some land-holders granting apparently customary leases evidenced by written documents.[4] This raises some complications which will be considered in due course.

(c) Indefinite long-term tenancy. In its earliest form this type of holding applied to strangers who have been assimilqted into the local land-owning group and, therefore, are likely to live within the community for a long period. This type of tenancy differs from periodic leases in that at the time of its creation the parties contemplate that it will last for an indefinitely long period.[5] In order not to claim

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3. Gunn, H.D. Pagan Peoples of the Central Area of Northern Nigeria, 1956, p. 69.

4. For similar problem in Ghana, see Allott, Essays, Chap.10.

5. cf. Elias, Land Law, p. 184; Meek, Land Tenure, p.189. Gunn, H.D., Pagan Peoples of the Central Areas of Northern Nigeria, p.69.

that the transaction was an outright transfer of such lands it is usually provided that the grantee shall annually render certain tokens in acknowledgement of the grantor's title. Owing to the fact that the parties intend the occupation to be for a long period, the grantee may, if not expressly prohibited by the grantor, plant permanent tree crops on the land but in such a way that the trees will not prejudicially affect the use of the land on the determination of the tenancy, and on the determination of the tenancy he continues to reap the fruits of the trees so planted.[6]

Although in strict theory long-term tenancy may only be for the lives of the parties, in practice customary law will not allow a grantee or his successor who has been fulfilling the obligations incidental to the grant to be evicted.[7] Normally a long-term tenancy is often heritable, the successors holding on the same terms and subject to the same conditions as the original grantee.

Indefinite long term lease has certain similarities with emphyteusis of later Roman law.[8] In both the grant is of uncertain duration and the exact nature of the interest of the grantee may not be fully defined.[9] The interest of the grantee, in both cases, is in

6. Green, Land Tenure in an Ibo Village.

7. Ikeanyi & Ors. v. Adighogu & Ors. (1957) 2 E.N.L.R. 38.

8. Lee, R.W., The Elements of Roman Law, 1952, p. 169-70.
Buckland, W.W. A Textbook of Roman Law, 1932, p. 275.
Manual of Roman Private Law, 1939, pp. 166-7.
Moyle, J.B., Imperatoris Justiniami Institutionum, Libri Quattuor, 1912, pp. 323-5.

9. But the Emperor Zeno, decided that emphyteusis was a contract sui generis and governed by its own particular rules: G.3. 145.

practice inherited by his successors and if the grantee failed to use the land he could be evicted. But whereas emphytensis was always a grant of agricultural land, customary long-term leases could be made for purposes of dwelling as well as for agriculture. Also the Roman grantee could alienate his interest, subject to the proprietor's right of pre-eruption, or alternatively, of claiming a fine of 2 per cent of the purchase price, but the customary long term tenant is not entitled to alienate his interest either in whole or in part, unless power of alienation is expressly given him by the grantor.[10]

Classification according to the consideration given by the grantee.

The principles of contract in native law and custom have not been adequately investigated and the applicability of the doctrine of consideration[11] in customary contracts has not been defined but in adopting this method of classification what is to be considered is whether the grantee is liable to give any, and if so, what consideration, to the grantor, for the lease apart from merely accepting it. With this approach, the following types of customary leases have been discovered:

(i) Rent-Free Tenancy. Traditional 'lending' and 'borrowing' of land depended to a large extent on the cordial relationship existing between the parties.[12] Where, therefore, the 'lender' and 'borrower' are on

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10. Nadd, op. cit., p. 182, however, mentions that among the Nupe there is hereditary tenancy which could be alienated.

11. For a full discussion on the doctrine of consideration in English Law see Cheshire, G.C. and Fifoot, C.H.S.: The Law of Contract, 5th ed. 1960. Chap. II of Part II., Prof. Shatwell: The Doctrine of Consideration in the Modern Law (1955), 1 Sydney Law Rev., 289.

12. Elias: Land Law, p. 182.

friendly terms no consideration, apart from accepting the grant, passes from the tenant to the landlord. The grantee pays no rent nor anything in the nature of rent. He renders no service of any type in respect of the grant.[13] This type of grant is usually for a short period and in such cases the parties may not even seek any witness to the transaction, relying mainly on the mutual confidence existing between them.[14] There may, however, be long-term rent free tenancies and usually witnesses are invited to testify to the nature of the transaction. Among the Ibos the landlord's reversion in such cases is evidenced by his right to perform an annual ritual known as ikpuba ani[15] on the land.

A rent-free tenant may, out of a desire to please his landlord, occasionally make gifts to or perform some services for his grantor, but as Ajisafe correctly observed, this is "as a matter of courtesy and in token of gratitude" for it is not compulsory."[16]

Rent free tenancies have been a constant source of litigation,[17] for owing to the growing economic value of land some grantees or their successors tend to claim the absolute interest in the

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13. Rowling: Ondo, paras. 60, 113. Cole: Niger Province, para. 107. Ajisafe, op. cit. p.10, para. 17. Meek: Law and Authority, p.104. In Land Tenure, p. 149, Meek says of the Tiv that "acceptance of payment for use of land would be regarded as striking at the very roots of hospitality".
14. Rowling, Ondo, para. 37.
15. Basden, Niger Ibos, p. 265.
16. Ajisafe, op. cit. p.10 para. 17. Meek, Land Tenure, p.190.
17. See e.g. Sanusi Alaka v. Jinadu Alaka, (1904) 1 N.L.R. 56; Eshugbayi, Chief Olôto v. Dawuda & ors. (1904) 1 N.L.R. 58; Ogbakumanwu & Ors. v. Chiabolo & Ors. (1950) 19 N.L.R. 107. Malomo & Ors. v. Olusalo & Ors. (1954) 21 N.L.R. 1. Onisiwo v. Fagbenro (1954) 21 N.L.R. 3; Pa Okuojeror & ors. v. Sagay & ors. (1958) W.N.L.R. 70. C.A.

property, while on the other hand, some landlords or their descendants seem to regret the free grant which could now be a source of substantial income, and accordingly they try to seize any excuse for evicting the grantee.

(ii) Service Tenancy. This type of tenancy arises when the agreement between the parties provides that the lessee shall contribute a certain minimum of labour-service in consideration of the grant made to him. The service is normally rendered on the landlord's farm.[18] Tenancies of this kind exist in parts of Nupeland,[19] in many areas of Iboland such as Oba in Onitsha Division and Ndizuogu in Owerri Province as well as in various parts of Yorubaland.[20] The modern tendency is, however, to convert them into cash tenancy.[1]

Nigerian customary service tenancy should not be confused with labour tenancy in other parts of the Commonwealth where such transactions are regulated by statute. In Kenya,[2] for example, it is governed by the Resident Native Labourers Ordinance.[3] By the provisions of that Ordinance permission to employ labour tenants or to reside on a farm as a labour tenant must be obtained from a magistrate.[4] The contract must be in writing and the terms, including

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18. Meek: Land Tenure, p. 124.
19. Nadel, op. cit. p. 183.
20. Rowling, Ondo, para. 37.
    Galletti, R., Baldwin, K.D.S., & Dina, I.O.: Nigerian Cocoa Farmers, 1956, pp. 116, 118.
1. Nigerian Cocoa Farmers, op. cit., p. 118.
2. Liversage: Land Tenure in the Colonies, pp.28-9.
3. Laws of Kenya, 1948, Cap. 113.
4. Ibid., SS. 4 & 6.

the period during which the tenant may reside upon the farm, the number of days of labour to be performed for the landlord, the supply of materials by the landlord for building huts, the notice for termination of the tenancy and other provisions agreed upon by the parties must be approved by the magistrate.[5] Nigerian customary service tenancy is not governed by any enactment and the parties are free to strike their own bargain.

(iii) Share Tenancy.

Under this type of tenancy the landlord stipulates for a proportionate share of the produce grown on it. The tenancy may take one of the following two forms:

(a) The landlord grants the lease and provides the crops which are to be grown on the land by the tenant, whose responsibility is mainly to supply the required labour.

(b) The landlord grants only the lease and the tenant provides both labour and the crops to be grown or the cattle to be reared.

The second type is more common than the first and obtains in various parts of Nigeria where production is normally on individual and moderate scale.[6] It applies to both food crops and to economic produce. For instance , in some Nupe areas[7] the tenant pays the landlord one-third of the agricultural produce and at Mamu in

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5. Ibid., S.5.
6. Meek, Land Law and Custom in the Colonies, 19. pp. 221-2.
7. Nadel, A Black Byzantium, p. 199.

Yorubaland[8] leases of cocoa farms are held on basis of sharing the yield. On the other hand the first type exists where large-scale farming operations on scientific lines, requiring substantial capital expenditure, are being developed. A tenancy of this nature obtains in the upper Niger, around Mokwa,[9] where a new agricultural project has been launched by the Government. Under the scheme in operation, the Corporatic in charge of the project provides all the machinery and tools needed as well as the seed crops and the tenant provides the labour, getting one-third of the produce and two-thirds going to the Corporation.[10]

Baldwin has made a careful examination of the economic and social arguments for and against share tenancy but the legal problems involved are equally interesting. What rights has the landlord if the tenant fails to pay him his share of the yield, and in particular, in Northern Nigeria where the Land and Native Rights Ordinance operates, is the customary letting on share tenancy lawful and can the lessor evict the tenant sua sponte ? These problems will be examined in full when dealing with the rights of landlords: for the moment it is enough to state that under the Mokwa Scheme, at least, the lessee has security of tenure.[11]

Share tenancy is not confined to Nigeria: from the Middle Ages it has been existing in Italy, Portgual, France, and the Danubian

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8. Galletti, Baldwin & Dina, Nigerian Cocoa Farmers, 1956, p.116.
9. Baldwin, K.D.S., The Niger Agricultural Project, 1957. pp.141-52.
10.Baldwin, ibid., p. 16.
11.cf. Baldwin, op. cit. p. 28.

countries.[12] In France it was called metayage. In the United States of America, in 1930, about 82% of rented farms were on share tenancy.[13] The system has been existing in India (before the recent land reforms) as well as in Java, Argentina and South Africa. In Ghana the traditional system known as abusa was a form of share tenancy.[14] Under this system one-third of the produce goes to the landlord, one-third to the farmer, and the other third to the labourers.

Share tenancy is not to be confused with the system by which the tenant is required to pay a fixed quantity of crop or other customary 'rent', irrespective of the yield of the land.[15] This type falls betwenn share tenancy and cash tenancy and is considered under the genetic term 'kola' tenancy.

(iv) Cash Tenancy. One of the changes in customary land law brought about as a result of modern economic conditions is the introduction of cash payment in consideration for leasing of land. This type of tenancy is progressively ousting other systems[16] but Rowling mentions[17]

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12. Liversage, Land Tenure in the Colonies, pp.31-36.
13. Liversage, ibid. p. 32.
14. Baldwin, op. cit., p. 145. Dr. Allott in Essays on African Law pp. 275-6 gives a very interesting document creating an abusa tenancy.
15. cf. Liversage, op. cit. p. 36.
16. Rowling, Ondo, para. 37-9; Green, Land Tenure in an Ibo Village, p. 30; J.G. Davies, Reports on Gyel and Bi-Rom, paras. 30-34; 83-85;
17. Ondo, para. 37.

that in some parts of Yorubaland there is "almost universal objection to cash payments" because it is against customary law and likely to lead the tenant to claim that he has become absolute owner of the farm by purchase. Where the holding is on a cash basis the amount of payment is quite modest and in some cases really small initially but may increase as the land becomes more productive[18] or as the imprpvements thereon rises in value.[19] Among the Ibo of Nkwelle in Onitsha District the rent of farmland is calculated at the rate of five shillings per plot measuring five lengths of bamboo stick on each side; among the Yoruba of Awori District it ranges from ten shillings to £1, in the Plateau Province of Northern Nigeria the amount of payment is between £4 and £5 for a considerable area of community land for one farming season[20] and in Nupe the rate is about eight shillings per farming plot every year.[1]

(v) 'Kola' Tenancy. By native law and custom a person asking any kind of favour from another usually takes with him some small gift in form of kola nuts and/or palm wine which the borrower and the

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18. Meek, Land Tenure, p. 211, says that in Reno area of Yorubaland an initial rental of 5/- is charged for a cocoa plot and when the trees begin to bear the rent may be doubled.

19. Chubb L.T., Report on Ibo Land Tenure, in an appendix gives example of provision for specified proportion of current value of house property payable to the landlord on assignment.

20. Meek, ibid., p. 198.

1. Nadel, op. cit. p.190

lender will consume.[2] This is a conventional way of creating friendly atmosphere in which the request could then be made.

Under the system of land holding which is called 'Kola' tenancy, when a grant is made the grantee is required to make annual acknowledgement of the landlord's title by formal gift of kola nuts and viands or a fixed quantity of produce[3] whether grown on the land or elsewhere, or even gift of a goat, fish or tobacco.[4] The payment is only of nominal value, its purpose being to show that the grantee's interest is not absolute and to preserve the landlord's reversion. This type of tenancy differs from the rent-free tenancy described already in that here, as a result of the agreement between the parties, it is obligatory on the tenant to make the customary gift of the fixed quantity, whereas in a rent-free tenancy he makes occasional gifts voluntarily.

The customary payment is known as iru[5] among the Ibos of Eastern Nigeria, as ishakole[6] among the Yorubas of the West and as kyuta[7] among the Nupes of Northern Nigeria. Its importance does not lie in the monetary value but in the regularity with which it is paid.

In recent years one general problem has arisen with regard to 'kola' tenancies as with rent free leases because in many cases the grants

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2. cf. Meek, Law and Authority in a Nigerian Tribe, p. 174.
   For social importance of Kola-nut in Iboland see Nigeria Union of Teachers, A Primer on Igbo Etiquette, 1949, p.16. published by Longmans, London.
3. In Sunmonu v. Sinadu, Ibadan, Suit No. 4/1928: "50/- per annum and four tins of palm oil per annum as 'ishalcote' were decreed": Ward Price, Land Tenure in the Yoruba Provinces, para. 175.
4. Basden: Niger Ibos, pp.264-5.
5. Basden, op. cit. p.
6. Rowling, Ondo, paras. 21, 22 et seq.; Ijebu, Footnote 131.
   In Benin it is called 'akorhere': Rowling, Benin, paras. 7 & 32. In Zaria Province it is known as "galla" - Cole, Zaria, paras.97/8.
7. Nadel, A Black Byzantium, 1942, p.190.

were made at a time when land had little exchange value but later, owing to improved economic conditions the lands so granted appreciated substantially and both the landlord and tenant wish to benefit from the enhanced value. The tenant may wish to sublet without the landlord's consent - contrary to customary law under which he holds, or the landlord may seek to replace the 'kola' tenant with other grantees who are willing to pay substantial cash rents.[8] This state of affairs led to such constant litigation that the Government was compelled, in 1935, to pass the 'Kola' Tenancies Ordinance.[9]

By S.2 of the Ordinance 'kola' tenancy is defined as

> "a right to the use and occupation of land which is enjoyed by any nqtive in virtue of a kola or other token payment made by such a native or any predecessor in title or in virtue of a grant for which no payment in money or in kind was exacted."

The essence of this type of tenancy is that the payment is not made in money nor in proportion to the yield from the land itself; yet it is implied in all cases that some customary payment is to be made. Dr. Elias says that the grant of Kola tenancy is "sometimes for no consideration at all"[10] and Dr. Basden records that "there may be only one payment of kola".[11] In the later case it cannot really be said that one payment of kola is in consideration of the grant for, as has been pointed out previously, the kola given initially is intended

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8. Elias, Nigerian Land Law and Custom, p. 185. Meek, Land Tenure, p.140.

9. No. 25 of 1935; Cap. 98 of Laws of Nigeria, 1948.

10. Nigerian Land Law and Custom, p.184.

11. Niger Ibos, p. 265.

to generate a friendly atmosphere conducive to favourable consideration of the request for a grant and the intended grantor incurs no liability if after thinking about the matter he refuses to make any grant. On the other hand, Dr. Elias' view is supported by the Ordinance but it is respectfully submitted that the draftsman's lumping together under one generic term 'kola' tenancy both a grant made rent-free and one in consideration of some payment is an under estimation of the nature of different types of transaction involved. A grant free of any payment in normal circumstances contemplates a short term lease: the tenant's possession and use is for such a time that the landlord can resume occupation without necessarily giving a general impression that he has altogether abandoned his interests in the land and without the probability of evidence of his title being lost. Where, however, a lease is likely to be of indefinite duration, customary law has always generally insisted on payment of 'kola' by the tenant as a means of acknowledging the grantor's reversion.

The 'Kola' Tenancies Ordinance applies

(1) "Where the tenant or any predecessor in title has granted interests in the land which is the subject of the tenancy to any person for a consideration other than a token payment, such interest being still subsisting, and

(2) "Where it is reasonable to suppose that payments in money or in kind which are made to the tenant, or will be due to him, in respect of such interests constitute a benefit more substantial than the grantor at the time of the grant anticipated that the tenant would derive from the grant of any such interest in the land."[12]

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12. Kola Tenancies Ordinance, 1935, S 3 (a), (b).

It is clear, therefore, that for the Ordinance to apply the tenant must have sublet his holding <u>and</u> that the benefit he derives from such subletting must be substantially greater in value than was reasonably anticipated at the time of the grant. If he has not sublet, or if he sublet at a token rent, the Ordinance does not apply. And if he has not sublet but has improved the demised property and occupies it personally either for dwelling or for his own business, it is submitted that no matter what substantial benefit he derives therefrom, the Ordinance does not apply.

The enactment is expressly stated to apply to the township of Onitsha and those parts of the Southern Provinces as the Governor may by Order in Council declare.[13] Where it applies the grantor[14] may apply for the extinction of the tenancy, and the issue will be decided by a tribunal consisting of the Provincial Resident and two assessors.[15] They decide the amount of compensation payable to the grantor and if any of the parties is not satisfied an appeal lies to the High Court.[16]

The Ordinance is of particular value not only because it is a vindication of the fact that the Legislature realises the general nature of customary grants but also because it provides for equitable benefit to the landlord where the tenant has by subletting gained substantially because of the changed economic situation not reasonably foreseeable when the grant was made.

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13. S. 1(2)
14. *Quaere* whether the grantee can also apply; presumably he cannot.
15. S.5.
16. SS. 10-13; 19.

Dr. Elias says that

> "the Ordinance seems to crystallise the apparently dubious rights of the grantor by giving him a chance to profit by an enhanced value of the land regardless of (a) the real nature of the grant at the time of its original provenance and that this might very well have been an out-and-out gift of land; (b) the state and quality of the land on its first hand-out; (c) the grantor's lack of enthusiasm to assent even a token claim of ownership until now that the land has become so valuable a commodity."16a

With the greatest respect, this criticism is unjustified and seems to arise from a misinterpretation of the Ordinance as well as from ignoring the exact nature of customary dealings in land. As already explained rent-free grant is not an "out-and-out gift of land" and no matter what is the "quality of the land on its first hand-out", as long as the tenant is in occupation and has not sublet the property, the Ordinance does not apply even if he derives very great direct advantage because of changed circumstances. Again the grantor cannot be said to "lack enthusiasm to assert even a token of ownership" until the tenant attempts to sublet and, as has been shown above, the Ordinance does not apply until he has sublet <u>and</u> has derived some advantage more than reasonably anticipated at the time of the grant made to him by the lessor. Apart from the lack of precision in definition resulting in classifying rent-free tenancy together with grants made in consideration of some token payment it can be said that the Ordinance truly realises the nature of customary tenancy.

16a. <u>Nigerian Land Law and Custom</u>, p.186.

Not much use is made of the provisions of the enactment in practice. This may be due to the fact that the landlord and tenant prefer to make their own arrangements, as Dr. Meek suggests, but it is equally true that in view of the above interpretation, a landlord will be ill-advised to invoke the Ordinance where his tenant has not sublet, and in many cases, especially in Onitsha, the tenant has only improved the land and uses it for his business as well as for dwelling, thus deriving substantial advantage from the original grant without providing a ground for action.

The general classification of tenancy in accordance with length of the term granted and the kind of consideration payable by the lessee is mainly for clarity of exposition. In practice a mixture of the two methods based upon the purpose of the grant is a more appropriate way of describing what the people do. Thus the classification possible may be 'short-term rent-free' or 'long-term kola' tenancy or such other phrases resulting from a permutation and combination of the two methods of categorisation. In subsequent pages such terms will be used only where they serve as short hand methods of explaining the type of tenure involved, but not otherwise.

SECTION ~~PART~~ II. (Contd.)

CLASSIFICATION OF TENANCIES.

B. Types of Tenancy under the General law.

The general law of Nigeria is based on English law and therefore the method of classification of leases under that general law follows the traditional system of classification in English law. As in customary law, so under the general law of Nigeria a clear distinction is made between a lease and a licence and in deciding whether the relationship created by the agreement between the parties is that of landlord and tenant or of licensor and licensee the ultimate factor is the intention of the parties. Thus where a person is permitted to operate a canteen business on premises and the permission was later withdrawn the issue depended on whether he was a 'tenant' within the Recovery of Premises Ordinance[17] or merely a licensee and therefore not entitled to protection.[18]

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17. Recovery of Premises Ordinance, S. 2 (1).

18. Akpini v. West African Airways Corporation (1952) 14 W.A.C.A. 195. Contra. S.C.O.A. Ltd. v. Ogana (1958) W.N.L.R. 141, C.A., where under an agreement in writing the plaintiff/respondent, Ogana, was to buy petrol and other oil products from the defendant/ Appellants, S.C.O.A. Ltd., and sell the goods at a filling station owned by the latter and in charge of which Ogana was put. As a result of losses of considerable quantities of petrol the agreement was terminated, and the Federal Supreme Court, consisting of Hurley Ag. F.J., Ademola C.J., and Quastie Idun, Ag. F.S., held that in regard to the occupation of the garage, the relationship between the parties was that of licensor and licensee. Similarly, in Balogun v. U.A.C. & Anor. (1958) N.N.L.R. 77, Reed J., held that such a person was a licensee, not a tenant.

As in English law, a licence could be created by a formal document but in the absence of any document the intention of the parties will be inferred from their conduct under the particular circumstances. Where a mere licence is granted the grantee has no interest in the property to which it relates; the grant makes his occupation qua the grantor lawful but he may not be able to exclude the grantor from the premises. Thus where a grantee of Right of Occupancy in Northern Nigeria purports to sublet the premises (which act he cannot do without the Governor's consent) and later revokes the grant and forcibly enters to eject the person to whom he purported to sublet it has been held that the latter cannot maintain an action in trespass against the former because the lease was void[18a].

As in customary law a purely personal licence cannot be assigned and if it is gratuitous it can be revoked at any time,[19] but if the licensee has brought his own property on to the premises he is entitled to a reasonable notice of revocation to enable him remove his things elsewhere. Where a grant creates a tenancy it may be one or the other of the following types:

(a) Term of Years. It is essential to this type of tenancy that the beginning and duration of the term should be certain at the time of the grant, or at least capable of being defined with certainty. A term of years has been defined by the Property and Conveyancing Law[20] of

19. Yaskey v. Freetown City Council (1933) 1 W.A.C.A. 297; but this is subject to the terms of the licence: S.C.O.A. Ltd. v. Ogana (1958 W.N.L.R. 141, C.A.

20. Property and Conveyancing Law, (1959) (Nov. Cap. 100 of 1959) in S.2.

18a. Ayo Solanke v. Abed (1961) NNLR 7

Western Nigeria in the same terms as in section 205 (1) (xxvii) of the English Law of Property Act, 1925. In the Eastern and Northern Regions, however, English law as on first January 1900 applies and the definition of a term of years in those territories should, in theory, at least, be in terms of English law operating at that date. There is, however, no substantial difference in the meaning of the term between Western Nigeria and the other Regions.[1] In all the Regions a term of years includes a term for a long period such as 999 years as well as a term for less than a year, or for a year or years and fraction of a year, or from year to year. The term must take effect in possession[2] or reversion, whether or not at a rent, with or without impeachment for waste, whether or not it is subject to another legal estate and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for lessor on redemption, or in any other event (other than the dropping of a life or the determination of a determinable life interest).

From the above definition any tenant for a fixed period, such as 999 years or one year or from year to year, or for a month or even a week is a grantee of a term of years absolute and the expression does not mean a long term. It could therefore be urged that the classification

1. This is because the L.P.A. 1925 consolidates many pre-1900 English statutes relating to land, and some of these, chiefly the C.A. 1881, apply in all Nigeria.
2. Receipt of rents and profits or the right to receive them is included in "possession".

under the general law of Nigeria, as in English law, is not satisfactory and that grants for long periods should be classified separately[3] from those of short duration, as in customary law. If the customary system is adopted then the first type of grant in general law will be a long tenancy, where the lease is for a period of at least 21 years. Following the traditional methods, however, the next type of tenancy under the general law is,

(b) Periodic Tenancy.

The commonest example of this type of tenancy in Nigeria is letting from month to month which is practically the normal form of letting of dwelling house in the township.[4] Other forms are yearly, quarterly, and weekly tenancies. As in customary law, so in general law, period tenancies repeat themselves from period to period while the holding continues. It differs from a fixed term of years, in that, unless determined by proper notice to quit, it may last for an indefinite period.[5]

As in the case of other kinds of tenancy, the precise character of this letting is a question of fact depdning upon all

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3. The Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c.56) S 2 (4) and the Rent Act 1957 (5 & 6 Eliz. 2 c. 25) S. 25(1) make a differentiation between long tenancies and other types of tenancies for premises with the Acts, the long tenancies being those of more than 21 years in duration but this does not make any difference to the inadequacy of the traditional classification because the application of the Acts is limited to certain types of premises and therefore the term 'long tenancy' will not apply to grants not within the Acts.
4. Rowling, Plateau.
5. Adepoule v. Saidi (1956) F.N.L.R. 79.

the circumstances of each case, unless there is an express agreement defining the nature of the transaction. Thus the mode in which the rent is paid, not necessarily the mode in which it is reserved, may afford an evidence of the tenancy. If rent is, therefore, expressed as £144 per year, and paid at the rate of £12 monthly, that may be evidence that the tenancy is monthly.[6]

(c) Tenancy at will. This type of tenancy arises where the parties expressly stipulate that the grant may be determined at any time by either of them, and even if it is agreed that it will be determined at the will of the grantee alone, the law will imply that it will also be determined at the will of the grantor and *vice versa*. The tenancy may also be created by implication[7] such as by merely permitting someone to occupy land during negotiations for its sale, but when the sale has been completed the occupier is no longer a tenant at will even if he is to pay only a small lump sum down and a fixed amount in perpetuity.[8] A tenancy at will differs from fixed tenancies in that it can be determined by implication such as the death of either party or by the grantor or the

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6. Ahuronye v. University College Ibadan (1959) W.N.L.R. 232, a case dealing with contract but relevant to the analysis. In Robert Oshinfekun v. Tinusa Lana (1956) W.N.L.R. 93, Adenola C.S., held that a tenancy is created, not by payment of rent, but by consensus between the parties; that in a yearly tenancy the payment of rent is by reference to the yearly rent which may be paid quarterly, monthly, or weekly; therefore where a grant is made on a month to month basis but the lessee paid twelve months' rent in advance at the request of the lessor, the tenancy was still monthly and it did not matter how many months rents were paid in advance.
7. Othman v. Accra Perfumery Co. Ltd. (1942) 8 W.A.C.A. 173.
8. Wobo v. A-G. (1952) 14 W.A.C.A. 132.

grantee alienating his interest. But a tenancy at will arising by implication of law may be easily become a periodic tenancy for if the grantee, after entry on the land, pays rent with reference to a monthly or yearly holding, he will become a monthly or yearly tenant as the case may be.[9]

(d) Tenancy at Sufferance. The important thing about this type of tenancy is that it always arises by implication of law as a result of a grantee wrongfully remaining in possession after the expiration of the definite term granted to him without either the assent or dissent of the grantor. He may be treated as a trespasser[10] by the grantor who is entitled to remove him and his goods, using reasonable force in the process. The tenant at sufferance can, however, sue a stranger (but not the landlord) in trespass and if the grantor assents to his remaining in possession he becomes a tenant at will. No better description of the nature of the tenancy can be given than in the words of the celebrated Edward Coke. He says:

> "There is a great diversity between a tenant at will and a tenant at sufference; for a tenant at will is in, and continues in, by right, but a tenant at sufferance enters by a lawful title, and holds over by wrong. A tenant at sufferance is he who at first came in by lawful demise, and after his estate ended continues in possession and wrongfully holds over. As if tenant pur auter vie continues in possession after the decease of cestui que vie, or tenant for years holds over after the determination of his term, the tenant so holding over is tenant at will by the landlord's laches and sufferance and had but a bare possession,

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9. cf. Chambre J. in Richardson v. Langridge (1811) 4 Taunt.128.
10. But where the Recovery of Premises Ordinance applies he cannot be so treated until the landlord has obtained a Court order for possession and any period allowed the tenant to move by the Court has expired.

> but the lessor cannot bring an action of trespass against him before entry. Against the Crown there can be no tenant at sufferance, but he who holds over in like cases to the above, is an intruder upon the Crown, because there is no laches imputed to the Crown for not entering."[11]

(e) Statutory Tenancy. In Nigeria two classes of statutory tenancy exist:

(i) Tenancy, in the strict sense of the term, created by statute.

(ii) A mere right to remain on demised premises after the term granted has expired.

Statutory tenancy of the first type exists where no grant was made initially, the tenancy merely arising by force of an enactment. Thus S.4 of the Increase of Rent (Restriction) Ordinance provides that

> "When a landlord has let.... any premises and his tenant, not being expressly prohibited from sub-letting, sublets such premises or any part thereof the sub-tenants of such premises or any part thereof shall be deemed for the purpose of this Ordinance to be tenants of the landlord."

Under normal principles of land law, neither privity of contract nor of estate exists between a lessor and a sub-tenant; the lessor cannot sue a sub-tenant for any breaches of covenant but would sue the tenant instead. Similarly the sub-tenant acquires no rights against the original landlord.[12] Therefore if the sub-lessor is evicted for breach of covenants, the sub-tenant's interest in the

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11. Co. Litt. 1830 ed. 576.

12. Megarry & Wade, The Law of Real Property, 1959, pp.636, 698, 704.

premises determines automatically. This enactment has reversed the normal legal position so that if a tenant who has not been expressly prohibited from sub-letting makes a grant to a third party, the third party will become a tenant of the landlord - a state of affairs which could not exist were it not for the statute.

Again the title of a native or a native community in Northern Nigeria has been convered into a "right of occupancy" by the Land Tenure Law which lays down that a

> '"right of occupancy" means a title to the use and occupation of land and includes a customary right of occupancy and a statutory right of occupancy..."[13]
>
> '"customary right of occupancy" means the title of a native or native community lawfully using or occupying native lands in accordance with native law and custom.'

This Law applies to about 75% of the land area of Nigeria and under it 60% of the Nigerian population have become statutory tenants. Their right of occupancy may be for a definite or indefinite term[14] and they may not alienate title or possession to a non-native except with the consent of the Governor[15]. They may sell, transfer possession or bequeath their title to a blood relation who is a native but the transaction is null and void unless the change of title is duly registered within a period of six months.[16]

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13. Ibid. S.2.
14. Ibid. S.8.
15. Ibid., Third Schedule, Regulation 1.
16. Third Schedule, Reg. 2.

The statutory tenancy into which the customary interests of natives have been converted is not the same thing as the "rights of occupancy" of non-natives for although the same term is used to describe both types of interests, non-natives acquire their rights by force of the grant made to them by the Governor under the Ordinance but natives acquire their interests not by force of any grant but because of the force of the statute which changed the nature of their original title into a tenancy. The interest of a non-native, therefore, comes with the definition of a 'term of years absolute' given above[17] and may be any of the traditional classes, while the rights of a native are an example of real statutory tenancy. Similarly leases granted under the provisions of other Ordinances, such as the Minerals Ordinance or the Crown Lands Ordinance, cannot, as Dr. Elias seems to have done,[18] correctly be classified as Statutory tenancies because although the Ordinances prescribe how they will be created, their existence depends on the grant being made and when so made may be one or the other of the types known to general law, as described already.

(ii) The mere right to remain on premises after the determination of the term granted is not tenancy *stricto sensu*. Such right is now governed by the Recovery of Premises Ordinance[19] and the Rent

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17. See pp. above, and Chapter 7 below for analysis of the nature of rights acquired under the Rent Restriction and the Recovery of Premises Ordinances.
18. Elias, T.O., Nigeria Land Law and Custom, 1953, p. 327f.
19. No. 39 of 1945; now Cap. 176 of Laws of the Federation, 1958.

Restriction Ordinance.[20] It is to this type of holding-over that the term 'statutory tenancy' applies in the English Rent Acts. The person who remains in occupation by force of the Ordinances has, in strict law, no tenancy at all: what he has got is a 'status of irremovability' - a security from being dispossessed by the fact that the landlord cannot re-enter and evict him without an order of the Court,[1] and that the Court cannot make the order unless one of the grounds laid down in Section 13 or the Second Schedule of the Rent Restriction Ordinance is proved and the Court considers it reasonable to make such order.[2]

The tenancy acquired by natives under the Land and Native Rights Ordinance has been grouped together with the 'status of irremovability' acquired under the Recovery of Premises and the Rent Restriction Ordinances in order to avoid introducing a terminology novel to professional classification of the rights acquired under the Rent Acts, but the distinction will be made in subsequent discussions wherever it is necessary.[3]

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20. No. 1 of 1946; now Cap. 183 of 1958. For detailed analysis of this statutory tenancy see Chapter 8 of this thesis.

1. cf. Ebner v. Lascelles (1928) 97 L.J.K.B. 497, at p.500, D.C., per Salter, J.
2. Rent Restriction Ordinance, S.13 (1)
3. For Tenancy for Life, See Chapter 5.

CHAPTER 4: GRANT OF TENANCIES.

1. Grants in Customary law.

The principles of customary law of contract have not been co-ordinated into a general theory but it can be laid down as a general proposition that each specific contract is governed by its own particular rules.[1] Thus the rules for a contract of marriage may differ from those for an agreement relating to tenancies. Even in English law, it may be said that the general theory of contract is an invention of the academic lawyers who extracted general principles from the normal daily transactions of the members of the public.[2] But whatever type of contract the parties make in customary law, there must, as in English law, be mutuality of consent. The grant of tenancy in customary law depends, therefore, on a bilateral agreement between the parties. By this agreement the tenant is given the right to exclusive possession and use of the land.[3] In customary law this does not necessarily imply a right to everything that grows on the land: the grantee may have only inawoke, a land which he is to cultivate only but not to "look up" to the fruit trees growing on it.

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1. cf Elias: Nature of African Customary Law, pp. 144-155., Lewis, I.M.: "Clanship and Contract in Northern Somaliland", (1959) Africa 234. But general principles could be deduced from these particular rules.
2. Cheshire and Fifoot. The Law of Contract, 5th ed. 1958, pp.19ff. have traced the development of modern English law of contract to the writings of the French jurists, Pothier, and the German, Savigny.
3. A principle of the general law is that a personal right of occupation gives the occupier no estate in the land and, therefore, he is not a tenant: See Bickersteth v. Shann (1936) A.C. 290 at p. 299, per Lord Maugham.

Generally it is the prospective customary grantee who takes the initial step in trying to obtain the land: when he approaches the prospective grantor he must satisfy the latter either of the purpose for which the land is required or of the duration of the tenancy. Where the duration is fixed, the period is not calculated with the meticulous accuracy of English law[4]: it is always reckoned with reference to the purpose of the grant. In customary law, as under the general law, the grant must not be made for a purpose which is illegal. Further, for the grant to be valid, it must be shown that it was made with the express or implied consent of the person or corporate group of persons entitled to occupy and use the land. A prospective grantee must therefore take care to see that the grant is made in the proper way and by a grantor capable of creating the interest, if the grant is not to be avoided. The proper way and the ability to create these interests in customary law will now be considered.

2. Grantors and Grantees.

In general a person capable of creating a tenancy may also become a grantee. Under native law and custom the power of alienation of land and of creating tenancies is vested in the person who is entitled to possess the land. To determine that person the type of land in which the interest is sought to be acquired must be considered - i.e. it must be discovered whether the land is individual property or whether it belongs

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4. But under S.4 of the Crown Lands Ordinance leases of Crown land may be granted to a native of Nigeria for an indefinite period. Further, rights of occupancy granted under S.8 of the Lands and Native Rights Ordinance (now S.8 of the Land Tenure Law 1962) may be for a definite or for an indefinite term.

to a corporate group, and if it does, who comprise the corporate group. Considered in this way the persons capable of granting customary tenancies include:

(a) Chiefs, Emirs, and Heads of Corporate groups.

(b) Member of a corporate group, subject to consent of the group.

(c) Individual occupier.

(a) Chiefs, Emirs, or Heads of Corporate Groups.

It has been shown above that private rights in land may exist concurrently with the rights of a corporate group: that an individual may be exercising certain rights in land while, at the same time, the family or any other social or political unit of which he is a member may have other interests in the same land. But in every case of alienation of interests in any land possessed by a corporate group, whether the alienation be by way of sale or grant of tenancy, the Chief or the head of the group is the convenient organ for negotiations. This administrative position of such heads must be distinguished from their social status. Again, distinction must be drawn between the proprietary and jurisdictional aspects of land tenure: the former could be alienated either by outright sale or by grant of tenancy but the jurisdictional aspect of land attaches to and runs with the land, except in the case of outright alienation between one Chief and another of the status.[5] What the Chief or any other head has got, with regard

5. cf. Ollennu, 3. in Ayisi v. Sakyiamabea (1957) 3 W.A.L.R. 92, Ghana.

J.?

to land possessed by a group, is jurisdictional power not proprietary rights over such land. As Viscount Haldane correctly observed,

> "The Chief is only an agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but other interests affected."[6]

The description of the Chief's position as that of an agent is relevant because if the agent exceeds his authority the transaction may be avoided by the principal.[7] The principal, in this respect, is the group entitled to possess the land and the Chief, in granting a tenancy is bound to observe the native law and custom from which he derives his authority.

Before making the grant the Chief is bound to consult and obtain the consent of his Council made up of the heads of various sub-units under him. These heads, on the other hand, are bound to consult and obtain the opinion of the members of the group which they represent. The legality of any grant made by the Chief depends upon whether the consent of his council was obtained. This is amply illustrated by the evidence given before the Northern Nigeria Lands Committee[8] on Monday, 1st June, 1908, by Sir S.R. Menendez, the

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6. Amodu Tijani v. Sec. Southern Provinces (1921) 3 N.L.R. at p. 56 of Chief Bassey. Duke Ephraim of Calabar in W.A.L.C., Minutes of Evidence, Friday, June 3, para. 12573, that the Chief or family head must call the principal members of each family and obtain their sanction before giving out communal land.
7. But the analogy must not be pushed too far for agency itself is a legal concept which cannot fully describe the position of the Chief who also has some interest (as other members of the group) in the land.
8. Cd. 5103, of 1910.

Chief Justice. A member of his Committee, Mr. Temple, asked,

> "Can a chief not allow a member of another neighbouring tribe to settle on the land of his own tribe?"

The learned C.J. replied,

> "Only with the consent of all the Chiefs. In the event of a stranger coming in, a Council of the community has to settle that question."[9]

When another member of the Committee, Mr. Strachey, asked,

> "Supposing that a desirable stranger came along who, it was thought, would add to the wealth or strength of the tribe, could the Chief provide a place for that stranger on the tribal lands?"[10]

Sir S.R. Menendez's reply was,

> "Not on his own initiative. It would have to be referred to the Council."[11]

In some places such as Benin, it is said that the Chief owns the land.[12] Such a statement suggests that he has unlimited powers of granting tenancies or of otherwise dealing with the land as he likes. Such an approach, however, is misleading because it confuses the proprietary aspect of land tenure with the <u>de facto</u> jurisdictional control which the Chief exercises with the consent of the corporate group which he represents. As Ayo Ogunshaye has recently pointed out, "the paramount ruler was the spokesman of decisions arrived at by the the Council of Chiefs and elders."[13] If a chief deals in land over

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9. <u>Ibid.</u> para. 114.
10. <u>Ibid.</u> para. 121.
11. <u>Ibid.</u> para. 121. cf. Ollennu, J. in <u>Allotey v. Abrahams</u> (1953) 3 W.A.L.R. 280 at p.286.
12. <u>W.A.L.C.</u>, <u>supra</u>, <u>Correspondence</u>, p.168. by Iyamu and Orofisi.
13. "The African Personality" in the <u>Encounter</u>, July 1961, p.46.

which he has mere jurisdictional control without the consent of the Council, the transaction may be void or voidable depending on whether he purported to exercise private rights or to act on behalf of the group while negotiating for the transaction. The Chief like any other head, has of course, the right to bind the group in routine matters, but borrowing money to improve the corporate land[14] or granting of tenancies without consultation is not a routine matter. If, however, the Chief's action is acquiesced in by members of the group the grant will be valid.[15]

In practice the members of the group usually acquiesce in and the Court may readily sanction the grant of land made by a chief to strangers for purposes of farming for a short period especially if his action is capable of reasonable explanation to the satisfaction of the members of the group.[16] The group normally will resist vigorously any purported leasing of "title" land which is dedicated to a deity or any land occupied by the Chief in his official capacity. This is because the life of the people is theoretically bound up with such land. A new people and a strange deity cannot be introduced thereon without their approval, nor can the chief deprive his successors in office of the use of the land. Further, where the

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14. Aralawon v. Anomire (1940) 15 N.L.R. 90.

15. Efena Efena Henshaw v. Henshaw and C.F.A.O. (1927) 7 N.L.R. 77.

16. Chief Eyo Archibong & Ors. v. Etubom Ededem Archibong & Ors. (1947) 18 N.L.R. 117.

land is already in occupation of a member of the group who has no absolute rights thereto, his consent to granting the tenancy must also be obtained otherwise such a grant will be void.[17]

(ii) Grants by the Governor/Minister. The power of chiefs to grant tenancies exist side by side with that of the Governor (in practice, the Regional Minister of Lands) to lease Crown lands within the Region as well as the Governor-General's power to grant mining leases in all territories. Grants made under the Crown Lands Ordinance are invariably similar to leases in English law and, *prima facie*, such grants are governed by the general law of Nigeria. There is nothing in the Ordinance, however, to prevent such a grant being made subject to native law and custom. As a matter of fact, S.4 of the Crown lands Ordinance provides that a lease to a native of Nigeria may be for an indefinite period and the Land and Native Rights Ordinance (now the Land Tenure Law) applicable to Northern Nigeria permits the granting of rights of occupancy (to any body) for an indefinite term.[18] A lease for an indefinite period is invalid in the law of England[19] which is the basis of

17. cf. Ollennu J. in Oblee v. Armah & Anor. (1958) 3 W.A.L.R. 484, Ghana. But occupation of communal land by a member does not deprive the group as such (as distinct from the Chief with consent of the group) from alienating the use of the land because the occupying member has no private rights *vis a vis* the group: See Webber J in Efena Henshaw v Elijah Henshaw (1927) 8 N.L.R. 77 at p. 79.
18. Land and Native Rights Ordinance (Cap. 96 of 1958) S.8. Land Tenure Law, 1962, S.8.
19. Megarry & Wade: The Law of Real Property, 2nd. ed. pp.609, 618-9.

the general law of Nigeria; it is, therefore, arguable that if such a grant is made to a Nigerian, it should be construed according to customary law so far as the rules of that law do not conflict with the express provisions of the Ordinances or of the Law. This is because under the High Court Laws (as explained in Chapter 1) native law is the primary law applicable to Nigerians and indefiniteness of the term lends force to the argument that the transaction is not to be governed exclusively by the general law.

The point is merely of academic interest because in practice the grants made under the Ordinances or the Law are always for a fixed term and from the wording of the documents, invariably subject to the general law.

(iii) Grants by Family heads and Family groups.

Normally the unit of land-holding throughout Nigeria is the family,[20] consequently most of the tenancies are of family lands. The head of a family may or may not be a Chief but whatever his political status the legal position is not affected: he controls the occupation and use of family land by members and by strangers.[1] In case of grant of tenancies he cannot act alone: he must consult and get the

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20. Green: Ibo Village Affairs, pp.33-34; Land Tenure in an Ibo Village, Ajisafe: Laws and Customs of the Yoruba People, pp. 6-7; cf. Coker: Family Property, p. 23: "The entire economic systems of the people of Nigeria is most closely related to the family and the native laws and customs relating to land-holding are a very substantial portion of family law in native jurisprudence". See also W.A.L.C. paras. 12,573, 14,659, & 14,661.
1. Policy for Land, E.R. Sessional Paper No. 7 of 1953, para. 3; No. 30 o 1955, para. 3.

approval of the adult members of the family,[2] so that, in fact, it is the group acting through the head, that makes the grant, and not the head himself.[3]

As Chubb correctly observed,

> "It can be stated quite categorically that no single person has the right to alienate the use of family land."[4]

This is because neither the head nor any other member of the family has any separate or alienable interest in the land held by the family as a group.[5] Where such land is alienated by the head without consulting an important member of the family, the grant may be avoided by the member who was not consulted,[6] but any unexplained delay by him in asserting his right may amount to an affirmation of the grant even if the period prescribed by general law for limitation of actions

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2. Under modern conditions consent of the native Authority is also required: See Hailey: N.A., Pt.III, p. 145. for Ijebu, Egba, and Ika N.As. Also E.R.L.N. No. 356 of 1959: Igbo-Etiti District Council (Alienation of Land), Bye-Laws, 1959. E.R.L.N. No. 370 of 1959: Izi D.C. (Alienation of Land) Bye-Laws, 1959: Both made under S.86 of the E.R. Local Government Law, 1955.

3. Bello Adedubu v. Makajuola (1944) 10 W.A.C.A. 33, See also Policy for Land, E.R. Sessional Paper: No. 7 of 1953, para. 6, No. 3 of 1955, para. 5. cf. Lord Maugham in Sakariyawo Oshodi v Brimah Balogun & Ors. (1934) 4 W.A.C.A.1, at p.3. "It is beyond dispute that the headman by himself had no right of alienation, but it seems now to be well settled in Lagos that land could be alienated even by a domestic with the consent of the Oshodi family".

4. Chubb, L.T.: Ibo Land Tenure, para. 32.
5. Coker v. Coker (1938) 14 N.L.R. 83.
6. Agagran v. Olushi (1907) 1 N.L.R.67; Bassey v. Eteta (1938) 4 W.A.C.A. 153. Kwesi Manko & Ors. v. Bonso & Ors. (1936) W.A.C.A. 62., Edmund v. Ferguson (1939) 5.W.A.C.A. 113. Bello Adedubu v. Makanjuola (1944) 10 W.A.C.A. 33, Yesufu Esan & Ors. v. Bakare Faro & Anor. (1947) 12 W.A.C.A. 134: all cases of sale but the principle is not affected.

has not expired.[7] It does not appear that 6he notice of a family meeting to approve of the transaction need be given, or that any meeting need be held at all: a grant may still be valid if the family-head consents and gets the approval of every eligible member separately. On the other hand, a family-head is an indispensable figure in the alienation of family land and if his consent to such alienation is not obtained the grant is invalid. It can, however, be proved by extrinsic evidence that he concurred to such a transaction.[8]

A problem which has not been finally solved is whether the alienation of family land by way of sale or lease without the concurrence of the eligible members of a family void abinitio or merely voidable by a dissentient member. This problem was noticed by the W.A.C.A. but left unresolved in Olowu v. Delasu[9]. The solution is more difficult in Ghana where the inconsistency of the decisions is more pronounced: the courts holding in some cases that alienation without consent is merely voidable[10] but in others that it is void ab initio.[11] The tendency of the Nigerian Courts is to regard such alienation without consent of the family as being voidable, not void. Thus in Agagran v. Olushi[12] the Full Court held that the sale of

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7. Agagran v. Olushi (1907) 1 N.L.R. 67; cf Ollennu J in Allotey v. Abrahams (1957) 3 W.A.L.R. 280.
8. cf. Ollenu J in Allotey v. Abrahams, supra.
9. (1955) 13 W.A.C.A. 662, especially at p. 663.
10. e.g. Kwesi Manko & Ors. v. Bonso & Ors. (1936) 3 W.A.L.A. 62, approving Quassie Bayaidie v. Kwamima Mensah, F.C.L. 150, bohh Ghana.
11. e.g. Agafoatse Agbloe II & Ors. v. Sappor & Ors. (1947) 12 W.A.C.A. 187 Thompson v. Mensah (1957) W.A.L.R. 240.
12. (1907) 1 N.L.R. 67.

family land without the consent of a member of the family whose consent is necessary was voidable by that member. This decision has been followed in a number of subsequent cases.[13] Similarly, in Johnson v. Onisiwo & Ors.[14] the W.A.C.A. held that the lease of family land without the consent of an important member of the family was voidable by that member, but that the transaction was not void *ab initio.* Further, a gift of such land without consent as well as a mortgage of it by the donee is voidable by the non-consenting members.[15]

On the other hand, in Adewuyin & Ors. v. Ishola & Ors.[16] the plaintiffs and the first four defendants were members of the same family at Ibadan, Western Nigeria. The first four defendants, as accredited representatives of the family, with power to lease and deal with family land, granted a lease to one Odutola, the fifth defendant, a Nigerian business man. Later, after the Olubadan-in-Council had lifted a ban previously imposed on leasing land to aliens, a Lebanese business man prepared a lease of the same land, and got the first four defendants to execute it in his favour. He then took possession of the land and erected a substantial building thereon.

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13. e.g. Belo Adedubu v. Makajuola (1944) 10 W.A.C.A. 33; Esan & Ors. v. Faro & Anor. (1947) 12 W.A.C.A. 135, Onwuka & Anor. v. Abriba Clan Council & Ors. (1956) 1 E.N.L.R. 17; Lateju v. Lanchun (1958) W.N.L.R. 106; Adenji v. Saka Disu (1958) 3 F.N.L.R. 104.
14. (1943) 9 W.A.C.A. 189.
15. Erikitola v. Salami Alli (1941) 16 N.L.R. 56.
16. (1958) W.N.L.R. 110.

After Odutola, the fifth defendant had successfuly sued the Lebanese merchant for recovery of possession, the present plaintiffs started this action to set aside the lease to him and to recover possession on the ground that the lease had been made without their consent and/or authority; the first four defendants willingly agreeing that they had leased the land to Odutola without the consent or authority of the family.

It was held by Ademola, C.J. that although

(1) "the case of Bello Adedubu & Anor. v. Makajuola[17] laid down the principle that the head of a family in Ibadan cannot dispose of family property without the consent of the family, this..... must not be taken to mean that every member of the family has to give his consent. It is.. enough if a mamority of the members gave their consent."[18]

(2) In any case there was evidence that the first four defendants as accredited representatives of the family had the consent and authority of the family to grant the lease.

(3) Once they had such consent and authority it did not matter to whom the land was leased.

It may now be said that although Olown v. Delasu[19] left open the question whether alienation of family land without consent of all the eligible members was void *ab initio* or merely voidable, both the earlier and later decisions lead to the conclusion that such a transaction is

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17. (1944) 10 W.A.C.A. 33, *supra*.
18. At p. 113. Contra Mbanefo J. (as he then was) in Onwuka & Anor v.Abriba Clan Council & Ors, supra, at p.21: "There are four branches of the family and each has a head. The consents of these four so long as they continue to be acknowledged as the heads of their respective branches are necessary in any dealings about the land."
19.

voidable at the instance of the member whose consent was not obtained. The right to avoid the alienation will be barred if the member on becoming aware of it does not take steps immediately to set aside the transaction. Thus, if an objecting member stands by and watches a purchaser eject the occupiers of the land[20] or pay them compensation for loss of possession, or if the sues for recovering his own share of the rents received from letting the property,[1] or if the tenant openly exercises acts of ownership or remain in possession for a long time,[2] the member's objection to the alienation cannot be sustained.

The judgment of Ademola, C.J. in Adewayin & Ors. v. Mosadogun Ishola & Ors.[3] implies that the right of the individual member of a family is to be consulted on, not necessarily to consent to the alienation since the grant will be valid if the majority support it. This raises some difficult problems. If the validity of the grant depends on the approval of the majority of the members, who are to constitute that majority? Presumably females and minors will be excluded, yet they are as much members as the adult males and the minors may be prejudicially affected by the grant. And can a majority of the family, even if they are junior members, by their own decision make a valid grant binding on the family and senior members? The judgment implies that this is possible but it is well-known that in customary law a grant of tenancy or any other

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20. Agagran v. Olushi, supra.
1. Johnson v. Onisivo, supra.
2. Akpan Awo v. Cookey Gam (1913) 2 N.L.R. 100; Suleman v. Johnson (1951) 13 W.A.C.A. 213.
3. Supra.

alienation of interests in land cannot be made without the concurrence of the family-head and the elder members. As Harragin, C.J., observed in a Ghana case, if the head unreasonably witholds his conent,

> "The only remedy that the family have is to remove the head of the family if they do not approve of him."[4]

If the decision of Ademola, C.J., is carried to its logical conclusion, a majority of family members may, by their action, disregard the interests of future generations and deal with the family land to satisfy their immediate personal desires. This is what customary law has always tried to avoid. It is respectfully submitted that the learned C.J.'s decision is justified on the facts because there was clear evidence before the Court showing that the plaintiffs knew and approved of the lease; but the principle of law remains unaltered (in spite of his lordship's dictum) - that a disposition of family land without the concurrence of all the eligible adult members of the family may be challenged by the dissentient members. If action is brought to avoid the disposition, a customary tribunal or the High Court will consider all the circumstances of each particular case, including the reasons for the grant as well as the interest of the family as a whole. If the Court is fully satisfied that the ground for opposing the grant is reasonable, it will be set aside, otherwise it will be approved even if the dissentients are very influential members

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4. Agbloe II. v. Sappor (1947) 12 W.A.C.A. at p.189.

of the family.

If an action is brought to set aside the grant, the dissentients should constitute the plaintiffs and the members who approve of the grant together with the grantees would become the defendants. This is because all the plaintiffs must speak with one voice. If the assenting members are joined as plaintiffs, the plaintiffs will be both approbating and reprobating; the defendant's success will be almost guaranteed for some of the plaintiffs (i.e. those who assented to the grant) will be estopped from asserting that the lease was without their consent.

Where some of the dissenting members are unwilling to sue for rescission of the grant, any one of them may sue alone even if the family head is among those who neglect or refuse to assert such rights.[5] Even if the dissentients had acquiesced in grants of parts of family land in the past, they may, neverthless, oppose future grants of which they disapprove, their past acquiescence notwithstanding.[6]

If the members willing to make a grant bring an action praying the Court to authorise the lease, approval will not be given merely because some of the parties desire to turn the property into cash.[7] The effect of the grant on the family as a unit must be taken into consideration.

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5. Bassey v. Cobham & Kouri (1924) 5 N.L.R. 90.
6. Otun v. Ejide & ors. (1933) 11 N.L.R. 124.
7. per Butler Lloyd, J. in Layinka Bajulaiye & Ors. v. Akapo (1938) 14 N.L.R.10.

Where the head of a family is a chief and there is vacancy in that office, any member who acts as head (with the knowledge and consent of the family) may, with the customary approval, grant tenancies which will bind all the family. If another member is subsequently appointed a chief but is not yet capped when the acting head makes the grant, the tenancy will neverthless bind the family.[8]

Grants by members.

A member of a family or any other corporate group may in his personal capacity, receive a grant of land held corporately by the group. If a grant is made to the group through such member, he becomes only a caretaker if the tenancy is governed by customary law, or a trustee if it is governed by the general law. In native law and custom a member to whom land has been allocated for personal occupation and use has no separate alienable interest in the portion which he occupies, although generally once the allocation is made he is entitled to continue in indefinite occupation. It is, of course, within the customary rule to add a condition that the member shall be dispossesed if the family or the group required the land but "such a rule could not justify the head of a house in determining the tenancy[9] on his mere *ipse dixit* that the family required it."[10] The member, however, has absolute rights over whatever improvements he has put on the land and may alienate his

8. The Secretary, L.T.C. v. Soule (1939) 15 N.L.R. 72.
9. As explained already such a member is not a tenant either of the Land or of the group and his holding cannot be correctly described as a "tenancy".
10. *per* Webber, J. in *Manuel v. Manuel* (1926) 7 N.L.R. 101.

rights over such improvements. Thus in Benin although all grants of land are legally made by the Oba, a Bini is free to transfer his plantations or houses,

> "but since the Bini himself does not 'own' the land, all that such a stranger obtains under the purchase is a 'chattel' ownership which he must support, if he wishes to exercise it, by a lease from the Oba of the land the improvements are on."[11]

In practice, members of family groups often do grant rights of possession and use of the land they occupy to persons who have no legal rights in the land, even though there has been no permanent partition of the land. Strictly construed such a grant is invalid unless it can be proved that the family or group expressly or by implication consented.[12] Every allocation to a member is for his personal use and occupation and alienation of his rights, however temporary, is prima facie evidence of his inability to use the portion so alienated.

The group is entitled to take back the land from the offending member,[13] whether he was born a member of the group or he was formerly a slave who later on became incorporated into the group.[14] The grantee acquires no interest at all.[15] This is so because the member lacks the legal capacity to create the tenancy which he purports to have made and therefore no contractual relations exist

11. Rowling, Benin, para. 36. A 'stranger' in this passage seems to mean an alien for Rowling says in the same paragraph that a Bini leasing to a Nigerian does so without any formality, and that the lessee holds from an individual not from the Oba.
12. cf. Cole v. Folami (1956) 1 F.N.L.R. 66, cap. pp.68-9.
13. Kadiri Adagun v. Fagbola & Ors. (1932) 11 N.L.R. 110.
14. Lawani Buraimo & Ors. v.Taiwo Gbamgboye & Ors.(1940) 15 N.L.R.,139. Chief Obanikoro v. Chief Suenu (1925) 6 N.L.R.87
15. Miller Bros. (of Liverpool) Ltd. v. Ayemi (1924) 5 N.L.R. 40.

between the purported tenant and the group. The W.A.C.A. accepted this principle laid down in Lawani Buraimo & Ors. v. Taiwo Gbamgboye & Ors.[16] but the learned C.JJ. added,

> "In thus upholding the judgment of the Court below, we wish to avoid being thought to subscribe to the proposition that in every case of the granting of a leasehold amounts to alienation and so connotes misbehaviour and involves forfeiture. That in our view is a most dangerous proposition and would carry the Native Law and Custom far further than it has been established by cases decided in the Courts......It is not difficult to imagine cases in which the granting of a lease, e.g. for a short period, would carry no challenge to the overlord's right and consequently involve no misbehaviour or forfeiture."[17]

With respect, this opinion accords with what actually happens in practice for members of corporate groups do grant short term tenancies of the land in their occupation. On principle, such grants are not valid and the group may evict the grantee if it wished. The fact that the grantee is allowed to remain in possession is evidence that the corporate group acquiesced in the grant. It could be said that what happened was a ratification (by the corporate group) of a transaction which the members impliedly effected without the authority of the group. By so ratifying the member's act the group makes it valid notwithstanding that he had no authority to act for the group at all. This is a question of agency.[18]

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16. Supra.

17. Onisiwo & Ors. v. Taiwo Gbamgboye & Ors. (1941) 7 W.A.C.A. 69, at p.70.

18. cf. Wilson v. Tunman (1843) 6 M. & G.236; Bird v. Brown (1850) 4 Ex. 786; Richardson v. Oxford (1861) 2 F. & F. 449; R. v. Chapman (1918) 2 K.B. 298; Am. Restatement of Agency, 82, 83. Bowstead on Agency, 12th ed., 1959, Art. 25. 33.

Members compared with joint tenants and tenants in common:

It may be useful to compare the position of a member with that of joint tenants and tenants in common under the general law. By the pre-1900 English law which applies throughout Nigeria (except the Western Region), joint tenants have one single interest in the land they hold and they may join in granting a lease. On making such a grant they will be considered as one single lessor. The grant will operate as a lease by each joint tenant so far as his interest is concerned and by all the joint tenants of the entirety of their interest in the property for the period of the grant.[19] On the death of any of them the lease will continue for the benefit of the survivors who will be entitled to the rent.[20] Similarly members of a group (like joint tenants in English law), may join together and make a grant of part of their interests in any land they hold. Such grant is considered to be made by the group as a corporate body; the idea of each member granting his own share of the interest does not enter into the transaction because such interest is united with the interests of the others.[1] If such a grant is made in English law and the grantor afterwards died, his survivors are bound by the lease even if it was made

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19. cf Doe v. Summersett (1830) 1 B. & Ad. 135, per Lord Tenterden, C.J.
20. See the last note, and also Henstead's Case (1594) 5 Co. 109.
1. Coupes v. Fletcher (1865) 6 B. & S.464.

to commence on the death of the lessor.[2]

In customary law, on the other hand, a member of a group cannot make a grant of his presumed share either to a stranger or to a fellow-member. Apart from the cases already cited, this point was amply illustrated in the evidence given by Sir S.R. Menendez, the C.J. of Northern Nigeria, on 1st June, 1908, before the NorthernNigeria Lands Committee. The questions asked and the answers given were as follows:

Chairman: "Would it occur to a native not in position of a chief to convey in any sense either the use of or the property in his land to a stranger, a non-native?"

"No, he has no right."

"It would not occur to him as a possibility?"

"Only if he came in contact with the native barrister."

Sir J. Diggas la Touche: "He might transfer it to a man of his own tribe?"

"In theory it would revert to the Chief who would re-grant it. It is probably done in a very simple way by consent."[3]

With respect, this passage correctly states the position in customary law provided that the term Chief includes heads of families or other groups holding land corporately. Even if allocation has been made to member but the property as a whole has not been permanently partitioned, the allocation is intended to be for the occupation and use

2. Litt. S. 289
3. Northern Nigeria Lands Committee, Minutes of Evidence, Cd. 5103, 1910, paras. 116-118.

of the member and his dependants: any attempt to transfer his rights implies that he has got more than sufficient land for his needs and, therefore, the portion he is trying to dispose of should fall back into the unallocated reserve of the group. This contrasts with the position in English law where a tenant in common may, by a separate grant, demise his own undivided share to a stranger[4] or to a co-tenant.[5] Like the English tenant in common, a member might join with other members to grant a lease of the land, but in such a case the grantors are acting jointly on behalf of the corporate group. Unlike a grant by tenants in common which operates as a separate lease by each tenant of his undivided share and a confirmation by each of his companion's act,[6] such grant by members confers some interest in the grantee, not because the grantors themselves individually demised their undivided shares but because by acting jointly they could lawfully and effectively restrict the enjoyment of the land by the corporate group on whose behalf the grant was made.

Who are members?

The size of a corporate group varies and the persons who may constitute its members differ according to the custom of each particular

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4. Co. Litt. 199a.
5. Leigh v. Dickenson (1884) 15 Q.B.D. 60, C.A.
6. Thompson v. Hakewill (1865) 19 C.B.N.S. 713, per Byles, J.

locality. In most localities kinship is traced through male lines only and therefore the descendants of a common male ancestor may constitute a land-holding group. In a few places, e.g. among the Verre and the Longuda of the Sardkana Province of Northern Nigeria,[7] and the Afikpo Ibos of the Eastern Region relationship is traced through females with the result that the land-holding group will be made up of matrilineal descendants of a common ancestor. Owing to the fact that the right to be considered a member depends on birth into the group, the adult sons of a member of the group are to be reckoned as members equally with their father. Further, if a man is married and during the subsistence of that marriage begets illegitimate children whom he acknowledges as his legitimate children, they are entitled to be considered as much members of the group as the legitimate issue. It does not matter whether their father contracted a customary marriage or an Ordinance marriage when they were born[8] because membership of the group is determined by customary law under which

> "there appears to be no difference between children born in native wedlock, and the offspring of fortuitous connection provided that paternity has been acknowledged."[9]

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7. Meek; Tribal Studies in Northern Nigeria, Vol. I. pp.415-16; Vol. II pp.346-7. The former Adamawa Province is now called Sarduana Province.
8. cf. Shang v. Coleman (1960) J.A.L. 160, especially pp.171-172.
9. per Osborne, C.J. in Savage v. Macfoy (1909) Ren. 504 at p.508. cf. In re Sapara (1911) Cen. 605; Thomas v. Thomas (1932) 16 N.L.R.5. Philip v. Phillip (1946) 18 N.L.R. 102. In native law and custom acknowledgement, it is submitted, gives the child full rights of a legitimate issue and not, as Coker thinks (Family Property, p. 266) mere right to receive property: cf. Lawal & Ors. v. Younam & Sons (1959 W.N.L.R. 155 where legitimate and illegitimate child left by Alhaji Adegoke Adelabu were heldkentitled to sue a third party for the death of their father.

The rule governing acknowledgement operates in a different way among the Yorubas from its operation among the Ibos. In Yoruba land a man who begs a child with a woman who is not his wife may later acknowledge the child as his legitimate issue, notwithstanding that the child was born in adultery. Such a child is treated as a member of the group if it is a question of deciding who is entitled to be consulted when it is proposed to alienate the land held by the group under native law and custom. Among the Ibos, on the other hand, children born to a man who has not made some marriage payment on behalf of the mother before the child is conceived cannot be made the issue of the natural father by mere acknowledgment. The child will be considered a legitimate issue of the mother's family group and entitled to the same right of consultation as other members of the group. Similarly, if a married woman is inpregnated by a man who is not her husband, the man cannot acknowledge the child as his own: it is the legitimate child of the woman's husband and has the same right in connection with leasing of the father's family land as his other children. If the woman's husband renounces the child (as he is entitled to do) and drives him away with the mother, the natural father cannot even acknowledge him as his child at this stage; he will become an issue of the mother's family having the same rights as other members of the family, in disposition of the land held by the group. Among the Yorubas the natural father could acknowledge the child so as to make him his legitimate issue.

On the other hand, among the Ibos if there is a concluded marriage agreement between a man's family and the family of a woman and the man has given something, however small,[10] towards implementation of the agreement, children born of the woman subsequent to the agreement are the man's legitimate issue and their interest must be considered in granting leases of family land. If they are of age, their consent will be necessary before a grant is made in the same way as the consent of all other members of the group is necessary.

It has been discovered that in a few localities in Ibo land birth into a corporate group is not the only criterion by which membership is decided. As Mbanefo, J. (as he then was) observed,

> "In Abriba strangers and even slaves who lived for a long time with a family are regarded as members of the family and have equal rights with the direct descendants of the original founder of the family to the use and occupation of family lands."[11]

These persons who become members by incoporation into the group are entitled to be consulted and to give their consent in granting of tenancy of the family land just as other members who were born into the group.

Individual Owners.

In native law and custom a land-holder is entitled to do whatever he likes with it as long as his action does not constitute a

10. e.g. payment of five shillings where the agreed marriage consideration was £25.

11. Onwuka & Anor. v. Abriba Clan Council & Ors. (1956) 1 E.N.L.R. 17, at p.19.

breach of customary rules relating to land-holding. As Ajisafe said,

> "An owner of land may give already cultivated land to anyone free for use without any consideration",12
> and
> "An owner of house property, or land in the town can give a portion of his land to another to build on."[13]

Generally, where land is held privately

> "the landlord acted alone, and his word was sufficient sanction to, and for, an applicant to cultivate a plot of land."[14]

In some communities, however, a private land-holder must obtain the sanction of his immediate political authority if the tenancy which he is granting is to be valid. Thus in Abeokuta it was provided that no private individual may lease houses and lands to anyone not a native of Egba land without the sanction of the Alake.[15] Further, many of the bye-laws made by local authorities under the Regional Local Government Laws restrict the customary rights of individuals in granting tenancies of lands which they hold. For example in Western Ahoada,[16] Igbo-Etiti,[17] and Izi,[18] the bye-laws made by the District Cojncil under the Eastern Region Local Government Law,[19] provide

12. Ajisafe, _op. cit._, p. 9, para. 13.
13. _Ibid._, para. 15.
14. Basden, _Niger Ibos_, p. 265.
15. Egba Government Gazette, No. 2 of 1904.
16. Western Ahoada Rural District Council (Alienation of Land) Bye-Laws, 1957, E.R.L.N. No. 272 of 1958.
17. Igbo-Etiti District Council (Alienation of Land) Bye-Laws, 1959, E.R.L.N. No. 356 of 1959.
18. Izi District Council (Alienation of Land) Bye-Laws, 1959, E.R.L.N. No. 370 of 1959.
19. No. 26 of 1955, SS.86 and 230.

that before any transaction[20] concerning land is entered into between a native of the area and a person who is not a native or between two non-natives, the parties to the transaction shall (i) appear in person before the Council and announce in public their intention of entering into such a transaction; (ii) state the precise nature of the transaction and the terms agreed upon; (iii) give a description of the land sufficient to enable it to be identified to the satisfaction of the Council.[1] The Council shall record the particulars and then give its approval to the transaction.[2] If it withholds approval, it shall also record the reasons.[3] If approval is given an instrument of the transaction signed by the parties shall be presented to the Council within sixty days of the date of such approval so that an endorsement of the approval will be made thereon.[4] Any transaction not entered into in accordance with the bye-laws is null and void,[5] and the grantee in possession may be ejected.[6]

The instrument must be registered within 30 days of its being endorsed by the Council[7] and if this is not done the instrument is void, provided that the Council may extend the period for registration.[8] An unregistered instrument cannot be admitted in evidence in any dispute

20. "transaction concerning land" means any sale, lease, gift *inter vivos*, mortgage, pledge, or other transaction whereby an interest in land or any trees thereon situate within the area passes.
1. S. 3(1)
2. S.3 (2), 2 (2).
3. S.3 (3).
4. S.4
5. S.5.
6. S.6.
7. S.7
8. S.8.

between a native and an non-native or between two non-natives.[9]

The bye-laws do not apply to transactions completed before their enactment nor to transactions governed by the Native Lands Acquisition Ordinance or Acquisition of Lands by Aliens Law.[10]

Pledgors and Pledgees.

It has been explained earlier that a pledgor of land under native law grants its possession and use to the pledgee who normally occupies the land in lieu of the interest due on the loan. Therefore, the fact that the pledgor has no possession would make it impossible for him to grant any tenancy of the land as long as the loan remained unpaid. On the other hand, the pledgee was expected to occupy the land personally and not to traffic in it. He had no legal right to transfer his rights of occupation without first requesting the pledgor to repay the loan and informing him that if no repayment was made someone else would be put into possession. In law, he was not entitled to grant a tenancy at all: he could transfer all his rights of occupation to another person willing to repay him the loan after the borrower had indicated his inability to repay immediately. Where the pledgee transfers his rights, the transferee acquires no more rights than the pledgee and, subject to being given reasonable notice, he is bound to quit as soon as the borrower has repaid the loan.

9. S.12.
10. S.1(2)

Under modern conditions, some pledgors are allowed to remain in possession of the pledged land and pay interest on the loan. Such pledgors in possession may grant a tenancy of the land and, as long as the agreed interest is paid, the grant remains valid. On default, however, the grantee's rights determine since he cannot obtain greater rights than the grantor-debtor, through whom he obtained possession.

Women, Minors, Slaves.

Women are normally dependent on their husbands if they are married, or on their fathers, brothers or guardians, if unmarried, for exercise of rights in land. If, however, a woman acquired land either by purchase or by inheritance or gift, she may grant a tenancy of it like any other individual land-holder. Similarly, a woman, even if married, may of her own initiative obtain a tenancy from any person ready and willing to make her a grant; her husband has no say in the matter and is not in any way liable on the covenants which she entered into with the grantor. On the death of a woman grantor or grantee her remaining rights in the land will pass to her children, not her husband. If she died childless the rights may pass to her blood relations though, in practice, where her husband had been on good terms with them, he will be permitted to take over the rights.

The right to be granted a tenancy depends upon the ability of the tenant to use the land; therefore minors may receive a grant

if they are able to use the land. In practice, however, minors exercise their rights through their fathers or other customary guardians. They do not generally create any tenancy of land devolving on them privately because until they are able to occupy and use the land effectively their legal guardians exercise control over the land. There is no theoretical rule forbidding a minor who acquites land privately from granting a tenancy of it but the question does not arise in practice because there was usually no need for a minor to acquire land privately.

The rights of slaves or persons of slave origin differ according to their status within the group among which they live. Those who have been incorporated into the group have the same rights as members born into the community.[11] Where a slave occupied land separately allotted to him, his rights are similar to those of a tenant, if he was not incorporated into the group; and therefore he could not grant a tenancy of the land in his possession.[12] During the period of slavery, whatever a slave or his descendant acquired was acquired on behalf of the master and, therefore, the slave had no right to dispose of it. Now that slavery has been abolished, there is no customary rule to prevent a person of slave origin who has acquired land privately from making a grant of it to anyone. Similarly, he can receive a tenancy in his own right regardless of the wishes of his former masters.

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11. See <u>Onwuka & Anor. v. Abriba Clan Council & Ors.</u>, <u>supra</u>.
12. But in some cases intelligent slaves were made managers of their master's property. Such an elevation was virtually an act of incorporation into the family.

Corporations and Unincorporated Bodies.

It is popularly thought that a corporation can be brought into existence only by fulfilling a prescribed course of registration to the satisfaction of the state legislature. As LLoyd correctly points out, this view is unsound because it ignores the fact that some corporations exist without any formal act of incorporation.[13] The customary institution which is nearest to the English common-law corporation is the family, described by a Nigerian Chief as comprising the dead, the living and the unborn. This section is not concerned with this type of customary institution but with registered companies and unincorporated associations.

An incorporated body, being a legal entity, may grant a tenancy of the land which it occupies but the grant is subject to the provisions of the Acquisition of Land by Aliens Law.[14] Under that Law a company or association or body of persons corporate or unincorporate is an "alien" and, therefore, can only acquire an interest in land with the consent of a Minister and under an instrument which, and the terms whereof, have been approved by the Minister. Such a body may alienate its interest in land to any other alien only with the consent and approval of the Minister.[15] The definition of "alien"

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13. Lloyd, D., The Law Relating to Unincorporated Associations.

14. Eastern Region, No. 11 of 1958; Western Region, Native Lands Acquisition Law, No. 4 of 1952, now Cap. 80.

15. E.R.S.4; cf. W.R. S.3(1) Providing for sonsent of Governor.

excludes

"(i) a body corporate established specifically by or under any Ordinance or Law which empowers that body to acquire or hold land; or

(ii) a corporate body incorporated under the provisions of the Land (Perpetual Succession) Ordinance or any other Ordinance or Law containing general provisions for incorporation where such corporate body is composed solely of Nigerians, or under the provisions of the Native Authority Ordinance, the Eastern Regional Local Government Ordinance, 1950, or the Eastern Region Local Government Law, 1955, or

(iii) a co-operative society composed solely of Nigerians and registered under the provisions of any Co-Operative Societies Ordinance or the Co-operative Societies Law, 1955."[16]

For the reasons already given in Chapter 1, such a grant may be governed by customary law unless the parties agreed to regulate their relationship <u>exclusively</u> by any other system of law.

As S.18(2) of the Companies Ordinance[17] confers upon companies formed under the Ordinance a general power to hold land, it is submitted that if registered in Nigeria, such a company is

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16. E.R., S.2; W.R., S.2(b)

17. Cap. 37 of 1958.

not an alien even if it is made up of non-Nigerians; it can therefore, acquire land and grant tenancies just like any Nigerian and such grants may be governed by the customary or general law according to the intention of the parties. On the other hand, as the exception does not cover unincorporated bodies, it seems that a voluntary organisation is an alien even if it is made up of Nigerians only: it cannot, accordingly, grant or acquire any interest in land without the consent of the Minister. This statutory provision seems to run counter to native law under which any group of persons(such as members of an age-grade or of a society such as the "Ogboni") may be granted a tenancy for carrying out the purposes of the group.[18]

Procedure for Creating the Relation of Landlord and Tenant.

The customary procedure for granting tenancies varies in details according to the custom of each particular locality though the broad principles are fairly uniform throughout the country. Where the parties are on very cordial terms "friendly loans are not attended by any formality".[19] This is true of the Angas of the Plateau Province in Northern Nigeria as it is of the Efiks, the Ibos, and the Yorubas of the South.

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18. Ward Price, H.L., Land Tenure in the Yoruba Provinces, para. 100.

19. Rowling, Plateau, para. 24.

Persons to whom a grant of land is made may be divided into four classes: (i) those who wish to settle permanently. These persons are generally given land after a trial period. After a long period such persons are often treated as members of the community and their rights may be co-extensive with those who enjoy rights in the land by virtue of birth, especially if the "incorporated" grantees have taken full part in defending the rights of the grantors over the land when those rights were threatened.
(ii) Itinerant strangers who are not and never become members of the community. These strangers are granted rights of using the land without being "incorporated" into the group.
(iii) Strangers who simply live in one district and receive a grant of land in another, generally for purposes of farming only.
(iv) A member of the community who has run short of land for his own needs and the needs of his dependants.

A resident within the community is well-known to every member of the group. He could often easily obtain a grant from a friend for the mere asking. If the prospective grantor is not a close friend, among the Ibos, the would-be grantee, like a stranger from another district, would take some palm wine and some kola nuts to the land-holder to request for the grant. If the parties agree, a day and time for "showing" land will be fixed. Where the grant is for

a short period, e.g., one farming season, it may not be necessary for witnesses to be present if the land is held by an individual. If it is held by a group a few witnesses from the grantor-group must accompany the head to mark out the plot and testify to the grant.

In customary law the mere offer and acceptance of a grant does not create a landlord and tenant relationship. The grantee must have entered; before such entry he has only a hope of getting the land. If the grantor breaks his promise the grantee cannot specifically enforce the bargain unless he can show that he has done some specific acts.[20] (on the land) which are irrevocably unequivocally referable to the agreement. If, however, the grantee has made monetary payment in consideration for the grant, under modern conditions the grantor will be compelled to implement the agreement.

Where the grant was to be for a long time and the grantee was not "incorporated" into the group so as to give him full rights of membership, he was expected to produce evidence that he would be a desirable tenant. This evidence generally comes from a member of the group with whom he must have been living for sometime to enable his character to be assessed. In Benin, for example, prospective grantees of long-term tenancies must be "adopted" by a local family if they are individuals, or if a group by the Oba acting on behalf of the political community, before making the request for the grant.

20. Such as clearing the land for building or manuring it for farming.

By and large, it is the tenant who takes the initial steps to obtain the grant: he makes his request to the land-controlling authority or to the private holder, either directly (if his character is well-known) or through a middleman. If the land is held by a group, the head of the group informs all the eligible members about the request and asks them to attend a discussion on it. On the appointed day the prospective grantee comes with his sponsor bringing some gifts of kola nuts and/or palm wine. If there is a general agreement, the parties may all go at once to mark out the area to be granted. In some cases the task of demarcation may be left to the head and selected members of the group.

Where the tenancy was expected to last for a long time a formal procedure was often adopted. Thus, among the Yorubas, if during the preliminary discussion it was likely that a grant would be made, the prospective grantors, through their head, would ask their land-priest to offer sacrifices and consult the dead ancestors as to the advisability of the grant. In ancient times if he gave unfavourable advice, the negotiations would be called off at once.

If the grant was to be proceeded with, then a date is fixed for completing the transaction. On the appointed day the grantee comes with his own witnesses, bringing the customary gifts mentioned above. He would restate his request in the presence of everybody. The wine is poured into a cup and handed over to the head, who pours

libation, calling on the gods and the spirits of the dead ancestors to take notice of the agreement and reveal whether it would be in the best interests of all the parties to complete the transaction. Then a kola nut would be split by the head. He would take three of its cotyledons into his hand and throw them on the ground after reciting some prayers and incantations to the ancestors and the gods of the group. A cotyledon which fell with the inside uppermost was favourable; if the outside was uppermost, it was unfavourable. If, therefore, all the three pieces fell with the inside uppermost, it was an indication that the relation of the landlord and the tenant would be very satisfactory; if two pieces fell with the inside uppermost, the omen was good and the grant could be made. If, however, the first throw resulted in all the three pieces falling with the outside uppermost, this was a warning of the dangers ahead and the grantors might retract at once. Sometimes this omen might be taken to mean that the spirits of the ancestors have not yet sanctioned the transaction and the grantors would go again to consult the land-priest who could advise on what sacrifices to make. Where the first throw results in two to one against, a second throw is made, and if necessary, a third, in order to get a decision.

The procedure among the Ibos is not substantially different from that of the Yorubas, but in an Ibo gathering, if the kola nut, when broken, falls into two cotyledons only, this would be a bad omen

and the transaction may be halted. In some parts of Ibo land the kola nut is not eaten at all; in other parts it is eaten by very elderly people only; in some places too a kola nut with seven cotyledons is not propitious.[4]

Sometimes a kola-throwing ceremony may be used to cover up the fact that the grantors were unwilling to proceed with the transaction. If, for example, after giving a preliminary consent they discover that the grantee would be an undesirable tenant, or if the head himself was over-ruled by the members in his objection to the grant, an adroit throwing could always result in all the cotyledons falling with the outside uppermost - a piece of evidence that both the ancestors and the gods are against the grant and nobody was to blame for it.[5]

Where a grant would be made, after a successful kola-throwing ceremony and on the grantors having laid down the special terms of the grant, the parties and their witnesses move to the land to demarcate the portion to be granted. The head stands at one end of the plot, digs up a sod of earth and throws it towards the centre of the plot. He

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4. See A Primer of Ibo Etiquette, by the Nigeria Union of Teachers, London, Longmans & Co. (1949), p. 16.
5. A usual statement on such occasions, in Oba, (Ibo) is: "Ana bu Onye tota o libe; ayi ada-etufukwo ana unu kama ayi ng-enye nwanne ayi nke a ebe o ga-ano we di ndu" - The land is for every one to enjoy as he comes to manhood; we are not throwing away your land (speaking to the gods and the ancestors), but we are offering to this our brother, a place where he could stay and keep alive."

then plants a life-stick at the point from where he dug up the sod. Having done this he starts walking round the boundaries, marking them out by digging casually at intervals and repeating prayers to the gods as well as calling upon the dead to witness the grant. His supporters follow him round, planting life-sticks at the points where he digs and responding occasionally to the supplications which he makes to the gods. On completion of the demarcation, the grantor would tell the tenant formally that the land which they had just walked round was the one granted to him, bidding him use it well for the purpose of the grant. Both parties would then congratulate each other, expressing the hope that the grant would be to their mutual advantage.

In case of outright sale the procedure is different in many ways. Among the Yorubas, for example, after the preliminary negotiations, a meeting is arranged on the site in question. This meeting is attended by the representatives of the Oba, the Ogboni Society, and the community. The vendor and the purchaser as well as the holders of adjoining land are present. The vendor marks out the land. Kola-nuts, palm oil and cowrie shells are put into an earthenware pot, which is then covered and fixed firmly in the ground. One each of _peregrum_, _akoko_, _eterum_, and _alosam_ trees is planted near pot. _A sheep is killed_. The parties split the kola-nuts

and exchange the cotyledons mutually. The gods are invoked to bless the parties and keep the land productive. The killing of the sheep is a mark of outright sale. Among the Ibos a goat (or a dog in some places) is killed. If this is not done the presumption is that only a tenancy (or if substantial payment was made, a pledge) was granted. In all cases the transaction must take place before witnesses,[6] for native law always frowned upon secret dealings in land.

The customary procedure described above is rapidly undergoing modifications. In some places the sacrificial element has been abandoned entirely, leaving only the kola ceremony. In others, no religious element whatsoever is introduced: the parties recording their agreement in a document. Sometimes the document is prepared by a legal practitioner; at other times it is drawn up in the vernacular by any one with some knowledge of writing. On yet other occasions the religious ceremony is followed by the execution of the written instrument. Some of the documents are interesting not only because they exemplify the normal practice today but also because they raise problems of construction. The following are specimens of such documents: one apparently drawn up by a Solicitor and the other by a layman.

6. See Jibowu, Ag. F.J., in Cole v. Folami (1956) 1 F.N.L.R. 66. cf. Ollennu, J. in Yeboah v. Ise (1957) 3 W.A.L.R. 299. Sed qu. whether there must always be a formal transfer before witness: See Boakye v. Broni and Domfe (1958) 3 W.A.L.R.

(i) Customary Lease apparently prepared by a Solicitor.[7]

THIS DEED made .... day of .... 19 ....

BETWEEN .... for and on behalf of himself and ....
family of ....(hereinafter called the Landlord, which herein includes the successors in title of the Landlord, where the contract so admits) of the one part,

AND ....of .... for the time being resident in ......
(hereinafter called the Tenant, which term includes the heirs and successors of the Tenant where the context so admits) of the other part

WITNESSETH

1. That in consideration of the sum of .... paid by the Tenant to ...., the Landlord as Kola (The receipt of which sum the Landlord hereby acknowledges) the Landlord hereby transfers to the Tenant all that piece or parcel of land known as Plot ...... in Block ...... shown on the plan No. .... deposited in the office of the Commissioner of Lands which is more particularly delineated and shown surrounded by a border coloured .... on the plan endorsed on these presents to hold the same unto and to the use of the tenant for ever, but subject to the following terms and conditions:

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7. THis the model used in connection with grants by the Modebe Family in Onitsha, Eastern Nigeria: See Chubb, Ibo Land Tenure, Appendix III, p. 103.

2. The Tenant shall not assign the whole or any portion of the said piece or parcel of land without the consent of the Landlord, and for the said consent the landlord shall be entitled to receive, in the case of a vacant plot........ and in the case of a plot built upon .... of the current value of the said property.

3. The Tenant shall pay all existing and future taxes, rates, assessments and outgoings of every description to which the Landlord or the tenant in respect of the land is or shall hereinafter become liable.

IN WITNESS WHEREOF the parties thereto have hereunto set their hands or made their marks the day and year first above written.

Signed, sealed and delivered by the above named

....

in the presence of ....

Signed, sealed and delivered by the above named

....

In the presence of ....

(ii) Customary Lease prepared by a layman.

IN ACCORDANCE with the decision of the District Head in consultation with his Elders we have seen fit to grant strangers wishing to build

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8. This is the model used in connection with grants by the in Zana Province, Northern Nigeria. The original document was written in Hanoa: See Cole, Zana, par. 39.

house the loan of land, for the purposes of building only AT Kpak, near the Railway Station and the Hausa Quarter. The land is not given for farming purposes.

SINCE the land is loaned they (i.e. the Tenants) have no right to do anything on it but build. When they wish to leave they have no right to sell the buildings that they have built to whomsoever they deem fit, but only with the knowledge and agreement of the Village Head.

FURTHER the District Head can dismiss a man from land if he does not live in harmony with the people of the district or if the land is wanted for another purpose.

ACCORDINGLY whoever has been given a place to build on must sign his name in this book.

Date.	No.	PROMISE
	1.	I .... understand and agree.
	2.	I .... understand and agree.

It is to be noted that whereas the document drawn up by a professional man is merely taken from a specimen lease in English form, that drawn up by the layman is quite original in form and provides only for unilateral execution by the grantee. How far the Courts will interpret these two documents in the same way is a matter of conjecture. It is submitted, however, that the instrument drawn up by the layman is explicit enough to leave no doubt that a customary grant

was made. The same thing cannot be said of that drawn up by the Solicitor. In spite of the use of the term "tenant" the document as a whole shows that a sale was made. This is because the grant was '<u>for ever</u>', not merely for indefinite period, however long. The grantor has reserved no reversion, has imposed no restrictions as to use or determination of the grantee's rights. For this reason the restriction on alienation without consent is in conflict with the full rights granted and, therefore, null and void. The layman has achieved the intention of the parties and professional training has become a great disadvantage!

GRANT OF LEASES UNDER THE GENERAL LAW.

All the classes of persons capable of granting tenancies under customary law are able to create leases governed by the general law. Where a leasehold interest is being acquired by the Government under the Public Lands Acquisition Ordinance the necessity for consent of the land-holding group is dispensed with because it is expressly provided (by the legislature) that the recognised head of the group can convey such land, notwithstanding any native law or custom to the contrary.[9] Where a group, as a result of political unrest, dispenses with the rule of their chief, they may still appoint heads who can grant leases of the land

9. Public Lands Acquisition Ordinance, S.7.

held by the group. The heads so appointed must act reasonably in the best interests of the members and must agree on the essential terms of the lease.[10]

Apart from grantors under customary law being able to create leases, the class of persons (usually unknown in customary law) who can grant leases in general law include trustees for infants, committees of lunatics, trustees in bankruptcy, executors and administrators, mortgagors and mortgagees. Any leases which they create are governed by English law as on 1st January 1900,[11] except in the Western Region where legislation has virtually introduced the current English law in all grants within the exclusive competence of the Regional legislature.

What determines whether a lease is governed by the general law (rather than native law and custom) is the form in which the instrument creating it is drawn. If this instrument is in the traditional form used in English law the relationship of the parties will be regulated by the general law because although they did not expressly contract that their obligations should not be regulated by customary law, that kind of transaction is unknown to native law and custom within S.27 (3) of the High Court of Lagos Ordinance.[12]

Although the lease is generally in the English form Nigerian

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10. Chief Eyo Archibong & Ors. v. Etubom Ededem Archibong & Ors. (1947) 18 N.L.R., 117.
11. For which see Woodfall, 1898 edition, pp. 34-72.
12. See p. 48 , note 15

lawyers rarely do more than simply draw up the deed. They seldom investigate the title. This is due to the fact that conveyancing in the modern sense is only a recent innovation for transactions in land usually proceeded on customary lines. The position is unsatisfactory both for the legal adviser[13] and for his client but nothing short of a Domesday Book can provide an effective remedy.

Essentials of a good lease. The following conditions must be satisfied if a lease is to be valid in general law: 1. The lessor must have the legal capacity to grant the lease. 2. The lessee must have the legal capacity to take the lease. 3. There must be in existence some land which is the subject-matter of the lease. 4. The lease must be in the form required by law. 5. The duration of the term granted must be clearly stated. 6. There must be gathered from the document or act of the parties an intention to create the relationship of landlord and tenant.

All the persons who cannot grant tenancies under customary law lack the legal capacity to create leases governed by the general law. Thus although Chiefs and heads of corporate groups are usually designated as "trustees" they lack customary capacity to grant tenancies and cannot create leases without the consent of the group which they represent.

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13. See, e.g. Lawson v. Siffre & Lawani (1932) 11 N.L.R.113 where a lawyer was successfully sued for damages for wrongful but gratuitous advice.

They are, therefore, not trustees in the true sense of the word. In the Western Region an infant lacks the legal capacity to create or take a lease[14] but in the other parts of the Federation where the pre-1900 English law applies, this incapacity is limited. The common law rule, as modified by the Conveyancing Act, 1881, still applies. Therefore the lease made anywhere in Nigeria (except the Western Region) by an infant is not absolutely void but voidable on his majority.[15] Under S.41 of the Conveyancing Act, 1881,

> "Where a person in his own right seised or entitled to land for an estate in fee simple is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877".

This Act allowed any persons entitled to the rents and profits of any settled estate to demise the same or any part thereof[16] without any application to the Court. The term granted will not exceed 21 years but could be renewed from time to time. The lease must be made by deed, at the best rent that could reasonably be obtained and should not be made without impeachment for waste. It should contain a covenant for payment of rent and a condition for re-entry in case of non-payment of rent for a period of 28 days.[17] S.49 of the 1877 Act further empowered guardians to exercise rights of

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14. Property and Conveyancing Law, now Cap. 100 of 1959 ed., SS.3(6), 17 & 18.
15. Woodfall, op.cit., 1898 ed. p. 41, and the authorities cited therein.
16. Unless there was an express declaration to the contrary in the settlement.
17. Settled Estates Act, 1877, S.46.

leasing on behalf of infants, and S.42 of the Conveyancing Act, 1881, gave trustees acting for infants special powers of management including a power "to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrender of leases and tenancies, and generally to deal with the land in a proper and due course of management." This means that both the infant, his guardian or trustee (if any) respectively may grant leases of land anywhere in Nigeria, except the Western Region where the English Law of Prpperty Act, 1925, has been enacted.

By operation of S.4 of the Statute of Frauds, 1677, the agreement for any lease created in Nigeria must be in writing, however short the term granted.[18] The lease itself must be made by deed if the term created is more than three years.[19] By operation of SS.1 and 2 of the Statute of Frauds[20] any grant of tenancy not put into writing by the person creating it (or by his agent) will have the force of a tenancy at will; such tenancy may, however, be converted to a yearly tenancy.[1]

By the Regulations made under the Native Lands Acquisition Ordinance[2] the term granted to an alien should not exceed 99 years.

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18. Okoleji v. Okupe (1939) 15 N.L.R.28. In the Western Region where English statutes no longer apply this is expressly provided for in S.67 of the Property and Conveyancing Law, cap. 100 of 1959 ed.
19. Property and Conveyancing Law, S.77 (W.R.)
20. Replaced in England, with amendments, by S.54 of the L.P.A.; 1925, and in the Western Region by S.79 of the Property and Conveyancing Law.
1. cf. Doe d. Rigge v. Bell (1793) 5.T.R. 471.
2. Cap. 144 of 1948, now replaced in the W.R. by Cap. 80 of 1959 and in the E.R. by No.

Registration.

The instrument creating a lease must be registered. Registration is of three types, namely, (i) Registration of titles under the Registration of Titles Ordinance;[3] (ii) registration of instruments under the Land Registration Ordiance; and (iii) registration in a local deeds registry where one is established under the Local Government Law.

The Registration of Titles Ordinance empowers the Governor of the Eastern or Western Region, or the Governor-General (in respect of Lagos) to establish land registries for the registration of titles. So far the only registry created for this purpose exists in Lagos.[4] Under the Ordinance every grant of a lease for a term of not less than forty years and every assignment having not less than forty years to run shall be void unless registered within two months or such extended time as may be granted.[5] Dealings in registered land are permitted in the like manner and by like modes of assurance as if the land were not registered but any rights created shall be overridden by registered dispositions.[6]

The Ordinance provides for optional registration of leases for not less than five years;[7] but it expressly excludes from registration a lease for a term limited to take effect more than twenty-one years from the date

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3. No. 13 of 1935, now Cap. 181 of 1958.
4. See L.N. No. 155 of 1956, page 2107 of Vol. X of Laws of Nigeria, 1958.
5. SS 5,14: The Registrar cannot grant extension of time for more than two months but the Court can.
6. S.42 (1)
7. S.6 (b)

of the instrument purporting to create it.[8] A survey plan of the land leased must be attached to the instrument sent for registration.[9] Titles registered under this Ordinance are excluded from the operation of Land Registration Ordinance,[10] but before the instrument is accepted for registration it must be properly stamped.[11] The Registrar decides on whether or not an instrument should be registered but an appeal lies to the Court.[12]

The effect of registration of any person as an owner of a lease is to

> "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 express rights, privileges, and appurtenances attached to the estate of the lessee, and free from all estates whatsoever, including those of her Majesty."[13]

The registered owner, however, is subject to registered incumbrances and other unregistered interests declared by the Ordinance,[14] including leases or agreements for leases for a term less than five years where there is actual occupation under the lease or agreement.[15]

The result is that in those parts of Lagos where registration is compulsory,[16] compliance with the Ordinance provides the lessee with

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8. S.15.
9. S.65.
10. S.86
11. S.93.
12. S.98.
13. S.48 (1)(b)
14. S.48 (2)
15. S.52 (e)
16. The small part of Lagos where registration is compulsory is shown in pages 2107-2128 of Vol. X of the Laws of Nigeria, 1958.

a state-guaranteed title but if registration is not effected the legal title will remain in the lessor who, consequently, becomes a trustee of the lease in favour of the grantee/beneficiary.

In those parts of Lagos where registration of titles is not compulsory and throughout the rest of the country an instrument creating a lease must be registered under the Land Registration Ordinance[17]. If one of the parties to the lease is an illiterate it must be executed in the presence of a magistrate or justice of peace who must subscribe thereto before it can be registered.[18] The Ordinance does not say what would happen if this section is not complied with but the document is nevertheless registered. It is submitted that the registration will remain valid until it is set aside by the person attacking it. An alien must have the consent of the Governor[19] endorsed on his lease before it could be registered but as the lease is void without such consent registration alone cannot give the alien any rights. It is provided that leases for a term not exceeding three years shall not be registered under the Ordinance[20] but the benefit of this cannot be taken by an alien unless the lease

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17. Np. 36 of 1924, now Cap. 99 of 1958, S. 7. But registration in a local authority register may be enough.
18. S.7.
19. He must be approved of as a person and the instrument must be approved. Nahman v. Odutola (1953) 14, W.A.C.A. 381.
20. Regulation 3(a) made under SS 32 & 34 of the Ordinance, Vol.VIII of 1958, ed. p.1192.

(for however short the period) was made with the requisite consent.

Where a local deeds registry has been opened by a local authority[1] all leases of land within the jurisdiction of the local authority may be recorded in accordance with the bye-laws made by that authority and if so recorded the instrument is exempted from the provisions of the Land Registration Ordinance.[2]

If registration is not effected either under the Lands Registration Ordinance or in a local deeds registry the lease if made to a native, is not void but the document cannot be admitted in evidence. This means that the lessee acquires valid rights from the moment of the grant and if registration is effect _ex post facto_ or if he is able to prove the grant without reference to the document he acquires indefeasible leasehold title. In this way the affect of the Registration of Titles Ordinance is quite different from that of the Land Registration Ordinance.

Other Requisites of a Good Lease.

In addition to the above requirements a lease executed by an illiterate must comply with the requirements of the Illiterates Protection Ordinance[3] and if it does not the writer of the document

1. As in Western Aloada, Igb - Etiti, and Izi, p. 19. _supra_, notes 5, 6, and 7.
2. Regulations 29 of 1924, 31 of 1927, 8 of 1947, as amended. Vol.VIII of _Laws of Nigeria_, 1958, pp.1192-1195.
3. Cap; 83 of 1958.

cannot enforce any rights he has acquired thereunder.[4] Compliance, however, need not be simultaneous with the execution of the lease,[5] but the fact that a person is literate in one language does not excuse the requirements of the Ordinance if the party to a document cannot understand the language in which it is written. Further, it would appear that execution before a magistrate as required by the Land Registration Ordinance does not excuse non-compliance with the illiterates Protection Ordinance.

Although a lessee who is not expressly prohibited may sublet or assign the demised premises he cannot do so if the property leased was Crown Land, unless, of course, he has obtained the previous consent of the Governor in writing. The consent is a condition precedent to a valid sublease; therefore, if at the time when the parties enter into the agreement to sublet the Governor's consent has not been obtained, there is an absolute absence of the estate which the sub-lessor purports to create and neither he nor the sub-lessee can sue for specific performance of the agreement.[6]

The Minerals Ordinance[7] vests the control of and the property

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4. S.C.O.A., Zania v. A.D. Okon (1960) N.N.L.R. 34.
5. Paterson Zochonis & Co. Ltd. v. Malam Momo Gusau & Anor. (1961) N.N.L.R.1. where Bate, J. held that the Ordinance did not prohibit ex post facto compliance.
6. Per Coussey, J.A., in Chidiak v. Coker (1954) W.A.C.A. 506.
7. Cap. 121 of 1958.

in minerals, mineral oils and all waters in the Crown.[8] No person can conduct any mining operations unless he holds a licence from the Chief Inspector of Mines authorising him to do so.[9] Similarly, only the Governor-General may grant licences to search for and work mineral oils and he alone can grant leases under the Mineral Oils Ordinance[10] which provides that

> "no lease or licence shall be granted except to a British subject or to a British subject or to a British company registered in Great Britain or in a British colony, and having its principal place of business within Her Majesty's dominions, the chairman and the managing director (if any) and the majority of the other directors of which are British subjects."[11]

This means that unless the law is changed any lease or licence to work mineral oils granted to a person or company outside the Commonwealth or the Colonies is illegal and the lessee acquires no rights whatsoever.

Only the Governor-General may grant exclusive rights over rivers, streams and water-courses; in the absence of any grant the use of tidal and navigable rivers for ordinary purposes, including fishing, is common to all the inhabitants of Nigeria. The right to fish in the rivers includes the right to establish temporary occupation on the river banks without the holders of the land actually granting any leases of the bank.[12] Where, therefore, a community claims exclusive

8. Ibid. S.3.
9. Ibid. S.4.
10. Now Cap. 120. The Revised Laws of the Fed. 1958.
11. Ibid. S.6(1)
12. Chief Braide v. Chief Adoki (1930) 10 N.L.R. 15, Full Ct.

rights to a fishing pond, evidence must be adduced to show whether the streams involved were part of tidal waters (in which case rights of piscary are not exclusive) or non-tidal.[13] It has not been decided whether exclusive rights of piscary exist in non-tidal waters but it is submitted that as no individuals or groups of individuals have any private rights over streams, rivers, streams or watercourses, it is immaterial whether the stream is tidal or not and, accordingly, the principle of Braide v. Adoki will apply to all waters flowing in natural courses.

The validity of any lease which contravenes the provisions of any enactment depends on the intention of the enactment, A lease whose purpose is to carry out an object which is illegal is void and the Court will not enforce it whether the illegality is pleaded or not.[14] If the lease is not ex facie illegal, the Court will not admit evidence of extraneous circumstances tending to show that it has an illegal object unless the circumstances relied upon are expressly pleaded. Thus, where a man obtained a lease of premises in his trade name which he omitted to register under the Registration of Business Names Ordinance,[15] Kingdorn, C.J., held that the lessor would not be allowed to take advantage of this omission to repudiate an otherwise perfectly good lease.[16]

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13. Chief Bassey v. Chief Ekanem (1953) 14 W.A.C.A., 364.
14. Esi v. Moruku (1940) 15 N.L.R. 116, criticised elsewhere on other grounds.
15. No. 5 of 1926, now Cap. 179 of 1958.
16. Victor Savage v. Alexander Sarrough (1937) 13 N.L.R. 141.

Under customary law a man's son cannot ordinarily grant a tenancy of the land held by the father as long as the father is alive. Where, however, the grant is governed by the general law it may be construed that the landholder has, by holding out his son (or any other person) as his agent, made the tenancy himself, or at least validated it.[17]

Application of Equitable Principles.

The principles of native law and of English common law relating to the grant of tenancies and leases are subject to the rules of equity because, as already exp;ained, the High Court Laws of all Regions provide that law and equity should be concurrently administered[18] and that customary law will be applicable only in so far as it is "not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force."[19] It is also provided that in case of conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail. The Court is empowered to apply law and equity "in the same manner as they are administered by Her Majesty's High Court of Justice in England."[20] This means that (i) where a valid contract

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17. Jead v. Cole (1939) 5 W.A.C.A. 92.
18. See p. 44a, note 7 , supra.
19. p. 44 , ~~note~~ , supra.
20. p. 44a , note 7 , supra.

exists an action for specific performance may be maintained against the party in default; (ii) where the contract has been partly performed, the Court may, in its equitable jurisdiction, make a decree of specific performance at the instance of him who had done the act of part performance even if there is no memorandum in writing to satisfy S.4 of the Stature of Frauds.

Therefore, where a land-holder has signed a contract for a lease and accepted some payment in respect of the lease but later refused to complete the Conveyance a decree of specific performance will be made against him.[1] Again, where a lessee is in possession of the premises by force of an agreement not under seal and the lessor sought to recover possession on ground that the agreement was, consequently, void, Kingdon, C.J. held that in equity though the lease was not under seal, it must be deemed to have been effectively granted and, therefore, for practical purposes, the parties were in the same position as if the lease were valid at law.[2] The equitable principles apply equally to incompletely executed leases. As Coussey, J, said recently,

> "Since the Jùdicature Act, 1873, the lessee may be liable upon an implied tenancy on the like terms and conditions as those expressed in the lease, if the incompletely executed lease is capable of operating as an agreement for a lease which could

1. cf. Hunmuani Ajoke v. Amasa Yesufu Oba & Anor. (1958) W.N.L.R.208, Ajuwon v. Salawu (1958) W.N.L.R. 134, both cases of sale but on the same principle.
2. Victor Savage v. Alexander Sarrough (1937) 13 N.L.R. 141.

> be specifically enforced, and the tenant who had entered thereunder would be bound in equity by the covenant to repair."[3]

In Nigeria, as in England, the reasons for application of the equitable principle of specific performance are that (i) when one contracting party has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of the land or expending money and labour or by doing other similar acts, there would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, or expend his money.[4] (ii) to permit a person to change his position or incur risk and expense under a contract and then allege that the contract does not exist, would be contrary to conscience.[5] (iii) a man in occupation of land, or doing some acts with regard to it would, prima facie, make himself liable at law to an action of trespass; therefore the Court would hold that there was strong evidence from the nature of the land that possession was obtained under a valid existing contract.[6] As Lord Selborne observed,

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3. Chidiak v. Coke, (1954) 14 1 N.A.C.A. 506, at p. 508, citing with approval Walsh v. Lonsdale (1882) 21 Ch. 11. 9.
4. cf. Lord Cranworth in Caton v. Caton (1867) L.R.1 Ch. 137 at p.148.
5. cf. Cotton L.J. in Britain v. Rossiter (1879)11 Q.B.D. 123, at p.130.
6. cf. Romer, J. in Rawlinson v. Ames (1925) 1 Ch. 96 at p.110-111.

> "the defendant is really 'changed' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself."[7]

The principle is founded on a doctrine closely analoguous to estoppel which operates so as to prevent a tenant from disputing his landlord's title.[8]

Specific performance, like every other equitable decree, is a discretionary remedy; where it cannot be ordered[9], the court may

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7. Maddison v. Alderson (1883) 8 App. Cas. 467, pp. 475, 478, 479.

8. Abudu Agboneji v. G.B.Ollivant Ltd. (1942) 6 W.A.C.A. 96.

9. Specific performance may be refused on any of the following grounds:

    (1) Uncertainty in the agreement.
    (2) Non-performance of a condition.
    (3) Defect in title of the lessor.
    (4) Great hardship on either of the parties, e.g., possibility of forfeiture by the intending lessor granting the lease.
    (5) Breach of trust.
    (6) Insolvency of the prospective lessee.
    (7) Misrepresentation or fraud of either party.
    (8) Mistake of fact, but not mere misunderstanding.
    (9) Illegality of the agreement.
    (10) Delay: Rafat v. Ellis (1954) 14 W.A.C.A. 430; Tella v. Akere & Ors. (1958) W.N.L.R. 26.
    (11) Implied rescission of the agreement.
    (12) Uselessness of the decree, e.g. where the term has expired, or is too short, or where the Court would be involved in supervision, or where the intending lessee has broken a covenant, cf. Taylor v. Arthur (1947) 12 W.A.C.A. 179; Tella v. Akere, supra.
    (13) Where the relief was not specially pleaded. Tella v. Akere, supra.

award damages instead[10] if the circumstances would have warranted making of the decree. Thus, where two letters constituted a complete agreement for a lease for a term of 99 years, Bairamian, J. (as he then was) decided that the fact that the parties contemplated executing a formal deed of lease did not affect the finality of the agreement; as the intending lessee broke the contract he was liable to pay damages for the breach.[11]

It is difficult to lay down a single principle of construing contracts of tenancy prohibited by statutes: each particular statutory prohibition must be considered separately in the light of all the relevant facts and the surrounding circumstances.[12] On this principle, it is submitted that an alien cannot obtain a decree of specific performance of a tenancy agreement in Nigeria, unless he can satisfy the Court that the provisions of the Acquisition of Land by Aliens Law [13] have been complied with. This enactment, as mentioned before, lays down that an alien cannot acquire interest in land without the approval of the Minister.[14] His occupation of land without such approval is an unlawful act[15] punishable by fine or

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10. cf. J. Jojo v. Cole & Anor. (1939) 5 W.A.C.A. 99.
11. Arbuckle, Smith & Co. Ltd. v. A - G. (1952) 20 N.L.R. 68.
12. cf. Devlin J. (as he then was) in St. John Shipping Comp. v. Joseph Rank, Ltd. (1957) 3 A.E.R. 683 at p.690.
13. No. 11 of 1958, E.R. cf. Native Lands Acquisition Law, No. 4 of 1952, W.R.
14. Ibid. S.4. E.R; S.3, W.R.
15. S.5, E.R; S.4 (1) W.R.

imprisonment.[16] Any transaction by which he purports to acquire any rights or interests over land is null and void unless approved under the Law.[17]

A problem of practical importance might arise in this way: suppose an alien (it is immaterial whether a firm or an individual) purports to take a lease from a Nigerian to whom he pays a substantial consideration and is then ejected[18] from the land which he has entered upon under a contract which has not been completed; the land is handed back to the Nigerian lessor, can the alien bring an action to recover the sum paid to the lessor? It is submitted that he cannot. This is so because the statute is directed to both the protection of the public and to the fulfilment of some object of general policy. A contact is not only unenforceable when it is expressly prohibited by some enactment but, as Atkin L.J. said,

> "It is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner.[19]

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16. S. 6 E.R; S.4 (2) W.R.
17. S. 4 (3) E.R.; S.3(3) W.R.
18. The Law empowers the A-G (E.R.) or Commissioner of Lands (W.R.) to institute ejection proceedings against the alien.
19. Anderson, Ltd. v. Daniel (1924) 1 K.B. 138, pp.149-50.

This same argument would apply too, where a non-native, whether a Nigerian or an alien, purports to acquire a leasehold interest in Northern Nigeria without complying with the provisions of the Land Tenure Law. There is no express requirement that the consent of the Minister must be given <u>before</u> the transaction is entered into; indeed the provisions of the enactment imply that the parties must have agreed on the terms of the conveyance. This means that an alien who has made a binding contract of tenancy with a native can sue or be sued for specific performance once he obtains the Ministerial approval.

Both the Crown Lands Ordinance and the Land Tenure Law prohibit any sub-letting or assignment of a leasehold interest to which they apply unless the necessary consent has been obtained. Therefore where there is such a contract of sub-letting or of assignment none of the parties can bring an action for specific performance (unless they can prove that the consent has been obtained). This is because giving or withholding consent is in the absolute discretion of the Governor or the Minister and if the Court made a decree of specific performance it would be nugatory.

Where, however, the conditions for a decree of specific performance exist, it will not be refused merely because the land is

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not situate within the jurisdiction of the Court. Thus in the British Bata Shoe Co. Ltd. v Melikan,[20] the plaintiff brought an action in Lagos for specific performance of a contract for assignment of one half of the defendant's leasehold property at Aba, Eastern Nigeria. At the time the action was filed in December, 1954, there was only one superior Court for the whole of Nigeria. This was known as the Supreme Court. At the time of the trial of the action in 1956 the Supreme Court of Nigeria had ceased to exist and was replaced by five independent High Courts, each exercising jurisdiction within its own territorial limits. The two parties to the action were residing in Lagos. At the trial Counsel for the Respondent submitted that the action should have been taken at Aba; where the land in dispute was situated, in accordance with the provisions of Order VII Rule 1 of the Supreme Court (Civil Procedure) Rules.[1] The plaintiff's Counsel, on the other hand, urged that the action could be commenced and determined in the Court of Lagos, being the place where the parties reside, in accordance with Order VII Rule 3. At the Court of first instance Abbott, J., struck out the case on the ground that the High Court of Lagos had no jurisdiction. On appeal, the Federal Supreme Court held, *inter alia*, that the High Court of Lagos could try the case because the parties resided within

20. (1956) 1 F.N.L.R. 100.

1. No. S.5 of 1945 and 3 of 1947: *Laws of Nigeria* 1948 Vol. X, p.18.

its jurisdiction. This jurisdiction was (subject to the provision of S.9 of the High Court of Lagos Ordinance, 1955), similar to the jurisdiction of the High Court of Justice in England, which, in actions for specific performance of a contract relating to land outside its jurisdiction, could, on equitable principles, enforce the contract over persons residing within its jurisdiction. In reaching this decision Jibowu, Ag. F.C.J., (to whose judgment Hubbard, Ag. F.J. concurred) and de Lestang, F.J., applied the principle laid down by English authorities ranging from Penn v. Baltimore[2] in 1750 to Deschamps v. Miller[3] in 1908.

The above analysis leads to two conclusions: first, in exercising equitable jurisdiction the Nigerian Courts act exactly on the same principles as the English Courts. This is true, of course, only in cases governed by the general law, for where the relationship of the landlord and the tenant is regulated by customary law, what the Court really does is enforcing the valid customary transaction which the parties made and which does not require the invoking of any equitable principle of specific performance based on part performance. Secondly, in refusing to allow the Statute of Frauds to be used as an instrument of fraud, the Court, however, will not tolerate equitable principles being relied upon as a weapon for evading any enactment which aims at protecting the public generally: nor would it grant any rights where the legislature expressly lays down that the whole transaction is a nullity.

2. (1750) 1 Ves. Sen. 444.
3. (1908) 1 Ch. 856.

CHAPTER 5. THE SCOPE OF THE GRANT.

If a valid tenancy has been created, it is important for the landlord and the tenant to understand what has actually passed under the transaction. The scope of the grant depends on whether the relation of the parties is regulated by the customary rules or by the general law, but whichever system applies, the intention of the parties must be ascertained in order to determine what was granted.[1] In discovering this intention the words used as well as extrinsic facts explanatory of the subject and of the rights of the parties, will be considered. As Norton says,

> "the question to be answered is 'What is the meaning of what the parties have said?" not, 'What did the parties mean to say?" The latter question is one which the law does not permit to be asked; it being a presumption *juris et de jure*, to rebut which no evidence is allowed that the parties intended to say that which they have said."[2]

This is a useful guide but perhaps customary law has regard to *what the parties really intended* and does not adopt the extrinsic approach of English law. As customary principles should be applied in determining the scope of a grant made under native law and custom, it will be obvious that the contract of the parties may vary according to the system of law applicable to the grant.

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1. cf. 51 C.J.S., 288.
2. *Norton on Deeds*, 2nd. ed. 19, p.50.

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Under both the customary and the general law the landlord gives to the tenant possession and use of the land granted. What land means will now be considered.

The Meaning of Land: In English law the word 'land' when used in a lease (if there is nothing to restrict its meaning) includes the soil and everything on or under the soil: all buildings erected on the soil, and, subject to the common law rights of the Crown to all gold and silver occurring in any mines,[3] all mines and minerals pass when a lease of land is made.[4] As Coke said long ago, land

> "comprehends any ground, soil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marshes, furzes, and heath.... It legally includes all castles, houses, and other buildings: for castles, houses, etc. consist upon two things, viz., land or ground, as the foundation or structure thereof, so that in passing the land or ground the structure or building thereupon passes therewith."[5]

Besides an indefinite extent upwards,[6] land, as construed in English law, extends downwards to the centre of the earth: hence the maxim cujus est solum ejus est usque ad caelum et ad inferos.

The English legal meaning does not fit the meaning of land either under the customary or under the general law of Nigeria. In

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3. Meggary and Wade, op. cit., p. 74.

4. Hill and Redman, op. cit., p. 123. This statement is now subject to the Coal Industry Nationalisation Act, 1946, and the Petroleum Productions Act, 1934.

5. Co. Litt. 4a. This definition is satisfactory in flat-earth times!

6. This is subject to the Air Navigation Act.

In customary law relating to tenancy the word 'land' means the soil, and the soil alone. When a landlord grants a piece of land to a tenant, what he does, and what customary law implies that he has done, is that he has parted (for the time being) with the possession and use of the <u>soil</u> within the area granted. Even if the transaction has been reduced to writing, the grant, without express words to the contrary or implied by custom,[7] passes to the grantee the mere right to occupy and use the ground according to the purpose for which the transaction was entered into. Special rules govern economic trees, minerals and/or any buildings on the land.[8] Unless expressly included in the grant, buildings and economic trees are excluded.[9] A man "may let his land, but he does not thereby let his trees."[10] On the other hand, a land-holder may grant a customary licence to another to reap the fruit trees growing on his land quite independently of any right to possess and use the land. If the above principles are borne in mind it will not be difficult to understand the principle on which the case of <u>Chief Etim & Ors. v. Chief Eke & Ors.</u>[11] should have been decided. The facts were as follows: the plaintiffs and their predecessors were customary tenants of the first defendants

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7. For easements implied by custom, see below.

8. <u>Meek, Land Law and Custom in the Colonies,</u> 19, p. 27.

9. <u>Yesufu Kugbuyi v. Odunjo</u> (1926) 7 N.L.R. 51.

10. Meek, note 2 above, p. 28. See also p.175. Cf. Ajisafe, op. cit. p.11. Johnson, <u>History of the Yoruba,</u> p. , Green: (1952) J.A.A., Oct. Supplement, p. 25.

11. (1941) 16 N.L.R. 43.

and their predecessors in respect of some land in Akpatenyo district of the Calabar Province, Eastern Nigeria. Later the tenants denied their landlord's title; litigation for forfeiture was instituted but reconciliation was eventually effected the plaintiffs continuing in occupation and use of the land as before.

Subsequently the first defendants, without any permission of the plaintiffs, granted to the second defendant who was a stranger to the locality, the right to cut palm-nuts on the land. The second defendant entered upon the land, cut palm-nuts and did other acts which interfered with the plaintiff's occupation and use of the land; they also removed a quantity of palm-nuts which the plaintiffs had cut. In the various suits started in the Native Court and which were later consolidated and transferred to the High Court the claims were, inter alia, for

(1) A declaration that the plaintiffs, as tenants by native law and custom, were entitled to continue to occupy the land and to cut palm-nuts together with the first defendants without interference;

(2) An injunction to restrain the first defendants and their agents from interfering with the plaintiff's rights.

(3) An order for an account by the first defendants of money

received from strangers as rent or payment for the right to cut palm-nuts, and payment to the plaintiffs of half the amount so received.

Martindale, J., held that on the facts of the case the first defendants conveyed full rights over the land to the plaintiffs, and accordingly, the plaintiffs were entitled to the declaration and to the order for an account by the first defendants, as claimed, and for a half share of the amount so received. In the course of his judgment the learned judge said,

> "It being a finding of fact that the first defendants could not at any material time and cannot lawfully convey any rights whatsoever in respect of the land to the second defendant, and palm-nuts savouring of the realty, without the prior knowledge and concurrence of their tenants by native law and custom, and the plaintiffs having condoned by the proffer of gifts other than those annually given and those gifts having been accepted by the first defendants and it being a further finding of fact as is evidenced by long user by which the plaintiffs are entitled to share in common with the first defendants, the claim of the second defendant against the plaintiffs for damages and injunction fail whilst the plaintiffs' counterclaim succeeds against the seconddefendant."[12]

With great respect, this "finding of fact" is mixed with an important principle of law. There is no doubt that a grantor in customary law may expressly grant possession and use of land together with rights over economic trees. If that was the nature

12. (1941) 16 N.L.R. at pp.51-2.

of the grant here the learned judge did not say so: he merely implied it from the fact that the landlords conveyed full rights over the land to the tenants, but it is not native law and custom, as Martindale J incorrectly asserts, that palm-nuts or any economic trees savour of realty.

The grant of land, without expressly including what grows on it, does not pass to the grantee the right over the fruit trees. It is only the occupation and use of the soil that is granted thereby in native law and custom. On this question of law, it is respectfully submitted that the decision was wrong. The learned judge concluded,

> "As a mere obiter dictum and without reference to this suit which is decided on other grounds, the view is held that severance of tenants farming rights and the rights to cut palm nuts over the same land is to be deprecated as being conducive to friction between the farmers and the palm nut cutters and to the wholesale destruction of palm trees and to the uneconomical working of the land. It is of interest that Tew, J. in Yesufu Kugbuyi v. Odunjo[13] held that only natives of the soil could reap palm fruits. That decision was, however, limited to that case."[14]

With respect, the reasoning in this dictum is a non sequitur. In many situations in life, including the relationship of landlord and tenant, there exist competing interests which are conducive to friction but they would not by themselves lead to the legal position being deprecated. Further, where a tenant or a licensee abuses the rights conferred upon him the person injured has his legal remedy.

It should not be concluded, however, that the learned Judge

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13. (1926) 7 N.L.R. 51.

14. At p.52.

did not do justice in the case: the Report shows that in the previous suits between the same parties, Webber, J. had made an order by consent of both parties on 3rd April, 1923 that

> "The plaintiffs are permitted to continue farming on the land, to reap the products of all trees planted by them and if any buildings exist on the land to occupy the same and to make all repairs to such building or buildings."

This order was in accordance with customary law. The plaintiffs - and any grantees of land - were always entitled to reap the fruits trees which they planted: the grantors have no rights over such trees even after the relation of landlord and tenant has determined. The first defendants in this case were in breach of customary law by granting to the second defendants the right to cut palm trees on the land regardless of who planted them. The plaintiffs were, accordingly, entitled to judgment because of invasion of their property rights by both defendants. They acted judiciously by confirming their claim against the first defendants to half the consideration received from the palm cutter; this half must have been the value of the yield from the palm trees planted by them. If grant of tenancy automatically included fruit trees the plaintiffs would have claimed all the consideration received by the grantors. The special facts of this case do not alter the customary principle that grant of tenancy passes to the grantee nothing more than the right to occupy and use the soil. As Martindale, J. himself correctly observed,

> "it is now settled law that once land is granted to a tenant in accordance with native law and custom, whatever the consideration, full rights of possession are conveyed to the grantee."[15]

The "full rights of possession" exclude enjoyment of economic trees not planted by the grantee.

The meaning of "land" under the general law of Nigeria is not exactly the same as in English law. For example, the Interpretation Ordinance states that

> "Immovable property or "lands" includes land and everything attached to the earth or permanently fastened to anything which is attached to the earth, and all chattels real, but does not include minerals."[16]

This meaning is more restricted than in English law where, as already shown, a lease passes to the lessee all minerals contained in the land (subject to the qualifications already explained) unless a contrary intention is expressed in the deed. The definition implies that 'land' means earth or soil as in the native law as well as fixtures attached to the soil - contrary to the native law. The exclusion of minerals is understandable because they are vested in the Crown. This does not mean that a lease of Crown land automatically passes to the grantee the right to exploit the minerals. To acquire such rights the instrument must expressly empower the grantee.

In the Western Region the Property and Conveyancing Law[17] states that

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15. At p.50.
16. Cap. 89 of 1958, S.3.
17. Cap. 100 of 1959.

> "land includes land of any tenure, buildings or parts of buildings (whether the division is horizontal, vertical, or made in any other way, and other corporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land."[18]

This definition is a modification of the English Law of Property Act, 1925, S.205 (1) (ix) and the words used in the Law should bear the same meaning as in that Act.[19] The definition is silent about minerals but it is arguable that it is not exhaustive and, therefore, that on the traditional theory of construction minerals are included. This doubt is removed by the Interpretation Law of the Region which, like the Federal Interpretation Ordinance, expressly excludes minerals from the definition of land.

It has been shown above[20] that the Conveyancing Act, 1881, is a statute of general application in Nigeria. This means that leases made in Nigeria (under the general law) are subject to the provisions of the Act if and so far as a contrary intention is not expressed in the lease.[1] The Act provided as follows:

> "S.6(1). A conveyance[2] of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

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18. S.2.
19. For which see, Hood & Challis, Property Acts, 8th ed. 1938, p.333-4.
20. See p.52 , above.
1. C.A., 1881, S.6(4).
2. A conveyance under the Act includes a lease, but not an agreement for a lease: Borman v. Griffith (1930) 1 Ch. 49.

This provision of the Act which was re-enacted by S.62(1) of the L.P.A., 1925, conflicts in one respect with the Nigerian Ordinance for under the Act waters are deemed to pass to the lessee but under the Minerals Ordinance the property in and rights over water courses are vested in the Crown. Therefore the Conveyancing Act is, to the extent of this conflict, inapplicable to Nigeria. This means that a lessee cannot acquire rights over waters and watercourses in spite of the application of the Act. It is significant that the Property and Conveyancing Law of the Western Region, enacting the provisions of S.6(1) of the C.A., omitted "waters and watercourses".

DESCRIPTION OF THE LAND.

Some of the most disturbing litigation concerning land in Nigeria arises as a result of disputes over boundaries. It is, therefore, of great importance that the area granted to a tenant should be accurately described.

In leases governed by the English law or by the general law the part of the instrument known as the "parcels" gives a description of the land demised. The description is usually by reference to an annexed plan but this is not essential if accurate verbal description can be given. In practice tracts of land are given specific names and the description of the area granted is often by reference to the name; yet no grant could be said to be complete unless the grantor or his representative indicated the boundaries which may be

marked by "Cairns, mounds, or ridges of earth, some species of trees or grass, or by streams or other natural features."[3]

When a dispute arises over boundaries in customary law it is resolved by the evidence of witnesses to the transaction. Where the evidence is inconclusive the disputed portion may be divided into equal parts and fresh boundary trees planted.[4] If the grant is governed by the general law, English principles of interpretation[5] are applied if the dispute is between individuals or families. To ascertain the area within the grant the precise boundaries must be given by an accurate plan if action is instituted.[6] If the dispute is between two communities, the question relating to boundaries will not be dealt with by the Courts but by an administrative officer under the Inter-Tribal Boundaries Settlement Ordinance,[7] in an executive capacity.[8] As enacted in the Western Region, the Law provides that a Divisional Adviser may, with the approval of the Permanent Secretary, Ministry of Local Government, inquire into and decide any boundary disputes between two or more tribes, sub-tribe, clan, administrative unit or other similar community and the inhabitants of a village.[9] He may be assisted by an assessor or assessors but no legal practitioner may appear.[10]

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3. Meek, Land Tenure, p. 153.
4. per Chief Bassey Duke Ephraim, in W.A.L.C. Minutes of Evidence, Friday, 6th June, 1913, para. 12,575.
5. For which see Norton on Deeds, 2nd. ed. 1928, pp. 229ff.
6. Amata v. Modekwe (1954) 14 W.A.C.A. 508.
   Chief Akpan Ekpo & Ors. v. Assibony Ebon & Ors. (1942) 16 N.L.R.112.
7. No. 49 of 1933, Cap. 85 of 1948, W.R., Inter-Tribal Boundaries Settlement Law, Cap. 52 of 1959.
8. Ovat Ebenyam & Ors. v. Chief Ayigo & Ors. (1941) 16 N.L.R. 30.
9. W.R. SS 3 & 4; Cap. 95 of 1948, S.3 & 4;
10. W.R. S.5; Cap. 95 of 1948, S.5.

A decision of the executive officer fixing a disputed boundary will operate as an estopel per rem judicatam in so far as it determines that the land outside the boundary was not included in the grant. In Anjoku v. Nnamani[12] the issues before the Supreme Court were:

"(1) Does a boundary so demarcated (under the Ordinance) settle or determine the question of ownership on both sides of that boundary?

(2) Does such a boundary affect the private rights on interests in lands affected thereby and acquired by individuals by virtue of their belonging to the respective tribes which were parties to the inquiry?

(3) Can a decision in such inquiry constitute res judicata in a subsequent action for a declaration of title and injunction by a party to lands on the other side of the boundary?"

To the questions the trial Judge replied as follows:

"(1) No, but the decision does decide non-ownership.

(2) Yes, to the extent that if, for example, individuals in a tribe on the West of the boundary claim ownership to land on the East, this claim would be invalid.

(3) In effect, once a boundary has been demarcated under the Ordinance that boundary is res judicata to the extent that

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(12) (1953) 14 W.A.C.A., 357. Followed in Nwabia & Ors. v. Adiri & Ors. (1958) 3 F.N.L.R. 112 where it was further held that there is nothing in the Ordinance to show that registration of any decision or order given on an enquiry is a condition of the validity thereof.

the boundary will not again be decided by the Court and title to land on either side of the boundary may not be decided as between the parties themselves."

On appeal, the W.A.C.A. upheld the decision; Verity, C.J. concluded,

> "It is difficult for me to conceive that the legislature intended to set up elaborate machinery for the settlement of such disputes if either party thereo, after availing themselves of all means open to them under the Ordinance to secure a decision, were to be at liberty then to have recourse to the Courts in the hope of securing a judicial decision at variance with that solemnly recorded and registered by statutory authority."[13]

The result is somewhat anomalous for by deciding non-ownership the administrative authority may be deciding the substantive legal dispute between the parties.

If a dispute within the Ordinance relates to boundaries as well as to other issues concerning the landlord and the tenant community, the officer must deal only with the question of boundaries; all other issues will be dealt with by the Court, where legal representation is permitted. If the officer purports to deal with those issues, his decision to that extent will be <u>ultra vives</u> and void.[14] Similarly, if the officer, instead of settling the boundary, rules that no dispute exists and that the parties shall continue to occupy and use the land in common, such ruling will be declared <u>ultra vives</u> on appeal

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13. (1953) 14 W.A.C.A. 357 at p.359

14. <u>Chief Oja & Ors. v. Chief Ukpoi</u> & ors. infra.

to the High Court.[15] For the officer's ruling to be binding, it must be a decision, not merely recommendations or proposals.[16]

If the land granted abutted on a highway and the relationship of the parties is regulated by the general law, it will be presumed[17] that the lease passed the adjourning half of the highway to the lessee notwithstanding that there is specific or scheduled measurement of the land on a map attached to the lease.[18] On the other hand, if customary law governs the grant, it will not be presumed that half of the highway also passed to the tenant. Only what was expressly granted to the tenant passed and if it was intended to cover any land not within the boundaries marked out, this portion must be expressly included.

EASEMENTS.

In Nigeria customary land-holding is usually looked upon as the exercise of concurrent rights in or over the land by individuals, families, or the community generally. Thus, although a private land-holder may farm the land for his food, the villagers may have a right of

15. Chief Oja & Ors. v. Chief Ukpai & Ors. (1954) 14 W.A.C.A. 538.
16. Oja v. Ukpai (1958) J.A.L., 119, P.C. esp. at p. 121.
17. The presumption may be rebutted, but it is not rebutted by, e.g. (i) the land being described as containing an area which can be satisfied without including half of the road; (ii) the land being described as bounded by the road; (iii) the land being referred to as coloured on a plan, even if half of the road be not coloured. (iv) the grantor being the owner of the land on both sides of the road; or (v) because subsequent events not contemplated at the time of the lease showed that it was very disadvantageous to the landlord to have parted with half of road: See A-G v. John Holt & Ors. note 18, infra. cf. Central London Ry. v. City of London Land Tax Commissioner (1911) 1 Ch. 467. esp. p. 474 (reversed on appeal on different grounds), Thames Conservators v. Kemp (1911) 2 KB. 272 at p. 284. Maclaren v. A.G. for Quebec (1914) A.S. 258 at p. 273. See also Foa, op. cit. pp. 61-67, Norton on Deeds p. 252 ff.
18. A-G. v. John Holt & Ors. (1915) 2 N.L.R.1 at p. 63 per Lord Shaw, in the P.C.

way over it[19]; the community may have a right to come on to the land for purposes of hunting or cutting and removal of grass and he may permit someone else to reap economic trees on the land. A grant of land subject to customary law does not abrogate all these natural[20] or local customary rights[1] and licences.[2] These rights must be distinguished from an easement, which is a right entitling a person having an interest in land to claim by way of advantage or convenience to the land in his occupation that the possessor of a neighbouring land shall submit to something being done by him to affect such neighbouring land, or that such possessor shall forbear from doing something on the neighbouring land.[3]

When a tenancy governed by customary law is created and the landlord retains any land adjacent to that granted, it will be implied that he made a reservation of all those conveniences which the retained portion enjoyed from or over the other during the unity, and without which the enjoyment of the retained portion could not be had at all. Similarly, it is implied that the landlord transfers to the tenant all the rights which are strictly appurtenant to the land granted.

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19. cf. Elias, Nigerian Land Law and Custom, 3rd. ed. p. 222.
20. e.g. the right of support of his land by the land of his neighbour.
1. e.g. ancient right of way over the land, or the customary rights of drying fishing nets on the land.
2. e.g. right to enter upon land to cut palm nuts.
3. cf. Innes, L.C., A Digest of the Law of Easements, 6th ed., 1900,p.1.
   Cheshire, The Modern Law of Real Property, 8th ed., 1958, pp.446-509. especially pp.459-460.
   Holdsworth, H.E.L., iii, 153-157, vii 321-342.
   Gale on Easements, 13th ed., 1959, pp.3-51.

Further, he is presumed to have converted into easements in favour of the tenant all such conveniences as are "continuous" and "apparent", including the right of way over a formed and defined road. The principle of customary law appears to be very similar to that of English law in this respect.

If the lease is governed by the general law, English common law rules and the provisions of S.6 (1) & (2) of the Conveyancing Act, 1881, apply so that, unless a contrary intention is expressed, the lease passes to the lessee all the "liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof." Therefore, when a conveyance is made either by way of sale or lease, the vendor or lessor cannot be allowed to derogate from his grant by limiting the enjoyment of the easement which passed under the conveyance. Thus in Onade & Ors. v. Thomas[4] the plaintiffs purchased a plot of land and took possession after paying the price. The vendor died before a conveyance was executed. Thereafter two of the children of the deceased vendor for themselves and on behalf of a minor child granted a conveyance of the plot to the plaintiffs. This provided for use of a common passage as an easement. Subsequently the same two children granted a conveyance to the defendant of an adjoining plot purporting to give him the exclusive use of the passage. The

4. (1932) 11 N.L.R. 104.

defendant enforced his right under the conveyance. The plaintiffs brought this action claiming damages for obstruction of their easement and an injunction to prevent further obstruction.

At the trial it was contended on behalf of the defendants that the conveyance was bad because the minor heir was not made a party to it. Butler Lloyd, J. dismissed this argument by saying that although the two vendors who covenanted on behalf of the infant had not been formally appointed as guardians, they were the proper persons to be so appointed and he was not prepared to regard the whole conveyance as invalid for want of that formality. Furhter, that even if he took a different view of the question the defendant could not succeed because any interest he had in the portion of the property purchased by him was derived from the same vendors and if the minor child was still alive at the time of the conveyance to him his conveyance was open to a stronger objection than that of the plaintiffs. Giving judgment for the plaintiffs the learned Judge said,

> "Now it is perfectly clear that the vendors could not in their own favour derogate from their grant and equally they cannot do so in favour of a third party."

In A-G. v. John Holt & Ors.,[5] the appellant companies claimed that they were entitled to "the free, uninterrupted, and exclusive easements, of right of way, anchorage, moorage, and groundage" over a foreshore which they reclaimed in Lagos. Their claim was based on

5. (1910) 2 N.L.R. 1 Div. Ct.; (1911) 2 N.L.R. 21 Full Ct. (1915) 2 N.L.R. 57, P.C.

(a) Crown grants

(b) Immemorial user

(c) Grants from native Kings of Lagos, previous to 6th August, 1861[6]

(d) Easement of necessity.

(e) Lost grant.

(f) The Prescription Act, 1832.

In the Full Court of Appeal Griffith, J. held that the easements of anchorage, moorage, and groundage were not proved but that the appellants acquired by the Prescription Act, 1832, a right of way over the foreshore and the eclaimed land, to their respective jetties. The jetty built out from the land had been exclusively and continuously used since 1877 for trading purposes by the firms occupying the land; the Crown proved nothing to defeat the claim, except that it originated within legal memory. Dealing with the argument concerning possession of the land by the Crown the learned Judge said,

> "I do not propose to go into all the niceties of the law, but in case it should be urged that the Crown has never been in possession of the servient tenement, i.e, the reclaimed land, so that the statute cannot run in this case, I would point out that as soon as the land was reclaimed, it became _ipso facto_ Crown land, and no further taking of possession was necessary on the part of the Crown."[7]

Osborne, C.J., said that whatever might have been the rights of the appellants prior to the making of a new Government road between the lands occupied by them and the Lagoon, they could no longer claim the rights of riparian occupiers, in as much as they now had no frontage on the Lagoon, but on a public street.[8] Like his jbrother, Griffith, J.,

6. The date of the treaty of Cession - See Chap. 1, p. 2 , _supra_.
7. Akt p.37. See also pp. 49-50.
8. At p. 39.

Osborn, C.J. held that the Defendant Companies acquired no easement to store their goods in the sheds built on the reclaimed land because that would imply an easement to have a permanent structure in the nature of a building on the land, an easement which would ripen into ownership - and he knew of no easement going as far as that.[9] He held, too, that they acquired an easement to have, use and maintain their jetty, and an uninterrupted right of way thereto, and also they have acquired an easement to place and keep trade goods and cooperate stores on the reclaimed land.

The judgment of the Full Court, in effect, affirmed that easements have been acquired over the reclaimed land. In case of William's Land[10] the easement was for the purpose of storing coopers, stores, casks, trade goods and produce; in case of Johannsen's and Dunkley's lands, easements for jetties.

In the Privy Council the Crown did not insist on the claim concerning Johannsen's and Dunkley's lands but in respect of the claim over William's land, it was urged that such easement as the companies assented, was unknown to the law and in any view the use to which the land was put by the Respondents and their predecessors in title, could not be the foundation of any easement, as it was

9. AT p. 50.

10. Part of the reclaimed property.

not a right assumed to be taken or asserted over the land of another, because the possession founded upon was possession of the land as the owner thereof. Delivering the opinion of the Board, Lord Shaw of Dunfermline said,

> "Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent with a right of easement as such. This principle is of general application and was so treated in the House of Lords in Dyce v. Hay[11] by Lord St. Leonards, Lord Chancellor, who observed: 'The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.'"[12]

The Board then held that the second contention of the Crown was correct because it seemed undoubtedly true that what was done by the Respondents was done by them as in their opinion their own land. The circumstances and the legal situation reasonably induced the opinion that they were not wilfully appropriating another's property or committing acts of treaspass, but were merely making good and proper use of their rights as owners of property abutting upon the sea. Explaining the legal position, Lord Shaw said,

> "An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another; and that the right being built up or assented is the right over the property of that other. In the present case this was not so. For

11. (1852) 1 Macq. 305.
12. (1915) 2 N.L.R. at pp. 67-8.

> these reasons their Lordships are of the opinion that the grounds upon which the judgments appealed from are put cannot be maintained."[13]

The Board agreed with Osborne, C.J., that the reclamation and the subsequent building could not have gone on without the knowledge or against the wish of the Government; it was more probable that those acts were done with permission from the Governor for the time being, than that they were acts of trespass done in defiance of the Government. Accordingly, it was decided that there was to be presumed in the Respondent's favour an irrevocable licence from the Crown to erect buildings and to store goods upon the reclaimed land and to use it generally for the purposes of their business.

The principles which emerge from these decisions are as follows:

(1) Once a grant of a tenancy is made, the grantee acquires all rights and easements strictly appurtenant to the land granted. The rights so acquired are enforceable against the landlord himself and against any one to whom he transfers any portion of the adjoining land.[14]

(2) There must be a dominant and a servient tenemant. An easement requires that some diminution of the natural rights incident to the ownership of interests in one piece of land be reflected in

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13. (1915) 2 N.L.R. at p. 68.
14. Onade & Ors. v. Thomas, supra. Easements originate in several ways: (i) By express private grant, inter vivos, or by will. (ii) By implied grant, e.g. on severance of tenements. (iii) By express or implied reservation. (iv) By prescription either in common law or under a statute; e.g. Prescription Act, 1832. (v) By express public grant or reservation. See next Section.

a corresponding artificial right superimposed on the natural rights incident to another piece of land. An easement is always annexed to a dominant tenement and cannot be separated from it by being annexed to a stranger. Any person entitled to occupy the dominant tenement is equally entitled to enjoyment of the easement which is inseparable from the rights of occupation.

(3) The dominant and the servient owners must be different persons.

This is clearly illustrated by the decision of the Privy Council in the A-G v. John Holt & Co. & Ors.[15] for if the grantee claims rights over the adjoining land on the assumption that he is also a tenant of such land, the right claimed cannot amount to an easement because a land-holder cannot have such a right over the property which he holds.

(4) An easement must accommodate the dominant tenement. It must not only be appurtenant to the dominant tenement but also must be directly connected with the enjoyment of the dominant tenement. As in English law, what is required is that the right

> "accommodates and serves the dominant tenements; for if it has no connection therewith, although it confers an advantage upon the owner and renders his ownership of land more valuable, it is not an easement at all, but a mere contractual right personal to and enforceable between two contracting parties."[16]

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15. Supra.

16. per Evershed, M.R., in re Ellenborough Park (1956) Ch. at p.170,C.A. quoting and adopting Cheshire, Modern Law of Real Property, 7th. ed. p. 457 8th ed., p. 459.

(5) The easement must be capable of forming the subject-matter of a grant. In theory, every easement owes its existence to a grant although in practice many easements are acquired by long user, the presumption being that the grant was made when the user first started and that the grantee did not acquire it by acts of trespass or by positive infringement of the law.

(6) An irrevocable licence does not amount to an easement.

Although the category of easements has never been closed, the right exercised by a person who has been given permission to come and do something on the land in occupation of another is a licence, not an easement. This is because the right exercised by the licensee is independent of his occupation of adjoining land whereas rights to an easement are always exercised as a consequence of occupying the neighbouring property.

Where the enjoyment of an easement has been infringed, a tenant may take appropriate steps to obtain some remedy, but in Opeifa & Anor. v. Lawal,[17] the plaintiffs claimed damages for trespass committed by the defendants on their property. During the trial it emerged that the trespass complained of were (i) cutting down trees and building a wall on the portion of the land which the

(17) (1935) 12 N.L.R.11.

defendant claimed to be his own, (ii) the erection of a building on the adjoining land, which interfered with an easement of the plaintiffs over the land. Graham Paul, J. held that the plaintiffs did not prove that the wall was built on their land and further that an action in trespass does not lie in respect of interference with an easement. With respect, this decision is sound in principle; the action must fail because the defendant could not have committed trespass on his own land. Had the plaintiffs been well-advised, two courses would have been open to them, (as to any other person whose rights to an easement is infringed).

1. They could have invoked the common law rights of a dominant owner and applied for the remedy of abatement. He could remove the obstructing wall or trees provided he does not by doing so trespass on the adjoining property. Abatement may be available notwithstanding that the obstruction was caused by a house which was inhabited.[18]

2. They could have brought an action for nuisance in the High Court[19] which could order abatement of the nuisance or award damages or may grant a mandamus or injunction "in all cases in which it appears to the Court just and convenient so to do."[20]

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18. Lane v. Capsey(1891) 3 Ch. 411 cf. Gale on Easements, op. cit.,p. 355 ff.
19. cf. Paine & Co. v. St. Neats Gas & Coke Co. (1939)3 A.E.R. 812, 823.
20. High Court of Lagos (Ordinance, Cap. 80 of 1958, S. 19(1). Eastern Region High Ct. Law, S.21(1); W.R., S. 27(1)

The Registration of Titles Ordinance[1] provides for registration of easements and profits _a prendre_ but registration of land under the Ordinance shall not prevent the acquisition of easement by prescription, nor shall registration of an easement, _profit a prendre_, or restrictive covenant prevent its extinction by non-user or abandonment.[2]

RESERVATIONS AND EXCEPTIONS.

Some of the rights which would normally come within the scope of the grant to a tenant may be expressly reserved or excepted by the landlord. The term "reservation", as used in English law, refers to something newly created and issuing out of the land granted, such as rent or services[3] but in non-technical language it includes any right (relating to the land leased) which the lessor desires to retain in his own hands, such as the right to resume possession of a definite part of the land granted, or right of way and profits _a prendre._ These latter rights, in strict interpretation, are regrants of the easements or profits in question by the lessee to the lessor.

An "exception" describes or enumerates things expressly excluded from the grant; it must be something which otherwise would have passed with the grant and must be of a defined part of the parcels

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1. Cap. 181 of 1958.
2. SS. 39 & 40.
3. 47a, _Doe v. Lock_ (1835) 2 A. & E. 705.

themselves. In customary law as well as under the general law, a valid exception must not be essential to the enjoyment of the land granted, nor must it defeat the purpose of the grant so as to render any part of the thing granted nugatory, and its operation must take effect simultaneously with the grant, so that the thing excepted never vests in the grantee at all.

In general law a reservation or an exception must be express,[4] if it is to be valid but in customary law reservations and exceptions arise by implication because exercise of rights in land are concurrent and unless a particular reservation will prejudicially affect the tenant's enjoyment of the land granted, the landlord need not inform the tenant at the time of the grant that it was being made.

Some reservations are imposed by statute. Thus, the Land Tenure Law[5] provides that every right of occupancy shall be subject to any easement affecting the land at the date of the grant. The holder of a right of occupancy shall, if required by the Minister, allow a road of access over the land the subject of his rights of

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4. This rule is subject to two exceptions: (i) easements of necessity are implied in favour of a grantor who retains some land adjoining that which he leased: cf. Pinnington v. Galland (1853) 9 Exch. 1. (ii) Easements required to fulfill the intention of the parties at the time of the grant, e.g. right to light or of support of a house retained by the lessor on leasing the neighbouring house: cf. Richards v. Rose (1853) 9 Exch. 218 at p. 221.

5. No.25 of 1962, N.R.

occupancy to any person occupying the land which is so situate that such road of access is, in the opinion of the Minister, reasonably required.[6]

The Minerals Ordinance lays down that a person who has been granted permission to construct a road over any land (other than that granted to him) cannot prevent any other person from having access to or using such road[7], and the grant of a mining lease or exclusive prospecting licence does not limit the power of the Governor-General or the Governor of a Region, as the case may be, to grant any other lease right of occupancy or licence (not being a mining lease or exclusive prospecting licence) to any other person in respect of the whole or any part of the land in question.[8] A right is reserved to the Governor-General, or the Governor of a Region,

> "to take from the land, the subject of a mining lease, temporary title, mining right or exclusive prospecting licence any materials required for the construction of railways, roads, buildings or other public works."[8]

Where, however, there is a conflict between the rights of a lessee under the Mineral Oils Ordinance in respect of lands included in the area of a mining lease, the rights of the holder of a mineral oil lease shall prevail.[9]

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6. Ibid., S.13 of. Land and Native Rights Ordinance, Cap. 96 of 1958, S.11.
7. Cap. 121 of Laws of Nigeria, 1958, S.86.
8. Ibid., S. 111(b).
9. Ibid., S. 112(1).

Some reservations are also imposed by the Crown Lands Ordinance. Thus if Crown land is leased, the lease shall not, unless otherwise expressly provided therein, confer any right to the water of any spring, lake or stream, other than such water as may be required for domestic purposes upon the land leased.[10] Similarly the lease confers no rights to the foreshore or minerals:[11] these are vested in the Crown under the Minerals Ordinance. Any person authorized by the Governor may at any time enter upon the land so leased and may set up poles and carry electric lines across such land.[12] Further,

> "All public thoroughfares existing on any land sold or leased under this Ordinance shall be deemed to be and shall be reserved and shall remain free and uninterrupted unless the same be closed or altered by the Governor or by other competent authority.[13]

The lessee, therefore, cannot prevent the public from using the highway and, *a fortiori*, a third party who repairs the road but has no legal liability to do so, cannot obstruct the highway with a toll-bar, for purposes of re-imbursing himself for his expenditure.[14]

THE DURATION AND PURPOSE OF THE GRANT.

One of the main distinctions between leases governed by the general law and tenancies regulated by customary law is that

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10. Crown Lands, Ordinance, Cap. of 1958, S.21.
11. *Ibid*, SS.21 & 22.
12. *Ibid.*, S.23.
13. *Ibid.*, S.25.
14. *Obasa v. Saruwa & Ors.* (1931) 10 N.L.R. 104.

whereas a grant under the general law must be made for a fixed or ascertainable period of time, the duration of a tenancy created under customary law is measured by the purpose of the grant. In general law (as in the law of England), where the parties made no mention of the date for the commencement of the lease, it is deemed to commence from the date of the grant; this is not so under customary law. The customary tenancy is deemed to commence from the date when the grantee enters or does some definite act. Such act must be unequivocally referable to the pre-existent agreement of tenancy. This is so because until the act done definitely establishes the purpose of the grant, a customary tribunal will find it impossible to decide upon the nature of the transaction. Where, for example, a customary grant is made for the purpose of farming, it takes effect as soon as the farming season begins[15] and the grantee begins to clear the bush for planting the crops. Owing to the fact that native law does not vigorously insist on definiteness of time, the term granted continues until the purpose of the grant is accomplished; in an agricultural tenancy the period will run from the clearing of the bush to the harvesting of the crops. If the grant is for building the term starts from the time when the tenant does some definite act

15. cf. Cole, Zania, para. 31 (b).

(such as bringing building materials on the land) towards setting up the house and it will last indefinitely until the site house is abandoned by the grantee or his successors.

In Raufu Adeyemo v. Ladipo & Dara,[16] Dpherty, Ag. J. said that the defendant's "contention that the grant was for a temporary occupation only finds no support in native law and custom" because "such a temporary occupation of land was unknown to native law and custom."[17]

This dictum is true so far as it relates to occupation of land for the purpose of erecting permanent dwelling-houses; this is evident from the circumstances under which the statement was made but must not be extended to cover every grant of tenancy. Nor must it be assumed that under no circumstances could a temporary occupation grant be made if from the surrounding circumstances it was not the intention of the parties that the grantees would remain indefinitely on the land. Thus it is usual to grant tenants who farm in a district outside their own permission to erect temporary dwelling houses on the farms: in such cases the erection of the houses is merely incidental to the main purpose of the grant and once the purpose is accomplished the tenancy will come to an end.

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16. (1958) W.N.L.R. 138 cf. Akofi v. Wiresi & Abagya (1957) 2 W.A.L.R. 257, CA. (Ghana) where it was held that an "abusa" tenancy inures to the benefit of, (apart from forfeiture for breach of condition, etc.) and is determinable only by, the grantee and his successors in title - Sed qu.
17. At pp. 139-140.

Under native law and custom a tenant cannot maintain an action relating to the land until he has entered into possession; he cannot bring ejectment against a third party who is in occupation of the land. If he has given any substantial consideration to the landlord he has a personal action to recover what was given or its equivalent value. Therefore if the tenancy is to commence at a future date any action he may have will be against the landlord only, not against third parties. On the other hand, a lease governed by the general laws of Nigeria may commence either presently or at a future date. In all the Regions (except the Western Region) a grant which is to commence on the expiration of a previous lease conveys only an interesse termini until the expiration of the previous lease. Thus in Adepoule v. Saidi,[18] the respondent, Saidi, leased premises which were at the time let out in portions to various tenants. The lease was to take effect at a future date. There was no evidence that the respondent ever entered into possession of the demised premises. He instituted the present proceedings to recover possession of a shop (a part of the premises) from the appellant. This shop had formerly been leased to one Alade who died some time afterwards. At the trial, the appellant resisted the claim on the ground, inter alia, that he was in occupation of the shop as one of the administrators of

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18. (1956) 1 F.N.L.R. 79.

Alalade's estate, whose tenancy had never been determined. The trial Judge found that Alalade's tenancy had been duly determined before his death, that the appellant was a trespasser and he made an order for possession.

There was no direct proof that the tenancy had been determined but the trial Judge assumed this from the recital in an exhibit put in evidence. On appeal, the Federal Supreme Court held that (a) the lower court was not entitled to assume that Alalade's tenancy had been determined: the Court has to decide on admissible evidence that the notice to quit was effective to terminate the tenancy. (b) The respondent not having entered into possession had only an interesse termini and so could not properly have terminated Alalade's tenancy. In delivering the judgment of the Federal Supreme Court, de Lestang, F.J. said,

> "Alalade was a lessee in possession at the time of the lease to the respondent and the respondent's lease did not take effect immediately, but on a future named date, i.e., 1st January, 1951. In other words, the respondent had a lease in reversion (Woodfall, paragraph 711). Such a lease did not, before the passing of the Real Property Act of 1925, create a term or estate until the lessee had entered into possession. Until then he had only an interesse termini. There is no evidence that the respondent ever went into possession of the demised premises, and indeed whatever evidence there is is to the opposite effect."[19]

On this principle which is based on the law of England before the

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19. At p. 81

passing of the L.P.A. 1925, after the day stipulated for the commencement of the term, an interesse termini is sufficient to support an action for entry or ejectment.[20] The doctrine of interesse termine has been abolished in the Western Region from the 2nd April, 1959.[1]

Whether the doctrine applies or not, under the general law operating in every Region, where the letting is by deed and the instrument is silent as to the date of its commencement the grant takes effect from the date of delivery.[2] If the date is an impossible one, e.g. 31st February, the lease will, likewise, commence from delivery. If the letting is by an agreement not under seal, it operates from the date of the agreement, provided there was an actual letting. If, however, the date is uncertain, e.g. where a lease is made on 20th July to hold from the 10th August, without saying which August is meant, English Courts have held that such a lease is thereby vitiated because the limitation is part of the agreement and the Court cannot determine it, not knowing the terms of the contract.[3] The authority of these decisions is doubtful because it seems that in Nigeria, at least, the omission could be supplied as a matter of reasonable inference[4] and that normally the month of the year, in which

20. Cole, Ejectment, . Woodfall, op. cit., 1898 ed., p. 159.
1. Property and Conveyancing Law, 1959, S.63 (1)
2. Co. Litt. 46b; Foa, op. cit., 8th ed., p. 90. Styles v. Wardle (1825) 4 B. & C. 908; 107 E.R., 1297.
3. Anon. (1674) 1 Mod. 180, Foote v. Berkeley (1671) 1 Sid. 420. Woodfall, op. cit., 1898 ed. p. 160.
4. cf. Boddington v. Robinson (1875) L.R.10 Ex. 270, 271.

the deed was executed should be implied.

Where a delivery has been made but a condition precedent has not been fulfilled before such delivery, it seems that the grant does not operate from the date of the delivery notwithstanding that the condition was fulfilled afterwards. Thus where a lessee of Crown land has sub-let and delivered possession to the sub-tenant without having obtained the prior consent of the Governor, the habendum will limit the certainty of the interest granted only from the time of obtaining the consent; therefore, the purported delivery will not operate as to render the sub-lessee liable on a covenant to repair if the premies later become damaged by fire.[45]

Leases for Life.

In customary law, it is unusual to grant a tenancy for life. Where a long-term grant of indefinite duration has been made the implication is that (unless otherwise expressly stated) the children of the grantee will continue as the tenants of the grantor on the death of the grantee. A customary tenancy for life may arise as a result of the grantee dying without issue for in such an event the land reverts to the grantor, not to the successors of the tenant.

5. Chidiak v. Coker (1954) 14 W.A.C.A. 506.

Except in the Western Region, under the general laws of the other Regions a lease may expressly or by implication of the law be granted for the life of the tenant.[6] If such leases are granted absolutely they will last as long as the life for which they were granted[7]; but some leases for life may determine before the end of the life for which they were created; thus a lease to A as long as he lives on the demised premises is a perfect lease for life but its duration depends upon the fulfilment of the condition.[8]

The lease could be granted for lives of persons other than the lessee. Such a lease is called "lease for lives" and under the English common law conferred a freehold interest upon the grantee. The common law principle was that a lease for lives to the lessee only, without naming a successor, entitled any person whatsoever to succeed upon the death of the lessee. The successor would enter upon the demised property as "general occupant" and would remain in possession until the dropping of the last life when the lease expired.[9] If the lease for lives were granted to the lessee and his heirs, the heir would enter as a "special occupant" and continue in possession until the dropping of the last life. The lease would be

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6. The lease could be for the life of another but this must be expressly made clear because a grant for a man's dwn life is deemed to be greater than a grant for the life of another; as leases are construed against the grantor, the lessee's life will be the measure if there is any ambiguity: Co. Litt.41b, 42a. Re Coleman's Estate, (1907) 1. 1.R. 488.
7. Co. Litt. 42a. 183a.
8. Co. Litt. 42a.
9. Co. Littl. 41b.

devised by will under S.6 of the Wills Act, 1837, which is a statute of general application.[10] Further, as the Land Transfer Act, 1897, is also a statute of general application, the lease for lives could vest in the personal representatives of the leasee as trustees for the special occupant. Where there is a doubt as to whether the lives for which the lease was created are still in existence, it appears that the Nigerian landlord could invoke the provisions of the Cestui que Vie Act, 1707,[11] and apply for the production of the cestui que vie before the Court.

Although the English Law of Property Act 1925 is not a statute of general application in Nigeria, the Property and Conveyancing Law of the Western Region[12] has laid down that any lease or under-lease, at a rent, or in consideration of a fine, for life or lives or for any term of years determinable with life or lives, or on the marriage of the lessee, or any contract therefor, made before or after the commencement of the Law, takes effect as a lease, underlease or contract therefore, for a term of 99 years determinable after the death or marriage (as the case may be) of the original lessee, or of the survivor of the orginal lessees, or of the survivor of the original

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10. See p. 52, Supra.
11. 6 Ann. C.18.
12. The Laws of Western Region, 1959 ed. Cap. 100.

lessees by at least one month's notice in writing given to determine the same on one of the quarter days applicable to the tenancy, either by the lessor or by the persons deriving title under him, to the person entitled to the leasehold interest, or if no such person is in existence by affixing the same to the premises, or by the lessee or other persons in whom the leasehold interest is vested to the lessor or persons deriving title under him. If the lease, underlease, or contract therefor is made determinable on the dropping of the lives of persons other than or besides the lessee's, then the notice may be served after the death of any person, or of the survivor of any person (whether or not including the lessees) on the lesser of whose life or lives the lease, under-lease or contract is made determinable.[13] This conversion of leases for life to a term of 99 years compares with a similar conversion to a term of 90 years by the English L.P.A., 1925, S.149 (6).

Date of Expiry of the term. It should be obvious by now that under customary law, a tenancy expires as soon as the purpose of the grant is accomplished or as soon as it ought to be accomplished under normal circumstances. For example, where farmland is let for one year and the grantee who entered on the 25th March completed reaping the crops on the 24th December of the same year, native law and custom will hold that the grant determined on the later date.

Similarly if the purpose could only be reasonably achieved by the end of June of the following year the grantee will not be liable for breach of any obligation to deliver up possession within a year. A tenancy of indefinite duration will similarly expire on the accomplishment of the purpose for which it was originally created.

This elastic principle of computation of the period covered by the grant is somewhat similar to that which applies in some American States where it has been held that if a lease is silent as to the length of the term during which a lessee may occupy the demised land for the performance of certain work thereon, he is entitled to a reasonable time within which to exercise his rights under the lease[14] and if he is not required by the lease to complete the work within a specified period, he must do so within a reasonable time.[15]

The principle of the general laws is different for, like the law of England, a lease made on the 25th March, for one year, is not determined until midnight of the day before its anniversary in the following year.[16]

Under both the Crown Lands Ordinance[17] and the Land Tenure Law[18]

14. e.g. Alabama, Burton v. Stevenson, 91 Southern Reporter 74; 206 Alabama 508 Georgia, Cherry Lake Terpentine Co. v. Lanier Armstrong Co. 73 S.E. 610; 10 Georgia App. 339.
15. Georgia, Kirland v. Odum, 118 S.E. 706; 156 Georgia 113. cf. Louisiana, Parker v. Sutton, App. 190, Southern Reporter 156, where it was held that under the civil law applicable the failure of the lease to fix a definite term does not necessarily render it invalid.
16. Sidebotham v. Holland (1895) 1Q.B.378, C.A.; Crate v. Miller (1947) K.B. 946.
17. Laws of Nigeria, 1958, Cap. 45. S.24
18. No. 25 of 1962, S.34.

the term granted may be determined before the date of its expiry if the land is required for any public purpose or if any "good cause" is shown. By the Regulations made under S.37 of the Crown Lands Ordinance an agricultural lease shall not ordinarily be issued for a term exceeding forty five years[19] and no building lease shall be granted for a term exceeding ninety-nine years. Similarly the Regulations made under the Native Lands Acquisition Law[20] prohibit granting a lease to an alien for a term exceeding ninety-nine years. Suppose a grant is made for 999 years instead of the statutory period, does the lease thereby become void ab initio or is the date of its expiry extended beyond the statutory period? No decision has been given on this point but it is arguable that such a lease will be valid for the term of 99 years authorised by law and void as to the excess period of 900 years and therefore the date of its expiry will be at the end of the 99 years.[1]

Option for extension or renewal of the lease.

A grant whether made under customary law or under the general law may contain an option for extension or renewal of the tenancy. If native law applies, such an option subsists for the benefit of both the grantor and the grantee and if on accomplishment of the original purpose of the grant the landlord is unwilling to extend the lease,

19. Regulation 2., Laws of Nigeria, 1948, Vol. V11, p.332.
20. Native Lands Acquisition (Approval of Transactions) Regulations, W.R.L.N. 120 of 1958, Reg. 4(a).
1. cf. the American case Hart v. Hart (1856) 22, Barbour (N.Y.) 606.

the tenant has no remedy unless it could be shown that he has done something on the land in contemplation of the extension and that it would be unfair for the landlord to refuse it. If a renewal is made, the tenancy will last only for the period within which the purpose of the grant will be achieved; the renewal cannot be regarded as recurrent so as to enable the grantee to have a second or third option.

It could be said that certain customary tenancies imply continued renewal of the grant from time to time. Thus, where a grant has been made for the tenant to occupy the land for his life there is an implied option in the grant that any issue of the tenants will continue in occupation on his death. If no serious breach of the covenants has been committed, a customary tribunal will usually decide that the grantor must renew the tenancy in favour of the successors of the deceased who have been occupying the land with him before his death.

If the lease is governed by the general law any option for renewal will be construed in accordance with the principles of English law applicable in each Region.[2] In all the Regions if the lease is for a definite term of years and contains an option for renewal without mentioning the length of the renewed term, effect may still be given to the option because there would be an implication that the extended

2. It has been shown that this is not necessarily the current English law.

tenancy is to be of the same duration and subject to the same terms as that which it succeeds.[3] This option, however, is vested in the lessee alone, not in the lessor.[3] A great difference exists here between leases governed by customary law and those subject to the general law.

Under S.15 of the Registration of Titles Ordinance, a lease for a term to take effect for more than twenty-one years from the date of the instrument purporting to create it shall not, after the first day of March, 1956, be registered under the Ordinance. As some unregistered leases are declared void by S.5, it means that such leases will be invalid. Further, throughout Western Region, S.163(3) of the Property and Conveyancing Law will apply to make leases not governed by customary law void if the term granted is to take effect more than twenty one years from the date of the instrument purporting to create it. None of these enactments refers to options for renewal, nor is there any provision in any of the existing statutes of Nigeria similar to the Law of Property Act, 1922, S.145 and Schedule 15 paragraph 7 (2) which lays down that a contract made after 1925 for renewal of a lease or an underlease for a term exceeding sixty years from its termination is void. It means, therefore, that an option for renewal can be made to take effect at any future date, notwithstanding

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3. cf. Lewis v. Stephenson (1898) 67 L.J.Q.B. 296.

that the date is more than 21 years from the date of the lease.[4] Further, subject to the Regulations made under the Native Lands Acquisition Law, the renewed lease will be valid even if the term exceeds sixty years from the termination of the previous tenancy.

On the principles applied by the W.A.C.A. in Moukarzel v. Hannah,[5] it is obvious that where a lease containing an option for renewal, it is not necessary for the right to be exercised by writing: it could be exercised by conduct and the lessor may be compelled to renew the lease as though the option had been formally exercised. Further, if no time was fixed within which the option was to be exercised, the right to get the lease renewed continued so long as the relationship of landlord and tenant existed between the parties, even though the term of the lease conferring the option has expired.

Whether the lease be governed by customary law or by the general law, the tenant must perform any conditions precedent before he can effectively exercise his right of renewal. In customary law, the fairness of the action of the parties must always be considered; so, the tenant will not lose his right to renewal because of technical breach of covenants; under the general law, on the other

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4. In re Strand & Savoy Properties Ltd. (1960) 3 W.L.R.1; Weg Motors Ltd. v. Hales (1961) 3 W.L.R. 558.
In England, the term granted mustntake effect within 21 years from the date of the instrument creating it. If it so takes effect, the option granted is not affected by S.149(3) of the L.P.A. 1925, because the option could not create a term until it was exercised, and it might never be exercised at all. S.163(3) of the P. & C.L. of the Western Region is similar to S.149(3) of the L.P.A. 1925, hence the above conclusion: See Evershed M.R. and Donovan L.J. in Weg Motors Ltd. v. Hale, supra.

5. (1947) 12 W.A.C.A. 125, Ghana.

hand, his right of renewal will be lost if at the time of his application for it there is any existing right of action in the lessor relating to covenants of the lease, and this is irrespdctive of the fact that the breach committed was of a trifling character.

Perpetual Renewal of Leases.

In strict logic the term "perpetual renewal" of leases is a misnomer and should either be abolished altogether or used as an inadequate substitute for renewal for indefinite period. The English L.P.A.; 1922,[6] abolished perpetually renewable leases and converted them into a definite term of 2,000 years. No Nigerian statute making such provision has been discovered and it is submitted that these indefinitely renewable leases could still be granted if the parties unequivocally manifest the intention for perpetual renewal: a covenant to that effect is not bad under the common laws relating to perpetuity.[7] This, however, does not imply that where a lease contains an option for renewal and provides that the renewed lease shall be on the same terms and conditions as that which it succeeds, the "terms and conditions" would include a further covenant for renewal, because in Nigeria, like England, the Courts will undoubtedly leaan against perpetual renewal.[8] The principles of customary law on this point

6. By S.145 and 15th Schedule. See also L.P.A., 1925, S.202.
7. Bridges v. Hitchcock (1715) 5 Bro. Parl. Cas. 6.
8. Baynham v. Guy's Hospital (1796) 3 Ves. 295.

are the same with the rules of the general law. Subject to the qualifications already indicated, the Nigerian Courts will generally apply English rules of interpretation to covenants conferring options for renewal.[9]

Renewal without Surrender of Sub-leases.

When a lessee is granted a new tenancy during the continuance of the old lease, a surrender by operation of law takes place[10] but this does not destroy the rights of sub-lessees. It has been provided in the Western region that

"(1) A lease may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any under-lease derived thereout.

(2) A new lease may be granted and accepted, in place of any lease so surrendered, without any such surrender of an under-lease as aforesaid, and the new lease operates as if all under-leases derived out of the surrendered lease had not been surrendered before the surrender of the lease was effected.

(3) Each under-lessee and any person deriving title under him is entitled to hold and enjoy the land comprised in his under-lease (subject to the payment of any rent reserved by and to the observance of the covenants, agreements and conditions contained in the under-lease) as if the lease out of which the underlease was derived had not been surrendered."

Sub-section (5) gives the lessor and any person deriving title under him the same remedies for breach of any covenants contained in the new lease as he had in the original lease.

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9. For which see, Woodfall, op. cit. 1960 ed. Chap. 19; Foa, op. cit. 1958 ed. pp.308-320.

10. Hill & Redman, op. cit., pp.474-5, and the authorities cited therein.

The provisions aim at placing all parties in the same position as if no surrender had been made: the sublessee is not affected by the surrender and the new grant, after the surrender of the term originally created, makes the new grantee the assignee of the reversion of the terms created by the surrenderor. This is a statutory application of the principles of English common law which already operated before the enactment and which still operate in all other parts of the Federation where the Law does not apply.

Conversion of Customary to English interests and vice versa.

One problem which keeps on recurring is, "is it within the scope of the lease to lay down that the relationship between the parties should be governed by native law and custom or by the general law?" Supplemental to this is the question whether a tenancy regulated by customary law could be "converted" into one governed by English law.[11]

The first question has been slightly touched upon in the first chapter,[12] where it was concluded that transactions between natives are normally governed by customary laws unless, (i) it appears to the Court that substantial injustice would be done to either of

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11. "English Law" in this context is taken to be the same as the general laws of Nigeria.
12. See pp.46-48, *supra.*

the parties by strict adherence to customary law, or (ii) the transaction is unknown to customary law, or (iii) the parties stipulated that their relationship should be regulated exclusively by a non-customary system of law. Transactions between non-natives are governed by the general law unless there is a specific enactment to the contrary.[13]

The problem may be much more complicated because some customary transactions are now carried out by methods which are either unknown to native law or consist of a mixture of customary and foreign elements. Suppose, for example, that one of the parties is literate and the other illiterate, but a lease in English form is executed after the parties had undergone a customary procedure for grant of tenancies, is such a lease governed by customary or by the general law? Further can the law governing it be altered from time to time? No definite answer can be given here: each case must be decided on the evidence available, though the general principle is that customary law always applies and mere omission of part or all the customary procedure or the literacy of the parties should not alter the position if the transaction itself, not necessarily the form in which it is effected, is known to native law.

In Cole v. Folami[14] the appellant in claiming the ownership of

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13. See Chap. 1. supra.
14. (1956) 1 F.N.L.R. 66.

a piece of land tendered a receipt for £25 as evidence of his purchasing the property. The Federal Supreme Court confirmed the decision of the trial Judge who dismissed the claim because it was not proved that the sale was with the consent of the family or that the transaction took place before witnesses. In giving the judgment of the Court Jibowu, Ag. F.C.J., said,

> "It is to be observed that the making and giving of receipts are unknown to native law, and that the giving of the receipt, Exhibit "J", is not within the rule of native law and custom."[15]

This statement would seem to imply that the giving of such a receipt converts the nature of the transaction from one regulated by customary law to one governed by the general law. With respect, it is submitted that such approach is dangerous: it is true that receipts *were* unknown to customary law but today they form a common feature of many customary transactions. In any case a receipt, or any document for that matter, is merely an evidence of the customary agreement reached by the parties and may not by itself prove that the transaction is regulated by the general law. The whole circumstances should be considered and the Court should take into account the question of hardship if a non-customary system of law is applied or whether the parties were in *pari delicto* if the general law is invoked. Mere use of English technical expressions should not be the criterion for

15. *ibid.*, at p. 68.

measuring whether the relation of the parties had been converted from the realm of custom to the sphere of the general law.

The judicial approach to this problem has not been very satisfactory. It seems to be an accepted principle that "a conveyance written in English in the usual English form must be construed in accordance with English law"[16] and therefore if the relation between the parties was originally regulated by custom, a subsequent excecution of a document in English form will remove the transaction from the province of native law and bring it within the scope of the general law; yet in every case "it is necessary....... to look at the document which evidences this transaction in order to determine its nature."[17] Thus in Griffin v. Talabi,[18] both parties to the action claimed title to a piece of land situate at Ebute Melta. The respondent, Talabi, claimed under a purchase receipt of 1928 and the appellant under a conveyance dated 6th July, 1946. The receipt of 1928 was coupled with an agreement to convey but there was no formal conveyance until 1946, after the property had been conveyed to the appellant. The question which arose was whether the original transaction was governed by native law and custom or by English law.

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16. U.A.C. v. Apaw (1936) 3 W.A.C.A. 114 at p. 116.
17. Griffin v. Talabi. (1948) 12 W.A.C.A. 371, at p. 372, per Verity, C.J.
18. (1948) 12 W.A.C.A. 371.

The W.A.C.A. held that the documents must be looked at to determine the nature of the transaction and having done so came to the conclusion that

> "They clearly evidence a transaction the nature of which is unknown to native law and custom, which are concerned with neither covenants to convey nor with the execution of formal conveyances."[19]

Verity, C.J. said that it would be dangerous to assume, in the absence of evidence to the contrary, that because a party to a transaction is a native and illiterate he is unable to appreciate the meaning and effect of a document to which he subscribes by making his mark. Further that the use of the term "beneficial owner" would be unnecessary if customary law was intended to govern the transaction, and finally that there would have been no need for the head of the vendor's family to have joined in the later conveyance to the Respondent.

On the other hand, the Courts accept the principle that "extrinsic evidence is always admissible to show the true nature of a transaction expressed in any document and the real relationship of the parties thereto."[20] In Eshugbayi, Chief Oloto v. Dawuda & Ors.[20], the plaintiff claimed certain lands attached to his stool. The defendant, a tenant, while admitting the claim, contended that there

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19. Ibid, at pp.372-3.

20. Eshughayi, Chief Oloto v. Dawuda & Ors. (1904) 1 N.L.R. 58, per Smith, J. at p. 60, citing Phip. Ev. 2nd ed., p. 538. cf. Burton v. Bank of N.S. Wales (1890) 15 A.C. 379.

was an absolute transfer (by gift) of the land to him by the plaintiff's predecessor in title. He produced a document registered in the Register of Deeds, Lagos, purporting to be a conveyance supporting his contention. It was explained by the plaintiff that although the deed purported to be an absolute conveyance, the real nature of the transaction was that the defendant was on the land as a tenant, and that people were bothering him; the plaintiff then had to give him the "paper" to stop the people from bothering him, and that the relation of landlord and tenant was to continue as in the past. The trial Judge gave judgment for the plaintiff. On appeal to the Full Court it was held that the plaintiff was entitled to recover possession under native law and custom and that extrinsic evidence was admissible to show that the deed was not to effect the relationship between the parties.

It is difficult to reconcile these cases. The reasoning in the cases on the same line with Griffin v. Talabi[1] suggests that the mere execution of a lease in English form implies exclusion of customary law or the conversion of the pre-existing customary relation between the parties into one governed by the general law. The argument assumes that the parties intended to alter their operative law by adopting a new form to effect their intention. This assumption (with respect) is unfounded. The parties might have

1. Supra. See also Brimah Balogun v. Oshodi (1929) 10 N.L.R. 36.

given no thought to the matter or if they did give they might have taken for granted that the customary relationship continues to subsist and that the "paper" which they signed is merely evidence of that relationship. One fundamental error which lies behind some of these decisions is the assumption that customary law is static and inflexible and, therefore, must be kept rigidly undiluted by the changing social conditions. On the authority of the Privy Council, where a modification of native law has taken place, it is the duty of the Court to administer it as modified.[2]

There is no doubt, however, that some forms of tenancy are foreign to customary law. Thus a weekly, or a monthly tenancy at a rent was unknown to and, therefore, cannot be governed by custom.[3] This means that when a customary tenant is later asked to pay rent monthly, it could be implied that the general law will start to apply to the relationship between the parties, unless it would be unfair to exclude customary law. This does not lend support to the view that the nature of the transaction or the system of law governing it depends on the form in which the transaction is set down nor to the more surprising assumption that an

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2. Eleko v. The Officer Administering the Govt. of Nigeria (1931) A.C. 662, at p. 673.

3. Bashua v. Odunsi (1940) 15 N.L.R. 107. cf. Asente v. Gold Coast Drivers' Union (1957) 3 W.A.L.R. 5 (Ghana) - held renting of rooms at fixed monthly rental not governed by native law.

illiterate understands the meaning and effect of a document which he subscribes by merely making his mark to be the conversion of the customary transaction with which he is acquainted to a non-customary one entirely novel to his ideas.

It is submitted that a more correct principle to the problem of conversion of interests from one system of law to the other is to be found in cases on the same line as Eshugbayi, Chief Oloto v. Dawuda & Ors.[4] which look behind the "paper" in order to establish what the natives did. Every claim of conversion by act of the parties should, therefore, depend on the evidence of what they did not on a general theory of the form of the document in which it was expressed.

Apart from conversion by act of the parties, the relation could be converted by statute. Thus under the Public Lands Acquisition Ordinance, the Governor has power to acquire lands for public purposes for an estate in fee simple or for a term of years, as he may think fit. Where a compulsory leasehold interest is thus acquired, the relation between the Governor as tenant and the land-holding group as landlord is regulated by the general law. This is implicit in the enactment. The rights of the landlords inter se will, however, continue to be governed by the customary law under

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4. Supra. See also Ogundirun v. Balogun (1957) W.N.L.R. 51. Boulos v. Odunsi (1958) W.N.L.R. 169. cf. Mensah v. S.C.O.A. Ltd. (1958) 3 W.A.L.R. 336. (Ghana) where Ollennu, J. applied native law and custom to land previously conveyed in English form.

which they hold. The Land Tenure Law of the Northern Region has converted the customary interests of the natives into a statutory "right of occupancy" vis a vis the Government but the interests of the people themselves continue to be regulated by native law.

Some form of conversion could also be effected by operation of law. Thus if the lessor or lessee dies intestate the subsisting interests will devolve upon his children as family property with the result that the relationship will no longer be governed exclusively by the general law applicable but will take account of the enlarged number of lessors or lessees. Despite the general law applicable to the lessor and lessee, the interests of the successors themselves will, again, be governed by native law.

Complicated situations might arise as a result of conversion. For example, suppose a tenant who was occupying under customary law later agrees with the landlord that he will henceforth occupy as a monthly tenant at a rent but subject to all other terms and conditions which he had been observing, now in breach of one of these conditions he sublets part of the property: will this breach be enforced against him or not? Under the general law he is entitled to sub-let unless expressly prohibited and even so sub-letting of part is not a breach of the prohibition unless otherwise stipulated. In such a case some incidents of customary law are mixed with those of the general law which customary law will,

so far as it is not inconsisted with any enactment or rules of equity, be imported into the interpretation of the convented lease. The problem cannot be pursued further but the principles which emerge are clear:

(1) Prima facie transactions relating to land between Nigerians themselves or between Nigerians and foreigners are regulated by native law and custom.

(2) The mere existence of a document, however worded, does not (or should not) convent the transaction from one governed by native law to one regulated by the general law.

(3) To prove such a conversion it must be established by evidence that the parties agreed to regulate their relations by the general law.[5]

(4) A deed which expressly provides for application of English law or the proper law is conclusive evidence of exclusion of the customary law but use of technical terms in a document is not conclusive evidence unless the nature of the transaction is unknown to customary law or it would be unfair to apply native law and custom.

(5) Conversion could be brought about by statute.

(6) In some cases the relation of landlord and tenant may be governed by the general law only while the relation of the landlords or the tenants *inter se* may be regulated exclusively by the native

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5. cf. Allott, *Essays*, pp. 248-9.

law and custom relating to the same land. The guiding light to these principles shines clearly in the trenchant words of Taylor, J:

> "As I have said before the title held by Anikin was a defeasible title under native law. Can such a defeasible title, defeasible by invoking native law and custom be converted into a title in fee simple under English law merely by a series of conveyances which refer to such title as being in fee simple? No other evidence was led by the plaintiff of any other matter relied on by him as converting such tenure to a fee simple. I am of the view that such conversion has not been ppoved."[6]

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6. Boulos v. Odunsi (1958) W.N.L.R. 169, at p. 170.

CHAPTER 6.

DUTIES OF LANDLORDS AND TENANTS.

Once the relation of landlord and tenant has been validly created, it gives rise to certain rights and duties which the parties enjoy and observe. These rights and duties, whether arising out of customary law or under the general law, are of two classes, viz:

(i) Express,

(ii) Implied.

General Principles of Liability for Breach of Duties.

When express, the rights conferred or the duties imposed depend on the intention of the parties at the time when they entered into the agreement creating the tenancy. Under the general law, a distinction is made between the obligations considered as covenants and what are regarded as conditions. The distinction relates to the remedy available in the event of breach, for breach of a covenant normally results in action for damages while breach of a condition leads to forfeiture of the tenancy [1]. On this principle, customary obligations are more in the nature of conditions than of covenants for their breach would usually give rise

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1. cf. Woodfall, op.cit, 1960 ed. p.253; 32 Am. Jur. 140.

to an action for forfeiture rather than a suit for recovery of damages.

If the lease is governed by the general law, the duties imposed by express covenants depend, to a large extent, on the words used by the parties as shown by the instruments they executed. If, on considering the whole document, the words used were not meant to operate as a covenant or condition, a claim based on the alleged breach thereof will not be sustained.[2]

Whether under native law or in the general law, the rights reserved and the duties imposed must not be illegal[3] nor against public policy [4] for

> "whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the Common or Statute Law, no Court, either of law or equity, will lend its assistance to give it effect." 5

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2. Awele v. Habib (1954) 21 N.L.R. 8

3. A.C.B. v. Oladapo (1951) 13 W.A.C.A 285. c.f. Morris v. Monrovia (1930) 1 W.A.C.A 70, at p.74 (Ghana) where Deane, C.J. stated that at Fanti customary law advances made by a man to his paramour while the relationship exists is irrecoverable. The cases do not relate to tenancy but the principle is not affected.

4. Adu v. Makanjuola (1944) 10 W.A.C.A 68.

5. per Jackson, Asst. J. in Esi v. Moruku (1940) 15 N.L.R. 116 at p.119, criticised elsewhere or other grounds. cf. Canfailla v. Chachin (1939) 5 W.A.C.A 104 at p.106. These decisions do not relate to customary law but the principle is well known and accepted by the natives: cf. Elias, Nature of African Customary law, p. 153.

Under native law the tenant's continued observance of the duties imposed by the grant depends on his continued possession of the land. If he is deprived of that possession either by third parties or by pre-existing or supervening impossibility, his duties are thereby extinguished. This follows from the understanding that the obligations were imposed because of his use of the land and anything which renders it impossible for him to continue the use is a direct challenge to the landlord and, accordingly, it will be unfair to the landlord to expect him to observe the covenants. Thus if there is a war and the land is occupied by the enemy, the tenant's liabilities will cease during the period of such occupation. Similarly if the land is rendered unuseable because of natural calamity the tenancy will be frustrated. In this respect the rules of customary law are somewhat similar to the principles of the law of Scotland, where it has been decided that if a demised house is requisitioned by military authorities the tenant could abandon the lease.[6]

This reasonable doctrine of customary law affords an interesting contrast with the harsh rule of English law which generally does not apply the doctrine of

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6. Mackeson v. Boyd (1942) S.C.56 and the authorities cited therein.

frustration to leases [7]. The native law, the law of England and of Scotland are at one that if the land granted to the tenant becomes compulsorily acquired, his duties will cease.[8]

In customary law an obligation imposed on two or more persons to whom land has been granted may be either a separate duty imposed upon each person separately or a corporate liability on the whole grantees. Whether the liability is corporate or several depends upon the words used and the intention of the parties as manifested by their conduct. [9] Native law is slow to attribute the misconduct

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7. Paradine v. Jane (1674) Aleyn 26; Tasker v. Bullman (1849) 3 Ex. 351. cf. London & Northern Estates Co. v. Schlesinger (1916) 1 K.B. 20 where the tenant, an enemy alien was prohibited from residing on the rented house by war-time regulations, yet was held liable for rent. In Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Trust Ltd. (1945) A.C. 221 the House of Lords held that a 99 year lease was not frustrated by war-time building restrictions, but Lord Simon, L.C. and Lord Wright observed that if, by legislation building on the land were permanently prohibited, frustration might possibly occur. Lord Russell of Killowen and Goddard L.J. held the opinion that the doctrine of frustration could never apply to leases. A majority of their Lordships were of the opinion that there was no binding authority on the House that the lease can never be frustrated. The Court of Appeal is, however, bound by such authority: See Denman v. Brise (1949) 1 K.B.22, C.A followed in Cussach Smith v. London Corporation (1956) 1 W.L.R 1368. See also Walford, "Impossibility and Property Law" (1941) 57 L.Q.R., 339.

8. Slipper v. Tottenham & Hampstead Junction Ry. (1867) L.R.4 Eq.112; Tay Salmon Fisheries Co. v. Speedie (1929) S.C.593, held bye-laws made the President of Air Council entitled the tenant to abandon the lease. The customary rule stated has no decided cases on this point, but is based on the normal practice.

9. Chief Okro Orukumakpor v. Itebu (1961) J.A.L. 159, P.C.

of one person to another and seldom visits the sins of the fathers upon their children; but under some circumstances the breach of a tenancy agreement committed by one member of a corporate group of grantees will result in joint liability of all the members.

In Idowa Inasa & ors. v. Sakariyawo Oshodi,[10] the eldest son of Nousah, by this time deceased, purported to sell and convey a portion of the land granted to Inasa House, to one Alimotu Orifunke. The grantor instituted an action in the Supreme Court claiming that the tenancy was forfeited. Tew, J. granted the declaration sought. Aworan Inasa was the only defendant to the action in which the declaration was made. No other member of the family was a party to the proceedings. The grantor, housever, evicted all the members of Aworan's family comprising his brothers, sisters, nephews and nieces. These persons now sought recovery of possession. The Privy Council affirmed the lower Court's holding that they had forfeited all their rights in their respective portions of Nassah's original allotment. In the Full Court of Appeal Kingdon, C.J. said,

> "The evidence on native law and custom, and the dicta of judges in previous cases go to show that where the right of occupation of rooms is based on an allotment of such rooms

(10. (1930) 10 N.L.R. 4; affirmed (1934) 11 N.L.R. 10; (1934) A.C. 99.

> to an ancestor of the family and there has been a breach by a successor of that ancestor through misconduct as conceived under native law and custom, there is a forfeiture of the entire holding which affects not only the individual guilty of misconduct but the whole family." 11

This ratio must be limited to the particular circumstances of the case taking into consideration the fact that the breach was committed by the head of the tenant-family, who in customary law, is the agent carrying out what the family is presumed to have decided. [12] If the breach had been committed by one member of the family or with the express disapproval of all the members, the others might not be involved in the forfeiture, Lord Blansburgh who delivered the opinion of the Privy Counsel said, with regard to this point,

> "It is left doubtful, on that evidence, whether the custom involves all relatives in this condemnation, irrespective of whether they approved of or encouraged the misconduct complained of, or were indifferent to it or ignorant of it, or even disapproved of it. The learned trial Judge, however, interprets the evidence as affecting only those relatives of the offender who sympathised with him and, in fact, he finds that the relatives of Aworan including the appelants had taken his side against his chief in a long-standing dispute, the claim by the family, based doubtless on the terms of the grant to Nassah, being that the chief had no rights whatever in the Inasa compound." 13

11. At (1930) 10 N.L.R., p.6.
12. The principle was extended in Onisiwo v. Fagbenro (1954) 21 N.L.R. 3 where forfeiture was held to have been incurred by a breach committed by two members of a family with the knowledge and approval of the third.
13. 11 N.L.R. at p.14.
14. (1928) 8 N.L.R. 19.

In Uwani v. Akom [14], the landlords brought an action against the heads of four Aro compounds who were granted tenancies in the Bende District of Eastern Nigeria. The claim was for forfeiture of the grant on the ground that some members of the Aro community were concerned in selling or mortgaging the occupation rights of one member of their community to another member, thereby offending native law and custom. The Provincial Court found that customary law was somewhat flexible on the point and that it would seem to rest with the landlord to decide on the extent of the punishment; further, that he was within his rights in compelling the Aro Community to quit the land.

On appeal, the Full Court held that it would be inequitable to eject the whole community of about 400 persons from an area of some 15 square miles on which they depended for their maintenance because some have committed an offence of a trivial nature. The Court then ordered that a tribute of £15 per annum should be imposed instead, 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 native custom was further investigated, it might be found that it is the

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14. (1928) 8 N.L.R. 19.

> persons who were parties to the offence and not the whole community who would be punished." 15

With respect, subject to two qualifications, this proposition is substantially true. The customary principle of liability for breach of covenants is that the soul which had sinned shall perish. The offender is personally liable. The two qualifications are: (i) where the offender is a representative of the group, e.g. where he is their head, his breach will involve the group; (ii) Individuals cannot escape corporate liability with the group by merely showing that they took no active part in the breach. Playing a passive role is sufficient to involve them. In their common expression, "silence means consent". To escape corporate liability the non-offending members of the group must prove either that they were entirely ignorant of the breach or that they vehemently opposed it and took the earliest reasonable opportunity to make the landlord realise that they were not privy to the wrong. These qualifications are important and the statement of Elias that legal liability in African law is always individual [16] is not valid under all circumstances.

A question which may be asked is, "where corporate liability exists, can its principle be applied when the

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15. *ibid.*, at p.22.
16. Elias, T.O., *The Nature of African Customary Law*, 1956 ed., p. 81.

person who committed the breach has no beneficial interest in the land involved?" For example, suppose A, the tenant of B, dies leaving minor sons to whom A's brother, X, becomes a guardian (thereby taking over the management of A's tenancy to which the minors succeeded in native law) does a serious breach committed by X operate to the detriment of A's minor sons? The possible answer provided to this interesting problem by a Yoruba case shows that fine distinctions could be drawn in customary law between liability for breaches committed by persons beneficially entitled to the tenancy and those committed by persons exercising right of control and are, therefore, strangers vis á vis the landlord. This case was Chief Eletu Odibo v. Seidu Salako & Ogusan [17], in which the facts were as follows: The predecessor in title of the plaintiff landlord, a white-cap chief, gave land in the year 1862 to one Tigbolo, son of Woru, Chief Posu, and Ali Drosemi to build on. They gave as thank-offering some kolas and two bottles of rum which the chief divided up in the neighbourhood, after splitting the kolas and pronouncing blessing on the land. Tigbolo and Ali built two rooms and lived on the land till 15th June, 1882, when Tigbolo died, leaving the second defendant, Ogusan, his son, a boy of about 10 years,

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17. (1882) W.A.L.C. 523.

and Ali on the land. After his death his brother, the first dependant Seidu Salako, had the land measured by a surveyor, and he stated before the Court that he did this in the interest of his nephew, the boy Ogusan, whose guardian he was. The defendant also contended that the land belonged to Woru.

The assessors informed the Court that the following were the appropriate rules/of native law:

1. That where persons were allowed by another to live and build on land, and that permission was accompanied by the ceremony (described in evidence) of the kola nuts and rum, that land belonged for ever to the persons allowed to build and live, their heirs and successors, until some wrong was committed, and that the native word for such a wrong was _buburu_, which means some gross misbehaviour.

2. That the sale or attempted sale by the person so entitled to live and build on the land is a gross wrong or _bùburu_.

3. That the obtaining of the surveyor's certificate of measurement by the tenant is such a grave wrong on _buburu_ as to render him liable to eviction at the will of the landlord unless the certificate was obtained with the landlord's consent.

4. According to native law and custom the second defendant, the little boy Ogusan, would not be turned out because

the certificate was obtained by his guardian, Seidu Salako.

The principle established here is that under native law for a breach of the terms of the tenancy to involve liability it must be committed by the person beneficially entitled to use the land. The landlord may have some rights of action against a guardian or person controlling the beneficial enjoyment of the tenancy; he may lawfully demand his removal or the appointment of another guardian in addition to him, but this right cannot be exercised in such a way as to prejudice the interest of the innocent tenants in beneficial occupation.

It is usually stated that the committing of a serious crime by the grantee is a breach of the terms of the tenancy. Such statements suggest that <u>any</u> offence, irrespective of its relation to the tenancy, operates as a breach of the duty owed by the tenant under native law and custom. This view is legally incorrect because it fails to distinguish between sanctions imposed for criminal offences not connected with the grants but which may lead to expulsion of the tenant from the community and the effect of such expulsion. The true legal position is that no tenant will be liable for breach of a covenant or condition unless the breach is directly or impliedly connected with the land. [18] It must,

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18. See Chief Bassey Duke Ephraim of Calabar in <u>W.A.L.C.</u>, 6th Jan. 1913, Paras 12,650 to 12,655 of the Minutes of Evidence.

in legal language, "touch and concern" the land. In some cases misconduct such as insulting behaviour, may lead the landlord to demand the land back: this is not really a penalty for breach of covenant but an exercise (by the grantor) of his option not to renew the periodic grant at the end of the period.

Landlord's Undertakings.

(a) Under Customary Law.

When a tenancy is granted under native law and custom, the landlord makes three implied undertakings; these are;-

1. That he has power to make the grant.
2. That he will not derogate from the grant.
3. That the tenant will have quiet possession, but he does not undertake that the land is suitable for the tenant's requirements.

1. Power to make the grant. It is an accepted principle of customary law that a man can give away only what he has authority to dispose of. He could dispose of his individually acquired property or what the group to which he belongs expressly or impliedly permitted him to give away. When a landlord makes a customary grant, there is this implication that either the land was his private property or that he had the authority of the land-holding group to make the tenancy. If it turns out that the grantor had no

power to grant, and, therefore, that the tenant was "stealing" the land, the landlord will be condemned to compensate him for any loss incurred as a result of the invalidity of the grant. The breach occurs from the moment the tenant suffers anybdamage for going into possession not, as in English law, from the moment of the grant.

2. Not to derogate from the grant. Although a tenant's occupation or use of the land granted is always subject to customary rights reserved to the grantor and the community generally, yet a landlord is, by native law, not to derogate from his own grant; he must not exercise any rights reserved to him in such a way as to defeat the purpose of the grant nor must he use his adjoining land or allow any one occupying it with his consent to use the land in such a way as to affect the tenancy adversely. Further, if he has made certain express grants with his right hand, he will not be allowed to take them away with the left simply because such grants do not naturally go with tenancies created under customary law. Thus, where a landlord expressly grants to tenants the sole right over economic trees growing on the land in addition to the normal use of the soil, he cannot later on turn round to deprive the tenants of the right over the trees simply because in native law only the land-holders have rights over economic trees.

This principle that the grantor is not to derogate from the grant applies to tenancies as well as to rights enjoyed by members of a land-holding group; the land-controlling authority, whether a chief or a family-head, can not make a grant of the same piece of land already in a member's occupation, to another person without the consent of the member in possession.[19]

3. Quiet Possession. By giving the tenant possession the landlord impliedly undertakes that the customary tenant will enjoy the use of the land granted free from interruption by the landlord himself or anybody acting on his behalf. The undertaking exists whether the grant was made for building or for purposes of farming and whether the terma of the tenancy were specified or simply implied by law. For example, the Uromi-Ezea native court in Ishan Division of Western Nigeria decided that once a stranger is allowed to build, he is entitled to peaceful occupation of the house and to all reasonable amenities; he may not be subjected to unjustifiable interference by the landlord because of some disagreement.[20] Similarly, the W.A.C.A. has held in a case [1] from Owenrinta, Eastern Nigeria,

19. cf. Thompson v. Mensah (1957) 3 W.A.L. R.240; Oblee v. Anmah (1958) 3 W.A.L.R. 484, both Ghana cases.

20. Uromi-Ezea 674/1945, cited Rowling, Benin, para.67 cf. Chubb, Ibo Land Tenure, para. 82.

1. Emegwara and ors. v. Nwaimo and ors. (1953) 14 W.A.C.A 347.

That where a customary grant of land was made on terms which were not specified, the tenants were entitled to exclusive and undisturbed possession until such time as the grantors established by lawful process that the tenants had forfeited their right of occupation; therefore, a landlord who enters on such land to disturb the tenants' possession is liable in damages for trespass and would be restrained by injuction from further acts of disturbance.

The customary right of a tenant to quiet emjoyment of the land is not limited to cases where there has been express grant; it extends to cases where possession was obtained by a trespasser who later acknowledged the landlord's title. Thus in Okoh v. Olotu & ors.[2], the plaintiff had been in possession of the land belonging to Ogbeumudei in Ag.or, Western Nigeria, for at least twelve years. He had planted economic trees thereon and the grantor knew about it and acquiesced. The defendants who were members of the granter's came on the land and destroyed the trees, their defence being that the land had never been given to the plaintiff. The plaintiff agreed that the land belonged to the granter. Mbanefor, J. (as he then was) held that the plaintiff had in fact been in possession for some 12 years and had incurred expense to the

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2. (1953) 20 N.L.R. 123.

knowledge and acquiescence, he could maintain an action for damages against the defendants, though they were members of the granters owning the land, for their damage to the trees. The learned Judge stated the general principle that a trespasser in possession can maintain an action for trespass against all but the rightful owner who interferes with his possession, and then proceeded,

> " At page 12 of the second edition of Halsbury's Laws of England, Volume 33, it is stated that a mere trespasser cannot by the very act of trespass immediately and without acquiescence give himself possession. The authority for that proposition is <u>Brown v. Dawson</u>. 3 This statement implies that the trespasser could by acquiescence of the true owner give himself possession. Where, as in the present case, the plaintiff has involved himself in an expenditure of money for the development of the land to the knowledge of the true owner and with his acquiescence, his position becomes, in my view, equivalent to that of a licensee with an interest in the land. He has a right to go on the land for the purpose of enjoying the interest he has with the acquiescence of the owner created or acquired on the land." 4

The court then awarded damages to the plaintiff for his possession which was disturbed. The interpretation of a customary principle here, with the yardstick of a renowned English authority, however undesirable in many respects, shows that there is no fundamental difference between the landlord's undertaking for quiet enjoyment

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3. (1840) 3 Ad. & E.1.624.

4. At p. 124.

whether construed under customary or under the general law.

Where the possession of the tenant is disturbed by a stranger not acting with the authority of the grantor, an action against the landlord cannot be maintained in customary law because the disturbance is as much interference with the landlord's rights as it is an interruption of the tenant's quiet enjoyment of the land.

Under the native law there is no implication that the land is fit for the purpose for which the tenant requires it. The tenant takes the land as he finds it - at his own risk. Therefore, if land granted for farming turns out to be infertile or full of noxious weeds, the landlord will not be liable for any damages which he might have suffered. This is because originally customary grants depended on friendship and a man should not be prejudiced because he showed some kindness to his friend. Moreover, a grantee is presumed to have accepted the grant with his eyes open as to the nature of the land; if his judgment turns out to be erronous, no one is answerable for this except himself.

(b) Under the General Law.

Where the relation of the landlord and the tenant is governed by the general law the lessor impliedly covenants

that -

1) He shall deliver possession to the lessee.

2) The lessee shall have quiet enjoyment of the premises.

3) The lessor himself will not derogate from the grant.

1. Delivery of Possession to the Lessee.

Following the principles of the Law of England, where actual demise is made without a formal lease (e.g. a lease for one year from January 1 at a fixed rent) there is an implied undertaking by the lessor to put the tenant into possession at the commencement of the term. If possession cannot be got, e.g. because a previous tenant is still in occupation, the lessor will be liable in damages.[5] Where a formal lease is executed, the implied covenant for quiet enjoyment includes an implied undertaking to put the lessee into possession at the commencement of the term as well as to allow him to remain in possession thereafter.[6] But does this undertaking imply that the lessor is bound to put the tenant into actual possession, or that he is only bound to put him into legal possession so that no impediment in the form of a better right to possession will be

5. Ludwell v. Newman (1795) 6 Term Rep. 458; Coe. v. Clay (1829) 5 Bing. 440. Jinks v. Edwards (1856) 11 Ex. 775.

6. Miller v. Emcer Products (1956) Ch. 304.

interposed to prevent the lessee from obtaining actual possession?

The English theory provides no answer to this question but it is submitted that in Nigeria, if the tenant is prevented from getting actual possession by some one over whom the lessor has control, (e.g. a former tenant) [5] the lessor will be liable for breach of his implied undertaking but he will not be liable where the tenant is prevented from taking actual possession by the act of a stranger over whom the lessor has no control.[7] In such a case he is only bound to place the lessee in legal possession of the demised premises.

2. Quiet Enjoyment.

Under the rules of common law applying in Nigeria the use of the word "demise" in a lease imports into it a covenant that the lessor is entitled to grant some term [8] and that the lessee shall have quiet enjoyment of the premises. This covenant for quiet enjoyment is an assurance that the lessee shall have the property undisturbed by the claim of any right which interferes with its ordinary and lawful possession. It is usually more extensive

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7. cf. the American case from Missouri, Brown v. Wall 171 S.W. 586, 186 MO App.150; See also 51 C.J.S. 310
8. Not necessarily the term he purported to create: the implied covenant for title determines with the interest of the lessor. For further discussion of the principle in English law, See Woodfall, op.cit., 26th ed. para 1444, Hill & Redman, 13th ed., para. 111

than the same covenant under customary law because, owing to the concurrent interests in land under native law and custom, what will be an interferance with the enjoyment in the general law, might be a lawful exercise of right permitted by implication of native law.

In the general law, like under custom, the lessee is protected only against the disturbance of the lessor and those lawfully claiming under him; the lessor is not liable for wrongful acts of strangers for the lessee has other remedies available against an intruder. Thus in Timson v. Fagbayi and anor.[9] where an action was brought on the breach of the covenant for quiet enjoyment as a result of disturbance caused by a third party, Butler Lloyd, J. giving judgment for the defendants on the principles of English law, said,

> " It appears to be settled law that a covenant for quiet enjoyment only protects the purchaser from the acts of the vendor and those claiming under him." 10

Under the Crown Lands Ordinance the covenant for quiet enjoyment is dependent on the lessee "paying rent and fulfilling the conditions therein contained."[11] This qualification, it is submitted, should be interpreted as in

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9. (1933) 11 N.L.R.165, a case dealing with purchase but the principle is not affected.

10. at p. 165

11. Laws of the Federation, 1958 Cap.45, S. 7 (ii); Laws of the Western Region, 1959, Cap. 29 S 7 (ii).

English law and does not mean that they payment of rent or the observance of other covenants by the lessee is a condition precedent to the landlord's observance of the covenant for quiet enjoyment. Even if the tenant is in breach, the lessor will nevertheless be liable to the tenant if he is disturbed in quiet enjoyment of the premises. [12]

The implied undertaking for quiet enjoyment can be excluded on extended by an express covenant to the contrary but where there is no such exclusion or extension, any substantial interference [13] with the ordinary and lawful enjoyment of the demised promises by the lessor or those lawfully claiming under him or acting on his instructions will amount to a breach of the undertaking.

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12. cf. Dawson v. Dyer, (1833) 5 B & Ad. 584; Edge v. Boileau (1885) 16 Q.B.D 117. Taylor & Webb (1936) 2 AER 763, reversed on different grounds, (1937) 1 AER 590.

13. The interference need not be physical; instructing under-tenants to pay rent directly to the lessor resulting in the lessee's loss of the rent or in dimunition of the value of the property will amount to a breach of the covenant: See Edge v. Boileau, supra. Noise or disorderly conduct, done on the adjoining premises, is not a breach of the covenant: cf. Jenkins v. Jackson (1888) 40 Ch.D.71; Jaeger v. Mansions Consolidated Ltd. (1903) 87 L.T. 690, 694, C.A; Phelps v. City of London Corp.(1916) 2 Ch. 255. But it may amount to nuisance on to derogation from the grant; see Newman v. Real Estate Debenture Co. Ltd. and anor. (1940) 1 A.E. R 131.

In Bashua v. Odunsi, Ilubanto (Joined by Order) [14], the plaintiff who was a tailor, occupied a shop as the tenant of the second defendant, paying a monthly rent, which was subsequently reduced to a contribution of 1s.6d. to the water-rate whenever the latter was payable on the whole premises. The plaintiff had denied being a tenant of the second defendant, claiming that he acquired the right to occupy the premises through his father.

The first defendant, who was a son of the second defendant had written to the plaintiff a letter, which he did not purport to write on behalf of the second defendant and by which he required the plaintiff to vacate the shop within two months. On the last day of that period, a carpenter acting on the instructions of the second defendant given by the first defendant, removed some corrugated iron sheets from the foof [15] of the shop while the plaintiff was still in occupation. The plaintiff suffered loss of his own property, those of his customers and also loss of profit.

At the trial the defendants argued that the denial of the landlord's title by the plaintiff entitled them, at native law and custom, to act as they did. Carey, J. rejected

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14 (1940) 15 N.L.R. 107

15.cf. Jones v. Foley (1891) 1 Q.B. 730.
Lavender v. Betts (1942) 2 A.E.R. 72.

the argument on the ground that a monthly tenancy at a rent was unknown to native law and he held that the plaintiff was entitled to recover damages.[15a]

If the lessee is dispossessed by a person claiming under a paramount title the lessor is not liable on the covenant because the lease is subject to the principle of caveat emptor. In such a case the lessee will not be able to recover any consideration he gave for the grant of the tenancy unless he can prove that there was mutual mistake or fraud on misrepresentation by the lessor.[16]

3. Not to derogate from the Grant.

Related to the obligation arising from the implied covenant for quiet enjoyment is the lessor's obligation not to derogate from his grant: He is not to take away with one hand what he has given with the other and, therefore, must not act in such a way as to render the premises unfit for the purposes for which the lease was created. As in customary law, the rule applies where the landlord retains a portion of land adjoining that which he leased. In such cases he impliedly undertakes not to use the land so retained in such a manner as would prejudice the right of the

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15a. sed qu. Whether developed customary law may be said to know nothing of a monthly tenancy at a rent.

16. Egbeyemi v. G.B.O. Ltd. (1939) 5 W.A.C.A 147; a case of sale but the principle is not affected. cf. Clayton v. Leech (1889) 41 Ch. D.103. where the principle of caveat emptor was applied in a case of an underlessee who was evicted as a result of his not investigating the sub-lessor's title.

lessee to use the property granted for any lawful purpose and in any lawful manner, even if by doing so he might diminish the value of the adjoining land retained by the lessor. Those claiming under a subsequent conveyance from him are in the same position as him. Thus where a grant of land with an easement of passage was made to A and subsequently the adjoining land was conveyed to B, giving him exclusive rights over the passage, it was held that B's grant was in derogation of the previous grant to A and, therefore, of no effect against him.[17]

EXPRESS UNDERTAKINGS.

Apart from the implied obligations, the lessor may also enter into express covenants. No particular form of words is required for making such a covenant, but where words with a fixed meaning are used in the document creating the tenancy, oral evidence will not be admissible to explain it in such a way as to mean something different from what they expressed.[18] The undertaking of the landlord must not contravene the provisions of any existing enactment; if it does, it will be illegal and unenforceable.[19]

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17. [illegible]

17. Dorcas Onade & anor. v. Thomas (1932) 11 N.L.R. 104, supra, a case of sale but on the same principle. cf. the English decision in Harmer v. Jumbil (Nigeria) Tin Areas Ltd (1921) 1 Ch. 200, C.A. where land was leased for the express purpose of a magazine for explosives, it was held that the subsequent lessees of adjoining land, who obtained their lease from a successor in title to the lessor, should be restrained by injunction from erecting on their land buildings which would have caused forfeiture of the licenses necessary for storing the explosives.

Everything written on a document creating a lease constitutes the deed. Therefore, except in the Western Region, a covenant is binding although it is endorsed on the deed after signing but before the sealing and delivery. This is because under the pre-1900 English law which still applies[20], sealing and delivery of a deed were generally sufficient to make it binding, without signing. In the Western Region, however, the Property and Conveyancing Law,[1] S.97, (which is similar terms to S.73 of the English L.P.A., 1925), lays down that sealing alone shall not be deemed to be sufficient but that every party who executes a deed after the date of the commencement of the Law [2] must either sign or place his mark upon it in order to complete it. In that Region, therefore, covenants indorsed upon a deed after 23rd April, 1959, must be so indorsed before signing.

Where the lease contains an express covenant for quiet enjoyment the implied covenant is excluded; but even in its usually qualified form it affords a greater protection to the lessee, because, unlike the implied covenant which ceases with the interest of the lessor, the express undertaking endures during the whole term created. Where the lessee is disturbed by a person who does not claim "by, from or under" the lessor, there is no breach of the covenant so as to render the liable.[3]

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20. See Chapter 1, <u>supra.</u>
1. Cap. 100 of 1959.
2. 23rd April, 1959.
3.

Although (on the principles of English law) there is no implied warranty that the demised premises are fit for the tenant's requirements on that they will be put and kept in repair, the landlord may expressly undertake to put them in a suitable condition. Such an undertaking will be interpreted according to the words used in the lease having regard to the intention of the parties. The tenant, however, may by implication waive his rights under the covenant. Thus in Sogbesan & ors. v. George [4], a landlord brought an action against his tenant claiming £94.6s.7d. being arrears of rent and also recovery of the premises. The tenant admitted the sum claimed less £5.- paid subsequent to the writ being issued but counterclaimed for the sum of £90.- by way of damages for the landlord's breach of a clause of the lease which provided

> "that the lessor shall as soon as possible and without any delay whatsoever at his own cost and expense cause any and all necessary repairs and things that are now requisite to be done in or to the said premises the particulars of which have been agreed upon by the lessee and himself."

The tenant went into occupation immediately the lease was executed. The lessor effected no repairs but permitted the tenant to do certain repairs and to deduct the cost from the rent. This was done and the tenant continued in occupation without calling on the landlord to carry out the

4. (1941) 16 N.L.R. 10.

above undertaking, until almost two years afterwards by which time his rent was in arrear.

At the trial it was submitted on behalf of the landlord that the tenant had made out no case on the counterclaim because by his conduct he had in law waived the effect of the clause relating to the landlord's undertaking.

Baker, J. held that the clause meant that the landlord should make the premises reasonably fit for habitation but that the defendant tenant was precluded from availing himself of the covenant contained in the clause, which the facts showed him to have waived.

An express undertaking for repairs entered into by the landlord may impose a single or continuing liability on him: i.e., he may either be under an obligation to put the premises in repair, in which case there can by only one breach of the covenant or he may be under a duty to keep them in repair, in which case there may be a continuing breach and the tenant's recovery of damages on one occasion is, accordingly, no bar upon an action on the same covenant on another occasion. The clause in Sogbesan & ors. v. George[5] was interpreted as imposing only a single liability on the lessor, for as Baker, J. said:-

> "It will be noticed that the lessor does not covenant to continue to keep the premises

5. Supra

> in necessary repair, the covenanter limiting his undertaking to, as the clause states, things that are now requisite to be done."

As in this case, so in all other cases: the express undertaking of the lessor will be construed according to the intention of the parties as shown by the words they have used.

LIABILITIES OF THE TENANT.

(a) Under Customary Law.

Under the native law and custom the tenant expressly or by implication assumes certain obligations as a result of the grant. The implied obligations relate to the tenant's use of the land [6] and the prevention of any serious misbehaviour relating to it, [7] which might prejudice the grantor's reversion.

In general the remedy for the tenant's breach of an implied obligation is forfeiture of the tenancy, occasionally injunction but very rarely damages.[8] A tenant's

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6. Ward Price, Land Tenure in the Yoruba Provinces, para.88. Meek, Land Tenure and Land Administration in Nigeria, pp. 190, 216.

7. Chubb, Ibo Land Tenure, para.96; Bohannan, Tiv Farm Settlement, p. 37. Sir S.R. Menendez, in W.A.L.C., Minutes of Evidence, para.94. Adegboyega Edun in W.A.L.C. para. 13,029; Chief Bassey Duke Ephraim in W.A.L.C. para. 12,650. Contra Ward Price, ibid., paras. 77, 87, 119; and Meek, ibid., p. 209.

8. cf. Taylor, J. in Mamodu Alege v. Ogundipe (1957) W.N.L.R. 211. Under present day conditions if the injury can be compensated for in money, damages may be awarded: Asagba v. Emovboyan & ors. (1959) W.N.L.R. 121.

misbehaviour may be one of the two categories:-

(i) Wrongful acts not relating to land.

(ii) Wrongful acts relating to land and inconsistent with the grant.

The most usual wrongful acts not relating to land are -

(a) Insulting behaviour,

(b) Political or criminal offences.

(a) Insulting behaviour is not by itself a breach of the implied obligation of the tenant but it may destroy the goodwill which is the basis of the grant. If the goodwill ceases to exist the landlord may, in the case of a short--term tenancy of indefinite duration, demand back the land. If the grant is for a long-term purpose, mere insulting behaviour will not entitle the landlord to ask the tenant to give up possession. Further, under modern conditions where customary grants are made in consideration of some monetary payment, the grantor cannot determine the tenancy because of the tenant's misbehaviour towards him.

(b) Political or Criminal Offences. Some writers[9] and court witnesses[10] hold the view that it is a breach of the terms of the tenancy for the grantee to commit a political or criminal offence in the community of the grantor and that

9. eg. Ward Price, op.cit., paras 77, 85, 87.

10. See eg. Tew, J. in Oshodi v. Inasa, Lagos Suit No.296 of 1925, cited by Graham Paul, J. in Ashogbon v. Saidu Oduntan (1935) 12 N.L.R. 7.

persistent repetition of such offences will result in forfeiture of the tenancy. This view is incorrect because what actually happened in such cases was that the tenant was punished by confiscation of his land - usually the only assets he possessed for paying a fine. More usually he was expelled from the grantor's community thereby making it impossible for him to be able to use the land. It was the non-user resulting from the expulsion, not the political or criminal offence of the tenant, that is the breach which will lead to forfeiture. A criminal offence may, however, amount to defilement of the land, and, therefore, a breach of the tenant's obligation.

(ii) Wrongful acts relating to land and inconsistent with the grant.

From what has been said so far, it is obvious that for a tenant to be guilty of breach of the customary obligation imposed by the grant, his wrongful act must "touch and concern" the land - it must relate to the tenancy as such and not merely to the tenant as a member of the political or social group. Further, the wrongful act must be of a substantial nature, or as the Yorubas put it, must amount to buburu which means a gross wrong.[11] Acts of this nature include the following:

1. Abandonment of the land.

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11. Chief Eletu Odibo v. Sedy Salako & Ogushan (1882) W.A.L.C., 523.

2. Defilement of the land.

3. Denial of the grantor's title.

4. Subletting or assignment without the grantor's permission.

5. Using the land for a purpose different from that for which it was granted.

6. Wanton waste.

7. Asserting rights over economic trees not planted by the tenant.

8. In a limited number of cases, withholding of customary dues.

1. Abandonment of the land. It is a breach of the implied obligation under which the grant was made for the tenant to abandon the land. Where he comes from a district different from that of the grantor he is, as Cole says,

> "accepted by the local community as one of themselves - if he cares to identify himself with them, but only so long as he does so identify himself. As soon as he ceases to do so by departing from them whatever rights he may have been granted by the community immediately and automatically cease." 12

It is essential that a man to whom land has been granted should use it; therefore, in the case of an agricultural tenancy, "should the grantee cease to cultivate the land,

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12. Cole, Report on Land Tenure, Niger Province, para.33.; cf. Niger, para. 41.

or abandon it, all his rights therein and determined."[13]

As interpreted by the Court, the question whether a grantee has abandoned the land is a question of fact depending on the evidence available in each particular case. The intention of the tenant, the reason for and the circumstances surrounding his absence, together with the length of time he left the land unused, are relevant factors to be taken into consideration. For example, in Bailie & ors. v. Offiong & ors.,[14] the defendants had obtained a declaration of title to a piece of land in 1913 but subject to the occupation rights of the plaintiffs. In 1917 the plaintiff, Bailie, had ceased to reside on the land and commenced to erect a building thereon claiming that the plaintiff had abandoned the compound and that they were entitled to resume possession. It was admitted that if abandonment was proved the defendants had every right to re-enter. Bailie stated that he left his house and went to live elsewhere because be was ill, but that he always intended to return to the land. He explained that he had allowed his house to fall down

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13. per Smalman Smith, J. (as he then was) in Ajose v. The Queen's Advocate & ors. (1892) R.C.J. at p.47, cf. Omovaka Ovie v. Omoriobokirhie & ors. (1957) W.N.L.R. 169. See also Meek, Land Tenure and Land Administration in Nigeria, p. 209; Green, Land Tenure in an Ibo Village, p.32; Chubb, Ibo Land Tenure, para. 92.

14. (1923) 5 N.L.R. 28.

because he intended to build a new and better one. The Divisional Court found that he had no intention to abandon the land and gave judgment in his favour. On appeal to the Full Court, Counsel for the landlords argued that the plaintiff's permitting his house to fall down was conclusive evidence of abandonment on which the lower Court would have found for the defendant regardless of the intention of the plaintiff. The Court rejected this argument and held, affirming the Divisional Court, that taking all the surrounding circumstances into consideration, there had been no abandonment of the land.

This decision reveals that the intention for the absence, not the mere fact of it, is paramount in deciding whether the grantee has abandoned the land. The tenant's absence for a considerable time raises a presumption, but only a rebuttable presumption, of abandonment. In the Full Court [15], Combe, C.J. admitted the principle of the landlord retaking possession on abandonment by the tenant but he thought that there might be some exceptions to the rule. The learned C.J. then went on to say,

> "However that may be, I entirely agree with the learned Judge in the Court below that such native law and custom does not apply when, as in this case, a native has been granted for his own occupation a defined area on which he was entitled to build as many houses as he may wish, or which he may

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15. i.e. in Bailie & ors. v. Offiong & ors. supra.

> use for any other purpose in connection with his occupation of a compound in a town, without obtaining the permission of the owner of the land." 16

With respect, it will not be impossible to think of particular circumstances under which exceptions to the rule could exist, but it is submitted that the dictum here is a mis-statement of the native law and custom. The authorities [17] and the general practice of the people agree on the legal principle: if the tenant can be shown to have abandoned the land, he loses his rights therein. It is for the landlord to prove abandonmnet. In Bailie & ors. v. Offiong and ors.[18] the landlord failed to prove not only the fact of abandonment but also the intention to abandon and the dictum of the learned C.J. should not be taken to have altered the principle.

2. Defilement of the land. A tenant may commit a breach of the terms of his grant if he defiles the land granted to him or if he allows it to remain unpurified when a third party has defiled it. Some acts are forbidden to be done on certain types of premises and if they are done on unauthorised places the land on which they are done is

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16. Ibid., at p.30
17. See noted 12 & 13, ante, and also Basden, Niger Ibos, p.265; W.A.L.C., para. 10,030; Cole, Zaria, para.121; Eyamba v. Holmes (1924) 5 N.L.R. 83., Berkeley, J. Chief Etim v. Chief Eke (1941) 16 N.L.R. 43, at p.56, Mantindale, J.
18. Supra.

considered to be defiled. For example, among the Ungwe, near Abuja Emirate, in Northern Nigeria,[19] it was forbidden by custom to allow a woman to give birth to a child on farm land or for a man to die in the bush even if the birth or death was accidental. Such event was expected to take place in the house and if the rule was broken the family responsible for the breach would have to pay one ram, one hen, and one basket to the Chief - the Jarkin Tsafi - in order that the farm land or the bush might be cleansed. If this was not done the farm on which the birth or death took place is considered unfit for farming. It was, therefore, obligatory on a tenant of the land on which such event took place to see that it was cleansed.

In Oba, an Ibo town in Eastern Nigeria, it was a defilement of the land for a person to commit suicide by hanging. If such a misfortune took place propitiatory sacrifices must be offered and unless they were offered the land would be unfit for human occupation. A tenant who allowed such a defilement to go uncleansed was in breach of his customary obligations and liable to eviction.

Some types of criminal offences are regarded as defilement of the land - as a frontal assault on the Earth-Goddess responsible for the fertility of the land. Such

an offence is an abomination and if it is not purged the land will be infertile and crops and men may perish. The tenant, like members of the group, is under an obligation to see that these offences are not committed. The offences include incest, rape, and the killing of a totem animal.

3. Denial of the Landlord's Title.

Customary grants being in their origin of an oral nature, every care was taken to see that the grantordid not lose his interest in the land by the tenant asserting absolute rights over the land or setting up such rights in a third party, adverse to the grantor.[20] If a tenant denies the landlord's title he commits a breach of the implied condition which is the basis of the grant and the landlord will be entitled to forfeit the grant.[20a] The essense of the matter is that the tenant has affirmatively set up title in himself or in some one else other than the landlord. The customary rule on this matter is not different from the rule of the general law or the law of England. A tenant's refusal to give up possession when he is asked to do so by the landlord does not constitute a denial of the grantor's title [1] unless by so refusing he also assents that someone else is his landlord.

20. Ward Price, op. cit., para 85.
20a. Onisiwo v. Fagbenro (1954) 21 N.L.R.3 and the authorities cited therein.
1. Surakatu Lawani v. Tadeyo & anor. (1944) 10 W.A.C.A. 37.

Where a tenant commits a breach of this undertaking forfeiture is incurred, but forfeiture is not automatic; the landlord must do some unequivocal act to show that he intends to re-enter and determine the tenancy. As the W.A.C.A. correctly observed in Surakatu Lawani v. Tadeyor and anor.[1]

> "there is no such thing as automatic forfeiture; misbehaviour does not automatically involve forfeiture, it merely makes the culprit liable to forfeiture at the will of the over-lord, which, nowadays, if resisted can only be enforced by reference to the Courts." [2]

Among the Ibos and the Yorubas the landlord manifests his intention to forfeit the grant by sticking a knotted oil palm-leaf [3] on the land, or by placing some fetish there [4], to show that the land is closed to the tenant.

If forfeiture has been incurred the landlord must take all reasonable steps to obtain his remedy at once; if he fails to act quickly an implication will arise that he has condoned the tenant's misbehaviour and the courts will, on the grounds of equity, refuse his calling in aid principles of native law, merely for the purpose of bolstering up a state claim. [5]

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1. (1944) 10 W.A.C.A.37.
2. ibid, at p. 39.
3. Meek, Law and Authority in a Nigerian Tribe, p.228; Jinadu Okunola v. Toriola (1957) W.N.L.P. 9.
4. Eshugbayi Oloto v. Dawody & ors. (1904) W.A.L.C. p.523; 1 N.L.R. 57.
5. per Webber J, in Akpan Awo v. Cookey Gam (1913) 2 N.L.R. 100.

In Iwok Owume v. Inyang [6] a tenant who had been occupying a piece of land in Calabar Province of Eastern Nigeria for some ten years and more, alleged that he had bought the land outright from the head of the local community. It was held by Carey, J., reversing the Provincial Court, that he had not by this allegation so impugned the landlord's title as to render himself liable to forfeit the holding. In considering whether or not forfeiture was incurred the learned Judge observed that

> "What the appellant [7] obtained from the land--owners was the customary native title to use the land for an unlimited time, subject to the observance of native law and custom in such matters. He unsuccessfully tried, as the Provincial Court was justified in finding, to acquire what he considered to be a better title by purporting to buy the land from the head chief. The evidence in the record and the principles laid down in the reported cases do not in my opinion establish that by so doing the appellant forfeited his right to occupy the land or rendered himself liable to pay compensation." [8]

The ratio of this case is that the tenant's purported purchase of absolute interest in the land and the claim of title in himself do not constitute a breach of the obligation. This is a correct application of the customary principle because the tenant was acting under a mistake of fact; a customary tribunal will not normally hold him

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6. (1931) 10 N.L.R. 111.
7. i.e. the tenant.
8. at p. 112.

guilty of breach though it will declare the purported sale invalid and order the head to repay the tenant whatever is paid as the purchase price. To be liable, the tenant must, in native law, be aware of what he was doing in denying the grantor's title: he will be acting more or less contumeneously in defiance of the landlord. Unlike English law where a technical error in pleadings by the tenant's Counsel could be attributable to the tenant himself, customary law will not hold him liable if his statement was made inadvertently. Thus, a statement made by an old man in cross-examination when giving evidence in favour of his son who was fighting a quite unjustified claim to eject him in a suit to which the landlord was privy, does not amount to a denial of the landlord's title.[9] This is because "a possibly angry or confused answer of an old man exasperated by cross-examination in the course of an unfounded litigation brought against his son" [9] was not made wilfully to prejudice his grantor's reversionary rights.

For the person claiming that his title has been denied to succeed in the action, it must be proved that he has a present vested reversionary interest in the premises, not merely a hope of obtaining such interest. A

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9. per Graham Paul, J. in Ashogbun v. Oduntan (1935) 12 N.L.R. 7.

son who is sui juris has no such interest in the land held by his father as long as the father is alive. Similarly, although by native law and custom a man who made an outright transfer of the land he held privately has a hope that it might escheat to him in the event of the transferee dying intestate and without an heir,[10] such a transferor cannot bring an action for denial of his title because he has no longer any present vested reversionary interest to support the action.[11]

Even if the tenant has denied the landlord's title, the landlord must specifically plead customary law and he may nevertheless lose his claim, notwithstanding such pleading, if it be found from the circumstances that his relationship with the tenant is governed by the general law or by the law of England.[12]

Where forfeiture has been incurred on this ground the High Court, like a customary tribunal, may, in its equitable jurisdiction, grant relief against forfeiture. On grounds of convenience as of equity eviction is rarely ordered where the grantee has been in occupation of the land for a long time.[13].

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10. Essien v. Duncan (1956) 2 W.A.L.R. 155, (Ghana) but the principle is the same in Nigeria.
11. Ayisi v. Sakyiamabea (1957) 3 W.A.L.R. 92, Ghana; but the same principle applies in Nigeria.
12. Bashua v. Odung; (1940) 15 N.L.R. 107.
13. Akpan Awo v. Cookey Gam, supra; Ometa & ors. v. Chief Dore Numa (1929) 9 N.L.R. 46. Apata Jamh of Akuku & ors. v. Freeman Ogbeki & ors. (1956) W.N.L.R. 73.

4. Alienation without the grantor's consent.

It is a breach of the implied term of the tenancy for the grantee to sublet, assign, mortgage, or otherwise part with possession of the land granted to him. This breach is related to that of denying the landlord's title and is usually the evidence of such denial because by alienating the interest granted to him customary law presumes that he has absolute rights in the land. The prohibition against alienation without consent is imposed by law and contrasts with the position in English law under which a tenant may alienate part of or all his interests in the demised premises unless expressly prohibited by contract.[13a] The customary rule applies fairly uniformly to all the tribal groups of Nigeria:[14] to the Ibos [15] and the Efiks[16] of Eastern Nigeria, as to the Binis [17] and the Yombas [18] of the West; to the Hausas [19] of the North and to the Federal territory of Lagos.[20] One reason for the rule is to

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13a. Woodfall, 26th ed. p. 857; Hill & Redman, op.cit., 13th ed. para. 472, and the authorities cited therein.
14. Meek, Land Tenure and Land Administration in Nigeria. pp.190,191.
15. Chubb, Ibo Land Tenure, para 96; Basden, Niger Ibos, p.266. Unwani v. Akom (1928) 8 N.L.R.19; Magbeleke Family v. Madam Iyaji, Onitsha Supreme Court Suit No.4 of 1931, cited Chubb, op.cit., para.97. Daniel v. Daniel (1956) 1 F.N,L.R. 50.
16. W.A.L.C., Minutes of Evidence, para.12,577 by Chief Bassey Ephraim. Bassey & ors. v. Eteta & ors. (1938) 4 W.A.C.A. 153 at p. 158, per Webb, C.J. Eyamba v. Holmes (1924) 5 N.L.R 83, at p.86: Berkely, J. Chief Etim v. Chief Eke (1941) 16 N.L.R. 43.
17. Rowling, Notes on Land Tenure in Benin, etc., para.36.
18. Folarin, The Laws and Customs of Egbaland, 1939 ed., p.79; Wand Price, op.cit., paras. 90, 131; Fernandez & Co. v. Shepherd (1906) W.A.L.C.527, Nicol, J.

19. Cole, <u>Zaria</u>, para.121; <u>Niger</u>, para.33.

20. <u>Buraimo & ors. v. Gbamgboye & ors.</u> (1940) 15 N.L.R. 139; (1941) 7 W.A.C.A 69. <u>Shelle v. Asajon</u> (1957) 2 FNLR 65.

prevent introducing on the land people whom the landlord will not desire as neighbours and who will be under no obligation to the community.[1] The tenant is accepted personally in sharing the use of the land with the grantor: he cannot pass his rights to others without the knowledge and consent of the landlord.[2]

Apparently the length of the period of the grantee's possession is immaterial; the rule in Akpan Awo v. Cookey Gam[3] does not apply. The landlord's right to sue for forfeiture crystalises at the moment when the tenant attempts to alienate. It is then that a breach of the implied term occurs and if the grantor takes steps within a reasonable time therefrom to enforce his remedy, the tenant may be evicted. In Onisiwo & ors. v. Gbamgboye & ors.[4] the Court declared that customary tenants who claimed they had been in occupation for upwards of 90 years forfeited their rights in the land from the time theycommitted breach of alienation. The tribal Judge after reviewing a number of authorities concluded:

> "In the present case on the authorities I have no difficulty in holding that the conduct of the defendants in executing a lease of family property for thirty years to a stranger without the consent of the family amounts to such

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1. per Cousey Ag. F.J. in Oknojeror v. Sittim Sagay (1957) W.N.L.R.70, at p.71; Fed. Supr. Ct.
2. Cole, Niger, para 33.
3. Supra.
4. (1941) 7 W.A.C.A. 69.

> a misbehaviour as to involve them in the forfeiture of their rights and the plaintiffs are entitled to the declaration sought." [5]

The W.A.C.A. in affirming the decision of the trial Judge said,

> "It is obvious that the leasing of the property by the defendant/appellants to a stranger for a long term of years under a claim of ownership constituted a direct challenge to the plaintiff respondent's rights and amounted to a misbehaviour entitling forfeiture." [6]

The principle that the tenant's possession for a long time will not defeat the landlord's right to enforce forfeiture in case of alienation applies in Ghana [7] in the same way as it does in Nigeria.

Not only a tenant but also a member of a corporate group occupying an allocated portion of land held by the group is under an obligation not to alienate without the consent of the group. In Adagun v. Fagbola [8], for example, a member of a family was held to have lost his rights to occupy family land allocated to him because of his mortgaging it without the consent of the family.

The breach of the tenant's customary undertaking does

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5. cited ibid., pp.69-70.
6. ibid., p.70.
7. See Ado v. Wusu (1940) 6 W.A.C.A.24, where it was said that occupation for 200 years did not raise an estoppel against the landholder.
8. (1932) 11 N.L.R.110

not depend on whether the alience acquired any legal interest in the land as a result of the transaction: it is the attempt to alienate that constitutes the breach. On principle, the alience or any other third party cannot acquire any legal rights in the land through the tenant because he is incapable of creating such interest without the grantor's consent. The gravamen of the misconduct is that

> "if it is not promptly detected, the overlords may one day be faced by an occupier who could assert that the overlords had acquiesced in or tolerated acts adverse to their title." 9

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Once a tenant has, with his eyes open attempted doing the act which amounts to alienation, the breach is committed whether or not the act was completed. In Onisiwo v. Fagbenro [10] the plaintiffs claimed a declaration that the defendants as customary tenants had forfeited their rights in the premises now known as 66, Martins Street, Lagos, because the defendants or some of them had granted a lease thereof to a third party. The premises were granted to the defendants' ancestors some eighty years ago.

9. per de Comarmond, S.P.J. in Onisiwo v. Fagbenro (1954) 21 N.L.R.3 at p.7, citing in support Sakariyawo Oshodi v. Buraimo Balogun (1936) 4 W.A.C.A. 1.

10. (1954) 21 N.L.R.3.

The defence was that -

1) the native law was different from what the landlords contended

2) the tenants had made no alienation because registration of the title of the third party (the alienee) had been refused

3) they had acted under an honest mistake that they and their ancestors were absolute owners of the property, in as much as they had been in possession for eighty years

4) the circumstances of the case did not warrant forfeiture.

In dealing with the first defendant's contention, de Comarmond, S.P.J. accepted the customary law as established by both the Federal Supreme Court and the W.A.C.A. and said,

> "The case of Buraimo v. Gbamgboye [11] is on all fours with the present one; the descendants of a domestic who had been given permission to occupy a portion of family land had granted a lease thereof to a stranger for a term of 30 years without the consent of the overlords. Butler Lloyd, J. held that a forfeiture had been incurred. What is more, the learned Judge dealt with Counsel's objection that no evidence of native law and custom had been given. The conclusion reached by the learned Judge was that *there was a clear principle emerging from judgments of this court, namely, that the rights of the customary tenant under native law and custom are limited to occupation during good behaviour, that these rights do not include the power to alienate without the consent of the family, and that an attempt to alienate without consent will involve forfeiture of those rights*."[12]

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11. *Supra*.

12. ibid., at p.5; italics mine.

The learned Judge rejected the second contention of the tenants and said that the cases cited in their support bear out the view that the execution of the lease did, under native law and custom, render the defendants liable to forfeit their rights as tenants.

The third defence was also rejected because there was no indication that the defendants tried to come to terms with the landlords: they definitely took the attitude (before the Registrar of Titles) that they were absolute owners and missed the opportunity of placating the landlords by offering to share the rent received and it was rather late in the day to say that they were sorry or that they made a mistake in good faith; they were not in a position to ask for equitable treatment.

De Comarmond S.P.J. also rejected the fourth argument and observed as follows:

> "One may feel tempted to attach little importance today to the rights of reversion or the rights of forfeiture established and recognised under native law and custom. One may think that, owing to the impact of Western Laws and the existence of modern social and economic conditions, the old order of things in Nigeria must fade out.
>
> I think, however, that the proper way of relegating irksome or outmoded law and custom is to have recourse to legislation as was done to Epetedo Lands.
>
> In the present case the defendants say, in effect, that forfeiture would be too harsh. What is the alternative? To let them go scot-free and have another try?" 13

13. at p.7

The learned Judge then declared that forfeiture had been incurred under native law and custom and ordered the tenants to give up possession of the property.

The implied prohibition against subletting could be varied by express provision in the agreement between the parties. Where such special agreement is clearly established the landlord will not be allowed to rely on the implied terms of grants in customary law to deprive the tenant of the rights acquired under the contract. This was the basis of the decision in Akunne v. Ekwuno [14] where the W.A.C.A., affirming Manson, J. held that by the special form of the grant made to the tenants, they were entitled to put other tenants and wine-tappers on the land without having to obtain the landlords consent every time.

5. Using the land for a different purpose.

The use to which a customary tenant may put the land granted to him depends on the purpose of the grant.[15] The two commonest purposes were farming and dwelling. Grants of farmland were for growing seasonal crops: it would be a breach of the implied undertaking for the tenant to plant economic trees thereon because firstly the presence of the trees would suggest that the tenant had absolute interests

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14. (1952) 14 W.A.C.A. 59
15. Eyamba v. Holmes (1924) 5 N.L.R. 83 at p.87.

in the land[16] and the landlord's reversion would thereby be in jeopardy, secondly even if it could be proved aliunde that the tenant had no absolute interests and that he owned only the trees, their very existence would restrict the landlord's enjoymnet of the land on determination of the tenancy.

Customary grants could be made for other purposes than farming or dwelling but the principle is not affected. Thus in Rhomda Division in Eastern Nigeria where land is usually granted for oil trading, the tenancy will be forfeited if the grantee engages in farming or fishing.[17]

The reason for confining the tenant to the particular uses contemplated by the parties at the time of the grant is that only a person who holds absolute interests in land has the freedom of using the land for any purpose and of changing that use at any time he likes. A landlord may, of course, expressly allow a tenant to use the land for as many different things as possible and to change such use quite often. In practice if this is done he generally preserves some evidence of his reversionary rights either by reserving some tribute, rent or service to himself or by performing some customary rites on the land, which only a man in his position can perform.

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16. Folarin, op.cit., p.80; Meek, Land Tenure and Land Administration in Nigeria, p.116.

17. Chubb, op.cit., para 79.

Where the grant is for the purpose of building a dwelling house, the intention of the parties is that the grantee will remain in occupation for an indefinitely long period and, therefore, unless the tenant is expressly prohibited, he may use the land for farming in addition to building. Sometimes, too, the grant is for unspecified purposes. If this happens the grantee may use the land for anything he likes so long as he does nothing to prejudice the landlord's reversion. Such grants for unspecified purposes are rare and the tenant may find some difficulty in proving one.

6. Wanton Waste.

A tenant under native law and custom is bound to use the land with due care so that its value to the landlord will not be destroyed or diminished when the reversion falls in. He is presumed to have undertaken to preserve the economic trees: it will be a breach of his obligation to cut them down or damage them in any way.[18] The liability exists regardless of the duration or the purpose of the tenancy granted but it relates only to voluntary waste: it does not extend to permissive waste.

If the tenant commits a breach of his obligation in this respect the landlord may forfeit the lease and/or

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18. cf. W.A.L.C. para. 12,575.

claim compensation for the waste. Thus in a recent case[19] from Warri in Western Nigeria, a representative action was brought against customary tenants to recover damages for wrongfully cutting down and damaging palm trees on a piece of land at Okuovbori and for injuring the reversion. It was proved that the tenants paid tribute to the plaintiff's family only if they (the tenants) collected palm fruits in a particular year and that they had cut down the palm trees as alleged.

Duffus, J, held that -

(i) the first defendant as a customary tenant had no right to cut down the palm trees;

(ii) on the point as to what form of action the customary owner of the land should take, if the defendant had not been a customary tenant and as such in possession of the palm bush the action should have been in trespass, but if he was a customary tenant and as such in possession and lawfully on the land, then the action would be properly brought as one for waste, it not having been argued that the defendant cannot, as a customary tenant and on the terms and conditions established in the case, commit waste.

The Report does not make it clear whether " the terms of the tenancy" referred to were express or implied but

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19. Asagba v. Emorboyan (1959) W.N.L.R. 121.

the point is immaterial and the learned Judge's decision (with respect) is correct in principle beaause once a customary landlord established that his tenant has committed waste, the onus is shifted on the tenant to prove the landlord's express consent to his action or otherwise suffer the penalty.

7. Asserting rights over economic trees.

A customary "loan" of land does not confer on the grantee any rights over economic trees standing on the land.[20] Every grant, therefore, contains an implied undertaking on the tenant's part that he is not to claim any rights in the trees on the land unless there was express agreement to the contrary. Among the Yorubas the customary tenant of farmland is said to have got an "Iwanoke" or "Dont-look-up land"[1] - that is, a piece of land in which his rights are limited

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20. Ajisafe, op.cit., p.11, Folarin, op.cit., p.79, Johnson, op.cit., p.95 Meek, Land Tenure and Land Administration in Nigeria, p. 190, 209. W.A.L.C., para. 12,575. Asagba v. Emovboyan, supra; Moses Johnson v. Weto (1895) W.A.L.C. 596, a case of "pledging" land, but on the same principle. Kugbuyi v. Odunjo (1926) 7 N.L.R. where Tew, Ag. C.J. admitted that his decision in a previous case, Lariade v. Adebiyi (cited 7 N.L.R. p.52) was made per incuriam.

1. Ajisafe, op. cit.

to tilling the soil but from which he is not to look up or cast envious eyes on economic trees. This rule is of fairly general application to tenants in all parts of Nigeria and is in direct contrast with the rule in English law.[2] Its operation is, however, limited to economic trees growing naturally on the land or to those planted by the landlord himself for if the tenant be allowed to plant valuable trees the grantor has no rights over them.

When a breach of the customary rule is committed the landlord may, on the principle laid down by Duffus, J. in the Asagba case [3] bring an action for waste. It seems, too, that he can bring an action for trespass for Tew, Ag. C.J. in Kugbuyi v. Odunjo [4] upheld the claim of an Awori landlord who sued in trespass against his tenant who reaped palm trees on the land he occupied. Trespass could be a proper action because although the tenant is in legal possession of the land he has no possession of the trees which are treated quite distinctly from the land on which they stand. Reaping them is, therefore, a trespass on the landlord's legal possession.

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2. Mervyn v. Leeds (1553) 1 Dyer 90a; Herlakenden's case (1589) 4 Co. Rep. 62 a, b; Liford's case (1614) 11 Co.Rep.46b. Barret v. Barret (1628) Iteb. 34. Doe d. Douglas v. Lock (1835) 2 Ad & El. 705, 750.

3. Supra.

4. (1926) 7 N.L.R. 51.

8. Withholding Customary dues.

The following table illustrates -

PAYMENTS IN RESPECT OF DEPENDENT INTERESTS.

Payment in respect of land-holding to person not in position of superiority:-	Payment in respect of land-holding to social superior:-	Payment in respect of land-holding to political superior:-	Payment not in respect of land-holding:-
rent.	[by members only] tribute/maintenance/dues.	(a) By members of the group tax (b) by non-members. Tax/tribute/rent	Taxes; customary dues (other than land dues).

Payment in respect of absolute interests:-

tax/tribute.

[illegible]. [illegible]. A customary tenant will be in breach of the implied obligation of his tenancy if he withholds paying to the landlord the customary dues payable in respect of his enjoyment of the land.

Customary payments made by a person in occupation of

land may be grouped as follows:-

a) Payments in respect of political obligations.

b) Payments in respect of social obligations.

c) Payments in respect of occupation and use of land.

a) Payments in respect of political obligations.

Customary dues within this category were in the nature of taxes payable by citizens of modern states and its purpose was to provide for the effective running of the body corporate - the political group. In Northern Nigeria these payments could be any of the following: [5]

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5. Lugard, Sir F.D. Northern Nigeria: Memorandum on the Taxation of the Natives in Northern Nigeria, London, H.M.S.O., 1907, Col. 3309. p.10 ff. Lord Hailey, N.A. Part III, pp.75-79, Rowling, Plateau, para. 38. Meek, Land Tenure and Land Administration in Nigeria and Cameroons, p
In the Gold Coast (as it then was) it was said by Webber, C.J. and Michelin, J. (Aitkin, J. dissenting) in Amoah II v. Atta & ors. (1933) 1 W.A.C.A 332, that the claim by a paramount chief to one third share of the rents or profits of lands alienated by stools subordinate to him was not of a political or constitutional character. This view, with respect, is questionable and seems to be based on Webber, C.J's, acceptance of the statement in page 49 of Caseley Hayford's "Gold Coast Native Institutions" which failed to distinguish between "abusa" payable by a customary tenant and "tribute" payable by subordinate chiefs from natural produce of land, such as gold, to the Paramount Chief even if absolute interests in the land is vested in the sub--chief: See Atta & ors. v. Armah (1930) 1 W.A.C.A. 15.

(i) "Zaka", a title payable by all Moslems to the administrative superior on the two staple crops of guinea corn and millet.

(ii) "Kurdin Kasa" or land tax payable by all agricultural classes and levied on the value of arable land. In Zaria Emirate the payment was calculated on every hoe.

(iii) "Ushur", a form of plantation tax, levied on all other crops such as rice, onion, indigo, wheat, cassava, tobacco and date palm, on which 'zaka' was not levied.

(iv) "Jingali", or tax on livestock.

In addition to these payments there were taxes on handicrafts and canoes as well as death duties and caravan tolls. Taxes similar to those paid in the North were payable in Souther Nigeria [6] at more or less regular intervals, according to the needs of the community. Sometimes, in addition to or in substitution for these payments the members of the community might undertake a corporate responsibility for the duties requiring the expenditure of the revenue so collected - such duties as maintaining the roads or market places or providing policemen for the village. [7]

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6. Aba Commission of Inquiry (Memo Quoted) Sessional Paper, No.28 of 1930. Lugard, Sir F.D., Report on the Amalgamation of Northern and Southern Nigeria, para 28.
7. Arderner, Interim Report on Socio-Economic Survey of Mba-lse, p. 102. Green, Ibo Village Affairs, p.12.

These dues whether assessed on land or produce and whether paid in cash or by services, were not rent. They were comparable to the British "Property Tax" payable under Schedule A of the Income Tax Act, 1952,[8] in respect of income arising from the exploitation of the right of ownership of land.[9] The fulfilment of the civic responsibility required by the Act from an owner of a freehold or leasehold premises does not transform such a payee into a tenant of the state of of the Income Tax Commissioners any more than similar customary payments do transform the customary paying into the tenant of the tax--collecting authority.

b) Payments in respect of social obligations.

Dues similar to those payable in respect of civic responsibility are also payable to chiefs and family heads by members of the community in recognition of the social superiority of and as a mark of loyalty to those heads. These payments, usually called tribute, are not made in consideration of the rights enjoyed in land. Among the Yorubas this form of payment is called *isin* [10] and differs from *ishakole* payable by tenants as such. The Ibos use the same word "iru" or "iru-ala" for both *isin* and *ishakole*.

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8. 15 & 16 Geo 6. & 1 Eliz II Cap.10 S.82; a Schedule A, para.1.
9. See *Halsbury's Laws of England*, 3rd ed., vol.20, para.51 ff.
10. cf. Elias, *Nigerian Land Law and Custom*, p.116, citing *Ife Overlords v. Modakekes* (1948) Daily Service, December, 22 p.1 Judgment of Hallinan, J. on Monday, Dec.13, 1948 at Ife Supreme Court.

It is a well-known principle of native law that a man who fails to discharge his civic duty may be penalized by being deprived of rights in enjoyment of 'communal' land but this does not imply that such a culprit is a tenant of the corporate group just as enforcing a judgment order against an income tax defaulter does not change the legal fact that he is not a tenant of the body politic.

c) Payments in respect of occupation and use of land.

Payments made in consideration of rights enjoyed in land are of two classes:

(i) Customary dues;

(ii) Contractual (customary) payments.

(i) Customary dues per se are imposed by law as a means of preserving the grantor's reversion. Liability for payment differs from one ethnic group to the other.[11] The Ibos refer to it as iru or iru-ala, the Hansas call it galla, the Yombas ishakole and the Binis, arkohere. In some societies such as the Tiv [12] it was totally unknown; in some places it was payable once every year as long as the tenancy lasts, in others it was payable only once, i.e. before the grant was made and yet in other areas the grantor was bound to return what he was paid (or

11. Cole, Zaria, paras 97 & 98. Ward Price, op.cit., paras.36, 114 and 117. Rowling, Benin, para.31.

12. Bohannan, Tiv Farm+Settlement, p.38 cf. Cole, Niger, para. 107. Usually the population in such societies was sparse and the land plentiful.

its equivalent) on the determination of the tenancy.

The reason for the customary payment was to provide some evidence of the grantor's ultimate title, not to provide him with an economic advantage. For this reason, in some cases where the grantor has implicit confidence in the tenant or where he performs special rites [13] consistent only with the rights of a landlord of the property, he may waive his claims for the dues. Where the claim has not been expressly or impliedly totally waived, it is compulsory on the tenant to pay it even if the parties said nothing about it at the commencement of the grant. Moreover, even if the tenant had made no payments in the past, the grantor could within any reasonable time in the future demand the due which would accrue and if the tenant failed, might enforce his rights by eviction [13] but he could not recover any past dues which he would be presumed to have waived.

An essential feature of this compulsory customary payment is that what is payable, together with the quantum thereof, is fixed by the local custom. For instance, in Oba in Eastern Nigeria, eight kola-nuts, eight yams and a hind leg of an animal killed by the tenant during the Ana-na-agwn Festival, is payable; in Asaba, the tenant pays yams, palm wine and tobacco [14]; among the Igbirra

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13. W.A.L.C. para.12,579.
14. Rowling, Benin, para. 90.

of Kukuru Division yams and palm wine [15] are payable. In the Allawa District of the Niger Province of Northern Nigeria the tenant was required to pay one bundle of grain measuring approximately 50 lbs. and if he has grown rice on the farm the dues will amount to five <u>mudus</u>[16] of rice [17]. Among the Hausas of Zaria Province one chicken was payable irrespective of the size of the land granted.[18] In the Kachia District beer was given as the payment [19], in the Zangon Katab a basketful of the crop grown [20], whereas in the Kagora District of the same province one goat was given at the commencement of the tenancy but was returnable on the determination of the grant.[1] In the Kwon area of the Plateau Province the amount was a basket of grain (or two for a large plot) and two pots of beer. [2]

(ii) <u>Contractual Payments</u>. A distinction must be drawn between customary dues of the above class imposed on the tenant by law and payments made as a result of an agreement between the parties. Whereas the customary dues are uniform in each locality, the contractual payment is not fixed and depends on whatever the parties stipulated,

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15. <u>ibid</u>. para.31.
16. A "mudu" is a small basin which on the average holds about 5 lbs of rice.
17. Cole, <u>Niger</u>, para 74.
18. Cole, <u>Zaria</u>, para.31
19. Cole, <u>Zaria</u>, para.66
20. Cole, <u>Zaria</u>, para.98.
1. Cole, <u>Zaria</u>, para.27.
2. Rowling, <u>Plateau</u>, para.58.

varying substantially within the same locality. If the parties expressly agree on what the payment will be the payment of the traditional customary dues will be excluded and only the contractually agreed amount can be claimed by the landlord. If the tenant fail to pay in any particular year the grantor may claim the accruing dues as well as the arrears. This is a mark of difference between those customary payments fixed by the parties themselves and those fixed by the implication of law: in the latter case the grantor can only claim what will be due at the time of action but not the arrears.

If no express agreement as to the dues was entered into at the time of the grant the tenant will be liable to pay only the traditional customary amount fixed by law and the landlord cannot later try to impose a larger amount after the tenant has entered into possession. It is submitted that the case of Mgbelekeke Family v. Madam Iyaji [3] is supportable on this principle rather than on the test of proof of custom according to the principles of English law adopted by the learned Judge. In that case a landlord claimed for a declaration of title and an order for half the rent received by his customary tenant who had concluded a lease of part of the land to a European firm. The Supreme Court addressed itself to the following questions:

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3. (1931) Onitsha Supreme Court Suit, No.4 of 1931.

(i) Did Madam Iyaji in fact consent to pay over half of the rent?

(ii) If she did agree, was there any consideration for the agreement?

(iii) Has a landlord under the custom of Onitsha people the right to receive from a kola tenant a share of the rent payable under a sub-lease?

In answering the third question the Judge said that one of the essentials of a custom which the Court would enforce was that it must be immemorial but that fact -

> "puts the plaintiffs in a difficult position since it is obvious that they cannot date the custom further back than the advent of European civilization before which such a conception as payment of a yearly rent for land was unknown but it has recently been laid down b the Privy Council and I should be the last to dissent from the proposition, that native custom may change with the advent of European ideas and I should not be inclined to exclude a custom from recognition if it could be shown that it has existed substantially back to the time of European settlement."

He stressed that there were other difficulties in the plaintiffs' way: a custom must be certain but all that the plaintiffs alleged was a custom to take a perfectly indeterminate share of rents. Further, the custom must not arise from wrong or unsurpation by the people of Onitsha; a mere practice of one side making a demand which is only accepted to by the other side under pressure and even forced

upon him by legal process could give rise to no binding custom since the essential element of consent was absent. He then concluded as follows:

> "I am clear that the custom contended by the plaintiffs lacks three essential elements for custom which the Courts will enforce, namely, antiquity, certainty, and free consent and that plaintiffs have also failed to make out their case under this head."

In this case the Court was measuring the validity of a custom in native law with the yard-stick of English legal principles. This, with respect, is unsatisfactory because in customary law itself the element of antiquity is not essential in all cases. What makes a special custom binding is general acceptance by members of the community to which it applies: if these members regard the rule as obligatory and binding upon them, a customary tribunal will enforce it notwithstanding that its origin could be traced within the living memory. What the <u>Madam Iyaji</u> case reveals is that there was no express agreement between the landlord and the tenant for payment of any additional dues to those recognised in native law, and, therefore, the landlord could not recover half the share of the rent paid by the European firm. Had his claim been solely for customary dues, the decision could have been different. Moreover, there was no indication in the Report that the landlord expressly empowered the tenant to sublet and a better remedy which he would have sought

would have been forfeiture of the grant because of the alienation. This he did not do and by making the claim for half the rent he impliedly waived the breach caused by the subletting without at the same time proving an express contract for payment of more than the customary dues.

Express Obligations of the Tenant in Customary Law.

Under the conditions existing today many of the implied terms of customary tenancies are expressly incorporated in a document executed by the grantee and intended to regulate his relation with the landlord. For example, the "book" signed by Ibo tenants in the Kagoro District of Zaria Province [4] expressly provided that -

1) the land is "for purposes of building only" and "is not given for farming purposes"

2) "when they [the tenants] wish to leave they have not the right to sell the buildings they have built to whoever they deem fit, but only with the knowledge and agreement of the village" - the grantors.

3) The District head could evict a troublesome tenant and could retake the land if it was required for public purposes.

Usually these documents are silent on a number of

4. Reproduced in Chapter 4, p.258-9, supra.

issues implied by custom.[5] In such cases if justice is to be done and effect given to the intention of the parties these implied terms must be deemed to be incorporated into the document by operation of customary law, as long as the terms are not in conflict with the express provisions of the document.[6]

Today, it is quite common to provide expressly for payment of rent in cash or sometimes in kind. Such payment not only serves as an aknowledgment of the landlord's reversion but it also provides some economic advantage to the grantor. Express reservation of such "rent", however small, will raise the implication that the tenant will pay any other customary dues to the landlord. One advantage (to the grantor) of an express provision for rent is that it can be enforced by action and arrears due could be recovered - a process which is not available in case of implied dues, the landlord's remedy for their breach being limited to forfeiture.

Obligations of the tenant under the general law.

The obligations of a person whose holding is regulated by the general law of Nigeria depend on who is the landlord. Where the Government or a statutory corporation is the

5. Such as payment of customary dues, denial of the grantor's title, rights over economic trees, etc.

6. cf. similar rule in English law: Odgers, The Construction of Deeds and Statues, 3rd ed. 1952, p.82-3; Norton on Deeds, 2nd ed. 1928, pp 143-6.

landlord most of the tenant's obligations are laid down by statute and, therefore, are implied by law. Where the landlord is a private person, company or a corporate group, some of the tenant's obligations are implied by law while others are expressly provided for by agreement between the parties. The most usual of these obligations are:

(i) To pay rates, taxes, and outgoings.

(ii) To pay rent.

(iii) To use the premises in a tenant-like manner.

(iv) Not to deny the landlord's title

(v) Not to assign, sublet or part with possession of the premises without the lessor's consent.

(vi) To pay compensation for damges caused by the exercise of his rights.

(i) Rates, Taxes and Outgoings. A tenant of Crown land in any part of Nigeria is the "owner" of the premises leased to him and is, therefore, liable to pay all rates, taxes, charges, duties, assessments or outgoings of whatever description as may be imposed. [7] This liability is imposed by law and even if the lease was silent on the matter he will nevertheless have to pay.

If the tenant does not hold from the Government but from a private person or corporate group his obligation in

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7. Lagos Local Govt. Law, Ordinance No.14 of 1955 as amended; now Cap.93 of 1958, s.138. cf. Western Region Local Govt. Law, Cap.68 of 1959, s. 181.

this respect is modified to some extent because the Local Government Laws [8] provide that an owner as well as an occupier of premises are both liable for rates but in the absence of an agreement to the contrary, the owner will ultimately be liable to the occupier who may recover it by action or deduct it from any rent due. An "owner", as defined, includes both a person receiving (or who would receive) rent of the tenement and the holder of a tenement direct from the Crown under lease, licence or otherwise [9]. This means that unless there is an express agreement to the contrary, the ultimate liability for rates will fall on the private landlord as the owner of the premises. This is a marked difference between the general law of Nigeria and the law of England under which the tenant, as an occupier, is liable to pay rates and taxes assessed on the premises.[10]

In Nigeria if the tenant paid the rate he could recover it by action or deduct it from <u>any</u> rent due or to become due but in England a tenant who pays his landlord's Property Tax must deduct it from the <u>first</u> payment of rent thereafter and if he fail to do so, cannot recover the

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9. Assessment Ordinance, cap.15 of 1958 (Fed.) S.2.

10. For further discussion of the rule in English law see, Cheshire, <u>op.cit</u>, p.373. Woodfall, <u>op.cit</u>., 1960 ed., paras. 1487, 1568. In Nigeria, the tenant could be made liable under the special terms of the lease. If liable, the landlord may, if authorised by the lease, re-enter on the tenant's failing to pay. For further discussion see <u>Basma v. Nonveldine</u> (1952) 14 W.A.C.A. 231, Sierra Leone, but on the same principles.

amount later either by deduction or by action.[11]

Complicated questions may arise where rates are assessed on premises held by a customary tenant. If the parties made no express provision as to liability for rates the tenant could claim that the grantor as "owner" of the land is liable notwithstanding that the tenant himself paid no rent. This contention could find support in the express definition of an "owner" considered above. On the other hand the landlord could argue that as payment of rates was not within the purview of customary law the tenant who enjoys rent-free premises is an owner in the loose sense in which it is used in West Africa [12] and therefore liable for the rates. Which of these two arguements will prevail before a court is a matter of conjecture.

(ii) Rent. Although in England payment of rent by tenants is quite common in practice, the existence of rent is not necessary in law to make a lease valid because the acceptance of the lease is sufficient consideration for the grant. This means that under the common law rule applicable in Nigeria if a lease governed by the general law is created by a grantor other than the Governor the tenant is under no implied obligation to pay rent. If, however, special technical words (such as "yeilding and paying") are used in the redendum there is an implication

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11. Denby v. Moore (1817) 1 B & Ald. 123.
12. See Nsirim v. Nwakerendu (1955) 15 W.A.C.A. at p.72.

that the tenant is liable to pay.[13] Moreover, even if there are no such technical words, a lessee holding at a fixed rent is bound, in law, to pay the rent notwithstanding that there is no express undertaking to that effect.[14]

Where the lease is made under the Crown Lands Ordinance or the Land Tenure Law, there is an implied obligation on the lessee to pay the rent specified in the lease.[1] This does not seem to have made any change in the normal rules because the lessee is bound to pay the rent reserved any way, even if there is no express covenant in the lease compelling him to do so.[14] The innovation introduced into the general rule of English law applicable in Nigeria is that the tenant should pay the rent in advance on the first January of each year. Ordinarily, where annual rent is reserved without any express mention of the date on which it is due, nothing is due until the end of the year. If, therefore, payment is made in advance,

> "it is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due, such an advance shall be treated as a fulfilment of the obligation to pay the rent." 16.

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13. Hellier v. Casband (1666) 1 Sid. 266.
14. Doe d. Rains v. Kneller (1829) 4 C. & P.3; 172 E.R.581.
15. Crown Lands Ordinance, S. 7 (b) (1) Fed. Land Tenure Law, S.11 (c)
16. per Ames, C.J. in G.B. Ollivant Ltd. v. Alakija (1950) 13 W.A.C.A 63 at p.65, citing with approval Willes J. in de Nicholls v. Saunders (1870) L.R., C.P. 589.

This rule still applies to leases governed by the general law if they do not relate to Crown lands, but a lease of Crown land alters this rule. The Land Tenure Law is silent on payment of rent in advance; therefore unless the certificate of occupancy contains any express covenant to that effect, the normal rule applies to grants of land in Northern Nigeria.

It is a principle of the general law that acceptance of rent operates as a waiver of the tenant's brach of a covenant in the lease.[17] This principle does not apply to leases of Crown land[18] or to certificates of occupancy granted under the Land Tenure Law[19] for it is expressly laid down that acceptance of rent in those cases will not operate as a waiver of forfeiture by reason of the breach of any express or implied covenant or condition. Further, where a private lease contains a penalty clause the rule is that judgment may be obtained but execution cannot be ordered to be levied out of the penalty[20]. Where, however, the tenant holds under the Crown Lands Ordinance[1] or the Land Tenure Law[2] he is liable to pay penal rent on breach of a covenant to develop or effect improvement on the land granted, within a specified period. This penal

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17. Awele v. Habib (1954) 21 N.L.R. 8.
18. Crown Lands Ordinance, S.19 (Fed.)
19. Land Tenure Law, s.24.
20. See Hill & Redman, op.cit., 1960 ed. p.92 note (b) and the authorities cited therein.
1. S. 10
2. S. 25

rent increases yearly as long as the breach lasts, and therefore unlike a lessee of private land, the tenant of Crown Land or the holder of a certificate of occupancy cannot invoke the common law rules to prove that the penal rent is invalid.

The Crown Lands Ordinance [3], the Land Tenure Law [4] and the Native Lands Acquisition (Approval of Transactions) Regulations [5], provide for revision of rents at intervals specified in the lease. The regulations made under the Native Lands Acquisition Law [5] expressly provide for revision of rent every twenty years. This means that an alien who acquires a lease in Southern Nigeria must understand clearly that even if the deed is silent on the question, his landlord can call upon him after the first and subsequent twenty-year periods to pay the revised rent. In case of any disagreement between the parties the matter will be referred to arbitration whose decision will be final. Neither the Crown Lands Ordinance nor the Land Tenure made any express provision as to the intervals of revision of rents. It seems, therefore, that unless the period is specified in the lease or certificate of occupancy the Governor cannot later purport to revise the rent at whatever time he may deem reasonable for such

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3. S. 9 (1) (Fed.) 4. SS.11 (c), 21, 23.
5. Reg. 5 b (2) W.R.L.N. 120 of 1958.

revision; this means, in effect, that the lessee will be liable to pay a revised rent only if the period for revision is embodied in his deed. The rule of English common law is that the tenant's liability to pay an increased rent depends on whether consideration was given for the increase or on the ground that the old lease was surrendered and a new one created.[6] This rule applies only to private leases in Nigeria among Nigerians themselves: it does not apply to any leases within the Crown Lands Ordinance, the Land Tenure Law or the Native Lands Acquisition Law since liability for increased rent in those cases depend expressly on legislation.

It is a rule of the general law of Nigeria that rent follows the reversion;[7] therefore if a lessee pays rent in advance and the landlord then assigns the reversion giving notice of the assignment to the tenant before the rent falls due, the tenant is bound to pay over again to the assignee of the reversion when the period of payment falls due.[8] But special circumstances may exist to make what was stated to be payment of rent in advance more than that and to amount to an acceptance of a lump sum in discharge of all rent to become due[9] so that a

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6. Parker v. Briggs (1893) 37 Sol.Jo. at p.452, Lambert v. Norris (1837) 2 M. & W 333.
7. cf. similar rule in English law: Woodfall, op.cit., 26th ed. para. 808.
8. Johnson v. Debs (1936) 13 N.L.R. 73, per Carey, Ag. C.J.
9. G.B. Ollivant v. Alakija, supra. per Ames Ag.C.J. atp.66.

purchaser of the reversion cannot then recover the rent so paid when it becomes due. If such a purchaser has notice, either actual or constructive, of the lessee's equity, he cannot recover the rent paid in advance from the tenant.[10]

It has not been decided whether the Apportionment Act 1870 applies to Nigeria but under the common law rules which apply if rent consists of money or anything admitting of sub-division it is apportionable upon severance of reversion [11], whether the severance is due to assignment of part of the premises [12] or to a surrender of part of the land granted [13] or to a grant or devise of the reversion in part [14] or caused by eviction of the tenant from part of the land by a title paramount to that of his landlord.[15]

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10. ibid. per Blacknall, P. at p.67, Knowledge acquired by the purchaser's agent in the course of the transaction will be attributed to the purchaser himself.
11. But at common law there was no apportionment in respect of time because rent was payable at the expiration of the period in respect of which it was reserved: Clum's case (1613) 10 Co. Rep. 127a, 128a. Where apportionable, the apportioned part is not payable till the whole is due; Re. United Club & Hotel Co. (1889) 60 LT. 665 Re. Lucas, Parish v. Hudson (1885) 55 L.J. (Ch) 101, C.A.
12. Gamon v. Vernon (1678) 2 Lev. 231. See also Burden, "spilt leases" (1961) Conveyancer, 384, especially p. 387 f.
13. Co. Litt. 148a.
14. Collins & Harding's Case 13 Rep. 57.
15. Smith v. Malings C & o. Jac. 160. See Also Hood & Challis Property Acts, 2nd Ed. pp 254 ff.

The dictum of Ademola, C.J. in Oshinfekum v. Lana[16] implies that the Landlord and Tenant Act, 1730, is a Statute of general application in Nigeria and, therefore, that a tenant is liable under section 1 of that Act for double the yearly value of the premises where he holds over contumaciously[17] after the tenancy has been determined by a proper notice to quit.[18]

In the Wester Region where the provisions of the English Distress for Rent Act, 1737, have been embodied in section 5 of the Landlord and Tenant Law, a tenant of any kind whatever will be liable for double rent for holding over after giving a valid notice to quit, whether he held over wilfully or not.[19] The double rent in this respect is not an increase of rent within the Increase of Rent Restriction Ordinance and is, therefore, recoverable regardless of the provisions of that Ordinance.[20] It is uncertain whether

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16. (1958) W.N.L.R.122. The provision of L & T.A. 1730 has been embodied in S.6 of the Landlord and Tenant Law of the Western Region, enacted after this decision.
17. For the rule in English law see Paul, J. in French v. Elliot (1960) 1 W.L.R. 40 at p.51.
18. This subject to the Recovery of Premises Ordinance, for which, see Chapter 8 below. In the Oshinfekun case the L. & T.A. 1730 was held not to apply because the tenancy was from month to month; cf. Lloyd v. Rosbee (1810) 2 Camp. 453 (weekly) and Wilkinson v. Hall (1837) 3 Bing N.C. 508 (quanterly tenancy).
19. Cf. Timmins v. Rowlinson (1765) 3 Burr 1063, 106 on S.18 of the Eng. L & T.A. 1730. Contra Sullivan v. Bishop based on a mistaken view of Lloyd v. Rosbee, note 18, supra.
20. cf. Flannagan v. Shaw (1920) 3 K.B. 96.

the English Act is a Statue of general application in Nigeria and, therefore, whether the rule applies to other parts of the country.

Under the Sherriffs and Civil Process Ordinance [1] a landlord's claim for rent is a preferential debt which a bailiff must pay (after deducting costs incidential to the sale of the leasehold property) before any other bedts of a judgment debtor.

(iii) User of the Premises. Two things will be considered under this head: a) user of the premises in a manner befitting a tenant; b) user of the premises for a particular purpose.

a) Use in a tenant-like manner: The general rule is that every tenant is liable for waste and is under an implied obligation to use the premises in a tenant-like manner. A weekly tenant (and probably a monthly tenant) is only required to take proper care of the premises; a yearly tenant is liable only for minor but not for substantial repairs.[2] The liability for repairs of a tenant for a term of years has not been clearlybdefined in Nigeria. The present research has revealed only one case [3] in which the tenant was sued for breach of the obligation

1. No. 40 of 1945, now Cap.189 of 1958, s.35 (3) (b).
2. A majority of lettings in Nigeria are on monthly terms; See Rowling, Kans, para. 58.
3. Chidiak v. Coker (1954) 14 W.A.C.A. 506. To be more accurate, it was the sub-tenant who was sued.

to repair. This pancity of authorityb is due to the fact that most leases for a term of years are granted under the Crown Lands Ordinance, the Land and Native Rights Ordinance[4], or by municipal authorities and the lessee is usually required to improve the premises by erecting a building or other works thereon. Under the Crown Lands Ordinance if the term granted is less than 30 years, the lessee is at liberty within three months of the termination of the lease to remove all buildings erected by him during the currency of the lease, unless the Governor shall elect to purchase them.[5] Similarly, under the Land and Native Rights Ordinance [4] an occupier has the sale right to any improvements effected by him and he may remove them from the land.[6] This means that in cases coming within those statutes the landlord suffers no damages because of the tenant's failure to repair. In case of leases outside the statutes and all grants of rights of occupancy in Northern Nigeria from the date of operation of the Land

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4. Now the Land Tenure Law.
5. Crown Lands Ordinance (Fed.) S.11.
6. Land and Native Rights Ord. S.25. This provision has now been altered by the Land Tenure Law S.20 (2) which enacted that on determination of the right of occupancy the improvements shall revert to the Minister without payment of compensation. Sed. qu. whether holders before the passing of this Law will not argue that this provision infringes the fundamental rights in the Constitution and is, therefore, void.

Tenure Law, the rule that the grantee must use the premises in tenant-like manner would apply so as to render him liable for non-repair where a reasonable tenant would not have allowed the damage to go unattended. As Lord Denning pointed out in an English case [7], the liability of the tenant in this respect does not depend on an obligation to repair (which may be non-existent if the lease is silent on the point) but on the principle that he must not commit waste.

A tenant may, of course, enter into an express covenant to repair. Where such a covenant exists and a right of re-entry is reserved, the lease may be forfeited if the tenant is in breach. If this happens relief against forfeiture can only be granted if special circumstances exist to warrant the exercise of judicial discretion in the tenant's favour. The mere fact that he regretted his breach or undertook to remedy it does not by itself entitle him to relief and if the trial judge without other reasons exercised discretion in the tenant's favour under such circumstances, it may be reversed on appeal.[8]

Under the Public Health Ordinance [9] a landlord, tenant, or an occupier is liable to abate any nuisance existing

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7. See Regis Property Co. v. Dudley (1958) 3 A.E.R.491, pp 509-510; H.L.
8. Basma v. Noureldine (1952) 14 W.A.C.A. 231, Sierra Leone.
9. No. 33 of 1917, now Cap. 165 of 1958 (Fed.); S.8 (2).

on the premises. Where the nuisance is due to any want or defect of a structural character, or where the premises is unoccupied, the liability is that of the owner.[10]

ALTERATIONS:

Sometimes a lease may contain provisions relating to alteration of the premises. The word "alteration" means a change in the form and construction (of the premises). This meaning, however, depends upon the use of the word in each particular context.

In Wadi George v. Lookmal Bros.[10a] a covenant in a lease provided that -

> "The tenant shall have the right to make or permit to be made alterations in or additions to the demised premises, PROVIDED such alterations or additions shall not affect the main construction of the demised buildings."

The dispute which arose was whether the tenant holding under such a lease was entitled to demolish a boundary wall in pursuance of the covenant.

Bennett, J. held that the tenant was entitled because, as he said,

> "in the instant case the covenant is not to alter or add in such a manner as will affect the main construction of the demised premises and I have no hesitation in holding that this boundary wall was not part of the main construction. Those words I understand to mean the main building."

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10. ibid., S.8 (3).
10a. Lagos Suit No. LD/403/1955, Reported in (1958) 2 N.B.J. 24.

This decision is, with respect, reasonable for the covenant against alteration, as shown by the proviso, was on the "construction of the demised buildings." Had the deed been more consistent and used the word 'premises' throughout, the result might well have been different.

b) User for a particular purpose. On the general principles of English Law applicable in Nigeria, a tenant is ordinarily entitled to use the demised premises for any lawful purpose whatsoever provided he does not thereby create a nuisance or infringe the provisions of a statute.[11]

A lease of Crown land should normally be one of the following:

a) Agricultural;

b) Building;

c) Railway site

d) "Non-European lease issued to non-Europeans for residential, business or, in the case of a native, farming purposes".[12] Where, therefore, a lease is stated to be one of those mentioned in the Regulations, the premises

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11. cf. Graham Paul, J. in Chairman, L.E.D.B. v. Belo Raji (1939) 15 N.L.R. 26 at p.27. For English principles see Brian, C.J. in Anon, (1480) Y.B. Ed. IV.10 p.1.10. Aldred's case (1610) Co.Rep.57b; Tenant v. Goldwin (1704) 2 Ld. Raym. 1089; Gas Light & Coke Co. v. Turner (1840) 6 Bing (N.C) 324; Pretty v. Bickmore (1873) L.R. 8 C.P. 401. Broder v. Sailland (1876) 2 Ch.D.692; Yellowy v. Morley (1910) 27 T.L.R. 20.

12. Reg. 1 of the Regulations made under S.37 of the Crown Lands Ordinance.

will be used only for agriculture, building, railway, residence or business, as the case may be. The term "non-European occupation lease" is not self-explanatory; it is only by construing the terms of each particular deed that the use to which Crown land granted may be put will be deduced. If, however, the deed is silent on the point, the lessee would, on general principles, be entitled to use the Crown land demised for any purpose he deems fit.

The Land Tenure Law places no restrictions on the use of land granted under the Law; this means that unless the certificate of occupancy imposes any restrictions, an occupier of land in Northern Nigeria may put it to any use.

Where a lease contains covenants restricting the user of the premises, the extent of the restriction must depend on the words used. Thus in The Chairman, Lagos Executive Development Board v. Belo Raji, [13] the lease granted by the plaintiff - landlord to the defendnat - tenant contained a restrictive covenant in the following words:-

> "The land to be used for residential purposes only."

The defendant used the house for residential purposes and

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13. (1939) 15 N.L.R. 26.

also regularly used the entrance hall, a large room, for worship at prayer meetings of considerable numbers of people who came on the invitation of himself or his family. The landlord claimed that such a use constituted a breach of the restrictive covenant because the tenant

> "has been and still is using the land for purposes other than residential - to wit, as a mosque."

Graham Paul, J. held that such a use of the house, whatever religion for which the worship might be, did not constitute a breach of the covenant.

On appeal to the W.A.C.A. it was argued, inter alia, that the trial Judge was wrong even on his own findings of fact in holding that there was no breach of the covenant. The defendant argued that the word "mosque" can only mean a place registered and dedicated as such, and in the absence of proof of such registration and dedication the plaintiff must fail. Rejecting the tenant's argument the W.A.C.A. said,

> "In our opinion the word 'mosque' must be taken to have merely its ordinary dictionary meaning, namely a place used for worship by Mohammedans."

The court then decided that from the evidence the trial Judge was wrong in holding that no case has been made out of the defence to answer. The appeal was allowed and the case remitted to the Court below for the defence to be heard.

On strict interpretation of the covenant in this case it could be contended that Graham Paul, J. was right because the phrase "for residential purposes only" means that the lessee is to make the premises his home or at least a place of habitation; this habitation need not necessarily be permanent or exclusive. The word "residence" denoted a place where an individual eats, drinks, and sleeps or where his family or his servants eat, drink and sleep.[14] As Graham Paul observed, the fact that a resident turned a large room in his house into a place where he can invite his family and his or their friends to worship does not convert the purpose of the use into non-residential.[15] Use for residential purposes only does not necessarily imply that the tenant must reside personally on the premises. If there are no other covenants in the lease prohibiting his sub-letting or parting with possession, no breach of the undertaking is committed so long as the person in occupation uses it for residence.[16]

The important question, however, is the dominant use into which the premises or part of it has been put. In this case the tenant by receiving his friends as a regular practice committed a breach of the covenant;[17] he has in

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14. cf. R v. North Curry (Inhabitants) (1825) 4 B &C at p.959.
15. Belo Raji's case, supra, at p.26.
16. Aliter, if the restrictive covenant laid down that the premises should be used as private residence of the lessee.
17. cf. Thorn v. Madden (1925) Ch.847; Tendler v. Sproule (1947) 1 A.E.R. 193.

substance turned part of the house into a charitable institution.[18]

Use for Trade or Business. A covenant may forbid the tenant carrying on some trade or business on the premises or may limit the amount of the activity he may carry on there. Ordinarily, "trade .... is a word having a technical meaning, and is limited to the case of buying and selling of wares, and so forth." [19] The term "business" is wider than trade and extends to cases where works necessitating the recourse of many persons to the demised premises, is done whether for profit or charitably, without payment. [20]

In Zard v. Saliba [1], the plaintiff claimed, inter alia, an injunction to restrain the defendant from using the premises situate at the rear of New Court Road, Ibadan, otherwise than as provided by the deed which stated that the lessee was

> "(b) To use the said land for purposes of residence, trading, garage, sawmill, and machinery only."

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18. cf. Rolls v. Miller (1884) 27 Ch.D.71.
19. per Willes, J. in Harris v. Amory (1865) 13 L.T.504, pp.505, 506. See laso Lord Davey in Grainger & Son v. Gough (1896) A.C. 325 at p. 345, 346. Lord Esher, M.R. in St. Martin's Vestry v. Gordon (1891) Q.B.61, at p.66, C.A. and Sargant, L.J. in Martin v. Lowry, Martin v. I.R.C. (1926) 1 K.B.550 at p.565, C.A. affirmed (1927) A.C.312.
20. See St. West Suburban Water Co. v. St. Marylebone Guardians (1904) 2 K.B.175, at p.180, per Buckley, J; Rolls v. Miller, supra; Portman v. Home Hospitals Association (1879) 27 Ch.D.81n.
1. (1956) W.N.L.R. 63.

The breach complained of was that the defendant erected a building on the land and used this as a propri[ie]tary club where beer and liquors were sold to members. The plaintiff also complained of the noise from the premises because the house was fitted with amplifiers and members danced to the tune of amplifiers as well as to jazz bands which played till late at night, sometimes till the early hours of the morning. The bands also practised during the day.

At the trial it was argued on behalf of the plaintiff that the word "trading" in clause 6 of the agreement referred to particular business and in view of the words "garage, sawmill, and machinery only" following it, should be construed as ejusdem generis and that such trades as clubs, etc., were not covered.

Ademola, C.J. after exmining English authorities rejected the argument. He said,

> "the word 'trade' is elastic. It is used many a time in a much wider sense than that of buying and selling." 2

The learned C.J. held that the term "Trade or Business" is applicable to a proprietor's club and that the proprietor of such a club trades; the lessee was, accordingly, not in breach of the covenant. He said that the word "trading" in the clause was specific by it self and that the other

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2. ibid. at p.65.

words following it merely state the other business or occupation permissible under the grant.

With respect, this is a welcome decision and is in accord with the highest authority. The plaintiff can not make up for his bad draftsmanship by giving the deed his own personal construction: the law must fix the obligation and the parties have no hand in it, once they have recorded their agreement.

Where a lease stipulated that the lessee was "to use the premises for purposes of trading and residence only", and also provided that the lessor would not unreasonably withhold consent for the tenant's assignment of the term, it was held (correctly) by Taylor, J. that a limited company cannot comply with the condition of using the premises for residence and, therefore, that the landlord could lawfully resist such assignment.[3]

Improvements. In some casea a tenant notnonly stipulates to use the premises for a definite purpose but also undertakes to make specified improvements on the land. This undertaking may, in a limited number of cases, be imported into the lease by statute. Thus, the Regulations made under S.37 of the Crown Lands Ordinance lays down that unless otherwise expressly provided the lessee of agricultural land shall -

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3. Shukri David v. Mohammed Debs (1957) W.N.L.R. 107.

> "during the first two years of the term of the lease expend on cultivation and clearing a sum at least equivalent to five shillings per acre of the total area demised." [4]

If livestock be brought on the land, he is required to erect and maintain such fences as will prevent such stock from straying off the land.[5] Further, there is an implied covenant in every building lease of Crown land that the tenant shall, within the time stated in the lease, erect and complete on the land demised buildings or other works of the nature and value not less than that stated in the lease, to the satisfaction of the Director of Public Works or other officer appointed by the Governor.[6]

In private leases, if there is an undertaking to effect improvements on the land, the obligations imposed will depend on the terms of the agreement. In Peter Onwuta v. The Niger Co. Ltd.,[7] the defendant company, lessees of "certain land knows as "Ye Kiosk", in Onitsha, Eastern Nigeria, covenanted to erect buildings of not less than £1000 in value within six months of the execution of the lease in 1921. The lessees failed to comply with the covenant but the landlord continued to receive rent up to January, 1925. In 1926 he refused to receive further rent which the lessees thereupon paid into the Treasury. The landlord then sued for recovery of the land.

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4. Reg. 4 (a)
5. Reg. 4 (d)
6. Reg. 7 (a)
7. (1926) 7 N.L.R. 79.

At the trial it was argued on behalf of the company that the landlord's acceptance of the rent up till 1925 operated in law as a waiver of the breach and of his right to forfeit the lease.

Webber, J. found from the uncontradicted testimony of the plaintiff that when he received the rent in January, 1925, he intimated to the agent of the company his intention to take advantage of the forfeiture clause. The Judge held, therefore, that after July 1925, and up till the time of the action there has been a continually recurring cause of forfeiture and that the plaintiff was entitled to recover possession; he further held that under the circumstances the company was not entitled to relief against forfeiture.

The lessee was bound to fail in this case because the evidence showed that he had allowed the breach to continue. Acceptance of rent by the landlord operated as a waiver of the breach only up to the time he received the rent and could not bar him from relying on the forfeiture clause for subsequent breaches. Had the tenant erected any building, however, he would not be bound to render an account of its value unless there was a covenant to that effect in the lease.[8]

The principle which governs covenants for improvement

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8. Sinotu Onitolo & ors. v. Hajaig (1940) 15 N.L.R.134, per Webber, J.

in private leases should be applicable to grants made under the Crown Lands Ordinance or the Land Tenure Law and the reasoning in the Peter Onwata case should apply to all leases.

(iv) Denial of the Landlord's Title. As in native law and custom, so in grants made under the general law - there is an implied term that the lessee shall do nothing to prejudice his landlord's title. If this obligation be broken, the landlord may re-enter and forfeit the lease. The rule is based on estoppel and has been embodied in the Evidence Ordinance[9] S.151 of which provides that -

> "No tenant of immovable property, or person claiming through such a tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

The principle cannot be circumvented by the tenant acquiring a title superior to that of his landlord from the landlord's lessor. If, for example, a sub-tenant acquires the reversion from the head-landlord, the sub-lessor ismstill his landlord (as well as his tenant!),

9. No.27 of 1943, now Cap.62 of 1958 (Fed.).

and, therefore, he cannot repudiate the sub-lessor's title not withstanding his acquisition of the reversion.

In Assaf v. Oyinloye and anor.[10], the plaintiff's father from whom the plaintiff derived his rights, obtained a lease of certain premises in Lagos, at a rent of £60 per annum. He sublet the premises to the first defendant who continued paying rent at the rate of £150 per annum till a ce tain date when he and the other defendant, who also knew of the plaintiff's lease, acquired the reversion. The first defendant then stopped paying rent to the plaintiff disputing his title. The plaintiff's offers of rent were refused by the defendants and the plaintiff paid the rent into Court. The defendants contended that the plaintiff's lease was void because it was not granted by all the three but by only two of the owners. Its validity, however, had not been challenged by the original lessors or their successors in title.

In giving judgment in favour of the plaintiff, de Comarmond, S.P.J. said that he found that the second defendant knew of the existence of the lease and was, therefore, bound by it. Further,

> "the position of the first defendant is clearer still. As sub-lessee he is estopped from denying his immediate lessor's title: Wabon v. Lane (1856) 156 E.R. 1042. That estopped binds him so long as he is sub-lessee: see Woodfall's Landlord and Tenant, 24th edition, p.15.

10. (1951) 20 N.L.R.1.

> If he denies his immediate lessor's title he commits forfeiture: see Woodfall, p.988. I find that the first defendant has incurred forfeiture as sub-lessee." 11

On the principles of English law on which this decision was based, the tenant, to be guilty of the breach, must affirm absolute title in himself or in a stranger; a general traverse in a pleading, even if wide enough to include the denial of the <u>tenancy</u>, does not amount to a repudiation of the landlord's title. [12] The essense of the tenant's breach is his direct renunciation of his character as a tenant thereby repudiating the relation existing between him and the lessor.[13] It is always a question of fact with what intention the tenant acted or used the words alleged to amount to a disclaimer of the landlord's title.[13]

The principle does not apply, however, where the landlord's title has expired; it does not apply to a tenant who has been evicted by a person claiming under superior title. Thus in a recent case,[14] the issue was whether a tenant who has been ousted from possession of

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11. *per* de Comarmond, S.P.J., at p.2. The decision was upheld on appeal to the W.A.C.A. See unreported decision of appeal No. 3608 dismissed on 12th Nov., 1952.
12. See Denning, L.J. in *Warner v. Sampson* (1959) 1 Q.B. at pp 312-3.
13. cf. *Wishbech St. Mary Parish Council V. Lilley* (1956) 1 W.L.R. 121.
14. *Witt & Busch Ltd v. Arab Bros of Kano & Lagos and ors.* (1958) 2 N.B.J. 23, Lagos Suit No. LD/361 of 1955.

the leasehold property by another person claiming a better title than the landlord could plead that other person's title in his defence to an action by the landlord for possession, rent and damages for trade injury and temporary severance.

Duffus, J. answered the question in the affirmative. He held that the tenant may plead eviction by title paramount despite the terms of S.151 of the Evidence Ordinance. The tenant could set up the title of the person who had evicted him against his landlord. This plea involved proof by the tenant that he was evicted, not necessarily by action, by some person having a paramount title to that of the landlord.[15]

An examination of the decided cases in Nigeria reveals that in interpreting the tenant's obligation to respect his landlord's title the courts have proceeded exactly on the principles of English law which, in substance, are not different from the rules of customary law on the subject.

(v) Assignment and Sub-letting.

Contrary to the rpinciples of customary law in Nigeria, the rule of English law is that unless a tenant is restrained by express provisions in the lease he may assign

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15. For similar rule in English law, see Woodfall, op.cit., 26th ed. 1960, pp 17-18.

or underlet the demised property.[16] This rule is of limited application in Nigeria for it can only be invoked in cases where the lease is not subject to the Crown Lands Ordinance or the Land Tenure Law. Where either of these two statutes apply there is an implied covenant that the lessee is

> "not to assign, sublet, or otherwise part with possession thereof, without the previous consent of the Governor in writing." 17

In Northern Nigeria any transaction or any instrument which purports to confer on or vest in a non-native any interest or right in or over any native lands otherwise than in accordance with the provisions of the Land Tenure Law is null and void.[18] This means that if the Occupier in breach of this provision purports to assign or sublet, the assignee acquires no interest whatsoever. No such rule exists with regard to Crown land: the Crown Lands Ordinance does not nullify any assignment or subletting made without consent; therefore on general principles of

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16. Bruerton v. Rainsford (1583) Cro. Eliz. 15; Doe d. Mitchinson v. Carter (1798) 8 Term Rep.57, 60; Church v. Brown (1808) 15 Ves. 258, 264.
17. Crown Lands Ord. S. 7 (b) (iii), Fed. cf. Land Tenure Law, SS.27, 28 & 29. The Regulations made under the Land and Native Rights Ordinance permit an occupier of native land, being a native to sell, transfer possession, or bequeath his title to a blood relation being a native, subject to registration; 3rd Schdl., Regs. 2, 3, & 4.
18. Land Tenure Law, S.32. Further, the Acquisition of Land by Aliens Law (.E.R. No. of 1958, W.R. No.4 of 1952) makes null and void any transfer of land by an alien unless consent of the Governor has been obtained for such transfer.

interpretation, an assignment or underletting of Crown lands or of any other land not subject to the Land Tenure Law, even if made without the consent of the Governor or any other lessor in accordance with the requirements of the lease, is not void notwithstanding that it is made in breach of the covenant. The alienation is effectual to vest the interest created in the assignee or under-lessee. This principle of law was not followed by Jackson, Assistant J. in Esi v. Moruku [19] where it was held that as subletting of part of the Crown land was forbidden by S.7 (b) (iii) of the Crown Lands Ordinance, no court should lend assistance to give effect to the subletting and, therefore, the sub-lessee could not be sued for rent of such land.

In Harry v. Martins, [20] however, Bairamain, J. (as he then was) held that a sublease of Crown land without the consent of the Governor and in breach of S.7 (b) (iii) of the Ordinance was not an illegal contract and, therefore, that the sublessee could bring an action for ejectment against the sublessor. Considering the opinion of Jackson, Assistant J. that such a contract was illegal because it was against public policy, the learned Judge said,

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19. (1940) 15 N.L.R.. 116.
20. (1949) 19 N.L.R. 42.

> "Public policy is, as the judgment states, a very unruly horse and 'judges are more to be trusted as interpreters of the law than as exponents of what is called 'public policy'.' I distrust that unruly horse and prefer to act on the accepted principle that *a contract freely entered into should be enforced unless it is clearly shown to be illegal under some authoritative decision in the common law or to be illegal under a statute*, and in dubious cases to give it the benefit of the doubt and enforce it." 1

After observing that the provisions of the lease were in general not unlike those in a private lease, and that the covenant against assignment without prior consent is often inserted in a private lease, he continued,

> "Breach of it entitles the lessor to claim forfeiture and it does not matter whether the sub-lessee is or is not a good man. The Governor may give notice and sue for forfeiture pursuant to S.16. It is the only penalty which the lessee may suffer under the Ordinance. *The Governor may of course waive his right like any other lessor. So long as he does not choose to enforce it, the lessee's term continues and the lease stands.* The lease is not void on account of breach of the covenant, even where the lease were to state that it shall be void on such breach, [it is not absolutely void] but voidable, and only the lessor can avoid it; if he does the lease will be avoided from that time only .... That is so whether the lease be of private land or of Crown land under a Colonial Ordinance, as was decided in *Davenport v. The Queen* (1877) 3 App. Cases p. 128." 2

After considering any possible criminal liability of the sub-lessee the learned Judge concluded,

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1. At p. 43, italics mine.
2. *ibid.*, italics mine.

> "From whatever angle the question is looked at, the conclusion is that the sublease, though in breach of covenant, is not an illegal contract. The doctrine of esteppel makes it binding as between the lessee and sublessee and the lessee is not entitled to eject the sublessee except in conformity with the law for the recovery of possession." [3]

The decision of Onyeama, J. in Item v. Felix Paul[4] was to the same effect. In the case of Marques v. Edematie [5] one of the defendant's arguments was (on appeal) that the assignment by him of the lease of Crown land which he previously held in trust for his niece (but now granted personally to him) would constitute a breach of the implied covenant not to assign without the Governor's consent. The W.A.C.A. in rejecting this argument held that although an assignment without consent might be a ground for forfeiture, it was not null and void; it could be lawfully made and if made would remain effective until action for forfeiture was taken by the Governor.

In view of the above authorities it could be asserted that the opinion of Jackson, Assist. J. in Esi v. Moruku, supra, has been over-ruled. The conclusion to be drawn is that apart from Northern Nigeria and cases of alienation by aliens to other aliens in the Eastern and Western Regions which are expressly rendered void by legislation,

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3. at p.44
4. (1957) W.N.L.R. 66.
5. (1950) 19 N.L.R. 75; W.A.C.A. Appeal No.3321, decided on 19th April, 1951.

a lessee of Crown land or of private land is capable of assigning or sub-letting his tenancy without obtaining the consent of the Governor or the Grantor. Upon such assignment or subletting, the interest created vests in the sublessee or assignee but the breach of covenant renders that interest liable to be destroyed by the Governor or other landlord re-entering to forfeit the lease. Until the lease is destroyed by forfeiture, the assignee or sub-lessee has a valid interest in the premises and is bound by those covenants which run with the land.

If the sublessee or assignee isto be bound by such covenants the assignor or sublessor must have executed a deed of transfer in his favour. Thus in Chidiak v. Coker [6], the plaintiff/respondent who was a lessee of Crown land on which he had put up buildings granted a sub-lease to the defendant/Appellant. When that sub--lease expired the parties agreed for a further term and the defendant stayed on. The defendant executed a further sublease which had a recital that the Governor's prior consent had been obtained (but stated no dated for such written consent). A fire destroyed the buildings whilst in the occupation of the defendant after his executing the sublease but before the date of approval on behalf of the Governor. In an action brought by the sublessor against him on the covenant to repair the trial

6. (1954) 14 W.A.C.A. 506.

Judge held that he was liable.

On appeal to the W.A.C.A. it was held that (i) on the evidence, the plaintiff executed the sublease after the fire, therefore the covenant to repair was not binding on the defendant at the time of the fire. (ii) By S.7 (b) (iii) of the Crown Lands Ordinance the prior consent of the Governor was a condition precedent to a valid sublease, but on the evidence this consent was not received until after the fire; it followed that at the time of the agreement to sub-let there was an absolute absence of the estate which the plaintiff purported to sub-demise and neither party could have sued for specific performance; therefore the defendant never had the consideration for which he covenanted to repair and equity could not be invoked in the plaintiff's favour. Coussey, J.A. to whose opinion Foster Sutton, P. and de Comarmond, Ag. C.J. concurred, said inter alia,

> "the execution of the lease by the lessor is a condition precedent to the lessee becoming liable on the covenant - Cardwell v. Lucas 7 ",
> and
> "it follows on the authority of Shaw v. Kay 8 and the other cases that the plaintiff could not hold the defendant/appellants to this covenant to repair" 9.

With the greatest respect, the plaintiff was bound to fail in this case because on the expiration of the previous lease he had executed no further sub-lease until

after the fire. Therefore although in occupation the defendant/appellant was not a tenant of the plaintiff and accordingly could not be in breach of a covenant to repair. This is the extent to which the authorities on which the Court relied went but no further. It is submitted, therefore, that the second ground on which the decision was based (namely, that prior consent of the Governor in writing was a condition precedent to a valid sub-lease) has no support in law and is contrary to the earlier decision of the same court in Marques v. Edemate, supra. Two facts must be clearly borne in mind in considering the question of alienation by the lessee:

(i) The Land Tenure Law and the Acquisition of Land by Aliens Law expressly prohibit alienation without consent and render any such transaction null and void unless the consent has been obtained.

(ii) The Crown Lands Ordinance prohibits alienation without consent but it does not nullify any transaction which is completed without such consent. The general principle of law, therefore, applies to such transaction and the alienation is valid until the original lease is destroyed by forfeiture taken out by the head-landlord. The head-landlord, whether a private person [10] or the Governor, may expressly or by implication waive the right

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10. Oki & anor. v. Akel (1950) 19 N.L.R. 94.

to forfeiture.[11]

Where a private lease contains a covenant not to assign or underlet without the lessor's consent, the covenant does not run with the land; therefore if the lessee is given the consent to sub-let it does not follow that the sub-lessee must ask for the head-lessor's consent in order to sub-let again if there was no provision in the sub-lease for his consent to be obtained.[12]

Where a private lease contains a covenant against assignment, there is usually a qualifying clause that the consent is not to be unreasonably withheld. In Shukri David v. Mohamed Debs [13], a claim was brought by a lessee against his landlord for an order to compel him to give consent to the deed for assignment of the lessee's interest in the property to the Ibadam Co-operative Marketing Union Ltd., or in the alternative a declaration that the tenant was entitled by reason of the defendant's unreasonable withholding of consent, to assign his interest in the property, notwithstanding the landlord's withholding of consent.

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11. But unlike private landlords, the acceptance of rent by the Governor does not operate as a waiver of forfeiture.
12. Doherty & anor. v. Nigerian Properties Co.Ltd. & anor. (1957) W.N.L.R. 74. But in England the head-lessor can take the benefit of the covenant in the underlease by virtue of S.5 of the R.P.A.1845 (now S.56 of the L.P.A.1925). This section has been enacted in the W.R. in S.81 of the P & C.L. but in Doherty's case decided before the enactment, the application of R.P.A.1845 was argued.
13. (1957) W.N.L.R. 107.

The lease contained a covenant against assignment without the lessor's consent which was not to be unreasonably withheld, and also a provision in clause 2 (5) that the premises was to be used for the purposes of trading and residence.

At the trial it was argued on behalf of the lessor that on the authority of Jenkins v. Price [14] a limited company could not comply with the covenant of residence and therefore that the premises could not be assigned to such a company. The contention on the part of the lessee was that the word "and" in "trading and residence only" contained in the covenant should be interpreted as meaning "or". Considering both arguments Taylor, J. observed,

> "I have to ask myself whether the nature of the lease is such that it is to be held by an individual? The object of this clause 2 (5) is that the lessee covenants that he will use the premises not for the purpose of trading or residence but for the purpose of trading and residence. The intention is to secure the lessee in the use of the premises for residential and for trading purposes." 15

The learned Judge concluded that the landlord has not unreasonably withheld consent because the company could not comply with the condition of residence; accordingly the plaintiff's case was dismissed.

It can safely be stated that the Nigerian law on the question of reasonableness in withholding the landlord's consent to assign is exactly the same as the rule of

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14. (1908) 1 Ch.D. 10 at p.12.
15. at p. 108.

English law on the subject. Under this rule the lessor must have some fair, solid and substantial cause for disallowing assignment or sub-letting.[16] Consent will not be regarded as having been unreasonably withheld if, for example,

(i) The landlord can prove that the assignee will be unable to use the premises as provided for in the lease[17] or if the property will be injured by the use to which the assignee proposes to make of it;[18]

(ii) the sole object of the assignment is to make it possible for the assignee to acquire statutory protection under the Increase of Rent (Restriction) Ordinance or the Recovery of Premises Ordinance;[19] or

(iii) the assignee cannot produce satisfactory references if required by the landlord.[20]

Except in the Wester Region where S.158 of the Property and Conveyancing Law reproduces S.143 of the English L.P.A., 1925, it is uncertain whether the Law of Proerty Amendment Act, 1859,[20] applies to the rest of Nigeria,

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16. Cheshire, op.cit., 8th ed. p.404; Treloar v. Bigge (1874) L.R. 9 Exch.151, 155. Barrow v. Isaac & Son (1891) 1 Q.B.417, 419; Mills v. Cannon Brewery Co. (1920) 2 Ch. 38, 45. See also Woodfall, op.cit., 26th ed. pp.563-583.
17. David v. Debs, supra.
18. cf. Bridewell Hospital (Governors) v. Fawkner & Anor. (1892) 8 T.L.R. 637.
19. cf. Lee v. Canter (K) Ltd. (1949) 1 KB.85 at p.96.
20. Shanley v. Ward (1913) 29 T.L.R. 714.

consequently it is uncertain whether the rule in Dumpor's case[1] has been abolished.

In England, every covenant condition or agreement against assignment, under-letting or parting with possession is subject to the implied covenant that the consent should not be unreasonably withheld.[2] This piece of legislation does not apply to Nigeria. If, therefore, the lease imposes an unconditional prohibition against assignment, the lessee cannot ask the court to declare that the lessor has unreasonably withheld consent, however flimsy the lessor's reason for refusing to assent. Further, apart from the Western Region where express provision to that effect has been made[3], it is uncertain whether a lessor in any other part of Nigeria may not demand a fine for the purpose of giving consent to an assignment.

COMPENSATION. Normally when a lease is granted and the rent fixed, the grantee is not under an implied obligation to pay the landlord or any other person for anything existing on the land: he takes the lease with all the

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1. This rule states that a licence to assign or sublet, whether relating to a part or the whole of the premises, operated as a total waiver of the covenant against assignment or sub-letting.
2. Landlord and Tenant Act, 1927, S. 19 (1).
3. Property & Conveyancing Law, S.159, reproducing S.144 of the English L.P.A. 1925 which re-enacted S.3 of the C.A. 1892. It has not been decided whether the C.A. 1892 is a statute of general application in Nigeria.

benefit and defects in the land. This general rule has been modified in Northern Nigeria by the Land Tenure Law (reproducing the provisions of the repealed Land and Native Rights Ordinance) which has laid down in S.11 that every certificate of occupancy shall be deemed to contain provisions to the following effect:

> "(a) that the holder binds himself to the Minister to pay to any person or community whose right of occupancy has been revoked in consequence of the grant of the right of occupancy to the holder such sums by way of compensation for unexhausted improvements and for the damage or inconvenience caused by disturbance as the Minister may decide; (b) that the holder binds himself to pay to the Minister the amount found to be payable in respect of any unexhausted improvement existing on the land at the date of his entering into occupation."

These provisions are rendered necessary because the theoretical basis of this Law is that no one in Northern Nigeria has absolute rights in the land which he occupies and therefore his right of occupancy could be revoked at any time "for good cause". If such right be revoked and a fresh grant made, the new grantee will be under a duty to pay the compensation only for the unexhausted improvement on the land and the inconvenience and disturbance caused to the previous occupiers. The amount of the compensation will be decided by the Minister and it would appear that his decision is final since no provision is made for its review unlike the case of rent. If the compensation decided is not paid the grantee's right of occupancy

may be revoked.[4]

Commendable as the payment of compensation may be, the main criticism of the Law lies in what it did not do rather than in what it did. The objection is in the theoretical conception that a native (or native-group) of Northern Nigeria has only a right of occupancy which is revocable at any time. This attitude is unsound because it neither accords with the native law or practice of the people nor with the theory of law generally. The people themselves recognise that eviction from the land which they and their ancestors have possessed over the years is a deprivation of property rights which cannot be compensated for merely by paying damages for improvements or inconvenience suffered. In theory of law generally a tenant evicted by the extra-judicial powers possessed by the Executive is entitled to compensation to the full value of the term taken over from him[5] not merely for loss of what he has put on the land. The limitation of the compensation to the value of improvements or amount of inconvenience only savours of nationalisation of the land; but the problem is rather political not legal and it need not be examined any longer.

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4. Land Tenure Law, S.34 (f)
5. Lababedi & Co. v. The Chairman, L.E.D.B. (1962), 3 W.L.R 740, P.C. decided on construction of the Lagos Town Planning Ordinance, Cap.103 of 1948, SS.38(1), 42 (1) (4), but the principle is not affected.

CHAPTER 7.

DETERMINATION OF TENANCIES.

A tenancy may be brought to an end as a result of one or more of the following factors:-

1. Accomplishment of the Purpose or Expiration of the term:

In customary law a tenancy expires when the purpose for which it was granted has been achieved. Even if the grant was made for a definite period, the period is calculated according to the use to which the land was to be put: the tenancy might come to an end either before or after this definite period. For example, if the grant was made for a fixed period of one year for the purpose of growing food crops, the tenancy will come to an end as soon as the crops are harvested: this could be before or after the expiration of a calendar year from the date of the grant. Where, on the other hand, the grant was for building a dwelling house but was said to be (for example) for twenty years, the grantee cannot be turned off at end of the period unless he has been guilty of a serious breach of the covenants.[1]

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1. cf. Cole, Zaria, paras. 31 (a) & 80. In some places where farmland is granted the tenancy comes to an end when the land is no longer useful for cultivation. Thus in Plateau Province a customary tenant continues in occupation "till the land has to go down again to fallow when possession reverts. Until this cropping cycle is complete the tenant cannot be turned off"; Rowling, Plateau, para.22.

Once it is certain that the purpose has been achieved no notice to quit is required in order to bring the tenancy to an end. Where, however, the tenant has not been reasonably diligent in accomplishing the purpose of the grant and, therefore, remained in possession after the end of the period within which he ought to have accomplished it the grantor is bound to give him notice of his intention to resume possession within a reasonable period from the date of such notice. The interval considered reasonable will be that within which the tenant will normally be able to remove his crops or other property from the land.

When a customary tenancy for the life of the grantee has been created, the grant determines, in theory, on the death of the tenant. In practice the children of the grantee continue in occupation on the same terms and subject to the same conditions as their deceased father.

Where a tenancy is governed by the general law of Nigeria which has incorporated the rules of English law, the grant together with all the sub-tenancies granted thereunder, will come to an end without any notice or other formality on the last day of the term.[2] Where the Rent Restriction Ordinance applies, the common law right of the landlord to maintain ejectment to recover

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2. Cobb v. Stokes (1807) 8 East 358; Ackland v. Lutley (1839) 9 Ad & El. 879.

possession without prior notice to the tenant has been abolished by the provisions of the Recovery of Premises Ordinance which make it necessary for the landlord or his agent to serve a written notice on the tenant declaring

> "the landlord's intention to proceed to recover possession on a date not less than seven days from the service of the notice." [3]

2. Happening of a Condition.

A grant of land may be made subject to a condition subsequent [4] - that the relation of landlord and tenant will determine on happening of the condition. The rule of English law is that a proviso in a lease without a penalty annexed to it is a condition, but if there is a penalty annexed it is a covenant.[5] If the event specified in a condition happens the lease will be determinable even though there was no proviso for re-entry.[6]

The rule of customary law which recognises grants for specific purposes operates in a similar way to this rule of English law because use for the purpose of the grant

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3. ibid. S.7. For further discussion on the two Ordinances see the next chapter.
4. If the condition be precedent, the lease cannot come into existence until the condition has been performed.
5. Simpson v. Titterell (1591) Cro. Eliz. 242.
6. Pembroke v. Beakley (1595) Cro. Eliz. 384; Knight v. Mory (1587) Cro. Eliz. 60. Freeman v. Boyle (1788) 2 Ridy. Panl. Rep. 69, 79; Sexton d. Freeman v. Boyle Vern. & Scr. 414, Ex. Ch; Doe d. Lockwood v. Clark (1807) 8 East, 185.

is a condition subject to which the relation of landlord and tenant may subsist: if the grantee uses the land for a different purpose the grant will be determinable notwithstanding that there was no express proviso to that effect at the time of the grant.

Except in the Wester Region, under the general law (incorporating English common law) applicable to all other parts of Nigeria, if a lease is limited to the duration of the lessee's life, the term will determine on the death of the lessee. In the Wester Region, the Property and Conveyancing Law[7] provides that any lease or underlease at a rent or in consideration of a fine, for any term of years determinable with life or lives or on the marriage of the lessee, or any contract therefor, made before or after the commencement of the Law, shall take effect as a lease, under lease or contract therefor, for a term of 99 years determinable after the death or marriage (as the case may be) of the original lessee, or of the survivor of the original lessee, by at least one month's notice in writing given to determine the same on one of the quanter days applicable to the tenancy, either by the lessor or the persons deriving title under him, to the person entitled to the leasehold interest, or if no such person is in existence, by affixing the same to the premises, or by the lessee or other

7. In S.163 (6)

person in whom the leasehold interest is vested to the lessor or the person deriving title under him. If the lease, under-lease or contract therefor is made determinable on the dropping of lives of persons other than or besides the lessees, then the notice may be served after the death of any person or the survivor of any persons (whether or not including the lessees) on cesser of the whole life or lives the lease, under-lease, or contract is made determinable, instead of after the death of the original lessee or the survivor of the original lessee..

This provision which is the same as that contained in S.149 (6) of the English L.P.A., 1925, was first introduced in England by the L.P.A., 1922, 15th Schedule paragraph 7 (3). For the reasons already given in Chapter I above, it does not apply to the other parts of Nigeria where the rules of common law accordingly still remain unchanged.

3. Merger.

Under customary law, like the general law, where a tenancy becomes vested in the present owner of the reversion immediately expectant on the term, the tenancy ceases to exist and is merged in the reversion. If, for example, a landlord under native law and custom makes an outright sale of the land to the tenant, the relation-

ship existing between the parties will determine and the tenancy will be extinguished. The same principle would apply where the relation of the parties is regulated by the general law.

In English Common law if a merger is to take place then the following conditions must be satisfied:-

(i) the interest in the land must unite in the same person without any intervening interest, however short;[8]

(ii) the person in whom they unite must hold them both in the same right.[9]

These conditions apply in Nigeria. This in Assaf v. Oyinloye & anor.[10] a sub lessee who had acquired the reversion from the head-lessor refused to continue paying rent to his immediate landlord contending, as could be inferred from the evidence, that his own leasehold interest has merged with the reversion. de Comarmond, S.P.J. correctly held that the sub lessee's assertion was a denial of his lessor's title giving rise to forfeiture. This is so because between the interest of the sub-lessee and the reversion was the intervening interest of the head-tenant and merger cannot take place as long as that interest is

8. Burton v. Barday (1831) 7 Bing. 745.
9. Platt v. Sleap (1611) Cro. Jac. 275; Jones v. Davies (1861) 7 H & N. 507. Ex. Ch. affirming (1860) 5 H & N 766; Chambers v. Kingham (1878) 10 Ch.D. 743.
10. (1951) 20 N.L.R.1., see Chapter 6 supra.

not vested in the sub-lessee.

It has been a general principle that merger was not favoured in equity; in many cases equity will continue to regard a term which merged in law as still subsisting, the question being governed by the intention of the parties. There was a presumption that merger was not to be inferred if it was in the interest of the party or only consistent with his duty that merger should not take place. By virtue of S.15 of the High Court of Lagos Ordinance [11] and similar provisions in the High Court Laws of the Eastern and the Northern Regions this principle of equity prevails in all parts of Nigeria except the Western Region. In the Western Region merger is governed by the Property and Conveyancing Law which provides in S.187 that there is now no merger by operation of law where there would be none in euqity.

4. Surrender.

A tenancy may be determined by surrendering the term to the immediate reversioner. In customary law this occurs when the tenant does an act inconsistent with the continuance of the tenancy and the landlord assents to such act. If, for example, the grantee delivers possession of the land before the purpose of the grant is accomplished and the landlord accepts possession, or if with the consent of the tenant the landlord grants the whole

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11. Cap.80 of the Laws of Fed. of Nigeria 1958.

of the land to a third party, the tenancy will be put to an end by the act of implied surrender. No ceremony or special words are necessary to effect the surrender as long as it can be established that the tenant by his act gave back the land to the grantor. The grantor's consent is essential to effect a surrender; if his consent is not given the tenant's purported surrender will amount to abandonment of the land.

In the general law of Nigeria (applying the principles of English law) a surrender could be by deed or by operation of law. No technical words are required in order to bring this about,[12] but surrender by operation of law can only be effective when the landlord retakes possession in such a way as to estop him from denying the determination of the tenancy.[13] A mere attempt by the landlord to relet the premises does not amount to retaking possession but a successful re-letting will do.[14] For a surrender by deed to be valid the following conditions must be satsfied:-

(i) The lessee must be a person able to surrender and must have an estate in possession.[15]

(ii) The surrender must be made to the immedaite reversioner.

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12. Cannan v. Hartley (1850) 9 C.B.634, n.(a).
13. Oastler v. Henderson (1877) 2 Q.B.D.575,C.A; Wallis v. Hands (1893) 2 Ch.75.
14. Smith v. Blackmore (1885) 1 T.L.R.267.
15. But see L.P.A., 1925, S.149 (1).

(iii) There must be privity of estate between the surrenderor and the surrenderee.[16]

(iv) The surrenderee must have a higher and greater interest than the surredneror in the property surrendered.

(v) The surrenderee must hold the interest solely in His own right, not in the right of another, although joint tenants may jointly surrender.

These rules apply in all parts of Nigeria except the Western Region under the existing provisions for application of English law. The lessee must, therefore, have an interest in possession, not merely a right to possession: he can only surrender if he has entered on the demised property for unless this has happened there is no reversion into which the term might merge. In the Western Region, S.163 (1) of the Property and Conveyancing Law makes actual entry no longer necessary because the term of years created is capable of taking effect at law or in equity according to the estate, interest, or powers of the grantor from the date fixed for the commencement of the term.

Since a surrender is a "conveyance" within S.2 (4) of the Conveyancing Act, 1881, in the Eastern and Northern Regions and the Federal Territory, every express surrender governed by the general laws must be in writing. It is

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16. Cornish v. Searell (1828) 8 B./ C. 471.

uncertain whether it must also be by deed because it has not been decided whether the Real Property Act, 1845, is a statute of general application in Nigeria.

The position in the Western Region has been clarified by S.77 (1) of the Property and Conveyancing Law which requires all conveyances [17] to be by deed.

In all the Regions if the leasehold is registered under the Registration of Title Ordinance, the surrender should be produced before the Registrar so that he may withdraw the lease which has become an obsolete entry no longer affecting the registered land.[18] If this is not done the transaction is still valid between the parties but the interest disposed of by the surrenderor is capable of being over-ridden by a registered disposition for valuable consideration.[19]

Under the common law rules of England the surrender of a lease does not affect or destroy the rights of the sub-tenants:[20] The surrender operates as a regrant to the lessor but subject to their rights. In Western Nigeria it has been expressly provided by S.154 of the

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17. Excluding surrenders by operation of law or those which may be effected without writing - ibid. s.77 (ii) (b).
18. Registration of Titles Ordinance, S.71 (1)
19. ibid. S.42 (1)
20. Mellor v. Watkins (1874) L.R. 9 Q.B. 400.

Property and Conveyancing Law that where a lease has been surrendered the estate of the head-lessor is deemed to be the reversion on the underlease to the extent and for the purpose of preserving such incidents to and obligations on the surrendered leasehold reversion as, but for the surrender thereof, would have subsisted. In effect the surrenderee becomes an assignee of the reversion expectant on the sub-lease. A similar rule exists in England under S.139 of the L.P.A. 1925 which has reproduced S.9 of the Real Property Act, 1845. For the reasons already given it is uncertain whether these provisions apply to the other territories within the Federation but as the commonl law rules apply the result is not different in substance.

The principle of English common law was that if a lessee who had sublet the premises surrendered his term, it followed that the reversion on the sub-lease having gone, the rent and covenants were gone also.[1] This rule was modified by S.6 of the Landlord and Tenant Act, 1730.[2] The section has been introduced in the Western Region by S.164 of the Property and Conveyancing Law. If, as already submitted,[3] the Landlord and Tenant Act, 1730, is a statute of general application in Nigeria the effect will be that all parties to a lease or under-lease are placed

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1. Threr v. Banton (1570) Moore, 94; Webb v. Russell (1789) 3 T.R. 393.
2. Now contained in S.150 of the L.P.A, 1925.
3. [illegible] (1831) 1 B & Ad. [illegible].

in the same position as if no surrender has taken place.[3]

The surrender vests the estate immediately in the surrenderee until he dissents[4]; it stops the accrual of rent [5] but does not affect the liability of the parties for breaches committed before the date of the surrender.[6]

5. Disclaimer.

The analysis of native law and custom given earlier shows that the interests conferred on a customary tenant cannot be transferred by the tenant without the consent of the landlord. Further, in original customary law land was not an object of commerical dealings; therefore if a tenant was indebted to a third party he could neither pledge the land granted to him nor could the creditor seize it, though he could seize the tenant's chattels. It will therefore be easy to see that the usual proviso for re-entry (in case of bankruptcy of the tenant) inserted in English leases is meaningless and unknown in native law and custom.

The English law incorporated into the general law of Nigeria does not include the English Bankruptcy Acts;[7]

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3. Doe d. Palk v. Marcheti (1831) 1 B & Ad. 715.
4. Thompson v. Leach (1698) 2 Salk, 618;
5. Southwell v. Scotter (1880) 49 L.J. (Q.B.) 356.
6. Brown v. Blake (1912) 47 L.Jo.495; Richmond v. Savill (1926) 2 K.B. 530. But F.E. Farrer in ( ) 11 Conveyancer pp 73, 81 questions the correctness of these decisions. It is submitted that they are sound in principle.
7. Halliday v. Alapatira (1881) 1 N.L.R.1; Fainley Ltd. v. McIver (1900) 1 N.L.R. 47.

so far, there has been no express legislation relating to the bankruptcy of natural persons [8]. It has, however, been provided by the Companies Ordinance[9] that the rules in force for the time being under the law of bankruptcy in England are to be applied in winding up insolvent companies.[10] The English rules provide that a trustee in bankruptcy may disclaim the property without leave of the court.[11] In spite of this provision it will be difficult to interprete the Rules without having regard to the substantive law contained in the English Bankruptcy Act, 1914.

The exact legal position in Nigeria is far from clear but from the language of the Companies Ordinance it would seem that on the making of a winding up order the assets of the company will be vested in the liquidator.[12] who in his capacity as a trustee in bankruptcy may disclaim the leasehold property of the company within twelve months after his appointment as a liquidator. If the property did not come to his knowledge within one month after the appointment, the period of twelve months will run from the time when he first became aware of its existence. Such a disclaimer would operate to determine the interests and

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8. But vide infra for insolvent debtors.
9. No.54 of 1922, now Cap.7 of Laws of the Federation of Nigeria, 1958.
10. ibid. S.205.
11. Bankcruptcy Rules, 1952, Rule 278.
12. This is contrary to the rule applying in England because there the assets are still vested in the company and the liquidator merely acts as an agent.

liabilities of the company under the lease; therefore if there is no underlease, the lease itself will be entirely gone.[13] If there is an underlease, the under-tenant will step into the shoes of the company (the head-tenant) on the liquidator's disclaimer.

When a natural person is unable to pay his debts his property is still vested in him and the rights of his creditors must be exercised in accordance with the provisions of the Sheriffs and Civil Process Ordinance, Part III. The Ordinance provides that the bailiff may levy execution against and sell the immovable property of the debtor.[14] The effect of such a sale is to transfer the rights and interests of the debtor/lessee to the purchaser,[15] thereby relieving the debtor from all the unaccrued liabilities of the lease and making the purchaser a direct tenant of the landlord. The bailiff is not empowered to disclaim an onerous lease but in practice, if it cannot be sold at all, the title which has never vested in him, remains in the debtor who will continue to be liable to the landlord. If that happens the relation of landlord and tenant can only be determined by the landlord accepting a surrender or exercising any rights of forfeiture that he might have reserved.

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13. Re Finley, Ex pante Clothworkers' Co. (1888) 21 Q.B.D. 475.
14. ibid. s.44.
15. S.50.

6. Abandonment.

As explained previously, a customary tenant must occupy and use the land granted to him; any failure on his part to use it amounts to an abandonment of the land which is a breach of his implied obligation under the tenancy.[16]

The length of time during which the grantee must have failed to use the land in order to raise an implication of abandonment varies with the custom of each district and the type of land involved. In case of farmland under constant cultivation, non-use for one farming season may raise a presumption of abandonment but where the land has been used for building a dwelling house abandonment can only be established if the house has completely fallen into ruins; [17] to establish this the landlord must prove that the delapidation was willingly permitted by the tenant. If the house went into ruins as a result of factors beyond the tenant's control, for example, his illness,[18] the presumption of abandonment will be rebutted. The intention with which the tenant ceased using the land is paramount; if he allowed farmland to lie fallow for more than the length of time usually allowed in the district, the presumption of abandonment will be rebutted on his proving satisfactorily that he intended to

16. Nadel, A Black Byzantium p.186; Ward Price, op.cit., paras.86, 96. Rowling, Benin, paras 20, 41.
17. Ajisafe, op.cit.
18. Baillie & ors. v. Offiong & ors. (1923) 5 N.L.R.28.

resume cultivation when the land has recuperated. The fact that a tenant permitted a lodger to occupy two rooms and a parlour in a house built on the land granted does not amount to abandonment of the land, if the rest of the holding was still occupied by members of the tenant's family.[19]

Where the land has been abandoned the grantor is entitled to re-take it at once without instituting any legal proceedings; as soon as he re-enters the relationship between the parties will automatically come to an end. The grantor must retake possession for unless he does so the tenant who has abandoned may change his mind and resume occupation. Actual entry by the grantor himself is not necessary because the tenancy may nevertheless come to an end if he has resumed possession constructively, such as by letting the land to a new tenant.

Where the relationship between the parties is governed by the general law, the extent of the application of English law is uncertain because it has not been decided whether the (English) Distress for Rent Act,1737, [20]as amended by the Deserted Tenement Act, 1817,[1] is a statute of general

19. Eyamba v. Holmes & Anor. (1924) 5 N.L.R.83. But this could amount to subletting without consent - a ground for forfeiture of the tenancy.
20. 11 Geo. 2, C.19. 1. 57 Geo.3, C.52.
20, 1. The enactment provides for recovery of premises which have been deserted by the tenant leaving no sufficient distress and a half year's rent in arrear. At the request of the landlord or his bailiff, two or more justices shall view the premises and affix a notice of a second view to take place not sooner than 14 days. If on the second view the tenant does not come forward and pay the arrears of rent, or there is no sufficient distress, the landlord could be put back into possession and the lease therefore becomes void.

application in Nigeria.

The provisions of S.54 of the Landlord and Tenant Act, 1954, are decidedly not applicable [2] because the Act is a post -1900 statute. It is submitted, however, that even if the English Acts do not apply, a Nigerian landlord could invoke the common law rules to re-enter where hist tenant has abandoned the demised land; from the time of such re-entry the tenancy will be determined by surrender through the operation of the law[3]. If the common law rule applies, then it is further submitted that the landlord's right of re-entry is not whittled down by the provisions of the Recovery of Premises Ordinances where the property demised is situated in an area to which the Ordinance applies.

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2. The section provides that if a landlord capable of serving a notice to quit applies to the County Court and satisfies the Court that he has taken all reasonable steps to communicate with the person last known to him to be the tenant and has failed to do so, and that during the 6 months ending with the date of the application, neither the tenant nor anybody claiming under him has been in occupation of the premises or any part thereof, and that no rent has been paid during the period, the County Court may by order, if it thinks fit, determine the tenancy from the date of the order.

3. Oastler v. Henderson (1877) 2 Q.B.D.575, C.A. The re-entry must, of course, be made with the intention of putting an end to the tenancy not simply because the landlord cannot help himself. Re-letting the premises to a new tenant puts an end to the former tenancy from the date of such reletting.

7. Forfeiture.

In native law and custom one of the commonest ways of bringing a tenancy to an end is by the grantor forfeiting the grant because of the tenant's breach of an express or an implied term of the tenancy.[4] If, for example, the tenant does anything prejudicial to the landlord's title, such as attempting to sublet or assign the holding without first obtaining the landlord's consent, or denying the landlord's title, or if he defiles the land, the landlord may re-enter and forfeit the grant. Further, if the tenant fail to perform the customary services or pay the customary dues, or if he fail to use the land for the purpose of the grant, the landlord is entitled to put an end to the tenancy.

The option to exercise the right of forfeiture was entirely that of the landlord though if the breach was of a triffling nature a customary tribunal would order the tenant "to rub his hand on the landlord's face" by giving him some small present to atone for the breach.

As a general practice, when the tenant commits a breach of the terms of his holding the landlord would inform him either in person or through a respectable friend. Such a communication will give the tenant an

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4. Action for damages was limited because in original native law land was not a thing to be trafficked in.

opportunity to apologise for the breach and seek a reconciliation with the grantor. If the tenant takes no steps to atone for his wrong the landlord may proceed to "close" the land. If this is done the tenant is thereby unequivocally notified (by the act) that he is not to enter the land again unless reconciliation is effected and the landlord 'opens' it for him. Where the tenant takes no steps to get it "opened", it will be assumed that he has consented to the forfeiture. If he tries to enter the land when it was still closed his action will amount to trespass.

In some cases (especially under modern conditions), if the tenant refuses to give up possession on the landlord's claiming forfeiture, he (the landlord) will bring an action before a customary court. If this happens, the main aim of the tribunal will be to reconcile the parties; therefore unless the breach is really of a serious nature forfeiture will not be ordered; the tenant will, instead, be warned against repetition of the breach and he may be ordered to pay a little "fine" in form of kola nuts and/or palm wine which both parties and the adjudicators will consume together as a mark of having restored the former goodwill.

Where the relationship between the parties is regulated by the general law the lease may be terminated by forfeiture on principles similar to those applied by English courts.

Since the English limitation Acts are statutes of general application in Nigeria [5], action for forfeiture must be commenced within twelve years after the right has accrued.[6]

Under the English rules applicable forfeiture clauses are construed strictly and against the lessor but where the lease is forfeited all the interests and all under--leases created under it are thereby completely destroyed.[7] The English common law rule relating to apportionment of conditions (contained in a lease) which concerns the landlords right to re-enter upon a breach was that "no grantee or assignee of the reversion could take advantage of a re-entry, by force of any condition".[8] This rule which has been altered in England does not apply to Nigeria because of S.10 of the Conveyancing Act, 1881 [9]. Therefore now the heirs, executors, and successors of the tenant as well as an assignee of the reversion can re-enter on the breach of a condition after the assignment.[10]

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5. See Cap.1, p 52 , supra; cf. N'jie v. Hall (1931) 1 W.A.C.A. 100, Sierra Leone.
6. Real Property Limitation Act, 1874, S.1; now replaced In England by the Limitation Act, 1939, S.4 (3)
7. Great Western Ry. v. Smith (1876) 2 Ch.D. at p.25.
8. Co. Litt., 215 a. See also Dumpor's Case, 4 Rep.119, resolution 5: Assignee of reversion in part held incapable of taking advantage of conditions. Similarly Knight's case, 5 Rep.54b. But the King and an assign taking by act of law are not within the common law rule; Coke, ibid., Resolutions 6 & 7.
9. Now S.141 (1) & (2) of the L.P.A., 1925; Similar to S.156 (1) & (2) of P. & C.L. of the W.R.
10. Litt. s.347; it does not appear that a right of re-entry which had accrued is assignable: Hunt v. Bishop (1853) 8 Ex.675, p.680; Hunt v. Remnant (1854) 9 Ex.635, at p.641. Crane v. Batten (1854) 2 W.R.550; 23 L.T.(O.S.) 220.

A parol lease is apparently within the section; in the Western Region, at any rate, it must be taken that on the principles of the English L.P.A., 1925, (which is reproduced in substance by the Property and Conveyancing Law), a lease includes an agreement for a lease[11], but in all the other Regions it is uncertain whether a lease includes an agreement for a lease[12] because the definition of a lease in the C.A.1881 is not as extensive as that contained in the Property and Conveyancing Law of the Western Region.

Where the landlord wants to maintain forfeiture his rights are enforceable not only against the original lessee but also against the successors in title - whether in whole[13] or in part [14] - of the demised property. In order to establish that forfeiture has been incurred the landlord must not only prove that the proviso for re-entry extended to the breach complained about but he must also show that he complied with the requirements of the C.A., 1881, relating to notice and that he has not waived his right of forfeiture.

From the provisions of the 1881 Act it is certain that

(i) the notice must be in writing;[15]

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11. cf. Rickett v. Green (1910) 1 K.B. 253, Cole v. Kelley (1920) 2 K.B. 106; Rye v. Purcell (1926) 1 K.B. 446.
12. cf. Farwell, J. in Manchester Brewery Co. v. Coombs (1901) 2 Ch. 608.
13. C.A., 1881, S.58.; P.& C.L.S.102(1); cf. L.P.A.,1925, s. 78 (1).
14. C.A., 1881, S.12; P.& C.L. S.155(1) & (2); cf. L.P.A.; 1925, s. 140 (1) & (2).
15. C.A., 1881, s.67.

(ii) it must unequivocally specify the particular breach complained of; [16]

(iii) if it is capable of being remedied, the notice must require the tenant to remdy it; and in any case

(iv) it must require the tenant to make monetary compensation for the breach. [17]

(v) The notice may be addressed simply to the "lessee" by that designation, without his name. [18]

(vi) It will be sufficiently served if it is left within the last known place of abode or business in Nigeria of the lessee, or if it be served on the lessee, it is sufficient to affix it on the land or any building comprised in the lease.[19] In the latter case, the landlord must have made sufficient and reasonable effort to serve the lessee personally.

(vii) The notice will be presumed to have been delivered if it is sent by registered post to the lessee by name, if the letter is not returned undelivered through the post.[1]

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16. ibid., S.14(1)
17. This is not necessary where the landlord does not require any compensation, e.g. because the breach cannot be remedied. Lock v. Pearce (1893) 2 Ch. 271.
18. C.A., 1881, s.67 (2) c.f. L.P.A. 1925, s. 196 (2)
19. C.A., 1881, S.3. cf. L.P.A; 1925, s. 196 (3)

1. C.A. 1881, s.67 (4) cf. L.P.A.1925, s. 196 (4)

It should be noted that the English Leasehold Property (Repairs) Act, 1938, as amended by the Landlord and Tenant Act, 1954, S.51, does not apply to Nigeria; therefore the landlord's notice need not require the lessee to serve a counter-notice nor is the lessee entitled to serve such counter-notice.

Where the tenant has committed a breach which entitles the landlord to forfeit the lease but the landlord fails to comply with the requirements of the C.A., 1881, any action he brings on the breach will not be properly brought before the Court.[2] S.14 of the 1881 Act does not extend to a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased,[3] but in Western Nigeria, such a breach comes within S.161(1) of the Property and Conveyancing Law unless it was committed before the commencement of the Law.[4] Fatayi Williams, J. has held recently that the notice required by S.14 of the C.A. 1881 is not necessary before a landlord could institute proceedings for forfeiture because of assignment or under letting (by the lessee) without consent.[5] It is not possible to discover the date on which the breach was committed from the report and

2. The lessor must also comply with the terms or restrictions imposed by any special proviso in the lease in addition to those imposed by the act.
3. ibid., s.14(6). Nor does it apply to cases of non--payment of rent: ibid. s.14 (8), but see below.
4. Property and Conveyancing Law, s.161 (8). cf. L.P.A. s.146 (8).
5. British Bata Shoe Company v. Abizakhen & Kamal (1960) W.N.L.R. 190.

the attention of the Court did not seem to have been drawn to that point. The decision will be correct only if the breach was committed before the 23rd April, 1959; for a similar breach committed in the Wester Region after that date, the court may now grant relief against forfeiture.[6] In all the other Regions, however, the relief may still be granted in cases of alienation without consent and the decision of Fatayi Williams, J. is still binding. This distinction between the present law of the Western Region and the laws of the other Regions should not be ignored; it shows that in spite of the common origin of the general laws applying in Nigeria, the apparent dimilarity may, in some cases, prove delusive and the laws cannot always be taken as identical on all points in all the Regions. [7]

In Peter Onwata v. The Niger Company Ltd.[8] the tenant company committed a breach of a covenant which entitled the landlord to forfeit the lease. Webber, J. held that it could hardly be contended that the landlord's notification that he would enforce forfeiture should be in a special form as required under the English Conveyancing Acts, 1881-92; he thought that an oral notice was

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6. cf. House Property Investment Co.Ltd. v. James Walker Ltd. (1947) 2 A.E.R. 789.

7. For the uncertainty of under-lessees outside the Western Region obtaining relief from forfeiture see below, p. 464

8. (1926) 7 N.L.R. 80, at p.82.

sufficient. With respect, it is submitted that this decision is questionable especiallynas the question whether the C.A. 1881 was applicable did not seem to have been considered by the Court. In view of the decisions [9] holding that it applies to Nigeria it cannot be argued that the particular form prescribed therein can be dispensed with.

Where the lease is forfeited but the property is in an area to which the Recovery of Premises Ordinance applies then in order to obtain possession the landlord must satisfy the court that it is reasonable to make the order; if the court's discretion in this respect is not exercised in his favour, the lessee will continue in possession as a statutory tenant.[10]

Where a breach entitling the landlord to forfeit the lease has been committed he may waive his right of forfeiture either expressly or by implication. Any act which shows that he considers the tenancy as still subsisting will be evidence of waiver. As in English law, so in the general law of Nigeria, waiver will be implied by the landlord's acceptance of or unqualifiedly demanding rent after forfeiture has been incurred. Further, the issuing of receipt for a bby-gone rent, addressing the

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9. See Chapter 1, p.52, supra.

10. For a further discussion on this point see chapter 8 below.

lessee as his tenant, or the service of a notice to quit after the breach, or statements made in the landlord's pleadings manifesting an intention to continue the tenancy, or levying of distress, or calling upon the tenant to do repairs, or the landlord himself entering to repair the premises, or his acceptance of surrender will afford evidence of waiver of the forfeiture. If, however, the breach is of a continuing nature[11] the implication that it has been waived can only extend to acts done down to the time at which the landlord could be shown to have affirmed that the tenancy exists.[12]

Leases of Crown land and grants under the Land Tenure Law are excepted from the rule that acceptance of rent operates as waiver of forfeiture.

In the Western Region, if a waiver is proved to have taken place in any particular instance, such waiver does not operate as a general waiver of other covenants contained in the lease: it extends only to the particular breach to which it relates.[13]

It is uncertain whether this rule applies in the other Regions because it is not known whether the Law of Property Amendment Act, 1860 (Lord St. Leonard's Act)

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11. eg. failure to repair, cultivate, build, or use in a particular manner.
12. Peter Onwata v. The Niger Co., supra, is sound on this point. For the same rules in English law see Woodfall, op.cit., pp.943-950. Foa, op.cit., p.649 f.
13. Property and Conveyancing Law, S.163, similar to L.P.A 1925, replacing L.P. (Amendment) A. 1860, s.6.

on which the provision is based could be regarded as a statute of general application in Nigeria.

Where forfeiture has been incurred it is possible for the tenant to obtain relief from forfeiture. This relief, with the terms under which it will be granted is in the absolute discretion of the Court. The exercise of the Judge's discretion will be influenced by such facts as

(i) the willingness of the tenant to remedy the breach alleged;

(ii) the readiness of the tenant to pay compensation for any breaches which cannot be remedied;

(iii) the tenant's undertaking to observe the covenant in future or to make good any waste if it is possible to do so.[14]

Each case of relief must be decided on the particular facts and any attempt to fetter the free exercise of judicial discretion based on the above list will not help the claimant.[15] The attitude of the tenant throughout the whole proceedings and his lateness in approaching the landlord for reconciliation may combine to prejudice his chances of obtaining relief.[16]

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14. cf. Rose v. Spicer (1911) 2 K.B. at p. 241, per Cozens-Hardy, M.R. reversed on appeal, on other grounds.
15. Per Loreburn, L.C. in Hyman v. Rose (1912) A.C.623.
16. Onisiwo v. Fagbenro, infra.

The provisions of the C.A. 1881 or of S.161 of the Property and Conveyancing Law of the Western Region apply to all types of leases, whether private or made under the Crown Lands Ordinance or the Land Tenure Law. Therefore a lessee of Crown land or a grantee of a right of occupancy in the Northern Region may, subject to the discretion of the Court obtain relief from forfeiture. If an order is made in favour of the tenant he is put in the same position as if no forfeiture has been incurred at all and all the previously existing liability before the action for forfeiture will continue to subsist.[17]

In the Western Region, because of the provisions of the Property and Conveyancing Law, s.161(4), under-lessees, including a legal mortgagee or chargee [18] or an equitable mortgagee entitled to a legal mortgage[19], or a person to whom the premises has been let without consent [illegible] can claim relief against forfeiture. If it is granted, the residue of the tenant's term will become vested in the under-lessee or such other person; this is an entirely new estate for the under-lessee because his term having been destroyed by the forfeiture has ceased to exist.[1] The sub-section operates in favour of under-leases in the Region even if the cause of forfeiture is one against

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17. cf. *Dendy v. Evans* (1910) 1 K.B. 263, C.A.
18. *Grand Junction Canal v. Bates* (1954) 2 Q.B.160
19. *Re. Good's Lease, Good v. Wood* (1954) 1 A.E.R.275

1. *Ewart v. Fryer* (1901) Ch.499, C.A.; affd. *sub.nom. Fryer v. Ewart* (1902) A.C.187.

which the Law provided no relief to the lessee. This is because the subsection is a general enabling clause, empowering the Court to give relief to an under lessee in case of forfeiture under any covenant, proviso, or stipulation in a lese, or for non-payment of rent, on such conditions as the Court considers just in each case.[2] In any case the under lessee must show that he has reasonably exercised the caution required of a prudent person in acquiring the property.[3]

The High Court Laws of all the Regions provide that in the case of any action for forfeiture for non-payment of rent, the Court shall have power to give relief in a summary manner and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise as can be imposed by the High Court in England.[4] In the Eastern and Northern Regions, like the Federal territory, no provisions similar to those of s.161 (4) of the Property and Conveyancing Law of the Western Region exist and it has not yet been decided whether the Conveyancing and Law of Property Act, 1812, on which the P. & C.L., S.161(4) was based, is a statute of general application in Nigeria. On the principle of the C.A.1881 which applied

2. Gray v. Bonsall (1904) 1 K.B.601, C.A.
3. Imray v. Oakshette (1897) 2 Q.B.218.
4. High Court of Lagos Ordinance, S.22 and similar sections of the Eastern, Northern and Western Region High Court Laws.

in all the other Regions (except the West) under-lessees cannot obtain relief against forfeiture of the head-lease from which the under-lease was derived.[5] It is submitted, however, that the C.A.1881 and the C. & L.P.A. 1892 should be read together[6] and that under-lessees everywhere in Nigeria could obtain relief for forfeiture in the same manner as in England.

To summarise, the decided cases and the relevant enactments reveal that

(i) Any serious breach of a term of customary tenancy leads to forfeiture of the grant whether or not this was expressly stipulated for before the grant was made.

(ii) A customary tribunal on the High Court in exercising its equitable jurisdiction may grant relief against forfeiture of the customary tenancy.

(iii) Under the general law denial of the landlord's title or a breach of any express covenant providing for re-entry as a consequence, entitles the landlord to forfeit the lease.

(iv) The landlord must give the statutory notice relating to the breach before exercising his right of forfeiture.

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5. Burnt v. Gray (1891) 2 Q.B. 98.
6. This is because the 1892 Act was passed in consequence of the decision in Burnt v. Gray, based on S.14 of the C.A.1881.

(v) The tenant may, on application to the court or in defence of the action brought by the landlord claim relief against forfeiture.

(vi) Granting of relief is at the discretion of the Court but it will not be available in the Eastern or Northern Region or in the Federal Territory if the breach is of a covenant against alienation; in the Western Region it could be obtained if the alienation was made after the 23rd March, 1959.

(vii) Relief may be granted regardless of who the lessor is; i.e. whether he is a native, a native-community, a corporation, or the Governor.

(viii) In the Western Region, under-tenants may obtain relief but only by having a new estate vested in them if the head-lease is forfeited; in the other Regions their position is uncertain though it seems to be the same as in the Western Region.

8. <u>Notice to Quit</u>.

It has been shown above that grant of tenancies in customary law is usually for an indefinite period and that even where the term is certain its duration is not reckoned with the same precision as in English law. Where the length of the term is not fixed the landlord may, subject to the qualifications shown below, claim the land

back at any time he likes; similarly the tenant may vacate at his own wish and deliver back possession to the grantor.[7] Before claiming the land the landlord is bound to give the tenant sufficient notice to quite. No definite length of notice is laid down by customary law, the test in each case being whether the landlord has acted reasonably and whether he gave the tenant sufficient time to remove his belongings from the land,[8] or "to reap the fruits of what he has already planted",[9] or to make alternative arrangements for a new grant. Thus in the Zaria Province, once the farming season has started the landlord cannot request the tenant to quit but must permit him "to continue to farm the land for that season".[10] Where the land is granted for the erection of a dwelling house or for any other purpose which was intended to last for a long time the landlord cannot evict the tenant out of mere wish to bring the grant to an end. This is because the nature of the user shows that the parties intended (at the time of the grant) that their relationship shall continue indefinitely as long as the tenant wished or observed the covenants and conditions of the grant. If

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7. Cole, Zaria, para.27.
8. Cole, Zaria, para.31(b); Ajisafe, op.cit., p.9 para 13(a)
9. Bolarin, The Laws and Customs of Egbaland, (1939)(ed), p.80.
10. Cole Zaria, para. 31 (b).

he commits a breach the landlord could ask him to quit but this is technically forfeiture of the grant. In cases of these grants for an indefinite period the tenant himself could quit the land by simply giving the grantor a sufficient notice of his intention to do so.

Where the relationship of the parties is governed by the general law, a periodic tenancy may be determined either by the landlord or the tenant serving a proper notice to quit, even without the consent of the other.[11] The rights of the landlord and tenant in this respect are equal and cannot be whittled down by any agreement to the contrary. Where, however, one party repudiates the landlord and tenant relation, he is not entitled to be given a notice to quit. Similarly, if the tenant abandons the premises and the landlord acquiesces in the abandonment the necessity for a notice to quit is dispensed with.

Where notice is necessary, its legth will depend on the agreement between the parties but in the absence of any agreement the English common law rules apply. If the premises is situate in an area to which the Recovery of Premises Ordinance applies, the common law rules are excluded and the length of notice required will be that

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11. But a notice to quit may be served in cases where a definite term of years is granted if the service be in exercise of an option to determine the lease, as provided in the deed: Doe d. Warner v. Brown (1807) 8 East, 165, Gray v. Spyer (1922) 2 Ch. 22.

laid down by the Ordinance.[12] S.8 of the Ordinance lays down in the absence of any express agreement to the contrary the length of the notice to be given by either party shall be as follows:

"(a) in the case of a tenancy at will or a weekly tenancy, a week's notice;

(b) in the case of a monthly tenancy, a month's notice;

(c) in the case of a quarterly tenancy, a quarter's notice;

(d) in the case of a yearly tenancy, half a year's notice; Provided that in the case of a yearly tenancy the tenancy shall not expire before the time when any crops growing on the land, the subject of the tenancy, would in the ordinary course be taken, gathered, or reaped if such crops were crops which are normally reaped within one year of planting and such planting was done by the tenant prior to the giving of the notice.

"(2) The nature of the tenancy shall, in the absence of any evidence to the contrary, be determined by reference to the time when the rent is paid or demanded."

Whether the Ordinance or the common law rules apply,

12. Actually the provisions of the Ordinance are simply statutory introduction of the English common law rules.

the notice must be given by the lessor or someone whom he authorised to act as his agent. Thus where the son of a lessor, purported to determine the tenancy by a letter, the letter making no mention of the lessor who later re-entered, Carey, J. held that the tenancy was not properly terminated and, therefore, that the lessor was liable to the tenant in trespass.[13]

The onus is on the person serving the notice to prove that the tenancy has been properly determined [14] and that the person who purported to act on his behalf was his duly authorized agent.[15] If such agent is a solicitor, he must be authorized in writing to serve the statutory notice to quit required by the Recovery of Premises Ordinance, otherwise the notice will be invalid.[16]

A right of occupancy granted in Norther Nigeria under the Land Tenure Law is, in substance, a lease and it can only be determined by revocation. Its revocation is a statutory act which could not, in view of S.47(2) (a) of the Interpretation Ordinance [17], be signified by an administrative officer on behalf of the Resident.[18] If it is not validly revoked proceedings for recovery of possession cannot be commenced.[18] In absence of any express

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13. Bashua v. Odunsi & anor. (1940) 15 N.L.R.107.
14. Olaoye v. M. & K. (1949) 19 N.L.R. 59.
15. Bashua v. Odunsi, supra.
16. Ayiwoh v. Akorede (1951) 20 N.L.R.4.
17. Cap.94 of Laws of Nigeria, 1948; now Cap.89 of 1958 edition, S.56 (2) (a).
18. Olat Majiyagbe v. A - G & ors. (1957) N.N.L.R.158.

provisions in the certificate of occupancy, the length of notice of revocation must depend on the common law rules,[19] in as much as the Reovery of Premises Ordirance does not apply; it will be sufficient if the notice is absolute, definite and unequivocal in character so that it cannot be misunderstood by the person to whom it is given that possession of <u>all</u> the demised premises is to be delivered up at the proper time.[20] The notice may state the exact date on which the tenant is to quit; if such date is stated, it must be the correct one otherwise the notice will be invalid.[1] To be valid, the notice must expire on and with the last day of some period of the tenancy.[20] It is for the person serving the notice to prove the nature of the tenancy the period, and what time it ends.[2] A letter which simply terminates the tenancy will be useless as evidence of these facts if the writer cannot prove them before the court. In case of a monthly tenancy, for example, it must be proved what period constitutes the month, i.e. whether the period began with the 10th day of one month and ran till the 9th day of the next or

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19. Mgbemena v. Onyekwun (1952) 20 N.L.R.100.
20. Kalencerian Bros. v. Millad Nahum (1955) 1 W.A.L.R.18, (Ghana), but the principle is the same. cf. Ackland v. Lutley (1839) 9A & E.879; Page v. Moore (1850) Q.B. 684. Sidebotham v. Holland (1895) 1.Q.B.378; Bathavon R.D.C. v. Carlile (1958) 1 Q.B.461.
1. Doe d. Murrell v. Milward (1838) 3 M. & W. 328; Precious v. Reedie (1924) 21 L.B. 149
2. Olaoye v. M. & K., supra.

whether it began with the first day and ran till the last day of the month. If the tenancy runs from the beginning to the end of a month, then the month's notice must be dated and served at least one day before the beginning of the month [3] to expire at the end of the month. Thus a notice to determine a monthly tenancy at the end of (say) June, must be dated and served not later than 31st May, to expire on 30th June.[3] If it is dated and served (say) on 10th May to expire on the 29th June, the notice will be invalid although the interval between its service and expiration is much more than a month. The same principle applies to the service and expiration of the half year's notice required to determine a yearly tenancy.[4]

Where the parties have made an express agreement relating to the length of notice to quit, S.8 of the Recovery of Premises Ordinance is excluded and the notice

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3. This obviates any doubt; if dated and served at the first day of the month to expire at the month-end the notice may still be valid unless the agreement requires one clear month's notice when the statement will strictly apply. A notice may be expressed in general terms; so, in the case of a yearly tenancy the lessee could be required to quit "at the expiration of the current year of the tenancy which shall expire next after the end of one half year from the date hereof". A notice in such general terms does not, of course, relieve the landlord of proving the nature or period of commencement of the tenancy: Olaoye v. M.& K, supra.
4. Lasaki v. Dabian (1957) N.N.L.R.12, where Smith, J. held that a half year's notice served on 1st September to expire on 29th February, 1956, was short by one day and, therefore, invalid.

must be served in accordance with the terms of the agreement. Where the Ordinance applies, on the determination of the tenancy either by effluxion of time or expiration of a valid notice to quit, the landlord must, to recover the premises, serve the tenant a notice in Form E of Schedule A. Such notice must be seven <u>clear</u> days' notice: both the day of the service and day of expiration are excluded. Thus a landlord who serves such a notice on (say) the 3rd day of the month must allow <u>all</u> the days, from the 4th to the 10th inclusive, to expire before he could be entitled to apply to the court for a plaint or writ. In such a case the earliest day on which he could apply will be the 11th day of the month. If the plaint or writ be issued on the 10th the action will be premature and the proceedings will be null and void[5] like cases where an invalid notice to quit was served.[6]

Service of notices to quit should be personal but if there is evidence that attempts to serve the tenant in person has been fruitless, the notice will be deemed properly served if it is posted on some conspicuous part of the premises occupied by the tenant.[7] In cases

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5. <u>Chinwete v. Amissah</u> (1957) L.L.R.I., Hubbard, J.
6. <u>Oyeledun v. Shomoye</u> (1960) W.N.L.R.126.
7. <u>Sunmonu v. Onayemi</u> (1955) 21 N.L.R.45, at pp. 46-7; Recovery of Premises Ordinance, S.28.

governed by the Recovery of Premises Ordinance, if on the expiration of the notice to quit and the seven days' notice of intention to recover possession, an order to issue a plaint or writ is granted by the Magistrate or the High Court as the case may be, the tenant cannot appeal against such order[8]; the only course open to him is to oppose the order for possession during the trial of the action.

On the principles of common law, an invalid notice to quit, even if assented to by both parties, would not in any circumstances put an end to the tenancy.[9] The position has been altered since the fusion of law and equity laid down by the High Court Laws, a promise by a landlord or a tenant to accept an invalid notice as a good one will be binding if it was intended to be acted upon and was in fact acted upon by the other party.[10]

Unless there is a waiver,[11] once a valid notice to

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8. Odunsi v. Alakija (1947) 18 N.L.R. 141.
9. Doe d. Huddleston v. Johnson (1825) M'Clel & Y, 141.
10. Johnstone v. Huddlestone (1825) 4 B. & C. 922.
10. Wallis v. Semark (1951) 2 T.L.R. 222 at p.227.
11. A "withdrawal" or "waiver" of the notice must be with the express or implied consent of both parties. If the withdrawal takes place after the expiration of the notice an inference will be drawn that a new tenancy has been created even if its terms are the same as those of the expired lease. Waiver may be proved by the fact that the Landlord accepted rent or levied distress after the expiration of the notice to quit but it must be shown that the rent was accepted with the intention of continuing the relationship. A new relationship is not brought into existence by the mere fact that an indulgent landlord allowed the tenant to remain upon the premises or that he failed to bring proceedings soon after the notice expired, if there is no other evidence that the tenancy was intended to be renewed.

quit has expired, the relationship between the parties will come to end automatically and the normal incidents of determination will follow.

9. Compulsory Acquisition.

The relationship of landlord and tenant may be brought to an end against the wish of the parties, by the premises being compulsorily acquired. In Southern Nigeria [12] to which the Public Lands Acquisition Ordinance applies, the Governor-General or the Governor of a Region (as the case may be) is authorized to acquire compulsorily any land which is required for public purposes.[13] In the Eastern and Western Regions as well as in the Federal Territory a local authority may, subject to obtaining the necessary ministerial consent, acquire compulsorily any land which is required for local government purposes.[14] In the Northern Region the Minister may revoke a right of occupancy for "good cause" which includes requirement of the land by the Government of Northern Nigeria or by a native authority in Northern Nigeria.[15]

Whenever it is resolved that land is required for

12. i.e. the Eastern and Western Regions, and the Federal Territory of Lagos.
13. Public Lands Acquisition Ordinance, S.3 (1).
14. Lagos Local Government Ordinance, S.150.
E.R. Local Govt. Law, No. 26 of 1955, S.187.

15. Land Tenure Law, S.34 (2) (c).

public purposes, notice of intention to acquire it compulsorily will be given to "the persons interested or claiming to be interested in such lands, or to the persons entitled by this Ordinance to sell or convey the same."[16] Although no specific mention is made of landlords or tenants, they are undoubtedly "the persons interested" if the land to be acquired has already been leased. The specimen conveyance of land in fee simple (in the Schedule to the Ordinance) suggests that the deed of transfer is to be made only by the absolute owner. Even if such conveyance is effective to destroy the tenant's interest in the land, it is submitted that it was not the intention of the legislature that the tenant should go uncompensated and therefore both he[17] and the landlord are respectively entitled to a moiety of the purchase price subject to the value of their respective interests in the land.[18] Once the con-

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16. Public Lands Acquisition Ordinance, S.5.
17. The Chhirman, L.E.D.B. & Anor. v. Summonu (1937) 3 W.A.C.A. 143.
18. In Kodilinye v. Anatogu (1955) 1 W.L.R. 231, the P.C. left undecided the nature of rights acquired by persons in occupation of land either with the consent or acquiescence of the owners and in Nwangwn & ors. v. Nzekwu & ors. (1957) 2 F.N.L.R.36. the Federal Supreme Court decided on the basis of the agreement between the parties that the absolute owner of the land under dispute was solely entitled to the premium paid by a corporation in respect of a lease of land consented to by bothethe owner and the occupier, to the exclusion of the occupier. Nothing in these two cases, however, indicates that in the absence of an agreement a land-owner could claim all the compensation to the exclusion of an occupier. Normally the landlord's share of the compensation should be calclated according to the value of his reversion whilst the tenant's moiety will be based on the value of his lease; see the Chairman, L.E.D.B. & anor. v. Sunmonu, supra.

veyance is executed in the proper manner, the interests of the landlord and tenant are destroyed and the relationship between them automatically comes to an end, even if the question of their proportionate share of the compensation may have to be decided under S.10 of the Ordinance.

INCIDENTS OF DETERMINATION.

1. Delivery of Possession.

In native law and custom once a grant has determined either by effluxion of time or by expiration of a notice to quit, it becomes the duty of the tenant to deliver back possession of the land to the grantor. This general rule is subject to some local modification according to the custom of the particular area. In the Kagora area of Zaria Province, for example, if a man was allowed to build a house on farmland of which he was a tenant, he was by custom entitled to continue farming for one season after he has removed his house. This was done in order to compensate him for the manuring which the land must have received.[19] In the Kachia District of the same province, this period of grace is two years, not one.[20] On the

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19. Cole, Zaria, para. 31 (c).
20. Cole, *ibid.*, para 66.

expiration of such period of grace, if any, the landlord may retake possession, if need be by use of reasonable force because in customary jurisprudence the tenant who wilfully continues in possession after the determination of his grant is a trespasser and cannot hope to get the assistance of his relatives or friends.

If the landlord preferred to bring an action against his tenant who holds over it was for the customary tribunal to examine the merits of the case and decide on whether the tenant would give up possession and if so at what time, or whether he should continue in occupation and on what terms he should do so.

Where the relationship between the parties is regulated by the general law, the rules of English law apply but with some modifications. Under this rule, the lessee is under an implied obligation to deliver up peacable and quiet possession of the premises with all landlord's fixtures, at the expiration of the term. He must eject all sub-tenants in order to give the lessor peaceable possession. If he is in breach of this obligation the landlord is entitled to recover all damages[1] sustained including

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1. This will include rent payable throughout the period that the landlord was kept out of possession, calculated at the current market value of the premises; it will also include any other damages arising out of the breach, e.g. claims by a third party to whom the landlord has let the premises but cannot put into possession because of the tenant's breach: see Bramley v. Chesterton (1857) 2 C.B. (N.S.) 592.

the cost of ejecting the sub-tenants.[2]

The obligation of the tenant to give up possession at the end of the term is over-ridden by the provisions of the Recovery of Premises Ordinance[3] in cases where that Ordinance or the Rent Restrictions Ordinance [3] applies. Moreover, if the parties have entered into an agreement to the contrary, possession need not be delivered on the determination of the tenancy.

A landlord entitled to possession may re-enter peaceably;[4] if he enters in a manner likely to cause a breach of the peace, he will be guilty of misdemeanour and liable to imprisonment for one year.[5] It is immaterial whether he is entitled to enter the land or not.[5] Once the landlord has obtained possession he could forcibly resist the tenant's attempt to re-enter. Even if the landlord entered forcibly and thereby becomes liable to be prosecuted criminally, it is submitted that the tenant has no civil remedy against him and he could continue to keep the possession so obtained. [6]

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2. For further explanation see Woodfall, op.cit., 26th ed. pp.1091-2.
3. See chapter 8 below.
4. cf. Adele v. Oyekan.
5. Criminal Code Ordinance, No.15 of 1916, now Cap.42 of 1958, s.81. "Peaceable possession" under the Section does not mean unchallenged possession: The Commissioner of Police v. Aileru & ors. (1958) W.N.L.R. 103.
6. If the tenancy has not been properly terminated the landlord's entry will be wrongful and he could be sued in trespass: Bashua v. Odunsi & anor. (1940) 15.N.L.R. 107; Ayiwoh v. Akorede (1951) 20 N.L.R.4.

2. Action.

In customary law a landlord whose tenant unlawfully continues to occupy the land granted after the term has expired may adopt the customary method of "closing" the land to the tenant thereby forcing the tenant to sue him in a customary court, if he liked; alternatively, the landlord himself may bring an action before a native court, claiming a declaration that he was entitled to possession and that the tenant should quit. Before the introduction of the modern native courts, if such a declaration be made it could be enforced by the landlord himself or by the traditional executive officers [7] of the court. Under the modern system of customary courts the order will be enforced by the appropriate officers of the court.

Where the general law applies to the tenancy, the landlord may also sue for recovery of the land at the expiration of the term. The procedure will depend on whether or not the land is situated in an area to which the Reoovery of Premises Ordinance applies. If the land is outside such area, the landlord may proceed by normal action in the High Court in the judicial division where the land is situated.[8]

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7. These officers usually comprised members of an age--grade or in some societies the "MMO" (masked men) or in others special messengers of the Chief or Court.
8. Supreme Court (Civil Procedure) Rules, No.1 of 1945, (Cap. 211 of 1948), O.VII, r.1.

It is uncertain whether the English Common Law Procedure Act, 1852,[9] is a statute of general application in Nigeria although it has been applied to Ghana by the W.A.C.A.[10] It is submitted, however, that the Act applies to Nigeria in the same was as it applies to Ghana.

It does not seem that the provisions of Order III Rule 9 of the Supreme Court Rules for speedy recovery of debts or liquidated money claims are available for the recovery of a land because the rule expressly refers only to "a debt or liquidated money demand." On the other hand the High Court Laws provide that in the absence of any rules or orders of court made under the Laws, the Court should exercise jurisdiction in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of Justice in England. This apparently means that an action for speedy recovery of land based on the English Order XIV Rule 1 could be entertained by the Court.[11]

If, as previously submitted, the C.L.P.A., 1852, applies to Nigeria the landlord may avail himself of the special provisions of S.213 of the Act. Under the section, if there is a lease or agreement in writing under which

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9. 15 & 16 Vic. Cap. 76.
10. in Ribeiro v. Chahin (1954) 14 W.A.C.A. 470.
11. cf. Unsworth, F.J. in Olawoyin v. A.-G. Northern Region (1961) N.N.L.R. 84 at p. 88.

a tenant for a term of years certain held till the term ended or was determined by a valid notice to quit [12] and the tenant refuses to deliver possession, the landlord may issue a writ in the ordinary form, with a notice at the foot, requiring the tenant if ordered by the court, to give bail by himself and two sufficient sureties, conditioned to pay the costs and damages recoverable in action. If after being served the writ in the usual manner the tenant fail to appear, final judgment may be signed and execution issued by the normal process. The landlord may also obtain such equitable relief as he may be entitled to having regard to the facts stated and proved even if the particular relief was not specifically asked for.[13]

In the Western Region the Landlord and Tenant Law [14], like the English Distress for Rent Act, 1737,[15] provides that where a tenant has given notice of his intention to quit at a time mentioned in that notice and shall fail to deliver possession as that time, then the tenant, his executors and administrators, shall be liable to pay the landlord double the rent for all the time such tenant shall continue in possession. There is no doubt that this

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12. It is not sufficient that the term was forfeited.
13. O.XXVI, r. 2.
14. Cap. 58 of Revised Laws of W.R. 1959, S.5.
15. 11. Geo II Cap. 19, S.18.

provision should be interpreted in the same way as in England and that the tenant need not hold over wilfully in order to render himself liable under the section. The tenant must, of course, have power to determine the lease and must have actually served a valid notice determinining it.[16] The double rent cannot be regarded as an increase in rent and therefore could be recovered notwithstanding that the land is within an area to which the Rent Restriction Ordinance applies.[17] If the landlord assigns the reversion the assignee could take proceedings against the tenant, to recover the double value because such assignee is a "landlord" within the meaning of the section.[18]

The Landlord and Tenant Law of the Western Region also provides that a tenant who holds over after a landlord's notice, will be liable for double the yearly value of the premises.[19] This is similar to the provision of the English Landlord and Tenant Act, 1730, S.1. As in the English Act, so in the Western Region Law: the tenant must hold over willfully, that is, contumaciously [20] if he is to be liable under the section. If he holds over as a result of reasonable mistake that he is entitled to remain in possession,

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16. Johnston v. Huddlestone (1825) 4 B. & C. 922.
17. Flannagan v. Shaw (1920) 3 K.B. 96.
18. Northcott v. Roche (1921) 37 T.L.R. 364.
19. ibid., S.6.
20. cf. Paul, J. in French v. Elliot (1960) 1 W.L.R. 40 at p. 51.

he will not be liable for the double value.[1] Further, the landlord must have made a "demand", the notice given must have been in writing and must have been a valid, binding notice to quit.[2] As the double value is not rent the landlord cannot distrain for it under Part IV of the Law of the Western Region; it may, of course, be recovered summarily under Order III, Rule 9 of the Supreme Court Rules, 1948.

It has been argued previously that both the Landlord and Tenant Act, 1730, and the Distress for Rent Act, 1737, are statutes of general application in Nigeria. For this reason it is submitted that the action for double rent or double value expressly provided for in the Western Region is available in the other parts of the Federation whenever the relation of landlord and tenant is regulated by the general law, whether the lease be made by private persons or is of Crown land or was created under the Land Tenure Law.

3. Fixtures.

It has been shown above [3] that the maxim quicquid

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1. Soulsby v. Neving (1808) 9 East 310,313 - mistaken claim of title. Crook v. Whitbread (1919) 88 L.J.K.B. 959 - mistaken claim that he is protected under the Rent Acts.
2. Johnston v. Huddlestone, supra.
3. See Chapter 2, pp 83-89.

plantatur solo solo cedit does not apply to customary tenancies in Nigeria because in native law what is planted on land belongs to the man who planted it; even if a man is a trespasser his rights to his own handiwork is not thereby defeated; for the ownership of land does not create title in what is put upon it by someone else.[4] As Rowling correctly observed of the Houses of Northern Nigeria,

> "improvements are looked upon not in the same category as land but much in the same light as clothes, farm tools, or any other personal property" [5]

This means that where a customary tenancy has validly determined, the tenant is still entitled to any crops or economic trees which he planted; alternatively he may receive compensation from the landlord in order to extinguish his rights in such trees.[6] Even where a squatter to whom the land was not lawfully granted has planted crops or economic trees, a customary tribunal will not allow the lawful land-holder to enjoy the fruits of the trespasser's labour without paying him some compensation. Where trespass is fully established and the land-owner is unwilling to pay compensation, an order for uprooting or destruction

4. Rowling, Benin, para.94.
5. Rowling, Report on Land Tenure, Kano Province, para. 68.
6. cf. Mbanefo, J. in Oko v. Olotu & ors. (1953) 20 N.L.R. 123 at p.124; Ajisafe, op.cit., p.12, para.19 (e).

of the trees will be made rather than allowing the land-owner to enjoy the fruits of some other person's labour.[7] It is not usual to make an order for uprooting or removal of food crops, especially yams, and if the landlord cannot afford paying the trespasser the necessary compensation, he will be bound to accept some compensation[8a] himself thereby turning the trespasser into his tenant. In some cases a tenant or trespasser may be allowed to sell the fixtures to anyone with the approval of the grantor.[7]

Where the relationship between the parties is governed by the general law the rules of common law apply,[8] but with some statutory modifications. These rules provide that anything fixed to the freehold becomes part of the freehold.[9] A fixture of that type must be delivered up by the tenant on the expiration of the lease unless the parties have entered into an agreement to the contrary or there is an enactment providing otherwise.

On common law principles a tenant is entitled to remove trade fixtures because they are not regarded as part of the freehold. The right of removal must be exercised during the term but if the grantee remains in possession after the end of the term he could still remove the fixtures

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7. Rowling, Benin, para.94; Ajisafe, op.cit., p.12, para. 68.
8. See Woodfall, op.cit., pp.760-784; Hill & Redman, op.cit., pp.539-555.
8a. But this is surely putting a premium on law-breaking!
9. Oko v. Olotu & ors., supra, at p.124.

if he continues to be regarded as a tenant. If his lease is of uncertain duration, he is entitled to remove tenants' fixtures within a reasonable time after its determination. Trade fixtures left by a former tenant do not become part of the fixutres of a new tenant [10] unless there was some express agreement to the contrary. Further, if an old lease is surrendered and a new grant is made to the same tenant, the new grant includes the former trade fixtures as part of the parcels of the demised property so that unless there was an express provision to the contrary the tenant's right to remove them is extinguished altogether,[11] nor can he pass such rights to a fresh tenant since the rights are non-existent any way.[12]

These principles of the common law should apply in Nigeria but in Safuratu Ige & ors. v. La Compagnie Generale des Comptiors Africains [13] the father (now deceased) of the plaintiffs granted two leases, covering the part in dispute, to a firm called Compagnie Bondelaise. These leases were assigned to the defendants, Compagnie Generale, on the 27th November, 1922. On the 15th November, 1924,

10. Re Thomas, Ex parte Willoughby D'Eresby (Baroness) (1881) 44 L.T. 781. cf. Smith v. City Petroleum Co.Ltd. (1940) 1 A.E.R. 260.
11. See Warrington, L.J. in Pole-Carew v. Western Counties and General Manure Co. (1920) 2 Ch. 97 at p.122.
12. cf. Stable, J. in Smith v. City Petroleum Co. Ltd., supra, at pp. 261 - 2.
13. (1935) 12 N.L.R. 51.

the defendants obtained a new lease which had a formal clause surrendering the previous grant.

The defendants vacated the premises before the determination of the new lease removing certain fixtures - counters, shelves, and electric lights - placed on the premises by the Compagnie Boudelaise. The plaintiffs brought an action to recover the value of these fixtures.

At the trial it was contended on the plaintiffs' behalf that at the time of the lease to the defendants the articles in question had, by the surrender of the previous lease and without any special stipulations to the contrary, become the property of the plaintiffs by merging in the freehold.

Grhham Paul, J. rejected this argument and held that unless there was an express provision that the lessee was to deliver up the demised premises -

"wit all and singular the fixtures and articles belonging thereto",

the defendants were entitled to remove the trade fixtures. The learned judge relied on the decision in Penton v. Robent[14] and dismissed the plaintiff's claim.

With the greatest respect, Penton v. Robart does not support the judgment. The issue in that case was the right of a tenant who was still in possession of the premises to

14. (1801) 6 R.R. 376; 102 E.R., 302; 170 E.R., 632.

remove trade fixtures after the expiration of the term. Graham Paul, J. did not seem to appreciate that the issue before him was not whether the tenants had a right to remove the trade fixtures which they put on the premises after the execution of the new lease but whether the effect of the surrender coupled with the new grant was to extinguish the tenant's right in any trade fixtures existing on the premises before the surrender and to vest those fixtures in the landlord. Obviously, a surrender will not affect trade fixtures put on the premises after the grant of the new lease but on principles of English law which the Judge applied the former fixtures will vest in the landlord by force of the surrender unless there was some express stipulation to the contrary. It is therefore submitted that even if Penton v. Robart is an authority on rights of tenants to remove fixtures after the end of the term,[15] the principle laid down by Graham Paul, J. in the Ige case is, to say the least, of doubtful legal validity.

The rules of common law explained previously have been modified in Nigeria by two enactments: the Land Te-

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15. dissented from Penton v. Robart in Deeble v. McMullen (1857) Ir. C.L. 355 and doubts have been cast on it by Alderson B in Weeton v. Woodcock (1840) 7 M. & W. 14; Leader v. Homewood (1858) 5 C.B. (N.S.) 546.
Charles J. criticised it in Earf v. Probyn (1895) 64 L.J.Q.B. 557.

nure Law and the Crown Lands Ordinance.

1. The old Land and Native Rights Ordinance provided that -

> "an occupier under a right of occupancy shall have the sole right to and absolute possession of any improvements effected by him on his land at any time before the termination of his right of occupancy and may remove any such improvements from the, provided that where the occupier constructs any buildings, works or other improvements pursuant to the terms and conditions of a contract to which the grant of the right of occupancy is subject as provided in section 8, such buildings, works or other improvements shall not be removed, sold, leased, mortgaged, or transfered in any manner whatsoever, without the consent of the Governor." 16.

This provision, in effect, meant that the tenant's right to remove fixtures of every description was recognised in all grants made in the Northern Region, unless the certificate of occupancy contained a special stipulation that the holder was to make the improvements. If it did, then removal of the fixtures (presumably if even they were for purposes of trade) must be with the consent of the Governor.

The modification seemed to make little difference in practice because the rights of occupancy granted under the Ordinance usually contained express undertakings by the g grantee to effect some specified improvements.

The section has been somewhat altered by the recently enacted Land Tenure Law which lays down in S.20 that -

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16. ibid., S.25.

"(1) During the term of a statutory right of occupancy the holder -

(a) shall have the sole right to and absolute possession of all improvements on the land;

(b) may, subject to the prior consent of the Minister, remove, sell, mortgage or transfer any improvements on the land which have been effected pursuant to the terms and conditions of the certificate of occupancy relating to the land.

(c) may, without the consent of the Minister, remove, sell, mortgage or transfer any improvements on the land which are in excess of the requirements of the building conditions and stipulations set out in the certificate of occupancy.

(d) shall make good any damage done to the land by the removal of any improvements therefrom.

(2) On the determination of a statutory right of occupancy all the improvements on the land shall revert to or vest in the Minister without payment of compensation to the holder."

It is laid down that the provisions of S.20 (1) and (2) shall take effect subject to the terms and conditions contained in the certificate of occupancy.[17]

Although sub-section (2) has now introduced the common law rules into the Northern Region, it seems that its effect is much wider because "all the imrprovements on the land" should include trade fixtures which are ordinarily removable by the grantee. Further, under sub-section (1) (c) the tenant may remove what are normally landlord's fixtures if -

(a) the tenancy has not determined, and

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17. ibid. s.20(3)

(b) those fixtures are in excess of the requirements of the building conditions and stipulations set out in the certificate of occupancy.

2. The Crown Lands Ordinance has introduced a more far-reaching modification for it has laid down that -

> "in the absence of special provisions to the contrary in any lease under this Ordinance all buildings and imppovements on Crown lands, whether erected or made by the lessee or not, shall on the determination of the lease, pass to Her Majesty without payment of compensation: Provided, however, that, *in the absence of any special provision to the contrary in the lease, when the land is leased for a term not exceeding thirty years the lessee shall be at liberty within three months of the termination (otherwise than by forfeiture) of such lease to remove any buildings erected by him on the land leased during the currency of such lease*, unless the Governor shall elect to purchase such buildings."[18]

If the purchase price cannot be agreed upon it will be determined by arbitration. The lessee, must, of course, make good any damage done to the land by his removing the building.[18]

This piece of legislation seems, in effect, to authorise the lessees of Crown land to remove all buildings they have erected on the premises during the currency of the term, no matter the duration of the lease but in cases where the term does not exceed thirty years a lessee may in addition remove the buildings within three months from the

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18. *ibid.*, s.11, italics mine.

normal determination of the tenancy unless the Governor elects to purchase them.

In the leading case[19] on this point the issue was whether buildings erected by a lessee of Crown land were the property of the Crown during the currency of the term and therefore outside the operation of the Increase of Rent (Restriction) Ordinance which did not bind the Crown. The plaintiffs contended that such buildings became part of the freehold and belonged to the Crown and that S.11 of the Crown Lands Ordinance merely provided for compensation on the determination of the lease.

The defendants, with whom Counsel for the Crown agreed, urged that the buildings did not pass to the Crown until the determination of the lease and, therefore, that they were subject to the Rent Ordinance.

The trial Magistrate held the view that S.11 of the Crown Lands Ordinance dealt only with compensation and did not affect the rule quic quid plantatur solo solo cedit. He decided, therefore, that the building in issue was the property of the Crown and outside the Rent Ordinance. Judgment was then given for the plaintiff, subject to the opinion of the Supreme Court on the points of law involved.

Brown J. held that S.11 of the Crown Lands Ordinance

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19. Mgbemena v. Onyekwu & anor. (1952) 20 N.L.R.100.

means that buildings on the Crown land do not belong to the Crown but to someone else during the continuance of the lease, and that although it is true (in view of S.60 of the Interpretation Ordinance) that the Increase of Rent (Restriction) Ordinance is not binding on the Crown, the application of that Ordinance to the buildings erected on Crown land by lessees thereof would not affect the rights of the Crown because on the determination of a lease the buildings will pass to the Crown free of any restrictions imposed by the Rent Ordinance. The learned Judge reasoned as follows:

> "Does such buildings belong to the Crown during the continuance of the lease? If it passes to the Crown only on the determination of the lease it must be from someone who has owned them before. *And although it "passes", it may be removed by the lessee if built by him during the tenancy*, showing that he still has a valuable interest in it which indeed the Crown may be willing to "purchase" as distinct from payment of compensation which is expressly eliminated by the wording of the section." 20

With the greatest respect this argument is incontrovertible and supports the view that the Crown Lands Ordinance has altered the rule relating to fixtures erected on Crown lands. This means that if lessees remove them during the term they will not normally be liable for waste, although ordinarily they would have been liable notwithstanding that they themselves erected the buildings.[1] Brown, J. correctly

20. at p.101, italics mine.
1. *Co.Litt.* 53; *Boswell v. Crucible Steel Co.* (1925) 1 K.B. 119.

limited the right of the tenant to removing of only those buildings he erected: if he remove any building erected by someone else he will, of course, be liable for waste.

CHAPTER 8.

STATUTORY RESTRICTIONS ON THE RIGHTS OF LANDLORDS.[1a]

1. Historical Background.

In Nigeria the common law rights of landlords have been restricted by statute. The earliest restriction was necessitated by the shortage of houses caused by the First World War, 1914-1918.[1] The first enactment [2] applied only to Lagos and came into force on the 22nd July, 1920.[3] The long title states that it was "an Ordinance to restrict the rent of dwelling houses". As the Attorney-General later explained,

> "its main object was to prevent landlord from charging excessive rents while there was a scarcity of housing accommodation." [4]

To achieve this purpose the Ordinance provided for a "standard rent" which was defined as-

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1a. It has not been possible to examine the question of how far Nigerian judges should draw on the vast store of English decisions on the Rent Acts though, in practice, they do refer to English cases thereon (subject to some slight distinctions) as though they are of binding authority.

1. Nigeria, Legislative Council Debates, Fourth Session, 19th Feb., 1926, pp. 74-75.

2. The Profiteering (Rent) Ordinance, No.8 of 1920.

3. The Statement in Elias, Nigeria Land Law and Custom, 3rd ed. p. 300 (2nd ed. p.343) showing the beginning of the restriction as 1942 is obviously inaccurate.

4. Nigeria, Leg.Co. Debates, supra. p. 75.

> "the rent at which the dwelling-house was let on the 31st December, 1917, or where the dwelling house was not let on that date the rent at which it was let before that date, or in the case of a dwelling house which was first let after the 31st December, 1917, the rent at which it was first let." [5]

The Ordinance applied to a house or a part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling-house and a garden or any other premises within the curtilage of the dwelling house, and where the annual amount of the standard rent of the house or part of the house does not exceed one hundred pounds.[6] Further, it applied, too, to a dwelling house which is used by the tenant for purposes of trade, provided that the Court is satisfied that no substantial part of the rent is payable in respect of the portion used for trade.[7]

It was provided that any increase of rent above the standard rend (as defined) could not be recovered notwithstanding any agreement to the contrary,[8] but a raising of rent was not to be deemed an increase within the Ordinance if it did not exceed the rent actually payable on the 31st December, 1917, by more than twenty per cent., or the rent

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5. ibid., s.2.
6. ibid., s.5 (1).
7. ibid., s.5 (4).
8. ibid., s.3 (1).

actually payable at any time in the year 1914, by more than fifty per cent.[9] The landlord was permitted to make an increase not exceeding ten per cent per annum of the amount he spent on executing improvement or making structural alterations to the dwelling house.[10]

S.3 (2) prohibited any demand of a fine, premium or other like sum as a consideration of the grant, renewal, or continuance of a tenancy of any dwelling house to which the Ordinance applied; it provided that if any such payment was made after the 17th June, 1920, the amount paid should be recoverable from the landlord either by a deduction from rent or by any other method.

S.3 (3) laid down that no order for recovering the possession of a dwelling house to which the Ordinance applied (or for the ejectment of a tenant therefrom) was to be made so long as the tenant continued to pay the agreed rent, as modified by the Ordinance, and perform the other conditions of his tenancy. Possession can be recovered on the ground that -

(a) the tenant had committed waste or was guilty of conduct which was a nuisance or an annoyance to adjoining occupiers; or

(b) that the tenant by subletting was making unreasonable profit; or

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9. ibid. s.3 (1), Proviso (b).
10. ibid. s. 3 ( ), Proviso (c).

(c) that the landlord reasonably required the premises for his own occupation or of some other person in his employment.

In all these cases the order for possession was to be made only if the court considered it reasonable to do so. A tenant was empowered to apply to the Magistrate for relief in any case where his landlord was acting in breach of the Ordinance.[11]

The Ordinance which was based on the English Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915,[12] proved useful in many respects so that a committee appointed in 1923 to consider its abolition reported in favour of its being retained for some further time regardless of the complaints that it led to restrictions on further buildings being erected.[13] Owing to improved conditions the Ordinance was finally repealed[14] in 1926 when the pre-existing rights of landlords were restored for a time.

Restrictions were revived during the Second World War, 1939- 1945, for in 1942 the Governor, in exercise of the powers vested in him under S.1 (1) of the Emergency Powers

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11. <u>ibid</u>. S.4.
12. 5 & 6 Geo. 5 Cap. 97, repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; 10 & 11 Geo. 5 Cap. 17.
13. <u>Nigeria, Leg. Co. Debates</u>, 19th Feb., 1926, pp.74-75.
14. By the Profiteering (Rent) (Repeal) Ordinance, No.2 of 1926. See also the last note, 13.

(Defence) Act, 1940 [15], introduced the Nigeria Defence (Increase of Rent) (Restrictions) Regulations.[16]

The Regulations applied to Lagos from the 1st July, 1942, and the Governor was empowered to make Orders specifying further areas to which they would apply.[17] In the areas to which the Regulations were introduced they applied to "premises" which, in effect meant <u>buildings</u>.[18] It was provided that where there has been a sub-letting, the sub-tenants were to be deemed tenants of the landlord [19] and a Rent Assessment Board was to be set up for

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15. As modified by Amendment 3 to the Emergency Powers Colonial Defence Orders-in-Council, 1939, and Art.1 of the Emergency Powers (Colonial Defence) Orders--in-Council, 1940.
16. No. 59 of 1942.
17. In exercise of these powers the areas to which the Regulations would apply were specified by the Southern Provinces (Increase of Rent Restriction) Order, 1943, Public Notice No. 218 of 1943, as amended by the Increas of Rent Restrictions (Definition of Premises)(General Application Order, 1943, Public Notice, No.219 of 1943. The areas included the townships of Lagos, Warri, Sapele, Forcardos, Burutu, Enugu, Port Harcourt, Aba, Abeokuta, and Ijebu Ode in the Southern Provinces and also the following areas of the Northern Provinces:
    Kano Province; Kano-Sabon Gari, Fagge; Kano city, Kano Tudun Wada.
    Plateau Province: Jos Township, Jos Native Town.
    Sokoto Province: Gusan Native Town, Sokoto Native Town.
    Zaria Province: Kaduna - Sabon Gari, Tudun Wada, Zaria Township, Sabon Gari and Tudun Wada.
18. See below.
19. <u>ibid</u>. S.4.

each of the areas to which the Regulations applied.[20]

Receipt of increased was made unlawful unless it was by an order of the Board. Any rent unlawfully received was recoverable.[1] Ejectment of the tenant must be with the permission in writing of the Board and a landlord could not apply to the Court for ejectment without such permission. The prohibition against ejectment did not apply to cases where rent has been in arrear for six weeks after it has become due.[2] Sub-tenants were not to be affected by ejectment of the tenant but if the order was made on the ground of any act, breach, default or misconduct of the sub-tenant, then he would not be entitled to retain possession.[3] Receipt of premium was prohibited and if any was received, it could be recovered.[4] An order of the Board was final and conclusive and not subject to appeal to any court.[5] All court were enjoined to conform to the Regulations.[6]

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20. ibid. S.5 In pursuance of this provision Rent Assessment Boards were set up at Enugu: Public Notice, No. 28 of 1943; Port Harcourt: Public Notice No.57 of 1943. Jos: Public Notice, No. 96 of 1943; Minna: Public Notice No.101 of 1943. Kanno: Public Notice, No. 124 of 1943; Kaduna: Public Notice, No. 170 of 1943. Zaria: Public Notice, No. 171 of 1943; Sokoto: Public Notice, No. 172 of 1943. Gusau: Public Notice, No.216 of 1943; Aba: Public Notice, No. 217 of 1943. Lagos: Public Notice, No. 347 of 1943.
    The rules of all these Boards were similar.
1. <u>ibid</u>. S.6.
2. <u>ibid</u>. S.8.
3. <u>ibid</u>. S.9.
4. <u>ibid</u>. S.10.
5. <u>ibid</u>. S.13.
6. <u>ibid</u>. S.14.

This piece of legislation was remarkably deficient in many respects: it did not lay down any grounds on which the Board was to order ejectment of the tenant and the Board had no rule of law or rule of precedent to guide it[7]; there was no appeal from its decision.[7] In practice, the Board was made up of voluntary members who freely and generously gave their time to the work but it was apparent that "a voluntary Board is not an adequate tribunal to regularise the relationship between landlords and tenants in times of peace." [7]

It seemed, too, that the only ground for the recovery of possession was the fact of rent being in arrears and that once it was proved to be in arrears for six weeks the landlord could eject the tenant, no matter the cause of the delay in payment and notwithstanding that after the six weeks the tenant may be ready to pay off all the arrears together with the damages suffered by the landlord. The Regulations, therefore, satsified nobody. In addition to these defects the general law of Nigeria lacked a simple procedure for recovering premises whether they were subject to the Regulations or not.[8] As will be shown presently some of these deficiencies were later removed.

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7. Nigeria, Leg. Co. Debates, 7th Feb., 1946, p.60 per Hon. G.L. Lowe, The A-G.
8. The landlord had to adopt the cumbrous common law action of ejectment.

In 1945 the Recovery of Premises Ordinance [9] was passed laying down the procedure to be followed by a landlord who intended to dispossess his tenant. This Ordinance was, in the words of the then Attorney-General,

> "an innovation in Nigeria and is the part of the proposed judicial reforms and the Bill deals with the recovery of premises when landlords have difficulties in recovering them and takes the place of the present ejectment action."[10]

The intention of its sponsors was that it should apply to every premises in Nigeria whether such premises were held under the general law or under native law and custom.[11] To prevent its application to customary tenancies in some cases, the legislature by a later amendment[12] adopted the curious procedure of empowering the Governor to declare, by Orders-in-Council, any specific areas to be excepted. In 1946 an Order-in-Council [13] was passed providing that the Ordinance was not to apply to the Northern Provinces or to the Western Provinces with the exception of the townships of Burutu, Sapele and Warri. The Eastern Provinces were left unaffected so that the Ordinance undoubtedly continued to operate there in full.

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9. No.39 of 1945.
10. Nigeria, Leg. Co. Debates, 5th March, 1945, p.72.
11. Nigeria, Leg. Co. Debates, 11th December, 1945, p.57 per the Hon. A-G.
12. The Recovery of Premises (Application-Amendment) Ordinance, 1945, No.67 of 1945, now incorporated in Cap. 176 of 1958, s.1 (2).
13. Recovery of Premises (Withdrawal of Application to Certain Areas) Order-in-Council, No.10 of 1946.

It was not envisaged that the Recovery of Premises Ordinance of 1945 would restrict the rights of landlords [14] nor, in fact, was there any clause in its various sections, which seriously limited a landlord's right to recover possession, provided the tenancy has been validly determined. When it was passed there was no intention that it should be dependent upon or complementary to any other enactment but the effect of an amendment passed in 1948 [15] to the Increase of Rent (Restrictions) Ordinance of 1946,[16] was to make the Recovery of Premises Ordinance restrictive in character and dependent on the later Ordinance for its application.

The Increase of Rent (Restrictions) Ordinance, 1946,[16] was passed mainly to remedy the defects in the wartime Defence Regulations.[17] The Ordinance, unlike the Recovery of Premises Ordinance, was not intended to apply to the whole of Nigeria but to operate only within the areas to which the Regulations applied; [18] moreover, the Governor was empowered to decontrol premises from time time.[19] It

14. The main object of the Ordinance was "to enable people who wish to get possession of their properties from tenants in illegal possession to recover the premises with the minimum expense and delay" - per the Hon. A-G, in the Leg.Co., Debates, 5th March, 1945, p.73.
15. The Increase of Rent (Restrictions) Amendment) Ordinance, 1948, No.9 of 1948.
16. No.1 of 1946.
17. Nigeria, Leg co Debates, 7th Feb., 1946, pp60-61. These defects are mentioned on p.505 , supra. Control of premises and their rents were henceforth brought before the judicial courts.
18. ibid. S. (1) (2).
19. ibid. S.1 (3), (4).

prohibited the ejectment of tenants unless an order of the court has been obtained[20] and laid down the grounds on which the court could order ejectment if it was reasonable to do so.[1] Up to this time the Recovery of Premises Ordinance, 1945, and the Increase of Rent (Restrictions) Ordinance, 1946, could be construed independent of each other but in 1948 an amendment [3a] to S.12 of the Increase of Rent (Restrictions) Ordinance provided that-

> "No tenant or sub-tenant of any premises to which this Ordinance applies shall be ejected therefrom save in pursuance of an order of the court obtained under the Recovery of premises Ordinance, 1945."

This amendment produced an impasse for, as already pointed out, the Increase of Rent (Restrictions) Ordinance still applied to specified areas in Northern Nigeria[2] but the Order-in-Council passed in 1946 had withdrawn the application of the Recovery of Premises Ordinance from the <u>whole</u> of that territory. The impossible state of affairs was revealed by a case [3] which came before Hubbard, J. in the Supreme Court, Kano. In that case the plaintiff/landlord applied to the Magistrate Court for the recovery of his premises situate in an area within the Increase of Rent

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20 ibid. S.12.
1. ibid. S.13 and Second Schedule.
2. i.e., those areas to which the Defence Regulations applied - see the last footnote 17, <u>supra</u>.
3. <u>Dabiri v. Ajiborisa</u> (1950) 19 N.L.R. 105
3a. The Increase of Rent (Restrictions) (Amendment) Ordinance, 1948, No.9 of 1948.

(Restriction) Ordinance.

The Magistrate decided, subject to the opinion of the High Court on a case stated, that he could not entertain the application because an order could only be obtained under the Recovery of Premises Ordinance which no longer applied to the Northern Provinces.

In the Supreme Court Hubbard, J. considered the possibility of a tenant in Northern Nigeria being ejected at all and came to the conclusion that to bring that territory within the operation of the Recovery of Premises Ordinance would entail the abrogation of the relevant portion of the Recovery of Premises (Withdrawal of Application to Certain Areas) Order-in-Council, 1946. The learned Judge observed,

> "It might conceivably be argued that the amendment .... should bec construed as applying to areas where the Recovery of Premises Ordinance is in force, on the principle of lex non cogit ad impossibilia. But, in my view, such construction would not be sound. The Maxim cited has no application where the impossible thing is the statutory basis of jurisdiction. The landlord has to apply for an order to be able to eject his tenant and since this Ordinance is not in force in the Northern Provinces, the learned Magistrate had no jurisdiction to entertain such application." [4]

The difficulty which this case so clearly demonstrated was

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4. At p.106. Surely, the legislature could be omnipotent, but not omniscient !

solved in 1951 by an Order-in-Council[5] which provided that the Order-in-Council of 1946 shall continue to apply but "with the exception of any areas in the Northern Provinces to which the Increase of Rent (Restrictions) Ordinance may from time to time apply". The amendment removed the difficulty as far as the Northern Provinces were concerned but as will be shown presently the Western Region has not been completely freed from the impossible state of affairs.

2. The Present Position.

Today the two Ordinances, the Recovery of Premises Ordinance [6] and the Increase of Rent (Restriction) Ordinance,[7] are still inforce in those areas to which they applied in 1951, although there have been some minor Regional amendments in a few cases.[8] The Recovery of Premises Ordinance of 1945 still retains that name today[9] but the Increase of Rent (Restriction) Ordinance is now captioned Rent Restriction Ordinance.[10]

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5. Recovery of Premises (Withdrawal of Application to Certain Areas) (Amendment) Order-in-Council, 1951, No.1 of 1951.
6. Henceforth referred to as the Recovery Ordinance.
7. Henceforth referred to as the Rent Ordinance.
8. See eg. note 12, *infra*.

9. Cap.176 of the (revised) Laws of the Federation of Nigeria, 1958.
10. Cap.183 of the (revised) Laws of the Federation of Nigeria, 1958. The Ordinance is henceforth referred to as the Rent Ordinance.

The Rent Ordinance, like the English Rent Acts on which it is modelled, looks like Virgil's monster: ' ingens, informe, horrendum visu ! It is a hurried piece of legislation and does not seem to have been framed with any scientific accuracy of language nor with much consideration of the result of its somewhat unhappy association with the Recovery Ordinance. The Rent Ordinance is a patchwork enactment deriving somewhat uncertainly from English Acts of 1915, 1920, 1933, 1939 and 1954 which apply to dwelling houses or to business premises, yet it deviates substantially from those Acts not only because of its economy of words but also because of the gaps it has left to be filled by Counsels and their clients. It is only the kindly leading light of the judges which can guide litigants through the dense darkness created by the legislature.

Both the Recovery Ordinance and the Rent Ordinance apply to the Federal Territory of Lagos.[11] In the Northern Region they now apply only to specified areas in Kano, Jos Township and Jos Native Town [12], while in the Eastern Region they apply to Aba, Enugu and Port Har-

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11. Laws of the Federation of Nigeria, 1958, Cap.176, S.1(2); Cap.183, S.1 (2).
12. Increase of Rent (Restriction) Northern Region) Order-in-Council, 1960, N.R.L.N.159 of 1960; See also the last note, 5.

court.[13] In the Western Region the two ordinances have been re-enacted as Regional laws [14] and both apply to Burutu, Sapele, and Warri.[15]

The Recovery Ordinance alone applies to the other parts of the Eastern Region[16] to which the Rent Ordinance has not been extended. This should not cause much difficulty in cases where the relation of landlord and tenant is regulated by the general law but the wisdom of subjecting customary tenancies in the Region to such a technical statute is, to say the least, highly questionable. It might be better to limit its operation to areas to which the Rent Ordinance applies and to enact a simple statute (in terms similar to the English Order XIV Rule 1) for speedy recovery of land.

In the Western Region the impasse created by the Order-in-Council passed in 1946 [17] and the amendment made in 1948 to the Rent Ordinance has not been entirely removed because the Rent Ordinance alone applies to Forcados, Abeokuta and Ijebu Ode.[18] The impossible situation in the

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13. Pub. Notice No.219 of 1943; Laws of Nigeria, 1948, Cap. 193. S.1. It was stated above that the O-in-C, no.10. of 1946 did not affect the Eastern Region.
14. i.e. The Recovery of Premises Law, Cap.110 of Laws of Western Region 1959; and the Rent (Increase Restriction) Law, Cap.111 of 1959.
15. See footnotes to Cap.110 & 111 of Laws of Western Region 1959 on pp. 297 and 319 of volume v.
16. i.e. excluding Aba, Enugu and Port Hartcourt.
17. No.10 of 1946, <u>supra</u>.
18. See Rent (Increase Restriction) Law, Cap.III of 1959, Footnote 1. cf. with Cap.110, footnote 1.

Western Region is that on the principle established by <u>Dabiri v. Ajiborisa</u>[19] premises in Forcados, Abeokata or Ijebu-ode cannot be recovered at all. It is expected that the legislature of that Region will soon remove this obvious anomaly.

3. <u>Premises within the Ordinances.</u>

From what has been stated so far, it will be seen that the original intention of the promoters of the Recovery Ordinance was that it should <u>enable</u> the landlord to recover his land quickly and swiftly but <u>not to restrict</u> his rights in any way. On the other hand the Rent Ordinance was intended to be restrictive; its purpose was to give a tenant security in two ways by

(i) controlling and regulating the increase of rent; and

(ii) regulating the recovery of premises.

Apart from the differences in application of both Ordinances to specific areas (as pointed out above), where both of them are in force, they are by no means co-extensive in application. This is due to the difference in the definition of the term "premises" in each ordinance. In the Recovery Ordinance the definition[20] shows that <u>every type</u> of land is included. Therefore in places like Lagos,

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19. <u>Supra</u>.
20. See p. below.

Warri, Port Harcourt or Kano to which both Ordinances apply any land, whether it is built upon or not, held by a tenant "at will or for a term, either with or without being liable to payment of any rent"[1] may only be recovered by proceedings taken out in accordance with the provisions of the Recovery Ordinance.[2] But in such places unless the land comes within the special meaning of "premises" in S.3(1) of the Rent Ordinance, its rent may be increased by the landlord at any time.

The Rent Ordinance lays down that the word "premises" includes,

> "any dwelling house <u>and</u>[3] any other building in which persons dwell, whether or not part thereof is used as a shop, <u>and</u> [3] any part of premises let or sub-let separately." [4]

This definition has been extended so that now the expression "premises" means

> "any dwelling-house, flat, factory, warehouse, office, country-house, shop, school <u>and</u> [3] any other building in which persons dwell or are employed or work and any part of such premises let or sublet separately." [5]

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2. The Governor or Minister as landlord of Crown lands can recover land leased to a tenant regardless of the Recovery Ordinance but a Crown lessee who sublets must comply with the Ordinance.
3. Italics mine: it is submitted that the word "and" as used here should be construed both conjunctively and disjunctively.
4. <u>ibid</u>. S.3 (1).
5. Increase of Rent Restriction (Definition of Premises) (General Application) Consolidated Order, Pub. Notice No. 22 of 1944. Increase of Rent (Restriction) (Northern Region) O-in-C, No.159 of 1960, S.3. cf. Definition of Premises (Lagos Township Extension) Order No.22 of 1942.

It is obvious from this definition that the Rent Ordinance applies only to buildings: if land is let without any building the Ordinance cannot apply.

4. The Recovery of Premises Ordinance.

If this Ordinance is to apply two conditions must be satisfied:

(i) there must be in existence some premises as defined in the Ordinance, and

(ii) a landlord and tenant relation must be established or alternatively, it must be proved that there is "occupation" within S.2 of the Ordinance.

(i) Premises. It is laid down in S.2 that the word "premises" includes

> "(a) a house or building or any part thereof with its grounds or other appurtenances, *and* [3]
>
> (b) land without any building thereon."

This definition may mean one of the following:

(i) a house or building regardless of the land on which it stands;

(ii) a house or building together with the land on which it stands or any other land surrounding it;

(iii) any land regardless of whether it is built upon or not.

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3. Italics mine: it is submitted that the word "and" as used here should be construed both conjunctively and disjunctively.

If this suggestion is correct it means that where a landlord lets a house or other building and expressly excludes the ground on which it stands from the letting, or where he lets only a third floor in a building, the Ordinance will nevertheless continue to apply to the letting and he can not claim that the letting related only to a personal chattel which could be recovered without complying with the requirements of the Ordinance. Moreover, a landlord who lets a house or any building surrounded by lands cannot claim that the Ordinance does not apply to the letting simply because the letting does not include any other land without buildings thereon. Nor, again, can a lessor of land on which there is no building argue that the Ordinance does not apply to his case simply because his land was not let together with some other land on which there are buildings. For this reason the word "and" in the definition should be construed both conjuctively and disjunctively.

(ii) Landlord and Tenant Relation or occupation. It could be inferred from S.7 of the Ordinance that unless a landlord and tenant relation exists, the landlord's right to recover the premises is not limited at all except by prohibitions against forcible entry. This view is supported by the opinion of the W.A.C.A. in Roberts v. Samuel [6]

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6. (1950) 13 W.A.C.A. 55 .

where it was held that a trespasser in occupation did not come within the term tenant in S.2 because by the model notice to quit (contained in the appendix to the Ordinance) the landlord "requires the tenant to quit and deliver up possession of the premises which you hold of me as tenant thereof."[7] It means, therefore, that if there is any uncertainty as to whether a person in occupation is a tenant or not, it is for him to prove how he came to be in that happy position[8] and that he is in occupation as a tenant of the landlord.

In the Recovery Ordinance the definition of "tenant" excludes a person "occupying premises under a bona fide claim to be the owner of the premises",[9] but it includes "any person occupying premises whether on payment of rent or otherwise."[9] As Abbott, J. rightly observe,

> "At first, then, any person occupying premises is automatically a tenant thereof whether the landlord of those premises likes it or not. But, of course, that is not what the definition means. If it were, any person could trespass upon and occupy premises and claim the protection of Cap.93 (10) and the adoption of the procedure laid down in Cap.93 (10). That is manifestly absurd and statutes should not be construed so as to creat absurdities." 11.

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7. per Lewey, J.A. at p.56, Italics mine.
8. Akinosho v. Enighokan (1955) 21 N.L.R.88. cf. Oloto v. Adm. General (1946) 12 W.A.C.A. 76.
9. ibid. S.2 (1): A family member will probably be excluded on this ground although his claim as "owner" ~~xxx~~ will not be legally correct.
10. Now Cap.176 of the Laws of the Federation, 1958 ed.,

11. Akinosho v. Enigbokan (1955) 21 N.L.R. 88.

It means, therefore, that neither a trespasser nor a person who does not acknowledge the reversion of the landlord can become a tenant within the meaning of the Ordinance.

A question which naturally arises is, must an occupier of land who claim protection under the Ordinance show an actual demise of an interest in land to himself or could a mere licensee also claim to be protected ? This question was considered by the W.A.C.A. in Akpiri v. West African Airways Corporation.[12] In that case the Corporation agreed with Akpiri that he should operate a Canteen for their staff, and he was allowed to use the corporation's premises rent-free. Later the corporation required him to vacate and on his failing to do so retook possession. The plaintiff then brought an action for unlawful ejectment. The corporation pleaded that he was a mere licensee and therefore that the procedure laid down in the Recovery Ordinance did not apply to his case. The trial Judge upheld this plea.

On appeal to the W.A.C.A. the issue turned upon whether the plaintiff was a tenant as defined by S.2 (1) of the Ordinance. Counsel for the corporation contended that the plaintiff as a licensee had no right of exclusive occupation; he merely had the use of the premises and, therefore, that he was not a tenant within the Ordinance.

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12. Supra.

The Court rejected this contention and held that the word "occupying" must be given its ordinary dictionary meaning and that it was clear from the evidence that the plaintiff was occupying the premises, therefore he was a tenant within the Ordinance.

This decision, if followed to its logical conclusion, is not entirely free from difficulty because it seems to have ignored the principle which the same Court had previously established in Roberts v. Samuel[12] - that the cases to which the Ordinance applies are those in which the landlord could serve a notice requiring the occupier "to quit and deliver up possession of the premises which you hold of me as tenant thereof." Suppose, for example, that an owner of a house on going away for a short holiday allowed a friend to occupy the house during his absence on the understanding that the friend would vacate when he (the owner) "said the word", could it mean that such occupier cannot be ejected without the owner complying with the technical and dealying provisions of the Recovery Ordinance ? To say that he must do so would, in the words of Abbott, J., "be manifestly absurd" yet that is what the W.A.C.A. seemed to have said.

This criticism does not imply that justice was not done in the case: on the contrary the decision is a happy one

12. Supra.

taking into consideration the facts that were in issue; but it could have been a more welcome judgment if the court boldly acknowledged that the plaintiff who was given the use and occupation of the premises by the Corporation was a tenant, not a mere licensee and that the Ordinance does not apply to licensees.[13] It could be suggested, however, that what Akpiri's case does establish is that a possessory licensee is entitled to protection of the ordinance but the ambiguity of the term "possessory licence" is such that its introduction into the argument will not clarify the principle of law involved.[14] It is submitted that in spite of the distinction which Reed, J. tried to draw between the Akpiri case and Balogun v. U.A.C.[15], the learned Judge's decision in the later case is a more valuable guide on the rights of licensees under the Recovery Ordinance for as he correctly stated, it cannot apply to a person who has only a mere right of coming to the premises for certain specified pruposes although, as every

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13. cf. the polite criticism of the judgment by Charles, J. in The Federal Administrator-General v. Adeshola & ors. (1960) W.N.L.R.53 at p.56 where the learned Judge felt that the Ordinance did not apply to licensees but had to follow the W.A.C.A. decision which was binding on him.
14. see Prof. F.R. Crane, "Licensees and Successors in Title of the Licensor" (1952) 16 Conveyancer, 323-348; Sheridan, L.A., "Licences to Live in Houses" (1953) 17 Conveyancer 440-471 for the difficulty involved in construction of licences generally.
15. (1958) N.N.L.R.77. It is unfortunate for a better understanding of the law on this point that the Ordinance was not pleaded in Ayo Solanke v. Abed & anor. (1961) N.N.L.R.7 or in B.C.O.A. Ltd. v. Ogana (1958) W.N.L.R.141 nor in Oloto v. Adm. General (1946) 12 W.A.C.A.76.

lawyer knows, such a person is a licensee. It is therefore hoped that the decision of the West African Court of Appeal in Akpiri v. West African Airways Corporation[16] is not the last word to be said on the application of the Recovery Ordinance to licensees.

A second question which arises is this: must the demise (if any) of the interest in land be made by the person claiming possession from the occupier? This question is of some importance because under the Recovery Ordinance a landlord is defined as "the person entitled to the immediate reversion of the premises".[17] Unlike the Rent Ordinance,[18], there is no provision (in the former) that a sub-tenant is to be deemed a tenant of the landlord. Suppose, for example, that L lets premises to T who sub--lets to S and on the determination of the term T quits but S remains in possession, is the relationship between L and S that of landlord and tenant within the Reoovery Ordinance? At common law S is not a tenant of L and on expiry of T's lease he becomes a trespasser as far as L was concerned. If, therefore the Rent Ordinance does not apply, can L eject S without resorting to the Recovery

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16. Supra.
17. ibid. s. 2 (1).
18. S.4 of the Rent Restriction Ordinance provides that if the tenant is not expressly prohibited in writing from sub-letting, the sub-tenant is to be deemed a tenant of the landlord.

Ordinance, or what is nearly the same thing, if the Rent Ordinance applies in the area but T was expressly prohibited from sub-letting, could S be regarded as a tenant of L ?

In Amos Bros. & Co. Ltd. v. British West African Corporation Ltd.[19] the respondent corporation granted a lease to a company, at first orally but reduced to writing, expressly prohibiting sub-letting. From the very start of the oral lease the tenant company sublet part of the premises to Amos Brothers and Company, Limited, the present appellants. The Corporation having obtained judgment against the head tenants proceeded to eject the sub-tenants and seized some of their goods in execution. The sub-tenants brought an action claiming, inter alia, damages for unlawful ejectment.

The trial Judge held that the sub-tenants had no right to possession and that the landlords were not liable for the attachment of the goods of a third-party occupying the premises through their tenants, unknown to them; he therefore dismissed the claim. The sub-tenants appealed.

In the appeal court they argued that they could not have been ejected without an Order of the Court but the landlords contended that they knew of the prohibition in the oral lease at the time of the sub-letting and could not

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19. (1952) 14 W.A.C.A.220.

avail themselves of the Rent Ordinance on the ground that the prohibition was not in writing.

The W.A.C.A. held that the words of S.4 of the Ordinance were clear and unambiguous and that effect ought to be given to them. At the time of the sub-letting there was no express prohibition in writing and the sub-tenants became entitled to be deemed tenants of the landlords for the purposes of the Ordinance: they were, therefore, entitled to the protection afforded thereby.

This result was possible because the premises were situated in Lagos where both the Recovery Ordinance and the Rent Ordinance applied and because the Court applied the definition contained in the Rent Ordinance. It is arguable that in an action for recovery of possession the definition of "tenants" contained in the Recovery Ordinance, should be applicable and, accordingly, as there was no express inclusion of sub-tenants therein, the appellants in the present case were, as far as the landlords were concerned, trespassers and, on the principle of Akinosho v. Enigbokan, supra, the sub-tenants were not entitled to invoke the Ordinance.

Even if the argument is not tenable in Lagos and in the other places where both the Recovery Ordinance and the Rent Ordinance apply, it cannot be dismissed in the parts of the Eastern Region where only the Recovery Ordinance

applies. It is submitted that with exception of Enugu, Aba, and Port Harcourt (where both Ordinances apply) there can be no doubt that a sub-tenant in the Eastern Region cannot claim that the procedure laid down in the Recovery Ordinance must be adopted before he is ejected. For the same reason where there is an express prohibition in writing against sub-letting and the tenant in breach of the prohibition sub-lets, the sub-lessee cannot claim that the Recovery Ordinance applies to his occupation. This reasoning, however, did not prevail on the W.A.C.A. in the recent case of Okedare v. Hanid.[20]

The facts of the case were as follows: a landlord leased premises to a tenant, with a covenant against sub--letting. The tenant broke this covenant and unlawfully sub-let to Okedare and another. The landlord succeeded in an action against the tenant, forfeiting the lease and obtaining an order for possession. The subtenants were not joined in this action. The landlords obtained a warrant for possession and the baillif finding the sub-tenants in possession, evicted them and their families from the premises. They sued the landlord claiming damages for trespass, or alternatively, for unlawful ejection. The trial Judge held that they were in the position of trespassers and, therefore, were not protected either by the

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20. (1955) 15 W.A.C.A. 17.

Rent Ordinance or by the Recovery Ordinance.

On appeal to the W.A.C.A., Conssey, J.A. to whose opinion Foster Sutton, P. and Kibowu, Ag. C.J., concurred, held that they did not come within the provisions of the Rent Ordinance but they were tenants occupying premises within the meaning of the Recovery Ordinance, and, accordingly, the landlords should have adopted the procedure laid down therein in trying to evict them. As that had not been done he was liable in trespass for their unlawful eviction by the bailiff.

This decision which is based on the reasoning in <u>Akpiri's case</u>, <u>supra</u>, seems to have entirely ignored the express provision of S.4 of the Rent Ordinance: i.e., that for the sub-tenant to qualify as a tenant of the landlord there must have been no prohibition in writing against sub-letting. It is to be hoped that a higher tribunal will one day re-examine the principle laid down by these two cases.

Although the correctness of the decisions have been questioned, they are of binding authority until reversed by a higher Court. The one principle which could be deduced from them is that what will determine whether a person is a tenant or not is how possession was obtained at the time of his entry vis a' vis his immediate landlord.

If this possession was lawful as far as the person through whom it was obtained was concerned, then the sub-tenant in occupation will qualify as a tenat of the landlord regardless of the fact that on principles of English law he would be a trespasser. If this deduction is correct then it is an entirely new development of the law by the courts quite distinct from what the sponsors of the Recovery Ordinance anticipated,[1] and the principle laid down in Akinosho v. Enigbokan, supra, should be qualified to this extent.

5. The Rent Restriction Ordinance.[2]

As already pointed out, the Rent Ordinance and the Recovery of Premises Ordinance are by no means co-extensive in application and one of them could apply in some cases where the other cannot. The Rent Ordinance applies to buildings (not necessarily to land) in which persons dwell or are employed or work. Such buildings must be let or sub-let separately. This means that there must be a

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1. Contrast the dictum of Coussey J.A. in the Okadare case, at 15 W.A.C.A. p.19: "In construing the Recovery of Premises Ordinance it should be remembered that we are dealing with a special statute which places limitations on the common law rights of a landlord with the object of regulating the recovery of and restraining summary eviction from occupied premises," with the speech of the Hon. A-G. that the object was to enable landlords "to remover the premises with the minimum expense and delay": Leg.Co. Debates, 5th March, 1945, p.73.
2. The Ordinance is referred to throughout as the Rent Ordinance.

a structural construction capable of being described either as a "dwelling house" or as a "building". To qualify as a dwelling house it will be necessary for the premises to possess some structural suitability but this is not a necessary requisite for every building.

Thus although a pigsty, or a cow-house[3] or a sea-side shack with primitive amenities[4] is not a dwelling house, each is obviously a building to which the Ordinance applies. Further, even if the premises let by the Yoruba landlords in Jos and described by Rowling as

> "sordid, dirty, scrofulous pestilential abomination before heaven, roofed with beaten-out tin cans" 5

fall short of dwelling houses there is no reason why each of them cannot qualify as a "building" with the Ordinance. It appears, too, that just as structural suitability is not a necessary qualification, so is there no necessity that the building should possess any degree of permanence or immobility; therefore a person to whom a "room" in a canoe-house[6] has been let, may claim that part of a building

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3. cf. Wright v. Ingle (1885) 16 Q.B.D.379, at p.390, 396, C.A.
4. cf. Bates v. Huckle (1948) U.L.R.159, Supp.
5. Rowling, Plateau, para.135.
6. In Lagos there are many canoes with roofs over them. these "buildings" are used as dwelling accommodation by Depe and Ilaje fishermen. Similarly Hansa fishmen and traders, especially in Onitsha, dwell in canoe-houses on the Niger.

has been let to him and, therefore, that he is protected by the Rent Ordinance.[7] This is because owing to the express provision of S.3 (1) of the Ordinance[8] part of a building, if let separately, comes within the term "premises".

Unlike the English Rent Acts which are restricted to dwelling-houses, the Nigerian Rent Ordinance applies to both dwelling-houses and business premises[9]. The word business, in this context, is not limited to commercial transactions: a club-house or a church are premises within the Ordinance because even if nobody dwells in them, people may be employed or may work in them. The employment or work need not be for any financial gain and (it is submitted) need not be continuous. In all these cases there must, of course, be a <u>building</u> to which the Ordinance will apply.

The protection afforded by the Rent Ordinance is of two kinds:-

(i) protection against the tenant's rent being raised beyond the permitted increase;

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7. Contrast this view with <u>Morgan v. Taylor</u> (1948) 99 L.J. News. 290 c.c. where a stationary but movable caravan was held not to be within the English Rent Acts.
8. See also Form D in the Recovery of Premises Ordinance (Schedule).
9. See <u>Akpiri's case</u>, <u>supra</u>, criticised on other grounds.

(ii) protection against being evicted without adopting the procedure laid down by the Recovery Ordinance.

It should be mentioned here that the Recovery Ordinance only could be complied with in case of lettings in areas where the Rent Ordinance does not apply (e.g. in many parts of the Eastern Region) and the grounds for dispossession laid down in the Rent Ordinance need not be a test in those cases.

<u>Let or Sub-let</u>: It is the letting or sub-letting which brings a premises within the protection afforded by the Rent Ordinance. Thus although the <u>Akpiri case</u> has established that a licensee comes within the Recovery of Premises Ordinance, such a person cannot be protected by the Rent Ordinance since the premises cannot be said to have been <u>let</u> to the licensee. Therefore a person residing in a hotel or hostel which provides no meals for the residents cannot claim protection of the Rent Ordinance against the proprietor increasing the fees without regard to the Ordinance. It seems, therefore, that a well-drafted licence could entitle a house-owner to increase the payment made by a licensee permitted to use his house, though, perhaps, it cannot entitle him to eject him without com-

plying with the provisions of the Recovery Ordinance.[10] The ridiculous situation which could arise is that if a house-owner allowed his servant to occupy a room separately for the better discharge of the servant's duties, he could capriciously increase any charges he makes in respect of the occupation because there was no <u>letting</u> to him, although the servant being a person "occupying" premises, cannot be evicted without the Recovery Ordinance being complied with.[10]

<u>Separately.</u> For any premises to be protected under the Rent Ordinance it must be let or sub-let <u>separately</u>. This means that each premises must be let or sub-let as a unit. The Question of "two-home men" which has arisen under the English Rent Acts cannot arise in Nigeria because if each letting in Nigeria is made separately, it does not matter whether or not the premises let is a separate dwelling-house.[10a]

A problem which has not yet been tested in the Courts could arise in this way: suppose a landlord lets three different properties together by the same instrument to

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10. This statement is made on the understanding that the <u>Akpiri case</u> is a binding authority, until it is set aside.

10a. But see "Non-resident tenants" below.

the same tenant, the lessor could argue that as the letting of each of the properties was not made separately the Rent Ordinance does not apply to each property as a unit and, therefore, that he could on different occasions increase the rent payable on each regardless of the restrictions imposed by the Ordinance. The tenant could argue that the landlord cannot recover each of the premises separately and, accordingly, no matter what breaches he might be committing with regard to one, unless the landlord could determine the lease as a whole, the tenant can not be evicted from each property separately. The question is not merely of academic interest for it could rise in practice: suppose a man married polygamously takes a lease of two or more different premises of the same landlord together under the same instrument and occupies each of these buildings with or through his respective wives, does the Rent Ordinance apply to each house separately.? It is submitted that it cannot apply and that a lessor is entitled to arrange his affairs in this way so as to take his house outside the restrictions imposed by the Ordinance. The problem posed here almost arose in Olorunkoje v. Rokosu & anor.[11] but it was not clear whether the tenant held the two premises he occupied under the same instrument.[12]

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11. (1953) 20 N.L.R.118.
12. The problem could be of great concern for a commercial company which might take a lease of many properties by the same instrument from one landlord.

6. Premises Outside the Ordinances.

(i) Crown Property. The application of the Rent the Recovery Ordinances is not only limited by locality[13] but also to certain types of premises within the same locality. Thus, even in a place like Enugu or Lagos where both Ordinances apply, Crown land is exempted from the control they impose. This is because under S.70 of the Interpretation Ordinance[14]

> "no Ordinance or Law shall in any manner whatsoever affect the rights of the Crown, unless it is expressly stated, or unless it appears by necessary implication that the Crown is bound thereby."

The Exception relates only to the rights of the Crown: a lessee of Crown land who has sub-let the premises cannot claim that the Ordinances do not apply to the sub-letting on the ground that on the determination of the head-lease all fixtures on the land will revert to the Crown because, as Mgbemena v. Onyekun [15] has correctly established, the

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13. It has been shown above that in the Eastern Region all land is subject to the Recovery Ordinance but only lettings at Enugu, Aba, and Port Harcourt are within the Rent Ordinance. In the Western Region only premises within the townships of Burutu, Warri, and Sapele are within both Ordinances, but properties situate at Forcados, Abeokuta and Ijebu-Ode are within the Rent Ordinance only. In the Northern Region only premises in the areas of Kano and Jos are within both Ordinances.
14. Now Cap. 89 of the Laws of the Federation of Nigeria, 1958.
15. Supra

fixtures will pass to the Crown free of any restrictions to which they were subject while in the hands of the tenant.[16]

(ii) Unlawful sub-letting. The control imposed by the Rent Ordinance may be removed if a head-tenant expressly prohibited in writing from sub-letting breaks this covenant. The head-tenant himself is still protected but the sub-tenancy is outside the Ordinance. This point was admitted by the W.A.C.A in Okedare v. Hanid[17]. The sub-tenant cannot complain against increase in rent, if the increase is made by the head-landlord. The practical effect will, however, be the same as if no increase had been made for the head-landlord cannot enforce the increase against the unlawful sub-lessee nor can the sub-lessor enforce it as the Ordinance applies to the relationship between him and the sub-tenant.

If the principle laid down in the Okedare case is correct then, although the Rent Ordinance does not apply to the relation between the unlawful sub-tenant and the head-lessor, the Recovery Ordinancy does apply for the

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16. See Rent Restriction (Application to Premises on Crown Land) O-in-C No.38 of 1949 which was not even mentioned in the Mgbemena case.
17. Supra.

sub-tenant is a person in occupation of land.

For a sub-letting to be outside the Rent Ordinance the sub-lessor must have been expressly prohibited in writing from parting with possession. The written instrument prohibiting the sub-letting must be in existence at the time of the sublease; it is not sufficient that it came into existence later on.[18] Therefore even if the head-tenant is expressly prohibited orally and the sub-tenant knew this, he could still claim to be a tenant within the Ordinance, a fortiori, a person to whom premises has been sub-let by a lessee not prohibited from sub-letting is a tenant of the head-lessor and within the Ordinance.[19]

(iii) Vacant Land. A letting of vacant land is obviously outside the Rent Ordinance although it could be within the Recovery Ordinance. This means that although a landlord cannot eject such a tenant without adopting the procedure laid down in the Recovery Ordinance he could increase the rent of the land regardless of the provisions of the Rent Ordinance.

If this reasoning is correct, a landlord could arrange his affairs in such a way as to avoid being caught by the

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18. Amos Bros. & Co. Ltd. v. British West African Corp. (1952) 14 W.A.C.A 220.
19. Dawodu v. Ijale (1946) 12 W.A.C.A.12.

restrictions of the Rent Ordinance. For example, he could let the land separately from the building and by a different instrument let buildings. In such a letting the Rent Ordinance will apply only to the building and he could increase the rent <u>of the land</u> notwithstanding the restrictions of the Ordinance. Alternatively, he could let vacant land to an individual or company who may undertake to erect a building thereon. If this happens the rent of the land could be increased beyond the limit imposed by the Rent Ordinance unless, of course, it could be inferred that the lease of the vacant land has been converted into a letting of the house.[20]

(iv) <u>Non-Resident Tenants</u>. There is no express provision in the Rent or the Recovery Ordinance that the tenant must personally occupy the premises but the Nigerian Judges, like their English brothers,[1] have limited the application of the restrictions only to cases where the tenant is in occupation. The <u>locus classicus</u> for this principle was <u>Robents v. Samuel</u>.[2] The issue in that case was whether a person not in occupation of premises could be evicted without the landlord adopting the procedure laid down in the

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20. <u>Kasumu v. Ibironke</u> (1952) 14 W.A.C.A. 189.
1. See e.g. <u>Haskins v. Lewis</u> (1931) 2 K.B.1. at p.14, C.A. <u>Skinner v. Geary</u> (1931) 2 K.B. 546, at p.559; <u>Foley v. Galvin</u> (1932) 1.R.339, Supp.
2. (1950) 13 W.A.C.A.55.

Recovery Ordinance as required by the Rent Ordinance. Blackall, P. to whose opinion Lewey, J.A. concurred, held that the person in possession must occupy as a tenant; he then said,

> "I only wish to add that *the Rent Restriction Ordinance which it was argued should be invoked applies only to a tenant in actual possession. The fundamental principle of this type of legislation is to protect a resident in a dwelling house, not a person who is not resident there, but is making money by sub-letting*." [3]

Ames, C.J. added,

> "It is not disputed that the appellant is the landlord within the meaning of the Recovey of Premises Ordinance. *The respondent cannot be a tenant within the meaning of the Ordinance because she is not in occupation* and she cannot be a tenant common law because she has refused to attorn tenant to the appellant." [3]

This opinion was re-affirmed by Abbott, J. in *Akinosho v. Enigbokan & anor.*[4] where he said that

> "The two statutes do not apply where the person sued for possession is not in occupation of the premises."

The result is that by abbold stroke of judicial legislation the Courts have grafted on to the prerequisites for the application of the Ordinances the doctrine of personal occupation, that is, that the tenant himself must be using the premises. A mere intention to regain possession

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3. at p.56. Italics mine.
4. (1955) 21 N.L.R. 88, at p.89.

at a future date is not sufficient: the animus possidendi must be coupled with corpus possessionis.

On this basis it is submitted that where a tenant has sub-let the premises and, therefore, is not in personal occupation, the landlord may, if he is permitted by the terms of the lease, raise the rent payable by the tenant without taking into consideration the limits set by the Rent Ordinance. It seems to be to the landlord's advantage if the lease he grants always contains express provision for increase in rent for although it will be impossible to make the tenant in occupation pay more than the rent limit, he could be forced to pay over part of the profits he might be making by sub-letting it.

The doctrine of personal occupation raises an interesting problem namely, can a man personally occupy more than one set of premises and be protected by the Ordinances with regard to all those premises? Suppose a man who marries seven wives takes a lease of seven different premises for occupation by each of his seven wives (lodging with each of them for one day a week) is he in personal occupation of each of these premises of could the lessors evict him or increase his rent regardless of the Ordinances?

In Olorunkoje v. Rokosu & anor.[5], a landlord wanted

5. (1953) 20 N.L.R.118.

to recover the possession of his premises situated at 8 Dagara Street, Lagos. The tenant was using the premises to house a son of his (who was of age and was married), two half-brothers and a step-mother. The tenant himself was living elsewhere with the rest of his large family consisting of five wives and fourteen children. The trial Magistrate granted the landlord's claim basing his decision on the principle established in England in the case, Skinner v. Geary [6] that the tenant not in personal occupation was not entitled to protection. On appeal to the Supreme Court, de Comarmond, S.P.J. ordering a new trial said,

> "A man with a large number of children may have to rent two premises (two flats for example) in order to house his whole family, and it would be erroneous to deprive him of protection solely on the ground that he does not actually reside in one of the flats." [7].

With respect, this is a welcome decision and it is submitted that the principle need not be limited to a two--home man, taking intonconsideration the social conditions in Nigeria. In England where polygamy is unknown in theory, the possibility of a man using more than two premises as his home may be too remote, but in Nigeria the

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6. (1931) 2 K.B. 546, C.A.
7. (1953) 20 N.L.R. at p.120. cf. Smith v. Penny (1947) K.B 230, C.A.

lawful polygamous nature of the indigenous society makes it probable that a man could use many premises as his home. It is therefore submitted that in spite of the doctrine of personal occupation which the Courts have established, if a tenant has the "corpus possessionis" through one of his several wives and her children, he is entitled to full protection under both the Recovery and the Rent Ordinances.

It should be added that as long as a tenant within the Ordinances is in occupation, he cannot waive his rights to the protection afforded; a mere willingness on his part to pay a rent beyond the limit or a promise to give the landlord possession (without his actually vacating the premises) will not be sufficient to entitle the landlord to enforce the promise. Nor, it is submitted, can a landlord make it a term of a contractual tenancy that the tenant would give up his rights under the Ordinances; such an agreement, even if entered into voluntarily, contravenes the Ordinances and the tenant may nevertheless change his mind and insist upon having the rights conferred upon him by the statutes.[8]

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8. cf. R.M.R. Housing Soc. Ltd. v. Combs (1951) 1 K.B. 486. Rees v. Marquis of Bute (1916) 2 Ch. 64; Alexander v. Rayson (1936) 1 K.B. 169; Burns v. Dennis (1948) W.N. (N.S.W.) 55; Elder v. Aurbach (1950) 1 K.B.359.

(v) Abandonment of Possession. Although the rights conferred by the statutes cannot be abrogated by any contract of the parties, there is nothing to prevent the tenant voluntarily paying rent increased beyond the permitted limit or voluntarily giving up possession without regard for the ordinances. Moreover, if the tenant abandons the premises the landlord is entitled to re-enter as if there had been a surrender: he need not first go to the Court to obtain an order for possession. This means that the Recovery Ordinance does not apply to a particular letting from the moment of abandonment but if the premises is re-let the application of the Ordinance will be revived.

If a tenant who is not in personal occupation leaves a sub-tenant in occupation, the sub-tenant will become a tenant of the landlord who could recover the premises from the head-tenant without resorting to the Recovery Ordinance provided the term granted to the head-tenant has come to an end. Even if the person in occupation cannot qualify as a tenant of the landlord because the head-tenant was expressly prohibited in writing from subletting it seems that on the principle established by Amos Bros. Co. Ltd. v. British West African Corporation Ltd.[9] he is nevertheless a person occupying the premises and therefore, that

9. Supra.

the Ordinance will apply to him. This means that although an order for possession could be made against the head-tenant without the landlord proving any of the grounds laid down in the Rent Ordinance, such order cannot be made against the Occupier unless one of the grounds is proved.

(vi) Demolition of the Premises. If a premises within the Rent Ordinance is destroyed (for example, by fire or storm), the contractual tenancy is not terminated because of the limited operation of the doctrine of frustration. Where the contractual tenancy has come to an end and the premises is held over under the statute, then if the building thereon ceases to exist the Rent Ordinance will cease to apply because there is no longer any building to which it can adhere. The application of the Ordinance is not ousted merely because the premises is uninhabitable but because the structure has disappeared.

Where, therefore, a lease contains a provision for periodic increase of rent and the building on the premises be destroyed by fire during the currency of the contractual tenancy, the landlord (it is submitted) may increase the rent beyond the limit imposed by the Rent Ordinance because the destruction of the building takes the lease outside the Ordinance and the relationship of the parties now will be governed by the terms of their contract.

The demolition of the building will not take the premises outside the Recovery Ordinance which applies equally to lands with buildings and lands without any buildings thereon. Therefore if the premises be demolished after the determination of the contractual tenancy and the landlord later rebuilds it, (it is submitted that) the tenant is entitled to continue in occupation of the new building unless the landlord had previously obtained an order to dispossess him. If such order has not been obtained and the tenant is refused possession it could be urged that he is entitled to sue the landlord for damages against unlawful eviction and probably for reinstatement. On the other hand it could be argued that because of the change of identity, the new premises is shed of all the attributes of the old and since the entity which is now in existence is entirely different from that which the tenant formerly possessed, the landlord could claim that until a new letting has taken place· the Recovery Ordinance applied only to the land and the building would be let either to the tenant or a new occupier at a rent entirely different from that agreed upon before the destruction of the building.[10]

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10. cf. the argument in Stockham v. Easton (1924) 1 K.B. 52; Abrahatt v. Webster (1925) 1 K.B. 563, C.A.

(vii) Change of user: Change of user will not take a premise out of any of the Ordinances although it might amount to a breach of covenant and, accordingly, become a ground for the landlord to terminate the lease and recover possession. If, however, the change of user is of such a nature that the tenant is no longer in personal occupation, he will, on the determination of the lease, lose the protection afforded by the ordinances. If, for example, he has sub-let all the premises, he will lose the protection but his sub-tenants (being in lawful occupation) will be entitled to protection. It is submitted that where a tenant has taken himself out of the statutes by such fundamental change of user, the protection may not be lost for all time but may revive owing to a subsequent change of circumstances, for example, where he has regained possession from the sub-tenants.[11]

(viii) Furnished Lettings with Board. A letting of furnished rooms with board is not protected by the Rent Ordinance. This is because S.2 of the Ordinance excludes from the term "rent" "any agreement for the letting or hiring of furnished rooms with board". Unlike the English Rent Acts, the Nigerian Rent Ordinance applies to mere furnished lettings because the definition of the word "rent"

11. cf. Leslie v. Cummings (1926) 2 K.B. 417.

> "includes any sum paid as rent or hire for the use of furniture where the premises are let furnished and the furniture therein is hired by the landlord to the tenant and also in the absence of any agreement to the contrary, any sum paid in respect of electric light and conservancy charges." [12]

This means that if the furnished letting is without board the agreement must be governed by the Ordinance. Further, a letting of unfurnished premises with board is protected by the Rent Ordinance. To be outside the Ordinance to be ousted the letting must be both furnished and with board.

The Ordinance gives no indication of what the term "board" means; it is submitted that the word bears its ordinary meaning and, therefore, that it means regular supply of meals not merely daily provision of a glass of palm wine or an early morning cup of tea. There is nothing to suggest that full board is essential and it is submitted that one meal a day, for example, bed and breakfast, if regular, will take the premises out of the Ordinance[13] provided too, that the letting is furnished.

On general principles, there must be a bona fide letting of furnished premises with board; the payment must be in respect of what the landlord actually provides.[14]

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12. S.12.
13. cf. Wilkes v. Goodwin (1923) 2 K.B.86 at pp.93,96, C.A. per Bankes & Scrutton L.J.J.
14. cf. Palser v. Crisling (1948) A.C.291, H.L.

Thus if the agreement expressly states that the letting is furnished and with board but both parties accept that no meals whatsoever are to be provided, the letting will still be governed by the Ordinance; the colourable use of words in the lease will not entitle the landlord to claim that the tenant is not protected.[14] Similarly where a letting was initially with board which later ceased, the agreement will be brought within the Ordinance from the time the board was withdrawn.[14a] The bona fides of the landlord is not destroyed, however, by the mere fact that he wishes to exclude the application of the Rent Ordinance for there is nothing to prevent him from arranging his affairs in such a way that the Ordinances cannot apply to his premises as long as the transaction is genuine and not a mere sham.[15] Therefore if the landlord refuses to let the premises unless the Occupier accepts it furnished and with board, the latter will not succeed in invoking the help of the ordinances as long as the transaction was not colourable and the parties were ad idem when it was entered into.[16] It is immaterial what proportion of the

14. cf. Palser v. Crisling (1948) A.C.291, H.L.
14a. cf. Stagg v. Brickett (1951) 1 K.B.648.
15. cf. Conqueror Property Trust Ltd. v. Barnes (1944) K.B.96, approved in Foster v. Robinson(1951) 1 K.B.149 at pp.518, 159, C.A.
16. cf. Furnival Properties Ltd. v. Edwards (1950) W.N.395, C.A. Maclay v. Dixon (1944) 1 A.E.R. 22, C.A., But see also Samrose Properties v. Gibbard (1958) 1 W.L.R.235.

payment was made to cover the board: as long as the letting is furnished and with board the Ordinance will not apply.

It is uncertain whether a furnished letting with board is within the Reoovery Ordinance. If <u>Akpiri's case</u> is extended to its logical conclusion, a person occupying under such terms is within the Ordinance. It is submitted, however, that such a letting is outside the Ordinance because although the lodger is physically present on the premises, he is not legally in occupation; the owner of the premises is, in law, in occupation thereof.

Where a tenant has lost his protection owing to a change in the character of his occupation the loss may not be for all time: the protection may revive owing to a subsequent change of circumstances. If, for example, the landlord later ceased to provide the board or furniture, this alteration in the nature of the letting will now bring the tenancy within the Ordinance.[17]

7. <u>Nature of the Protection conferred on tenants by the Ordinance</u>.

The Ordinances have given tenants protection by the following means:

17cf. <u>Oak Property Co. Ltd. v. Chapman</u> (1947) K.B.886.

(a) Control of Rent

(b) Restriction of Premium

(c) Control of ejectment.

A preliminary observation which should be made is that as long as the contractual tenancy exists the relationship of the parties is governed by their agreement so far as the agreement is not in conflict with the Ordinances. Neither the landlord nor the tenant can rely on the Ordinances to break a term of their contract if such a term is not prohibited. For example, if the rent of any particular premises has been fixed under the statute and the landlord contracts to accept a sum much lower than the fixed amount, he cannot rely on the Rent Ordinance to increase the sum so agreed upon to the limit fixed under the statute unless the contractual tenancy has come to an end.[18] Similarly, if a monthly tenant has contracted expressly to accept a week's notice to determine his tenancy he cannot rely on the Recovery Ordinance to ask for a month's notice instead. When, however, the contractual tenancy has ended, each party could claim all the benefits conferred upon him by the Ordinances even if they were not provided for by the lease.

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18. cf. Kerr v. Bryde (1923) A.C.16; Goodwin v. Rhodes (1921) 2 K.B.182 at pp.185, 186.

(a) Control of Rent.

The object of the Rent Ordinance is, as the narration below the title shows, "to contol and regulate the increase of rent and recovery of possession of premises in certain areas." The control is mainly of the increase of rent, not necessarily of the initial rent payable from the first letting of a premises. The Governor of a Region, however, is empowered to fix a maximum rent for premises within thebOrdinance "in cases where the normal net rent of such class or classes of premises would not exceed fifty-two pounds *per annum*."[19]

It means that unless a maximum rent has been fixed a landlord can charge whatever he liked on the first letting of his property. Further, if the normal rent of such class of premises would exceed £52.- *per annum*, the Governor would have no power of imposing the maximum rent.

The present research has revealed that the power of fixing maximum rent has, so far, only been used in the Eastern Region. The failure of the Legisalture to provide for a means of ascertaining the maximum rent and the unwillingness of the Governors of other Regions to use the powers conferred upon them in this regard have been at the root of the present outcry of tenants against "iniquitous landlords".[20] It is quite impossible, with the present

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19. Rent Restriction Ordinance, S.5. This is a facultative, not a mandatory provision.
20. See the "Daily Times"(Nigerian Newspapers).

present state of affairs in the country, for a tenant to find out what the maximum rent is (except, of course, in the Eastern Region). The landlord could under such circumstances charge whatever rent he liked on each fresh letting of the same premises.

In those parts of the Eastern Region where the Rent Ordinance applies and where the power of fixing rent has been used, the maximum amount payable depends on the category of the building and the area in which this is situated. Thus in Port Harcourt the rent ranges from £1.16s. per month "for one living room of an area measuring one hundred and twenty square feet in a house" of Class A1 to 7s.6d per month for a similar room in a house of Class B4.[1] From the landlord's point of view the objection to this system is that it will eventually freeze rents at an uneconomic level and therefore prevent future buildings being erected if they will come under the control. If this happens the remedy which the legislation was meant to provide will be of no avail whatsoever. It

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1. The Port Harcourt Maximum Rents Order, 1958, E.R.L.N. No.128 of 1958, replacing E.R. Pub. Notice, No.8 of 1951. See also the Enugu Maximum Rents Order No.197 of 1957 fixing rents at Enugu to range from £1.16.s. to 12s.6d. per room per month; The Aba Maximum Rents Order, Pub. Notice No.213 of 1957, fixing Aba rents to range from £1.10s. per room per month. These maxima do not apply to rooms let as flats.

might be suggested that in order not to penalise landlords provision should be made in the enactments for period revision of rents fixed at intervals of (say) ten years. In the places where the maximum rent has been fixed, the amount so fixed is that which the landlord could recover and if he charges any sum above that, it will be irrecoverable even if the tenant undertook by an express agreement in writing to pay the excessive rent.[1a]

In the other Regions of the Federation where the amount has not been fixed, the rent payable shall be calculated as follows:

(a) Where the premises has been let before or on 1st July, 1941, the rent payable on that is the basic maximum rent.[2]

(b) If the premises be vacant on 1st July, 1941, the basic maximum rent shall be the rent at which it was last let.[3]

(c) If the premises be completed after 1st July, 1941, the basic maximum rent shall be that at which it was first let or if the parties do not agree on the amount, that which may be fixed by a court as, fair and reasonable rent.[4]

1a. Nwaokenla v. Nebonta (1961) All N.L.R. 420

2. This is not expressly laid down but is implied in S.6 which forbids receipt of increased rent on or after 1st July, 1941. The term "basic maximum rent" used here means the maximum rent payable excluding the permitted increase thereon.

3. Rent Restriction Ordinance, S.9 (a)

4. Ibid. S.9 (b).

(d) Where premises even though completed before the 1st July, 1941, be first let after that date, then the basic maximum rent shall be that agreed upon by the parties as the rent payable on the first letting or if they fail to agree that which may be fixed by a court as a fair and reasonable rent.[5]

If the rent agreed upon under either paragraph (c) or (d) is less than £52 _per annum_ and does not represent a fair and reasonable rent, the court shall have power to fix the rent.[6]

The main objection to these provisions is that they virtually give the tenant no protection at all against the landlord charging excessive rent initially. _Firstly_, it is highly improbable that a landlord would admit a person into occupation of his premises or grant such person a lease except the rent payable has been agreed upon by the parties. If it has not been agreed upon the prospective tenant cannot ask the court to intervene while negotiations were going on for he is not a tenant; once the amount is agreed upon, then _cadit questio_: The Court has no power to intervene. _Secondly_, even if it be assumed (for the sake of argument) that the court could intervene, in practice he would be a very bold tenant

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5. ibid. s.9 (c).
6. S.9. proviso.

who on entry would take his landlord to court the next day in order to set aside the rent which he presumably accepted. It would not lie in his mouth to say that he did not voluntarily agree to pay the sum for he will be met with the argument that he need not have accepted the letting at all. Thirdly, a landlord could so arrange his affairs as not to be caught by the restrictions imposed by S.9. For example, he could agree with the tenant that the initial rent of a premises having a present value of £3 per month will be £10 per month but that within a period of (say) 2 years the landlord would be receiving only £3 per month if the tenant paid four weeks in advance. This arrangement, it is submitted, will be perfectly legitimate [7] and the landlord could after two years demand a sum more than £3 per month, probably reducing the four weeks advance payment pro rata. The transaction will not be caught by the Rent Ordinance so long as the landlord does not demand more than £10 a month because the basic maximum rent is that at which the premises was first let: not what the tenant actually paid but what he actually agreed to pay regardless of the rebate given him for payment in advance.[7]

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7. cf. Bathavon R.D.C.v. Carlisle (1958) 1 A.E.F.801, C.A. where no objection was at all raised as to the legitimacy of a provision that if there were no arrears of rent on a certain date the tenant would be entitled to a rebate. The landlord cannot, of course, change the tenant more than £3 per month within the first two years: Basil v. Said Raad & Sons (1957) 3 W.A.L.R., C.A.

Finally, where the rent has been fixed by a first letting, there is no means by which a subsequent tenant can easily find out the amount so fixed. This means that on a change of tenancy the landlord could easily charge whatever rent he liked.[7a] These objections demonstrate that nothing short of express provision of the amount of rent payable - - as done in the Eastern Region - can satisfy the pressing need of tenants especially in Lagos. To meet eventual curtailing of building dwelling houses there should also be provision for periodic revision of fixed rents every ten years.

Permitted Increases. When the rent payable has been determined as laid down above, the amout so fixed could be increased in the following cases:-

(i) Where the landlord has made some expenditure on improvement of the premises.[8]

(ii) Where he has made some expenditure on repairs.[9]

(iii) Where there is an increase in the rates payable by the landlord.[10]

(iv) Where the Governor [11] or the Court [12] has made

7a. In the Northern Region the Increase of Rent (Restriction) Amendment) Law, 1961, No.15 of 1961 makes provision of a receipt obligatory in cases where rent has been fixed under S.5 of the Rent Ordinance. Though such receipts are usually given, they cannot be available for the new incoming tenants except in very special cases.

8. Rent Restriction Ordinance, S.6 (2) (a).

9. ibid. S.6 (2) (d)

10. ibid. S.6 (2) (c).

11. S.6 (2) (b)

12. S.11 (5)

an Order for increase.

(v) Where there is a transfer of burdens or liability to the landlord.[13]

(i), (ii) Expenditure on improvements and repairs. A landlord is permitted to increase the rent payable by an amount calculated to provide 6% of the expenditure on improvements which he effected on the premises.[13a] The term "improvement" includes the provision of additional or improved fixtures or fittings or structural alteration to the premises but it excludes any expenditure on decoration or repairs.[13a]

A tenant is empowered to apply to the Court for an order suspending or reducing the increase on the ground that such expenditure was unnecessary in whole or in part but the court will not make the order unless the tenant proves either -

> "(i) that he was the tenant when the expenditure was incurred and he had not given his written consent to the improvement or alteration and the expenditure thereon; or
>
> (ii) that the landlord having beein in possesion of the premises at the date when the expenditure was incurred, the applicant is the first tenant subsequent to that date and became tenant without notice of the following particulars, that is to say -
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> (a) the nature of the improvement or the alteration;
> (b) the amount of the expenditure thereon;

13a Rent Restriction Ordinance, S.6 (2) (a).
13. S.8 (2).

and

(c) the amount of the maximum increase of rent chargeable on account thereof." 14

The Ordinance did not define the term "improvement" but it is obvious that it must be something which adds to the letting value of the property on the determination of the tenancy. If the tenant has given a written consent, the improvement need not be suitable to the character of the building in order to entitle the landlord to claim the 6 a% of the amount expended thereon.

Further, if the landlord is responsible for the whole of the repairs he may increase the rent by an amount not exceeding 5% of the net rent.[15] If he is responsible for only part of the repairs the permitted increase is such lesser amount than 5% that may be agreed or may, on the application of the landlord or tenant, be determined by a court to be fair and reasonable having regard to such liability.[16]

An improvement must be distinguished from a repair. The main test is whether something new has been provided for the benefit of the tenant, not whether there was a replacement of something already in existence but has now become dilapidated or worn out - even if it is the

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14. S.6 (2) (a)

15. S.6 (2) (d) (i)
16. S.6 (2) (d) (ii).

replacement of something old by its modern equivalent.[17] Thus if the landlord substitutes new water pipes for the old, or re-wires the electricity, it will amount to repair not an improvement.[17] If, on the contrary, he replaces damp and rotten wood-floor with a new one, adding a new concrete bed for the floor, that isman improvement, not a repair.[18] A fortiori, if a wooden floor is replaced by a concrete one, that will amount to an improvement. Similarly if an old dry closet is replaced by a new water closet, this will be reckoned as a provision of something entirely new and, therefore, an improvement.[19] Further, where the premises which the tenant occupies is merged with an adjacent premises so that the two become one composite whole, such alteration may amount to an improvement of the demised property.[20] It is submitted that as long as the tenant consented to the alteration, it will be immaterial that he did not regard it as an improvement: the test is whether from the point of view of a reasonable man the alteration has added to the letting value of the premises. If what was done amounted to

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17. Morcom v. Cambell-Johnson (1956) 1 Q.B.106; (1955) 3 W.L.R. 497.
18. cf. Water v. Rowland (1952) 2 Q.B.12.
19. cf. Strood Estate Ltd. v. Gregory (1936) 2 K.B. 605, affirmed (1938) A.C.118.
20. cf. Lambert v. Woolworth & Co. (No.2) (1938) Ch. 883.

an improvement the landlord could claim 6% of his expenditure thereon; if it amounted to repairs then his claim would be 5% of the net rent, not 5% of the expenditure on repairs.

Although it is not expressly so stated, the landlord's right to claim the 5% of the net rent is not limited to the occasions on which he effected repairs. His right depends on the liability to execute repairs in accordance with the terms of the contract existing between him and the tenant. He could make the claim if the contract made him responsible for repairs even if, in practice, he did not execute any repairs. The tenant's remedy in the latter case will be action for breach of the covenants of the lease. On the contrary, the landlord can only claim 6% of the cost of each improvement he actually made with the consent of the tenant: if he makes no improvement at all he cannot claim anything in that respect.

(iii) Increase in rates. If by the contract of tenancy the landlord is liable for the rates, then he is permitted to increase the rent payable in respect of the premises in accordance with the table contained in the first Schedule to the Rent Ordinance.[1] This table shows that an increase in rates in Lagos from 8d. to 9d. will result in an

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1. S.6 (2) (c).

increase of rent by 2d. in the £ ; an increase of rates by extra 1s.10d will cause a rise of rent by 3s.1d. in the £ . Where the premises are let to two or more tenants the permitted increase shall be apportioned proportionately between such tenants in accordance with the rent payable by each of them.[2]

No definition of the term "rates" is given by the Ordinance but the word would normally include general and water rates but not electricity or conservancy charges. If the contractual tenancy imposed liability for rates on the landlord then, as long as the contractual tenancy subsists, he cannot increase the rent under this head. If, however, the tenancy is of a periodic nature, the lanldord may serve the tenant a notice to quit. On the expiration of the notice or on the determination of the term by any other means the occupier will become a protected tenant; the landlord could then increase the rent because the relationship of the parties is now governed by the Ordinance and those terms of the expired tenancy consistenet with the Ordinance. If the tenant contends that the landlord cannot reoover increased rent when rates are increased, the contention will be inconsistent with the Ordinance and, therefore, will not be sustained.

If the lease is silent on the liability for rates and

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2. S.6. (2) (c) proviso.

the landlord has been paying them it could be urged that he will impliedly be liable for all future increases in rates without charging the tenant any increased rent on that account. On the other hand it could be argued that he will be entitled to claim increased rent in such circumstances because although he impliedly accepted to pay the rates initially, he did not accept to pay more than the amount chargeable then without passing part of the increase to the tenant in form of additional rent. Which of these two arguments will prevail is uncertain.[2a]

Conversely, no provision is made for the reduction of rent if the rates increased are subsequently reduced. It is submitted that if this happened any increase in rent made on account of increase in rates will be reduced proportionately;[3] if no increase had been made in the rent then there will be no need to reduce the rent[4] even if the reduction in rates has made the amount payable much less than the rates at the time when the basic maximum rent was fixed.

2a. But see the section on transfer of burdens.
3. cf. Strickland v. Palmer (1924) 2 K.B. 572, C.A.; Swain v. Brittain (1924) 13 L.N. C.C.R. 18. Stanley v. Morris (1923) 68 Sol.J. 37, C.C.
4. Strickland v. Palmer, supra; Swain v. Brittain, supra. Murphy v. Kinsella (1928) 1 R. L.T.R. 62 Cir.

(iv) Order of the Governor or of the Court. The Rent Ordinance empowers the Governor-in-Council to make an Order directing that the rent of any premises subject to the Ordinance be increased in accordance with the terms of the Order. Any such increase may be by way of a percentage increase and shall take effect from the date fixed in the Order. The net rent formerly payable under the provisions of the Ordinance, together with such permitted increase shall be deemed to be the net rent duly payable under the provisions of the Ordinance.[5] The Governor has power to increase or reduce the permitted increase or otherwise alter vary, or amend the provisions of the first or any subsequent order.[6]

A landlord or his tenant could apply to the Court for an Order fixing the rent of any premises;[7] the Court may make the Order fixing the rent or fixing the amount by which it may be increased[8]. Further, the Court has powers of re-hearing, reconsidering and revising a decision on rent, if it thinks that the power should be exercised and if an application is made by either party.[9] In practice these powers are seldom used because the parties

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5. Rent Restriction Ordinance S.18(1). See Also S.6 (1) (b).
6. ibid. S.18 (3).
7. ibid. S.11 (1).
8. ibid. S.11 (2).
9. S.11 (5)

naturally prefer settling the issue privately to resorting to the uncertain and vexatious process of litigation.

(v) Transfer of Burden or Liability. It is laid down in S.8 (1) of the Rent Ordinance that -

> "any transfer to a tenant of any burden or liability previously borne by the landlord shall ...... be treated as an alteration of rent and where, as a result of such transfer, the terms on which any premises are held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased whether or not the sum periodicallybpayable by way of rent is increased."

It is further provided that

> "any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as a result of such transfer, the terms on which the premises are held are on not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent the purpose of this Ordinance." 10

Under these provisions the terms of the existing tenancy will have to be compared with the terms of the lease by which the basic maximum rent was fixed. As in the English Rent Act of 1920, so here, the word "terms" means "the legal rights and obligations of parties as determined by the provisions of the contract or by law",[11] or in other words "the provisions of the lease which are

10. ibid. s.8 (2).
11. per Lord Normand, in Asher v. Seaford Court Estates, Ltd. (1950) A.C. 508 at p. 520.

are binding in law".[12]

The word "burden" has a wider meaning: the section will apply even if there was no contractual burden, but there was something which imposed on the landlord or the tenant, "as a matter of practice, the burden of doing work which had previously fallen on the other."[13] The term includes what the tenant or landlord has to do or provide voluntarily for the reasonable protection or enjoyment of his interest in the premises.[14]

The "liability" referred to in the section means that for which the landlord or the tenant is <u>legally</u> liable.[15]

"Transfer" means "shifting".[16] But in order to amount to a "transfer" the burden or liability must be a legal obligation imposed by the terms of the tenancy: therefore, if the tenancy agreement was silent on the point and the landlord or tenant ceased to undertake certain services which he voluntarily assumed, there would be no transfer.

The Ordinance does not entitle either the landlord or the tenant to transfer a burden or a liability on to

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12. <u>Seaford Court Estates Ltd. v. Asher</u> (1949) 2 K.B.481 at p. 486, C.A., <u>per</u> Green, M.R.
13. <u>Asher's case</u>, supra, at p. 498, C.A. <u>per</u> Denning, L.J.
14. cf. Lord MacDermott in <u>Asher's case</u>, supra at p.527 H.L.
15. <u>Asher's case</u>, <u>supra</u>.
16. <u>Asher's case</u>, at pp. 524, 526, H.L. Approving Scott L.J. in <u>Winchester Court, Ltd. v. Miller</u> (1944) K.B. 734 at 743, C.A.

the other: it simply provides for the adjustment of rent if such a transfer takes place in cases where the agreed terms of a new tenancy differed from the terms of the tenancy which fixed the basic maximum rent.[17]

From what time can the permitted increase take effect?

The question which will now be considered is whether a landlord who is contractually bound to a tenant to receive a sum of money less than the basic maximum rent can, during the subsistence of the contractual tenancy, obtain a revision of the rent either by application to the Governor or to the Court, and then enforce the payment of the revised rent against the tenant before the determination of the lease. It has not been possible to discover from the reported cases whether this question has been considered by the Courts in Nigeria but it has arisen in Ghana under the Rent Control Ordinance [18] which is similar to the Nigerian Statute on this point. The Ghana Ordinance empowered a Rent Assessment Committee to make an order fixing rent; it lays down that -

> "such rent shall be the standard rent of such premises notwithstanding any lease to the contrary." [19]

This provision fell to be interpreted in Amah v. Picas.[20]

17. cf. Winchester Court, Ltd. v. Miller, at p. 744.
18. Gold Coast (as it then was), Rent Control Ordinance, 1952, No.2 of 1952.
19. ibid. S.5 (3) (a).
20. (1954) 2 W.A.L.R. 79.

In that case a landlord had let premises under a contractual tenancy for fifteen years to the defendant tenant at a monthly rent of £20. Before the end of the fifteen years period the landlord applied to the local Rent Assessment Committee for a standard rent to be assessed on the premises. The Committee assessed the rent at £45. a month. The landlord subsequently brought an action to recovery from the defendant the difference between the contranctual and the standard rents as from the date of fixing the standard rent. Wilson, C.J. held that the landlord could recover the standard rent so fixed notwithstanding the currency of the lease which reserved a contractual rent lower than the standard rent.

According to the learned C.J. there is nothing whatsoever to suggest that the Ordinance provides a one-way control, favouring and protecting only the tenant. Considering the contention raised on the tenant's behalf he said,

> "The arguement that the Ordinance allows a landlord under a subsisting lease the right to get a standard rent fixed, but does not allow him to demand the payment of anything more than the contractual figure in the lease seems to fly in the face of the whole tenor of the Ordinance and is one which on first principles I find myself entirely unable to accept and in the absence of any clean authority for that submission I must reject it." 1

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1. <u>ibid</u>. at pp.81-2.

The Chief Justice was referred to English authorities supporting the tenant's contention but he rejected them on the ground that the Increase of Rent and Mortgage Interests (Restriction) Act, 1920, to which the authorities applied, is

> "an entirely different piece of legislation based on different principles and employing different methods of procedure from those with which we are concerned in the Rent Control Ordinance, (1952". [2]

Conversely, in circumstances exactly similar to those which arose in Amah's case, Windsor - Aubrey, J. held that the same Ordinance conferred no powers on a landlord who was contractually bound to a tenant at a rent lower than the standard rent for the premises, to demand the standard rent from his tenant during the pendency of the contractual period.[3]

These two decisions are irreconcilable and it is submitted with the greatest respect that the decision of the late Sir Mark Wilson, C.J. in Amah's case is based on a wrong principle of law. As Granville Sharp, J.A. correctly said in a later case[4] in the Court of Appeal of Ghana,

> "unless the Act[5] either expressly or by

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2. At p.81
3. Mansour v. Compagnie Francaise de L'Afrique Occidentale (1956) 2 W.A.L.R.77.
4. Hinawi & Co. v. Bassil (1958) 3 W.A.L.R. 495, C.A.
5. more correctly the Ordinance.

> necessary implication states the contrary, neither the tenant nor the landlord can take advantage of the Ordinance to derogate from the agreement between them as to rent until such agreement has been determined either by effluxion of time or by notice to quit duly served. To hold otherwise would be to conflict with the long established principle of mutuality in relation to the rights and obligations arising out of contract at common law." 6

In view of the decision given by the Ghana Court of Appel in the Hinawi case it should be assumed that Amah v. Picas has been over-ruled - and rightly so.

Applying the interpretation of the Ghana Ordinance to the similar provisions of the Nigeria Statute, it may be laid down as a principle that there is nothing in the Rent Restriction Ordinance which forbids a landlord from contracting for a sum less than the basic maximum rent; if he enters into such a contract he will be bound byb its terms and even if the Governor or the Court makes an Order fixing that rent at a figure higher than that agreed upon by the pa ties, the order should not affect the tenant's rights under the existing contract and the landlord cannot recover the difference unless the contract itself provided for revision of the rent during the currency of the lease.

It must be stressed that the converse is not true: if the contract provided for a sum higher than the amount

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6. Hinawi & Co. v. Basil, supra, at pp. 506-7.

fixed by the Governor or the Court, the landlord can only recover the lower figure because the higher sum is in direct conflict with the provisions of the Ordinance and, therefore, invalid.

Once the contractual tenancy has determined, the relationship of the parties depends only on the Ordinance and those terms of the expired lease imported into the Ordinance. Consequently, the landlord being entitled to the basic maximum rent fixed by the Governor or the Court can, from the determination of the lease, enforce it against the statutory tenant.

(b) Restrictions on Premium.

It is provided by the Rent Restriction Ordinance that

> "it shall be unlawful for any one in consideration of a grant, continuance, surrender or giving up of a tenancy or sub-tenancy of any premises to which this Ordinance applies, to require, make, or receive the payment of any fine, premium or other like sum or the giving of any pecuniary consideration in addition to the rent." 7

It is further provided that where such payment was made the amount shall be recoverable by the tenant by whom it was made from the landlord by whom it was received, and may, without prejudice to any other method of its recovery,

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7. ibid. S.15 (1).

be deducted from any rent payable by the tenant to the landlord.[8]

The Ordinance gives no definition of the terms "fine" and "premium"; unlike the English Rent Act it contains no provision that if the purchase of any furniture, fittings or other articles has been required as a condition for the grant, renewal, continuance or assignment of a tenancy and the price asked exceeds a reasonable price the excess is to be treated as a premium.

The reason for prohibiting the landlord receiving any fine or premium is undoubtedly to prevent his evading the Ordinance by obtaining more than the rent permitted through the simple devise of stipulating for an additional advantage, such as the payment of a lump sum, as a condition for the granting of a lease. How far the Ordinance has succeeded in achieving this is uncertain. It is obvious that if the landlord requires the premium to be paid to a third party such payment will be caught by the Ordinance but if is uncertain if it could be recovered from the landlord unless it be proved that the third party received it as an agent of the landlord. This is because S.15 (2) expressly lays down that the fine or premium can be recovered only "by the tenant by whom it was paid from

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8. *ibid*. s.15 (2).

the landlord by whom it was received". The provision of the English Rent Act on this point is differently worded: the Act permits recovery of premium but it is silent on the important point of who must have received it. This makes it possible for a tenant under the English Act to contend that once he has paid a premium he could recover it from the landlord no matter by whom it was received.[9] On the other hand, under the Nigerian Ordinance it seems to be a condition for the landlord's liability for repayment that the premium must have been received by him.

Moreover, it appears that the landlord may lawfully require a tenant to pay an inflated price for some furniture, fittings or any other articles as a condition for the grant. As such a transaction is not expressly prohibited it could be urged that the tenant by making the payment and receiving the article has got what he bargained for and that no premium has been received by the landlord. Furthermore, it appears that if the landlord required payment of a lump sum as rent in advance he did not require any premium and that the demand is legal. He could lawfully stipulate as a condition for granting the lease that the tenant is to pay a stated sum at the end of the term in satisfaction of the then existing repairing

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9. Elmdeme Estates Ltd. v. White (1960) 2 W.L.R. 359, H.L. distinguishing Rex v. Birmingham (West) Rent Tribunal, Ex Parte Edgbaston Investment Trust Ltd. (1951) 2 K.B. 54.

covenants[10], although if he demanded that such payment be made in advance it will amount to a premium.[11]

The prohibition against premium applies to the tenant too; it would seem to be unlawful for him to demand such payment in consideration of surrendering the lease. If this be so, then there is an obvious gap in the Statute for there is no provision for the landlord paying it to recover the sum from the tenant to whom it was paid. On general principles, the landlord cannot recover the illegal payment he made [12] for it will be difficult to say that from his own point of view the parties were not in pari delicto.[13]

On the other hand, unless the tenant can establish that the request for premium was amde by the landlord or by some other person on the landlord's behalf, he cannot recover the amount so paid. Therefore if the wife of the landlord in her own capacity required or received the premium, for example, in order to help the prospective tenant to persuade her husband to grant the lease, the conferment

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10. cf. Boyer v. Warbey (1953) 1 Q.B. 234, C.A. but the point was not argued.
11. Macdonald v. John Laing & Son (1954) S.L.T. (Sht. Ct.) 77.
12. Alexander v. Rayson (1936) 1 K.B. 169; Chettiar v. Chettiar (1962) 2 W.L.R. 549, P.C.
13. aliter if the payment was made by the tenant under the same circumstances: Kiriri Cotton Ltd. v. Dewani (1960) A.C. 192, P.C.
14. cf. Lord Radcliffe in Elmdene Estates Ltd. v. White (1960) 2 W.L.R. 359 at p. 365.

of such benefit on her will be "an act of inexplicable benevolence" for which the tenant will have nobody but himself to blame.[14]

Moreover, for any payment made by the tenant to the landlord to qualify as premium, it must have been received "in consideration of the grant." If, therefore, the landlord demanded the amount in order to give the prospective tenant some information about vacant premises, even if the premises were those of the landlord himself, the sum so paid will not be a premium within the Ordinance and it cannot be recovered by the person paying it.[15]

(c) Restriction on ejectment. It is laid down that no tenant or sub-tenant of a premises subject to the Rent Ordinance shall be ejected without an Order of the Court obtained in accordance with the provisions of the Recovery Ordinance.[16] The Court is prohibited from making the order unless one of the grounds specified is satisfied and the court thinks it reasonable to deprive the tenant of possession. A landlord who sues for possession must satisfy the Court -

(i) that he is entitled to possession at common law - that is, that the term or the interest of the tenant in the

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14. cf. Lord Radcliffe in Elmdene Estates Ltd. v. White (1960) 2 W.L.R. 359 at p. 365.
15. This is an obvious moral for landlords!
16. Rent Restriction Ordinance, S.12.

premises has come to an end either by effluxion of time or by forfeiture or by a valid notice to quit;

(ii) that it is reasonable to make the order for recovery of possession, <u>and</u>

(iii) that one of the specific grounds set down in the Rent Ordinance for recovery of possession applies.

(i) <u>Determination of the contractual tenancy</u>. As long as the contractual tenancy exists a landlord will not be able to bring an action for recovery of the premises. This is because the Rent Ordinance, like the Recovery Ordinance, does not enable him to do what he could not have done under the terms of the lease. The first step which he ought to take is to determine the contractual tenancy. He may do this -

(a) if there is a provision in the lease authorising him to serve the tenant a notice to quit[17]. He must comply strictly with the terms of the lease in this respect.

(b) If he has no power of serving such notice, then he could forfeit the lease on account of the tenant's breach of a covenant provided, of course, that a clause to that effect is contained in the lease. If he cannot prematurely

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17. The notice must be in the appropriate form as laid down in Schedule A of the Ordinance and must comply with the general rules relating to notices to quit as explained in the last chapter.

determine the lease either by notice to quit or by forfeiture, then he must wait until it determines by effluxion of time.

Procedure for recovering Possession. On determination of the tenancy by any of the fore-mentioned ways if the tenant refuses to quit the landlord must then serve him a written notice in accordance with form E, informing him of the landlord's intention to proceed to recover possession on a date not less than seven clear days from the date of the service of the notice.[18] The landlord must wait for this notice to expire before he takes the next step.[19]

If on the expiration of the seven days' notice the tenant still neglects to quit, the landlord may then apply to the Court for the issue of a writ or enter a plaint (depending on whether the action is in the High Court or in a Magistrates Court) as in Form F.

On the summons or writ being served on the tenant the proceedings will take the normal course of actions.

(ii) Reasonableness of the Order. At the trial of the action it is the landlord's duty to satisfy the Court that it is reasonable to make the Order for possession: there

18. Recovery of Premises Ordinance, S.7. Sunmonu v. Onayemi (1955) 21 N.L.R.55.
19. If he issues his writ before the expiration of the notice the action will be premature.

is a general overoriding discretion that ejectment of the tenant will not be ordered "unless the Court considers it reasonable to make an Order or give such a judgment".[20]

The object of the Rent Ordinance is to give the tenant greater, not less protection than he has under the rules of common law and to curtail the normal rights of the landlord.[1] The provision of S.13 directing the Court to make an Order in certain circumstances are mandatory only in the sense that an Order for recovery of possession of premises affected by the Ordinance may not be granted unless the prescribed conditions are satisfied: the section should not be interpreted as requiring the issue of an order whenever the conditions are satisfied;[2] the judge may, in exercise of his discretion, refuse making any order even if the necessary grounds are fulfilled.[3] The issue is not whether it is reasonable for the landlord to ask for possession[4] but whether, in the opinion of the Court, it is reasonable to make an order for possession against the tenant. The Court has to consider all the relevant circumstances as they exist at the date of the hearing and the Judge must do this in what Green, M.R. has called " a

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20. Rent Restriction Ordinance S.13 (1)
1. Ogunsanya v. Amos Bros., supra; Aschkar v. Somuah (1957) 2 W.A.L.R. 264, Ghana.
2. Moubarak v. Eguakun (1956) 1 W.A.L.R. 88, Basil v. Said Raad & Sons (1957) 3 W.A.L.R. 231 at p.235, per Ollennu, J. - both Ghana cases.
3. Ilorin v. Fagbo (1949) 19 N.L.R. 40.
4. cf. Shreeve v. Hallam (1950) W.N. 140, C.A.

broad, common-sense way as a man of the world".[5] As long as the premises is subject to the Ordinance the Court has the duty to apply to Ordinance even if the tenant did not plead it.[6]

Some of the relevant factors which the court will take into acoount include -

(i) the conduct of the parties [7];

(ii) hardship caused the landlord by refusing the Order, or the tenant by making it [8];

(iii) the fact that it is more reasonable for the landlord to move another tenant [9];

(iv) a bad record for non-payment of rent [10] but not merely one or two defaults by an otherwise good tenant [11].

The list is not exhaustive and the question of reasonableness must depend upon the particular circumstances of each case. Once the trial Judge has come to a decision, his exercise of discretion will not be interferred with if (a) there was some evidence on which he could have arrived at the decision[12] and (b) he has clearly not applied

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5. Cumming v. Danson (1942) 112 L.J.K.B.145, at p.147.
6. per Coussey, J.A. in Ogunsanya v. Amos Bros. Ltd. (1952) 14 W.A.C.A. at p. 109.
7. cf. Upjohn v. Macfarlane (1922) 2 Ch.256, Swanson v. Edelman (1949) E.G.D.136.
8. Ilorin v. Fagbo (1949) 19 N.L.R.40; Moubarak v. Eguakun (1956) 1 W.A.L.R. 88 (Ghana)
9. cf. Hardie v. Frediani (1958) 1 W.L.R.318, C.A.
10. cf. Dellentry v. Pellow (1951) 2 K.B. 858.
11. Moubarak v. Eguakun, supra.
12. Ilorin v. Fagbo, supra.

a wrong principle of law in reaching the decision, or (c) based his judgment on extraneous factors.[13]

Specific Grounds for Recovery of Possession.

The Court may make an order empowering the landlord to recover possession under the following circumstances:

1. If suitable alternative accommodation is available for the tenant.[14]
2. If the tenant is in arrears of rent.[15]
3. If he is guilty of breach of an express covenant of the tenancy.[16]
4. If he has been given notice to quit and the landlord has contracted to sell or let the house or has taken any other step which would be seriously to his own prejudice.[17]
5. If the premises are reasonably required for any purpose which is in the public interest.[18]
6. If the tenant has been guilty of nuisance, annoyance, or illegal or immoral use of the premises.[19]
7. If the premises is so over-crowded as to be dangerous to the inmates.[20]

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13. Cumming and Danson, supra.
14. Rent Restriction Ordinance, S.13 (1) (b).
15. ibid., Second Schedule, para (a)
16. ibid., 2 " " (b)
17. ibid., " " " (c)
18. ibid., " " " (d)
19. ibid., " " " (e)
20. ibid., " " " (f)

8. If the premises has been subject to an abatement or similar notice.[1]

9. If the premises requires substantial repair.[2]

10. If the premises be reasonably required by the landlord for his own occupation or for the occupation of any son or daughter of his over eighteen years of age; or for the occupation of his father or mother.[3]

Each of these grounds will now be examined.

1.7 Suitable Alternative Accommodation.

A landlord may obtain an order for possession if

> "the Court is satisfied that suitable alternative accommodation is available for the tenant." [4]

Such an accommodation must be available at the date of the hearing [5]; it is immaterial that the accommodation was available at some previous occasion but the tenant refused to take it up. The onus is on the landlord to prove that the suitable alternative accommodation is available.[6]

Suitability. The Rent Ordinance gives some indication which will help to determine whether the alternative accommodation is suitable. Such accommodation will be suitable if in the opinion of the Court it is "reasonably suitable

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1. ibid., Second Schedule, para (g)
2. ibid., " " " (h)
3. ibid., " " " (i)
4. See last note 14.
5. cf. Kimpson v. Markham (1921) 2 K.B. 157.
6. Nevile v. Hardy (1921) 1 Ch.404.

to the needs of the tenant and his family as regards proximity to the place of work, the means of the tenant and the needs of the tenant and his family as to extent and character and in the case of business premises, if such accommodation is ..... reasonably suitable and no appreciable loss will be caused to the tenant by the transfer of the business." [7]

The word "family" does not mean only the wife and children of a monogamous marriage: it includes the wives of a polygamous union, their issues and the illegitimate children together with the wards of the tenant.[8] It is submitted that it also includes both brothers and sisters of the tenant who occupy the premises with him, as well as the wives and children of the tenant's sons residing with him.[9] The word should be given its loose and flexible meaning; it should not be construed in the terms of European sociology. In Nigeria it should include grand-parents, uncles and aunts: in short the yardstick by which a family should be measured is "traceable consanguinity".[10]

It is submitted that if a tenant takes in lodgers

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7. S.13 (2)
8. cf. Ames, A.J. S.P.J. in Ilorin v. Fagbo (1949) 19 N.L.R.40.
9. cf. Standingford v. Probert (1950) 1 K.B.377, C.A.
10. W.A.L.C. Draft Report, April 1917, para. 94.

who cannot be reckoned as members of his family they should not be considered in the question of alternative accommodation[11] but the loss of income he might sustain may be relevant in considering whether it is reasonable to make the Order.[12]

Further, it is submitted that the alternative accommodation need not be that of the landlord himself: premises owned by the tenant or by a third party may be sufficient if it is suitable and available when the order of the Court takes effect.[13]

If the whole or part of the premises is used for business purposes any appreciable loss of custom and/or profits will make it unsuitable. Further, the accommodation may be unsuitable because it is too large[14] or because it lacks certain facilities such as bathroom or lavatory [15] but the fact that the alternative premises does not contain all the amenities in the previous one will not per se make it unsuitable though it might effect the reasonableness of the order.

2. Rent in Arrear. [illegible].

The Court may make an order for possession if -

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11. cf. Thompson v. Rolls (1926) 2 K.B.426
12. Williams v. Palant (1924) 2 K.B. 173.
13. cf. Barnard v. Towers (1953) 1 W.L.R. 1203, C.A.
14. Macey v. Dolphin (1950) 156 E.G.D. 422, C.A.
15. Esposito v. Ware (1950) 155 E.G.D. 383, C.A.

"the rent lawfully due ... is in arrear for one month after it has become due".[16]

The date on which proceedings are commenced is the material date for deciding whether the landlord's claim under this head could be sustained.[17] The claim will be barred if the tenant tenders the rent more than one month after it is due but before the proceedings were commenced; even if the proceedings have been initiated before the payment was made it may be unreasonable to make the order.[18] Further, it will not be reasonable to make an order for possession if, before the trial, the tenant has paid all arrears of rent unless there is a history of continued default on his part.[19]

Where the rent has been in arrear for one month after it is due, it is submitted that unless special circumstances exist, it will be unreasonable to refuse the landlord possession. The Court will not be debarred from making the order by the fact that the landlord has on past occasions allowed payments more than one month after the date it should have been paid unless, of course, there are special facts which will warrant an inferrence that the agreement betwean the parties has been varied.[17] But a tenant cannot be

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16. Rent Ordinance, Second Schedule, para. (a).
17. Bird v. Hildage (1948) 1 K.B.91, C.A. It will be to the landlord's advantage to stipulate expressly that rent is payable in advance and, therefore, due on the first day of each month, quarter, or year. If not paid by end of the month then he could bring an action at once whereas if rent is due at the end of the month, quarter or year he must wait for one further month to expire before bringing his action.

18. cf. Moubarak v. Egnakun, (1956) 1 W.A.L.R.88
19. Moubarak v. Egnakun, per Windsor-Aubrey; Dellenty v. Pellow (1951) 2 K.B. 858, C.A.

ejected for arrears of rent owed by his predecessor in respect of the premises.[20]

3. <u>Breach of Express Covenant</u>.

The Court may make an order for possession if "the tenant has been guilty of the breach of an express covenant or agreement of the tenancy."[1]

The covenant or agreement broken must be <u>expressly</u> prohibited by the tenancy: it is not sufficient that it is implied by law or arose under the Ordinance. This is somewhat unsatisfactory from the landlord's point of view because although a breach of some implied obligations (such as denial of the landlord's title) is a ground for ejecting the tenant under the general law or native law and custom, the statutory requirement makes it imperative that the landlord must have expressly forbidden the breach if he is to rely on it as a ground for seeking possession from a tenant after the expiration of the term granted.[2] The provision in the English Rent Acts is different; under those Acts the obligation broken may arise either under the original contractual tenancy or under the Rent Acts

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20. cf. <u>Tickner v. Clifton</u> (1929) 1 K.B.207.
1. Rent Ordinance, Second Schedule, para. (a)
2. It seems that a breach of an implied obligation (eg. denial of the lessor title), if committed during the term, could constitute a ground for forfeiture of the lease but cannot afford a ground for recovery of possession.

and may be express or implied.[3]

In Nigeria, as in England, the agreement broken must arise out of the tenancy: it must be one running with the land and not merely a personal covenant.[4] Thus if there is an express agreement that the tenant is to use the premises as a private residence he will be liable under this head if he has been taking in paying guests[5] but not if he turns a large room in the house into a place where he could invite his family and his or their friends to worship although such user may amount to nuisance, a separate ground for ejectment.[6]

If a contractual tenancy is still in existence, an acceptance of rent by the landlord after the date it is due will amount to a waiver of his right to enforce the breach[7] but as the breach is of a recurring nature the waiver will cease when the landlord gives notice to enforce the covenant and refuses to accept further rent.[7] The lease may then be forfeited on account of such subsequent breach but the tenant is still entitled to remain in occupation until an order for possession is obtained under the Recovery Ordinance. If the contractual

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3. See 1938 Act, 1st Schedule, para (a).
4. R.M.R. Housing Society, Ltd. v. Combs (1951) 1 A.E.R.16, C.A.
5. Tendler v. Sproule (1947) 1 A.E.R. 1933.
6. Chairman, L.E.D.B. v. Bello Raji (1939) 15 N.L.R.26.
7. Peter Onwata v. The Niger Co. Ltd., supra.

tenancy has determined before the breach occured, the landlord may obtain possession under this paragraph, subject to the discretion of the Court on the reasonableness of the Order.[8]

The liability of a tenant for breaches of covenants (other than those relating to rent) committed by his predecessor is uncertain: it seems that the landlord could obtain an order for possession against the original tenant and his assignee [9] but not against a lawful under-tenant.[10] It is submitted that where the breach committed by the head--tenant is of a continuing nature (such as covenant to repair), the landlord could base an action for recovery of possession from the under-tenant on the continuous breach which has not been remedied.[11]

4. Notice to quit given by the tenant.

An order for possession could be made where

> "the tenant has given notice to quit in consequence whereof the landlord has contracted to sell or let the premises or has taken such other steps as a result of which he would be seriously prejudiced if he could not obtain possession." 12.

8. cf. Oak Property Co. v. Chapman (1947) K.B.886; Tideway Investment and Property Holdings v. Wellwood (1952) Ch.791.
9. ~~XXXX~~ cf. Chapman v. Hughes (1923) 129 L.T. 223.
10. Amos Bros. & Co. Ltd. v. British West African Corporation Ltd. (1952) 14 W.A.C.A 220.
11. Tickner v. Clifton (1929) 1 K.B.207. See Also Lloyd & Montgomerie, Rent Control, 2nd edition, p.157.
12. Rent Ordinance, Second Schedule, para. (c).

To come within this paragraph a tenant must have actually given a notice which is valid in law to determine the tenancy; merely giving up possession without notice and returning the key to the landlord will not be sufficient [13] though it could amount to abandonment of the premises.

The notice given by a tenant will be construed technically: it will not include an agreement between the landlord and the tenant for the tenant to give up possession nor a letter asking the tenant to fulfil that promise[14] because the essential characteristic of a notice to quit is to put an end to the tenancy regardless of the landlord's wishes.[15]

An undertaking given by a tenant to deliver possession of the premises on a particular date may, according to the construction and special circumstances, amount to a notice to quit.[16]

If the landlord brings an action under this paragraph, it will not be sufficient if he proves that the tenant has given a valid notice to quit; it must also be established that as a consequence of the tenant's notice the landlord contracted to sell or let the premises or

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13. cf. Standingford v. Bruce (1926) 1 K.B. 466, D.C.
14. Olaoye v. Mandilas & Anor. (1949) 19 N.L.R.57.
15. cf. De Vries v. Sparks (1927) 137 L.T. 441, D.C.
16. cf. Gilbert v. Jordan (1920) W.N.309.

that he has taken some other steps as a result of which he would be sriously prejudiced if he could not obtain possession. If the contract of sale or lease is not for vacant possession or if it is made subject to the tenant moving out, then the landlord would not be "seriously prejudiced" for he will not be liable under the contract if the tenant fails to leave.[17]

If a sub-tenant is lawfully in occupation, a decree for possession based on the head-tenant's notice to quit will not affect the sub-tenant.[18] On the other hand a sub-tenant cannot give a valid notice to quit to the head-landlord because although he is deemed to be his tenant the notice given must be valid at common law but under the common law a sub-tenant cannot determine the head-tenancy. Further, it is submitted that a head-tenant cannot take advantage of a notice to quit served by his under-tenant to the head-lessor to recover possession from the under-tenant under this paragraph.

5. Required for any purpose in the public interest.

The court may make an Order for possession if "the premises are reasonably required for any purpose which is in the public interest".[19]

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17. cf. Hunt v. Bliss (1919) 89 L.J.K.B.74; Green-Price v. Webb (1919) 89 L.J.K.B. 216.
18. Rent Ordinance, S.14.
19. ibid., Second Schedule, para. (d).

The Ordinance gives no guide to what is meant by the term "public interest"; it is, therefore, for the court to decide what the term should include. It is submitted that the phrase "public interest" as used in this paragraph is not different from the term "public purposes" used in the Public Lands Acquisition Ordinance. This means that an Order could be made under this paragraph if the premises are required for the exclusive use of the Government, or for the use of the general public, or in connection with sanitary improvements of any kind.[20]

It cannot be said, however, that premises are required for a purpose which is in the public interest if the sole purpose is to lease it to a commerical company which will improve it substantially by erecting impressive houses or other structures connected mainly with the business of the company.[1]

In Olaoye v. Mandilas & anor.[2], the landlords were seeking possession on the ground that they wanted to pull down the existing house and erect a four-storey building on the site. The trial Magaistrate held the view that putting up such a building on the land which was one of the important commercial sites in Lagos would certainly

20. See G.H.L. Fridman in (1953) 31 Com. Bar Rev. 537 and P.S. Atiyah in (1958) 21 M.L.R. 138.
1. Chief Commissioner, Eastern Provinces v. Ononye & Ors. (1944) 17 N.L.R. 149.
2. (1949) 19 N.L.R.59.

enhance the beauty of the town and that it was to the public interest. On appeal to the Supreme Court, Ames J. said that -

> "To require premises to construct a commercial building, however big and however beautiful, is very obviously not 'a purpose which is in the public interest' within the meaning of that phrase as used in item (d) of the Secon Schedule."[3]

The learned Judge, therefore, dismissed the landlord's claim.

With great respect, this is a welcome decision. Any particular purpose which is considered to be in the public interest must not be vague and the way in which it is in the public interest must be capable of proof.[4] It appears that the purposes which are regarded as charitable in English law will come within the phrase "public interest".[5] On this principle if the reason for seeking recovery of possession is to use the premises for advancement of education or religion or the promotion of public health, or the erection of a public halls for entertainment or meeting, the court may decree possession under this paragraph. Whether the purpose is charitable or not will not be conclusive in determining what is in the public interest:

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3. at p.60.
4. cf. Gilmour v. Coates (1949) A.C. 426.
5. For the position in English law see Snell, Principles of Equity, 25th ed. pp. 137-162, esp. pp.140-142; Scott on Trust, 2nd ed. Vol.IV, pp.2692-2695 and the authorities cited therein.

as long as the court is satisfied that the reason for seeking possession is to use the premises for something which will be of benefit to the public, the landlord could succeed even if the object is not charitable.

6. Nuisance, annoyance, illegal use, Waste, Neglect and Default.

An order for possession could be made if the tenant or any person residing or lodging with him or being his sub-tenant -

(i) has been guilty of conduct which is a nuisance or annoyance to adjoining occupier, or if the premises has been used as a brothel, or

(ii) the tenant or such other person has been convicted of using the premises or allowing it to be used for an illegal purpose, or

(iii) if "the condition of the premises has deteriorated owing to acts of waste by, or the neglect or default of the tenant or any such person, and where such person is a tenant or a lodger, that the tenant has not taken such steps as he ought reasonably to have taken for the removal of such sub-tenant or lodger."[6]

(i) Nuisance, Annoyance. The words "nuisance" and "annoyance"

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6. Rent Ordinance, Second Schedule, para. (e).

are not defined by the Ordinance. It seems that "nuisance" should be given its meaning at common law, that is, an unauthorized act which will abridge or diminish seriously and materially the ordinanry comfort of existence to reasonable people.[7] This does not necessarily include an act made a nuisance by statute[8] if the act would not be a nuisance at common law.[9]

"Annoyance" is wider in meaning and includes whatever reasonably troubles the mind of an ordinary sensible person.[10]

The two words would include such things as creating excessive noise, making of dust or causing noxious fumes or smell.[11]

The use of the premises as a brothel covered by this paragraph means using it "for purposes of prostitution" as defined in the Criminal Code;[12] it is not necessary,

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7. cf. Knight Bruce, V.C. in Walter v. Selfe (1851) 4 De G. & Sm. 315 at pp.321-325, and Goddard, C.J. in Howard v. Walker (1947) 2 A.E.R. 197 at p.199 citing with approval the definition in Winfield, Textbook on The Law of Tort, 3rd ed., p.426. See also Pollock, Law of Torts, 15th ed., p.308.
8. Such as over-crowding or failure to provide adequate sanitary convenience under S.7 (b) and (1) of the Public Health Ordinance, now Cap.165 or 1958.
9. cf. Timmis v. Pearson (1934) L.J. N.C.C.R. 115.
10. Tod-Heathly v. Benham (1884) 40 Ch.D.80 at p.95, C.A.
11. Chapman v. Hughes (1923) 39 T.L.R. 260 p.261, per Slater J. and Spencer v. Silva (1942) S.A.S.R. 213 (Australia) at pp.219,220, per Mayo, J.
12. S.1 (1).

however, that a conviction must be proved if the landlord could establish the fact aliunde. Regular private immorality which cannot amount to using the premises as a brothel may nevertheless amount to nuisance or annoyance, if it is such as to offend the feelings of neighbours.[13] Similarly, persistent rudeness of the tenant to his neighbours or their visitors[14], or systematic loud abuse of the landlord [15] and probably uncontrolled gossip may amount to nuisance or annoyance which will entitle the Court to make an order against the tenant.

In order to be affected by the nuisance or annoyance of the tenant the premises of the adjoining occupiers should be contiguous with or near enough to that occupied by the tenant.[16]

In every case it is for the Court to decide whether an act is a nuisance or annoyance, judging from the particular circumstances and the available evidence[17] for what may be a nuisance in Tinubu Square may not be a nuisance in the Oyingbo.[17]

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13. cf. Benton v. Chapman (1953) C.L.Y. 3099.
14. Shine v. Freedman (1926) E.G.D. 376.
15. Adamson v. Fraser (1944) 61 Sh. Ct. Rep.132, the tenant calling his landlord "thief, liar, murderer, whore".
16. cf. Metropolitan Ry. Land Corp. v. Burfit (1960) 7 C.L.282, C.C.
17. See Pollock, C.B. in Bamford v. Turnley (1862) 3 B & S 66 at pp. 79, 80.

(ii) Conviction for illegal use. if the landlord's claim is based on illegal use of the premises actual conviction must be proved.[18] Any illegal act which the tenant did on the premises would come under this head[19] but it is not necessary that the offence was committed on the premises. If it is established that the tenant took advantage of his occupying the premises to commit the offence,[20] an order for his ejectment could be made notwithstanding that only one single act was proved[1], but the making of the order is always subject to the question of reasonableness.

(iii) Waste, Neglect, Default. Where a landlord is seeking possession on the gound of waste, neglect of default of the tenant he must prove that the premises has deteriorated: an ameliorating waste or any structural alteration which has not diminished the value of the property will not support the landlord's claim for possession under this head. If an express prohibition against structural alteration is broken by the tenant improving the value of the premises this may provide a technical ground for claiming possession under paragraph (b) above but it

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18. Frederick P.Latts & Co. Ltd. v. G. (1950) 1 T.L.R. 859, C.A. But if no conviction is proved the act may nevertheless amount to nuisance or annoyance.
19. A. & B v. C. (1930) S.L.J. (Sh. Ct.) 30; Hodson v. Jones (1951) W.N. 127, C.A. having unlawful carnal knowledge of young girls on the premises.
20. cf. Banks, L.J. in Schneider & Sons v. Abrahams (1925) 1 K.B.
1. Hudson v. Jones, supra.

would not amount to waste, neglect or default and normally the court would consider it unreasonable to make an order for possession in case of such a technical breach.

It is submitted that where a tenant has broken an implied obligation of the tenancy (e.g. the obligation to use the premises in a tenant like manner) and the breach results in a deterioration of the premises, the landlord could claim possession under this head although he could not have claimed under paragraph (b). Therefore even if there was no express covenant for the tenant to keep the premises in repair, or if such a covenant exists but absolves him from liability for "fair wear and tear", he will nevertheless be liable under this head if he neglected to do his duty as a reasonable tenant or defaulted in remedying the fair wear and tear so that they would not result in consequential damages to the premises not due to fair wear and tear.[2]

If the waste, neglect or default was caused by a subtenant or a lodger, the head-tenant will still be liable if he did not take reasonable steps to remove the offender. Mere threat of legal proceedings against such offender would not be sufficient steps on the tenant's part but he would be excused if the result of a legal action would be

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2. cf. Regis Property Co. v. Dudley (1959) A.C. 370.

genuinely doubtful[3] although he would be liable where the sub-tenant could have had no defence.[4]

Where an order is made against the head-tenant as a result of the sub-tenant's default, the sub-tenant will be affected by the order under the proviso to S.14 of the Rent Ordinance.

7. Over-crowding.

The court may make an order against the tenant if "the premises are so over-crowded as to be dangerous or injurious to the health of the inmates".[5] Where possession is sought on this ground, the court must be satisfied that the over-crowding could have been abated by the removal of any lodger or sub-tenant (not being a parent or child of the tenant) whom it would, having regard to all the circumstances of the case, including the question whether other accommodation is available for him, have been reasonable to remove. In such a case it must be established that the tenant has not taken such steps as he ought reasonably to have teaken for removal of the under-tenant or lodger.[6]

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3. Berton v. Alliance Economic Investment Co. (1922) A.C. 370.
4. Atkin v. Rose (1923) 1 Ch. 522.
5. Rent Ordinance, Second Schedule, para. (f).
6. ibid. para. (f).

The provision of the Nigerian Ordinance in this matter is quite different from that of the English Acts. Under the English Statute a tenant of over-crowded premises cannot claim the protection of the Rent Acts as to recovery of possession[7] although, perhaps, he might be protected with regard to rent.[8] In Nigeria such a tenant is still protected unless the Court thinks it reasonable to make an Order against him. This Nigerian provision is to be preferred to that of the English Acts because it is certain that in Nigeria, on general principles, the Court will not make an Order for possession if the over--crowding is deliberately caused by the landlord himself whereas in England a landlord could risk criminal prosecution but still deliberately over-crowd his premises in order to prevent the operation of the Rent Act giving the tenants any protection against his recovery of possession.[9]

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7. Housing Act, 1957, S.84(1) replacing Housing Act, 1936, s.65 (1). The over-crowding must be such that the tenant is rendered guilty of an offence; he will not be guilty if the over-crowding is due to increase in the number or ages of his children and the local authority cannot provide him alternative accommodation, provided that the tenant did not refuse to displace a lodger or sub-tenant to avoid the over-crowding: Housing Act, 1957, S.78 (3), replacing H.A.1936, S.59 (3).
8. cf. Megarry, Rent Acts, 9th ed. p.97.
9. If the tenant in England is protected against rent the landlord will not obviously take such risk since he cannot obtain any financial advantage by over-crowding the premises. If, however, the Rent Acts are entirely excluded because of the over-crowding then there might be some practical inducement for him to put in too many tenants, charging them whatever he liked, even though he runs the risk of criminal prosecution.

8. Abatement Notice.

Another ground on which a landlord might obtain an order for possession is that "the premises are the subject of an abatement or similar notice issued by a public authority[10] and compliance with the terms of such notice is only possible through the ejectment of the tenant.'[11] The Court is empowered to impose a condition for the return of the tenant when the abatement notice has been complied with.[11]

The abatement notice must be/a valid one if the landlord is to rely on it as a ground for seeking possession. Compliance with it must mean that the tenant cannot reasonably remain on the premises. If it is of such a nature then the Court may make an Order notwithstanding that the tenant is willing to remain on the premises and give the landlord all facilities for complying with the notice.

The mere fact that an abatement notice has been served on the landlord by a public authority does not en-

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10. The Ordinance gives no definition of "public authority" but it should normally mean a body of persons authorized by statute to carry on certain duties in the public interest whether the body makes any profit or not; cf. Peterson, J. in Metropolitan Water Board v. Benton (1921) 1 Ch. 299 at p. 305 and Parker, J. in Littlewood v. George Wimpey & Co. Ltd (1953) 1 A.E.R. 583, at p. 586-7. Consequently, the various local authorities, the Nigeria Broadcasting Corporation, the Ports Authority, etc. are all public authorities.
11. Rent Ordinance, Second Schedule, para (g).

title him to eject the tenant s or to proceed to comply with the notice while the tenants are still on the premises. The landlord must obtain an order of the Court to evict them although the public authority itself acting in the general public interest for the protection of life and health would be immune from liability if it takes any steps to remove the dangerous building occupied by the tenant.[12]

In Ogusanya & anor. v. Arab Brothers Ltd.[12], the Lagos Town Council gave a Statutory notice requiring the landlords to pull down a building at 4 Tinubu Street, Lagos, because it was in a dangerous state. A similar notice was posted on the premises by the Council when the tenants refused to accept service. On their refusing to leave, the landlords removed the roof and then demolished the walls. The tenants sued for trespass. Gregg, J. dismissed their claim holding, in effect, that the landlords acted lawfully in evicting the tenants for the purpose, or in the course of demolishing the premises under the abatement notice. The tenants appealed.

Before the W.A.C.A. their main argument based on the Rent Ordinance Sections 12, 13 (1) (a) and paragraph (g) of the Second Schedule was that the sections are to be read

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12. Ogusanya & anor. v. Arab Bros. Ltd. (1952) 14 W.A.C.A., 107 at p. 108, per Coussey, J.A.

together with the Township Ordinance and that the landlord could not act upon the abatement notice to evict them without seeking the interposition of the Court to order that possession be delivered up to enable the landlord to comply with the notice. The W.A.C.A. accepted this argument. Coussey, J.A. delivering the judgment of the Court said, inter alia,

> "I think the Ordinance enjoins, I would say almost expressly enjoins, a landlord to apply for and obtain an Order of the Court upon the notice of abatement, as well for his own protection as for the safeguard of the tenant's rights ..... In my opinion, therefore, the above provisions of the Increase of Rent (Restriction)Ordinance are not swept away by a Town Council notice of abatement; the defendants do not attract any immunity by virtue of the notice, and there was a trespass by the defendants in evicting the plaintiffs without an Order of the Court." 13

With respect, this is a correct conclusion. It might be added that if the contractual tenancy is still subsisting the landlord must include in his prayer a request to determine the tenancy if this is necessary.

The provision of the Nigerian Statute is, again, different from that of the English enactment in this respect because under the English Rent Acts an owner of premises in respect of which a closing order has been made under the Housing Act, 1957,[14] may obtain possession without complying with the requirements of the Rent Acts.

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13. at 14 W.A.C.A., at p.109.
14. S.188 (1).

9. Substantial Repairs.

An Order for possession could be made where "the premises require substantial repairs on account of which it is necessary for the tenant to vacate possession."[15] The Court may, however, impose a condition for the return of the tenant when the repairs are completed.[15]

This provision is ambiguous as it stands because it seems that whenever a premises requires "substantial repairs" the landlord could apply for possession whether the repairs are to be carried out or not. It is submitted that the landlord must show that he intends to effect the repairs and that his seeking possession is based on the fact that the tenant must vacate if the repairs are to be effectively carried out.

The word "substantial" means considerable or big.[16]

To "repair" means to put right[17] or to make good defects, including renewal where necessary.[18] Repair always

15. Rent Ordinance, Second Schedule, para (h).
16. Palser v. Grinling (1948) 1 A.E.R.1, XXX H.L.; Atkinson v. Bettison (1955) 3 A.E.R. 340: putting in of a new front held not substantial.
17. Police v. Oguluga (1952) 20 N.L.R.44, per Bairamain, J.
18. cf. Inglis v. Buttery & Co. (1878) 3 App.Cas.552 at p. 579, per Lord Blackburn. Lurcott v. Wakely & Wheeler (1911) 1 K.B.905 at pp.922, 924, C.A. per Buckley, L.J. O'Neill v. Coffin (1920) 20 S.R.N.S.W. 264 at pp.268, 269, per Street, C.J. (Australia). Graham v. Markets Hotel Pty Ltd. (1943) 67 C.L.R. 567 at p. 579 per Latham, C.J. (Australia). Re Church of St. Jude (1956) S.A.S.R. 46, at p. 53 per Hannan, J. (Australia).

involves restoration by renewal or replacement of subsidiary parts of a whole;[18] it is the making good of remediable defects,[19] a putting right that which has gone wrong.[20] "Repairing" does not mean preventing some future fault[1] but as Pearson, J. said in an English case,

> "work does not cease to be repair work because it is done to a large extent in anticipation of forthcoming defects or in rectification of merely incipient defects, rather than the rectification of defects which have already become serious. Some elements of anticipation is included." 2

It seems that if the landlord's reason for seeking possession is to reconstruct the premises, then he cannot proceed under this paragraph because "to reconstruct" means "to rebuild". In deciding whether what is to be done amountsto repair or to reconstruction the quantum of physical demolition and building work must be looked at as a whole, judging the difference between the premises as they are and what they will be after the alterations.[3] In every case where the landlord seeks possession under this head the repair must be substantial.

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18. See previous page.
19. London & N.E. Ry. Co. ve Berriman (1946) A.C. 278 at p. 294, per Lord MacMillan.
20. Cade v. British Transport Commission (1958) 2 A.E.R. 615, at p. 698, per Viscount Kilmiur, L.O. cf. Day v. Harland & Wolf Ltd. (1953) 2 A.E.R. 387, at p.640 per Evershed, M.R.
1. London & N.E. Ry. Co. v. Berriman, supra. at p.307, per Lord Porter.
2. Day v. Harland & Wolf Ltd. supra, at p. 388.
3. cf. Joel v. Swaddle (1957) 1 W.L.R.1094; Bewlay v. British Bata Shoe Co. (1959) 1. W.L.R. 45.

It is submitted that the landlord is not the sole judge for the purposes of this paragraph.[4] The Court must be satisfied that the premises require the repairs contemplated not merely that the landlord wishes to carry out some repairs. He must satisfy the Court, too, that the work of repair is intended to be done either by himself personally, or by his servants or agents or by building contractors.[5] He must prove a state of affairs which, under normal circumstances, he will be able to accomplish: it must be a firm, settled intention to repair -one not likely to be changed once he obtained possession.[6] Further the landlord must also satisfy the Court that the repairs cannot be carried out without the tenant being ejected. If the court is satisfied on these points and thinks it reasonable to make the Order, the tenant cannot upset the decision on the ground that he was willing to give the landlord unspecified facilities for the work to be done. The test is, assuming the work of repair could be

4. Under the English L. & T.A. 1954, S.30 (1) (f) the landlord is the sale arbiter of his desire to reconstruct a premises: See e.g. Ireland v. Taylor (1948) 2 A.E.R.450; Fisher v. Taylors Furnishing Stores (1956) 2 A.E.R.76.
5. cf. Gilmour Caterers v. St. Bartholomew's Hospital (1956) 1 Q.B. 387. Cafeteria (Keighley) v. Harrison (1956) 168 E.G. 668.
6. Fisher v. Taylors Furnishing Stores Ltd. (1956) 2 A.E.R 76 and Asquith, L.J. in Cunliffe v. Goodman (1950) 2 K.B. 237 at p. 253, approved in Betty's Cafe v. Phillips Furnishing Stores (1959) A.C. 20. See also Denning, L.J. in Reohorn v. Barry Corporation (1956) 1 W.L.R. 845 at p. 849.

done at all, could it in common sense reasonably be done as contemplated if the tenant had been allowed to exercise his rights as one lawfully occupying the premises.[7]

If an order for possession is made, it will not be set aside on appeal simply because the tenant was suspecting the good faith of the landlord's application or that the repairs were in the private interests of the landlord (as opposed to public interest) for there is nothing in the paragraph which requires that public interest should be a factor in considering whether ejectment will be ordered or not so as to enable the landlord to proceed with the repairs.[8]

10. Required by the Landlord for occupation.

An order for possession could be made against a tenant if "the premises are reasonably required by the landlord for occupation for

(i) himself; or

(ii) any son or daughter of his over eighteen years of age; or

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7. cf. Evershed, M.R. in Whittingham v. Davies (1962) 1 W.L.R. 142 at p. 148.

8. See Verity, Ag. J.A. in Aschkar v. Samuah & anor. (1957) 2 W.A.L.R. 264, at p. 267 (Ghana).

(iii) his father or mother."[9]

An order will not be made on this ground if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by making the Order than by refusing it.[10]

Unlike the provision in the English Rent Act, a person who became a landlord by purchasing the reversion could apply for possession under this head immediately the purchase is completed.

The onus is on the landlord to prove that he is acting reasonably and in good faith in requiring possession.[11] He has to show that he genuinely needs the premises at the present time and not merely that he prefers it to, or that it is more convenient than, other premises available to him.[12] The landlord may, however, reasonably

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9. Rent Ordinance, Second Schedule, para. (1)
10. ibid. proviso. The paragraph does not contain any restriction similar to that imposed by the English Act on a "landlord by purchase" - see 1957 Act, 6th Schedule, para.21 - landlord by purchase on or by Nov.7, 1956; 1933 Act, 1st Schedule, para.(h) - landlord by purchase on 11th July, 1931.
11. Breedy v. Khalife (1952) 20 N.L.R. 91, at p.92, per de Camarmond, S.P.J. cf. Epsom Grand Strand Association Ltd. v. Clark (1919) 35 L.T.R. 525, C.A.
12. Aitken v. Shaw (1933) S.L.T. 21 at p.22, per Sheriff Blades, K.C. (Sh. Ct.).

require premises for occupation by himself even if he is occupying other premises [13] or even where he intends to increase his income by sub-letting part of the accommodation,[14] or where he intends to make some repairs or alterations before moving in.[15]

> "The words 'reasonably required' connote something more than desire, although, at the same time, something much less than a necessity will do." [16]

The Nigerian Rent Ordinance applies to every kind of building in which people dwell or carry on business; therefore, if a landlord reasonably requires the premises for the expansion of his business, it will be wrong in principle for the trial Magistrate to dismiss his application merely on the ground that he has a living accommodation elsewhere, or that the tenant owes no rent. The landlord is not required to show that he wants to occupy the premises as his residence: if he requires the accommodation for the expansion of his business it is just as valid as if he wanted it for occupation as his residence.[17]

If the landlord is seeking possession on the ground that the premises are required for occupation for "his

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13. Neville v. Hardy (1921) 1 Ch. 409.
14. Sheppard v. Collins (No.2) (1942) lr. Jur. R.55.
    M'Intosh v. M'Cracken (1949) S.L.J. (Sh.Ct.) 51.
15. Mac Killop v. Cameron (1949) S.L.T. (Sh. Ct.) 49.
16. per de Comarmond in Breedy v. Khalife supra, at p.92.
17. See Gregg, J. in Adebajo v. Odunlami (1949) 19 N.L.R. 55 at p.56.

father or mother" it does not mean that the phrase "his father or mother" must be construed disjunctively and that the premises must be required for either but not for both of them. It would be wrong to assume that the legislature intended a landlord to give shelter to one of his parents who was alone and in need of help and assistance but not to both parents.[18] The sub-paragraph will be satisfied if the landlord reasonably required the premises for occupation by his father and/or mother; a fortiori, if the landlord sought possession on the ground that the premises are required for himself and any son or daughter of his over 18 years of age and his father and/or mother, the Court may make an Order if it is considered reasonable to do so regardless of the fact that the provisions of paragraph (i) are construed both disjunctively and conjunctively.[19]

It is submitted that an adopted son or daughter will qualify as "son" or "daughter" of the landlord under this paragraph but a step-son or a step-daughter will not. Similarly, a step-father or step-mother will not qualify as the father or mother of a landlord[20] although the adoptive parents will qualify.

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18. cf. de Comarmond, S.P.J. in Breedy v. Khalife, supra.
19. Fawaz v. Nabban (1952) 14 W.A.C.A.226.
20. Judd v. Smith (1952).

It is obvious that "son" or "daughter" means legitimate son or daughter by the law of Nigeria. Therefore if a man who married by native law and custom purports to marry another woman under the Marriage Ordinance during the subsistence of the customary union, the purported Ordinance marriage will be invalid and the children can not be legitimate under the general law. As the Ordinance marriage is void, the status of the children will be regulated by the customary law and if they are legitimate under this law (e.g. because they have been acknowledged by their father) then they will qualify as "son" or "daughter" under the paragraph.

If, again, there is a subsisting Ordinance marriage and the husband purports to marry another woman by native law and custom, the customary marraige will be void and any children born under it will be illegitimate.[1] The father, therefore, cannot apply for possession on the ground that the premises are reasonably required by any child of such customary union [2] nor, if such a child is

1. Shang v. Coleman (1960) J.A.L.161, Onwudinjoh v. Onwudinjoh (1958) 2 E.N.L.R.1.
2. If, however, the father had illegitimate children before the Ordinance marriage and recognised them as his children, they will qualify as legitimate children for whom the premises could be required.

the landlord, can application be made that the premises are required for the occupation of the "father", though it could be made if it be for occupation of the mother.

Greater Hardship.

If the court is to make an Order for possession under the paragraph, it must be satisfied that greater hardship would not be caused by making the order than by refusing it.[3]

The burden of proving that it is reasonable to make the Order is on the landlord but that of establishing greater hardship is on the tenant.[4] If there is evidence showing hardship on both the landlord and the tenant, the trial court is the conclusive judge of where the greater hardship lies.[5]

The existence of alternative accommodation is a factor to be taken into account in deciding the question of greater hardship. This is quite different from the requirement of S.13 (1) (b) of the Rent Ordinance concerning alternative accommodation. Under this paragraph

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3. Rent Ordinance, Second Schedule, para.(i) proviso.
4. Breedy v. Khalife (1952) 20 N.L.R.91, at p.92, per de Comarmond, S.P.J. Adebajo v. Odunlami (1949) 19 N.L.R. 55, at p.56, per Gregg, J. Fawaz v. Nabban (1952) 14 W.A.C.A. 226 at p.228, per Coussey, J.A.
5. cf. Holden v. Cook (1944).

wrongful neglect of the tenant to accept such accommodation (if it is no longer available at the time of the trial) is a factor to be considered by the trial judge.[6] But (it is submitted) the Court may make an order under the paragraph even if no alternative accommodation is available provided it is reasonable to give the landlord possession.

On the other hand, if there is alternative accommodation the Court will not be bound to make an Order but must take all the existing facts into account in considering the question of hardship including the effect of the removal on the business of the tenant or the landlord for if the new premises looked like "a den" so that the public would not unreasonably conclude that a strange change had overcome the tenant's or the landlord's circumstances if he were obliged to move into it, then the accommodation will not only be unsuitable but the moving of the business will be a cause of hardship.[7]

The court is bound, too, to consider hardship to all those who would be affected by granting or refusal of the order, including wards,[8] "relatives, dependants, lodgers, guests, and strangers within the gates".[9] Due regard

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6. Holden v. Cook, supra.
7. Fawaz v. Nabban, supra; Ilorin v. Fagbo (1949) 19.N.L.R. 40.
8. Ilorin v. Fagbo, per Ames, Ag. S.P.J.
9. Olorunkoje v. Kokosu & anor. (1953) 20 N.L.R.118, at p. 120, per de Comarmond, S.P.J. obviously citing Asquith, L.J. in Harte v. Frampton (1948) 1 K.B. 73, at p.78.

will also be given to the status of the persons affected by the order and their proximity to the landlord or the tenant, as the case may be.[10]

Since the question of hardship is one which is eminently suited for the trial Judge to determine, his findings will not be disturbed on appeal unless no attention has been paid to the question or there was no evidence of hardship to support the findings.[11]

Appeals.

It is laid down that when a trial Court has decided the question of recovery of possession on any of the grounds discussed so far, then

> "either party .... may appeal from the decision of the Court to the appropriate court of appeal whatever may be the value of the subject matter in dispute." 12

Bairamain, J. has interpreted this provision as enabling no more than one appeal from the Court of first instance.[13] The learned Judge said,

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10. Olorunkoje v. Rokosu & anor. (1953) 20 N.L.R.118, at p.120.
11. Fawaz v. Nabban, supra, at p.228; Olokunkoje v. Rokosu and anor., supra, at p.120. per de Comarmond, S.P.J.
12. Recovery of Premises Ordinance, S.30, Italics mine.
13. Logios v. Custodian of Enemy Property (1949) 19 N.L.R. 34.

> "Had it been the intention to enable a further appeal to the W.A.C.A from the Supreme Court's decision on an appeal from a Magistrate the section would have gone on to say something like this: 'and either party to an appeal from a Magistrate to the Supreme Court may appeal from the decision of the Supreme Court on the appeal to W.A.C.A.'." 14.

With the greatest respect, this opinion is questionable because the word "court" in section 30, (as underlined above) construed in the light of the Interpretation Ordinance[15] cannot mean a single court: it would include all courts above the trial court. Further, under the High Court of Lagos Ordinance, S.50 (1),

> "Any person aggrieved by a decision of the High Court in any civil appeal from the Magistrate Court may appeal against such decision to the Federal Supreme Court in the same manner as if such appeal were from a decision of the High Court in the exercise of its original jurisdiction."

It is submitted, therefore, that today an appeal would lie right up to the highest court of the realm - that is, up to the Judicial Committee of the Privy Council.

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14. ibid., at p.35.

15. Now Cap.89 of the Revised Laws of the Federation of Nigeria, 1958, S.46 (b). Formerly Cap.94 of 1948, S.37 (b).

CHAPTER 9.

SUCCESSION TO THE RIGHTS OF LANDLORDS AND TENANTS.

1. General.

In Nigeria succession to the rights and duties of landlords and tenants is tied up with the law of inheritance of property generally. The existence of this law depends on the existence of private property and on the pattern of social organisation because (subject to succession to lesser interests held by individuals) as a learned writer observed,

> "Unless there is private property, owned and possessed by individuals, the question of inheritance hardly arises. For whereas an individual dies and his property, if he has any, has to be disposed of in one way or another, a group, such as a clan or tribe or family, does not die. Members die and are replaced by new members in the common[1] enjoyment of the property of the group. The property itself, however, never changes hands or needs to be disposed of. ...... the group is conceived of as the repository of the right to possession." 1a.

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1. There is strictly no "common enjoyment" of land held corporately by a group: see the term "community" pp. 73-74, supra.

1a. G.D.H. Cole, "Inheritance" in the Encyclopaedia of the Social Sciences, 1948 ed. Vol. VIII p. 35. See also Chief Bassey Ephraim in W.A.L.C., No.1047, Minutes of Evidence paras. 12,628 and 12,629.

The succession laws of Nigeria are very complicated because they are still partly based on the lingering sense of group ownership and partly on the complete freedom of disposition which is a feature of individualistic notions of property characteristic of the English-speaking peoples and which competes side by side with the customary idea that a man's wealth is intended to benefit his children and relatives. On the whole, however, the customary rules are precise, but as in other spheres, they are subject to changes owing to the changing nature of economy and the pattern of social organisations. The complication has not been very much resolved by the courts because the judges have, on occasions at least, while paying lip-service to the clear provisions of native law and custom, gone on in the next breath to contradict them by extending the principles of European law of property or the succession laws of one cosmopolitan locality in Nigeria to a whole tribe most of whom are yet untouched by the rapidly changing social structure. Such judicial legislation (for it is nothing else), wherever it exists, reveals an urgent need for co-ordinating the researches of social anthropologists with the enactments of the legislature and the decisions of the courts as well as for recording all the customary laws - for the benefit of all the people of Nigeria.

2. Succession in Customary Law.

Who are entitled to succeed? In order to determine who are entitled to succeed to rights created under a customary tenancy it must first be discovered whether the landlord or the tenant is an individual or whether it comprises a corporate group. Where either of them consists of a group, then, as already pointed out, the question of succession does not arise at all because the rights and duties acquired under the grant are exercisable by the members of the group for the time being, acting through its accredited representatives, whether the representatives be customary headmen, chiefs, Emirs or a statutory body.[2]

Where the grantor or the grantee is an individual, a general rule applicable to all the tribes in Nigeria is

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2. In the Western Region, e.g., under the Communal Rights (Vesting in Trustees) Law, 1958, SS.4, 5, 6 and 10, the Ijebu-Ode District (Ijebu-Ode Communal Lands) Trust Instrument, W.R.L.N. 220 of 1960, vested in trustees (who are persons for the time being holding certain customary offices) all rights in or over land exercisable on behalf of the Ijebu-Ode community by any Chief or Chiefs or any other persons, including the right to lease and accept surrender of leases. Similar vesting instruments exist elsewhere in the Region.

that succession is traced almost exclusively through males[3] and it is the children of the deceased[4] who are entitled to succeed to his rights and duties. In strict native law and custom, it is generally the sons[5] of the

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3. Anderson, Islamic Law in Africa, pp.185, 189; Basden, Niger Ibos, pp. 267-8.
   Bradbury, The Benin Kingdom, 1957, p.77; Coker, Family Property, p.224.
   Gunn, Peoples of the Plateau Area of Northern Nigeria, p.127-8
   Gun, Peoples of the Central Area of Northern Nigeria, p.127-8.
   Harris, "Economic Aspects of Life among the Ozuitem Ibos", Africa, 1943-4. Vol.V. No.14, pp.12-23; 302-334.
   Lloyd, P.C., "Some Notes on Yoruba Rules of Succession and Family Property", (1959), J.A.L. 7.
   Meek, Land Law and Land Administration in Nigeria and Cameroons, p.179.
   Meek, Tribal Studies in Northern Nigeria, Vol.1, 1931, p.106.
   Rowling, Plateau, para.13; Green, Land Tenure in an Ibo Village, p.11.
   Talbot, The Peoples of Southern Nigeria, Vol III, 1926, p.677.

4. W.A.L.C., Minutes of Evidence, para. 13,030.
   Green, ibid.; Lloyd, ibid.; Basden, ibid.; Talbot, ibid. Oloko v. Giwa (1939) 15 N.L.R.31; Adeseye v. Taiwo (1956) 1 F.N.L.R. 84. Salami v. Salami (1957) W.N.L.R.10; Sheffi v. Williams (1892) R.C.J.19. Re Sapara (1911) Ren 605 at p.606.
   See also Meek, Tribal Studies, supra, Vol. III, p.421; Dennett, R.E., Nigerian Studies, 1910, p.206; Rowling, Ondo, para 71.
   Ward-Price, Land Tenure in Yoruba Provinces, para.68, 76; Chubb, op.cit., paras. 92, 96.

5. Cole, Zaria, paras. 64, 113. Appendix D; Niger, para. 76. Anderson, op.cit., p.186. Bradbury, op.cit. pp. 97, 152. Meek, Tribal Studies in Northern Nigeria, Vol.1. p.106. Omoniregun v. Sadatu (1888) R.C.J.15, Re Hotonu (1892) R.C.J.18.

of the deceased who succeed to rights in land because daughters were expected to be married out; accordingly women's rights were limited to inheritance of feminine articles[6] and goods.

The decision as to who are entitled to be called the children of the deceased should depend entirely on customary law: they should include not only the issue of the deceased under a lawful marriage but also children born out of wedlock if they are acknowledged by their natural father as his children. It is submitted that they should include children born under a void christian or ordinance marriage because although such children may be illegitimate under English law or under the Ordinance, the status of the children in this case is determined by customary law under which they are legitimate. If, for example, a man who is validly married by native law and custom purports to marry under the Marriage Ordinance, the marriage is void but the issue will still be legitimate since their father recognises them as his children by customary law. It would be otherwise if the Ordinance marriage preceded the customary union.[7]

Unless it can be established that the grantee has

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6. Cole, Zaria, para.64; Anderson, op.cit. p.86; Gunn, Plateau, p.86.
7. Orwudinjoh v. Onwudinjoh (1957) 2 E.N.L.R.1. Coleman v. Shang (1961) 21 N.L.R. 562, (Ghana).

only a life tenancy personal to himself alone, once a man's children have been determined they have a legal right to succeed to their father's tenancy and a landlord cannot take advantage of the tenant's death to impose new condition on the children[8] or to recover the land capriciously.[9] Where the children are too young to be able to control the land effectively the elder brother of the deceased (or if he has no brothers the head of his family) will take over management of the property on their behalf[10] but the children have a right to compel him to restore any property which he has misapproriated though, in practice, such a right is rarely exercised because of the social duty to keep family quarrels out of the courts.[11] In some case, however, a widow acting on behalf of her children can resist the right of a brother or other male relative to take care of the land and if she could produce very cogent reasons for her stand and convincing evidence of her ability, a customary tribunal (and, no

8. Chubb, op.cit. para.96.
9. cf. Cole, Zaria, Para.80.
10. Meek, Law and Authority in a Nigerian Tribe, p.322 Bradbury, op.cit. p.152. Such a brother must, of course, be a native of the place where the land is question is situate.
11. cf. Lloyd, P.C., "Some Notes on Yoruba Rules of Succession" in (1959) J.A.L. at p.14.

doubt, the High Court too) will empower her to administer the land on behalf of her children. The Court will not give her such powers merely because she asked for them or because she does not get on well with the brother-administrator if evidence of his mismanagement cannot be adduced.

In many cases the children of a deceased tenant occupy the land corporately as family property but sometimes the land is partitioned and generally they inherit equal shares though as a matter of respect, the eldest son is given a larger share [12] and in all cases, choosing the partitioned portions is by seniority in age. Partitioning resulting from the death of a principal land-holder has led to excessive fragmentation which the governments of Nigeria are finding to be progressively detrimental to good land use.[13]

The brothers of a deceased tenant have no customary right of succeeding to the tenancy unless they were in occupation of the land with their deceased brother.[14] The exclusion is due to the fact that their character was probably unknown to the grantor and, therefore, if they be allowed to succeed, it will amount to forcing the land-

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12. Green, Ibo Land Tenure, p.12; Bradbury, The Benin Kingdom, p.120. Rowling, Ondo, para.24; Ajisafe, op.cit., Chap.IV, paras 5, 11, 23-7.
13. See eg. Daily Times, Thursday, 15th March, 1962, p.1.
14. Meek, Law & Authority in a Nigerian Tribe, p.322.

to accept new tenants whose behaviour may be detrimental to the well-being of the community.

A widow has no customary right to inherit the land held by her deceased husband either as landlord or as tenant but she is entitled to stay in the matrimonial home. Similarly, the daughters of a deceased tenant have a right to continue in possession of the land held by their father until such a time as they should marry or die when the land would revert to the grantor.[15]

Where a tenant married more than one wife and each wife had children surviving him the land occupied by the tenant would devolve on all the children as a corporate group but if it be decided to partition the land, then division will be carried out by "houses".[16] In general,

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15. Bohannan, Tiv Farm and Settlement, p.31.
16. In a polygamous family, the issu of each wife constitute a "house" (Yoruba - idi; Ibo-Mkpuke), so that in practice there are as many houses as there are wives with sons. A house with only one son ranks equally (and shares equally) with a house with ten sons.
See Green, Land Tenure in an Ibo Village, p.12; Rowling, Ijebu, para.105. Folarin, The Laws and Customs of Egbaland, Chap.31.
Lloyd, "Some Notes on the Yoruba Rules of Succession" (1959) J.A.L.7.
Lloyd, Yoruba Land Law, 1962, pp.280-1.
Dawodu v. Danmole (1962) 1 W.L.R. 1053, P C.

if a house has no male children, it will not be entitled to participate in the partition of the land: the head of the senior house will be responsible for maintaining the women until they marry, although, of course, they are entitled to reside in the buildings which they had been occupying before the death of the tenant. If a house becomes extinct, its share of the land does not necessarily revert to the landlord but falls into residue to be used jointly by the surviving houses.

In spite of the partitioning (which is treated by the landlord as an internal affair of the issue of the deceased) the duties owed to the landlord are owed by all the houses as a corporate group and in the case of tribute the houses contribute equally irrespective of their size.

The rights of a deceased landlord who had contracted a polygamous union devolve on all his issues as a unit but those rights are exercised by the eldest son on behalf of all the houses: he receives the customary dues which will be shared according to the number of houses and the exercises a general supervision over the land which is regarded by the deceased's children as "family

property".[17]

A widow cannot inherit the land held by her deceased husband[18] but she has a right to stay in the matrimonial home[19] and to be allocated sufficient land for farming (if she has nonsons) or to be re married to the head

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17. The term "family property" is ambiguous; it could connote at least three things:
    (i) the land of a deceased man which the children of his nuclear family (i.e. a house) use together without partitioning;
    (ii) Such land occupied or used by the issue of a polygamous marriage - i.e. by children of all the houses of a deceased man; and
    (iii) The land in which the issue, as members of a wider family-group to which their father belonged, share some interest with other agnatic relatives of the deceased.

18. cf. Rowling, Ijebu, para.115; Ondo, para.124(a). See also Omoniregun v. Sadatu (1888) R.C.J.15. cf. with the native law and custom of the Cambia Protectorate as stated by Miles, J. in N'jie v. N8jie (1956) 2 W.A.L.R. 70.

19. Omoniregun v. Sadatu, supra. See also Basden, Niger Ibos, p. 267.

(or any other member) of the family.[20] If she has any son she is maintained out of her son's share of the estate or by the guardian of the son who would either become her guardian as well or re-marry her.

A general rule is that if a married woman holds land in her personal capacity, either as a landlord or a tenant, on her death her rights in the land will pass to her children,[1] not to her husband. If, however, she died

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20. It is not correct in law to say, as many anthropologists maintain, that a woman could be inherited. In law there are at least three courses open to her:
    (i) She could choose to be remarried to the principal successor to the deceased (unless the successor be her own son) or to the deceased's nearest male relative;
    (ii) She could go back to her own home and get re-married to someone else;
    (iii) She could remain as the wife of the deceased in the matrimonial home, maintaining herself and her children from any portion of the deceased's estate granted to them.

    If she adopts the first alternative her former issue will not become the children of the successor as Elias incorrectly asserts of the Ibos in his "Lugard Lectures". They will continue to be the children of the deceased and only those born after the new union will become the children of the successor, the new husband. If she chose the second course the bride-price payable on her re-marriage will be a refund of that paid by her deceased husband. If she chose the last course any children born out of some casual union with other men will become the children of the deceased.

1. Ward-Price, Land Tenure in the Yoruba Provinces, para.99. Meek, Law and Authority in a Nigerian Tribe, p.323. Bradbury, The Benin Kingdom, p.47; Nwugege v. Adigwe. (1934) 11 N.L.R.134.

without any issue surviving her, any land she acquired <u>before</u> marriage will pass to her brothers but if it was acquired <u>during</u> marriage, it will pass to her husband.[2]

The principles of customary law stated so far are subject to local variations. Thus, although the general rule of patrilineal succession exists, there are some societies in which succession is matrilineal. For example, among the Verre of Adamawa Emirate matrilineal succession is the normal rule: a man's compound with his farm and other property passes to the most senior of his sister's sons who then becomes responsible for the younger children of the deceased.[3] Similarly the Longunda are matrilineal but their neighbours the Kanukuru are patrilinial[3]. Other matrilineal tribes in Norther Nigeria include the Igarra of the Benue Province [4] and the Jibu who practice matri-local marriage.[5] Among the Jukun succession to property is matrilineal but inheritance of chieftaincy is patrilineal because, according to them, "if a sister's son were

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2. eg. at Ena in Benin Division, Bradbury, <u>ibid</u>., p.97. See also Meek, <u>ibid</u>., p.324. Contrast the position among the matrilineal Akans of Ghana; Allott, <u>Essays</u>, p.230.
3. Meek, <u>The Northern Tribes of Nigeria</u>, p.419.
4. Basden, <u>Niger Ibos</u>, p.267; Nadel, <u>A Black Byzantium</u>, p.32
5. Meek, <u>A Sudanese Kingdom</u>, p.100.

allowed to succeed to the throne, lions would invade the town".[6]

In Eastern Nigeria there exist within the patrilineal Ibos matrilineal groups in Ohafia and Abriba in the Bende Division[7] and in Afikpo, Edda, Unwana, Amaseri, and Okpoha of Afikpo Division.[8] Among the Yakö of Calabar Province a man's agnatic relations succeed to his land but his matrilineal kinsmen enjoy definite rights over crops and trees growing on the land. Usually a son succeeds his father in the controlling of the family ritual.[9]

Among the predominantly patrilineal Yorubas of Western Nigeria descent may be traced in either the male or female lines in Ijebu or Ondo Provinces [10] but as Rowling said,

> "where female rights in the land did emerge their usual cause was the failure or threat of failure in the male line. In the later case a female enjoyed claims less on her own standing than as a potential mother of heirs or as trustees for them." 11

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6. Meek, ibid. p.37.
7. Basden, Niger Ibos, p.268; Meek, Land Law and Land Administration in Nigeria, p.179.
8. Meek, Land Law and Land Administration, p.179.
9. Daryll Forde, "Land and Labour in a Cross River Village" (1937) 90 Geog. Journal, p.45.
   " " Marriage and Family among the Yakö of S.E. Nigeria, 1941, pp.3, 45, 56, and 70.
10. Lloyd, P.C., Yoruba Land Law, 1962, pp. 33-4.
11. Rowling, Ijebu, para.111. cf. paras.135 and footnote 139 to para. 110. As the same writer explained elsewhere, the rights of daughters in this respect depend on the degree of filial relations they have maintained with their deceased father: Ondo, para 24 (b).

In the Islamic Emirates of Northern Nigeria, Moslem rules prevail and recognize the right of all children to succeed irrespective of their sex [11a] but this orthodox principle is modified by native law and custom so that, in practice, only sons succeed and daughters are compensated.[12]

Further, although in general all sons succeed to the tenancy and other property of their deceased father, in some places only the first son succeeds to the land. Thus among the Binis and the Ishan of Western Nigeria movables pass to all sons but immovable property is inherited by the senior son who must, however, make good his claim by bearing a greater part of his father's funeral expenses.[13] On the death of a grantee who is not a Bini this same rule applies but attempts to limit succession only to the children born to a man of Bini wives have been dismissed as inquitable.[13] The rule of primogeniture applies, too, to the Biroms[14] and the Nupe [15] of

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11a. This partly depends on whether the succession comes before an Alkali or not.
12. Anderson, op.cit., pp.185-9.
13. Bradbury, The Benin Kingdom, pp.46-7, 52, 77, 79. In Benin the rule does not apply in full to any house occupied by the deceased: Rowling, Benin, paras. 18, 22-24.
14. Gunn, Peoples of the Plateau Area of Northern Nigeria, p.86.
15. Nadel, op.cit., p.88.

Northern Nigeria and to some Ibos [16] and Efik[17] of Eastern Nigeria. The extent of application of the rule varies: in some places if the eldest son died before the father, the next eldest son will succeed, in other places it is the first male issue (not the brother) of the eldest son who would succeed. Whoever succeeds on this principle is legally bound to look after the interests of the dependants of the deceased.

In a few places the principle of primogeniture gives way to ultimogeniture. Thus among the Marki Verre of the Sardauna Province, the youngest son inherits his father's real and personal property.[18] The reason for the rule is that as soon as a son is old enough to marry he has to leave his father's compound and establish a compound and farm of his own but the youngest son continues to live with and help the father till his death when all the property, including the father's social position, would devolve on him.

When a man dies without issue, his rights in any land which he might have held as landlord will pass to his

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16. Basden, Niger Ibos, p.267; Meek, Law and Authority in a Nigerian Tribe, p.320.
17. Forde, D & Jones, G.I., The Ibo and Ibibio - Speaking Peoples of South-Eastern Nigeria, pp. 75 & 76.
18. Meek, Tribal Studies in Northern Nigeria, Vol.1., p.421.

brothers, the uterine brothers being preferred to half--brothers. Among the Ibos all brothers generally inherit such rights jointly but in some parts of Ibo land they pass to the eldest brother only.[19] Among the Yorubas it is an established customary rule that property cannot pass from a deceased brother to a brother or other kinsman older than himself.[20] This, it is said, should obviate the risk of the older brother using his wider experience to undo his junior relation in order to inherit his wealth.

Where a deceased tenant is not survived by any issue, a brother who, to the knowledge of the landlord had been using the land with him could succeed to the tenancy. If he had not been using the land with the deceased tenant, it will then revert to the grantor. In Uromi in the Benin Division the Onogie (i.e. the village chief) will inherit the property of a man who dies without sons.[1]

(B) Dispositive Succession.

Although generally succession according to customary law is intestate yet in many cases the deceased could

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19. Basden, Niger Ibos, p.267-8; cf. Bradbury, The Bening Kingdom, p.77; and Lloyd, note 20, infra.
20. Lloyd, "Some Notes on Yoruba Rules of Succession", (1959) J.A.L.7, at p.19.
1. Bradbury, ibid.

influence the course of succession[2] either by making outright grants in his lifetime, or by making nuncupative wills (or today, written documents) relating to his property, or even in some limited cases by disinheriting a child who would normally be entitled to succeed. Inheritance of property in this way may be termed "dispositive succession".

If the deceased's wishes are to be respected they must not offend native law and custom for as the Ibos say "where a deceased man had arranged for the devolution of his property the living may upset the arrangement" - if it contravenes the rules of customary law [3]. As Gunn says of the Biroms of Northern Nigeria, "there is no secrecy ..... there are no surprises." [4] Where a landlord wishes to dispose of his rights in favour of a stranger, either during the landlord's lifetime or on his death, the transaction must take place openly in the presence of witnesses. As a tenant cannot (in customary law) create interests in the land that he occupies in favour of strangers, his powers of affecting the devolution of

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2. Lloyd, ibid., at p.17; Anderson, Islamic Law in Africa, p.216; Gunn, Peoples of the Plateau Area of Northern Nigeria, p.86. Rowling, Ondo, para. 24; Coker, op.cit., p.220; Meek, Law and Authority in a Nigerian Tribe, p.322.
3. The actual expression is, "Onye nwụrụ anwụ kechaa ekpe, ndị dị ndụ ekeghaa".
4. Gunn, ibid.

the tenancy is limited. He cannot influence the course of succession to the tenancy in such a way that a person who has not been using the land with him can inherit the tenancy. He may indicate what portion of the land that each of his children will occupy and can declare which of them he has disinherited. Dishersion must be due to some gross misbehaviour[5] by the child concerned; must take place openly before witnesses and the child must be informed of this within a reasonable time of his father's pronouncement so that, if possible, reconciliation may be effected and the pronouncement revoked. This is the limit within which dispositive succession can apply to customary tenancies.

The general principle of Islamic law is that on the death of a man, his property will be

> "divided into numerous fractions[6], according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when, the reason is, not that the testator has the power to defeat the law of inheritance, but the heirs, having become owners of the property, could deal with it as they liked, and therefore ratify the act of their ancestor. No Mohammedan is allowed to

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5. eg. persistent theft; see Chief Ephraim in W.A.L.C. para.12,858.
6. But see the Land Tenure Law, No.25 of 1962, S.30(b) which prohibits sub-division without the prior consent of the Minister.

> make a will in favour of any of his heirs and a bequest to a stranger is allowed only to the extent of one-third of the property." 7

Under the Koran a husband or a wife was made an heir; females and cognates were empowered to inherit; parents and ascendants were given specific moieties even where there were surviving male ascendants; generally females were entitled only to half the share of males and exclusion could be made on grounds of religion[8] but such exclusion will now be illegal both on the general principles of equity[9] and under the Native Court Law.[10] Fyzee (referring to Pakistan) says that the rule may be stated thus:

> "Keep the bulk of the property for the agnatic heir ("asabat") the persons whose rights were always recognised by tribal law, and respect the Koranic provisions by giving specific shares of the persons mentioned in the Koran." 11

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7. Per Mahmood, J. in Gobind Dayal v. Inayatullah (1885) 7 All at p.782-3 (India).
8. Assaf Fyzee, Outlines of Mohammedan Law, 2nd ed., pp.321, 334.
9. See Mallam Aba v. Mary T. Baikie, Suit No.K/20A/1943 where Ames, J. sitting in the Kano Supreme Court set aside the findings of the Alkali Court on the ground that excluding a Christian daughter from inheritance because of her religion was contrary to natural justice; cited Anderson, op.cit., p.216, footnote 4.
10. S. 21 (3).
11. Fyzee, op.cit., p.338 "Asabat" consists of -
    (i) all male agnates
    (ii) four specified female agnates: daughter, son's daughter how low soever, full sister; consanguine sister.

It may be said that a Moslem land-holder in Nigeria is subject to this rule and has very restricted powers of influencing the devolution of his property. Land (or rather the use of land) is inherited by those entitled under native law and custom but compensation is payable to the persons mentioned in the Koran. It is probably because of this that customary law has triumphed over Islamic law in matters of land tenure and succession.[12] Among the Yoruba moslems succession is governed entirely by customary law not at all by Islamic law[13], and, therefore, the deceased's power of affecting the course of succession is not abrogated by his religion.

(c) Administration of the Estate.

Under normal circumstances the estate of the deceased is administered by his eldest son if he has come to age but where he is still a minor administration is by the brother of the deceased, who is usually chosen at a family meeting.

Among the Ibos when a man dies the most urgent task is to arrange the public part of his funeral ceremony and for his burial which usually takes place within twentyfour hours from the death.[14] Mourning and other private funeral

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12. Anderson, op.cit., pp.189, 222.
13. ibid., p.223.
14. This is mainly the responsibility of the eldest son or if he is too young, the guardian.

rites take three native weeks (twelve days); after this period the senior son will start to administer the estate, paying the deceased's debts and recovering claims against his debtors. Funeral expenses are chargeable on the estate.[15] Transfer of rights in land held by the deceased will take place after one farming season from the time of the death.

Among the Yorubas the person responsible for the administration, called the babasinku [16], is normally the eldest son, if he is of age. Usually only those inheritors who contributed to the funeral of the deceased can succeed.[17] As in Ibo land, so among the Yorubas: distribution of the property of a man who married many wives is according to the "houses" surving him. [18]

Under the Maliki School of Islamic Law, although the person of the deceased is by no means considered to be totally extinct until his debts and obligations are discharged,[19] the estate devolves to his heirs from the moment of death but they can only distribute or transact with it after they have paid the deceased's debts.[20] Further,

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15. Meek, Law and Authority in a Nigerian Tribe, p.320.
16. Literally, father who buries a dead body.
17. Lloyd, op.cit. p.16.
18. Basden, Niger Ibos, p.267; Lloyd, ibid.
19. Mahmud, Muslim Law of Succession and Administration, p. 26.
20. Mahmud, op.cit., p.71.

although the Koranic share of each heir is well-known, the actual division of the estate is done by the Qadi or the partitioner (qasim), or by the heirs under mutual agreement.[1] In some casea a man may, in his lifetime, appoint an executor (called the wasi) who must see to his proper funeral and burial and who is responsible for calling in the assets, the payment of debts, and the distribution of the estate.[2] The Qadi HAS general supervisory jurisdiction over the estate and has the power to appoint or remove a wasi [3], to substitute a wasi for one already appointed, for example, where the previous wasi claims a debt against the estate. He could also appoint a wasi for a specific purpose, such as for minor heirs, for absent claimants, or for litigation.[4]

If the estate is insolvent, under customary law the successors will be fully liable for the debts of the deceased. Under Moslem law, in such a case, only the Qadi and the wasi can deal with it, not the heirs unless the latter have obtained the consent of the creditors[5]. If the estate is solvent the wasi must

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1. Mahmud, op.cit., p.79
2. Mahmud, op.cit., pp.144, 151.
3. A wasi appointed by the Qadi is called qa'im.
4. Mahmud, op.cit., p.145.
5. Mahmud, op.cit., pp.145, 170.

obtain the permission of all adult heirs to sell any part of it because in principle each heir is a personal representative of the deceased.[6]

The orthodox rules of Maliki law stated above are of limited application in the Moslem areas of Nigeria because of the influence of customary law but it is difficult to state precisely to what extent they apply in a certain area except that they do not apply at all to the Yoruba Moslems of Western Nigeria.

3. Judicial Application of Customary Principles of Succession.

It has been pointed out in Chapter 1 that, in all the Regions within the Federation, the High Court is empowered to observe and enforce native law and custom which is not "repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law for the time being in force". Under this provision, which has remained practically unaltered since 1876 [7], the Courts have regularly attempted to observe customary principles of succession but the judicial

6. Mahmud, op.cit., pp.169-70.

7. The application of the principle was much earlier, dating at least from 1843.

application has not always been uniform nor consistent with some evidence of customary rules obtained from extra--legal sources. The main reason for this divergence is because until very recently there has been no literature dealing with customary law and even those books that exist today are far from being comprehensive. Moreover, most of the reported cases deal with the customary rules applicable in the cosmopolitan city of Lagos where the social and economic conditions are far different from those observed in most of the country. Further, customary law is treated as a question of fact before the High Court, evidence of it must be given otherwise the claimant will fail.[8] This has led to each party to a dispute trying to get as many reputable men as possible to support his version of native law, leaving the judge to choose as best he may which of them to accept. How far the principles of native law stated above have been applied by the Courts will be seen from the following discussions.

A principle stated above is that succession to land held by a corporate group does not present any difficulty because the group continues to exercise the rights already vested in it, the head of the group at a particular time

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8. George v. Administrator-General (1955) 21 N.L.R.85.

retaining control on behalf of the members. This principle has been judicially recognised and is the _ratio_ of many decisions relating to the position of chiefs or other headmen as "trustees" holding the land they control on behalf of the community.[9] These cases show that the property devolves on the group as such, not on the members _pro rata_.[10] The customary head of the group acts in an administrative capacity in exercising the group's rights over the land.[11] As the defendant said in _Chief Omagbeni v. Chief Dore Numa_,[12]

> "I do not claim the land as my own, but in trust (13) for the Olus and Jekris. If an Olu (14) were appointed, I would hand up my staff at once ..... I represent the Olu because I am head and because I am paramount Chief. If I were not paramount Chief I would not represent the Olu." 15

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9. See eg. _Amodu Tijani v. Secretary, Southern Nigeria_ (1921) A.C. 399, _Odutan Onisiwo v. A.-G._ (1912) 2 N.L.R. 79, esp. p.82; _Chief Omagbeni v. Chief Dore Numa_ (1923) 5 N.L.R. 17, (1924) 5 N.L.R.212
10. _Ogunmefun v. Ogunmefun_ (1931) 10 N.L.R. 82; _Caucrick v. Harding_ (1926) 7 N.L.R. 48; _George v. Fajore_ (1939) 15 N.L.R.1.
11. _Inyang v. Ita_ (1929) 9 N.L.R. 84.
12. _Supra_
13. The word "trust" here has no legal connotation.
14. i.e. the legitimate Chief.
15. at p.23.

In cases of such corporate holdings any breach of the terms of the tenancy will be enforceable against the present members.[16] No member of the group can deal with the property without the consent of others.[16a] If any member purports to deal with it without authority the transaction will be set aside.[16b]

Another rule of customary law was that succession was traced almost entirely through the male line. This principle was acknowledged early in the history of Nigerian Courts and was accurately stated by the assessors who sat with Smalman Smith, C.J. in 1888 in the case of <u>Omoniregun v. Sadatu</u>.[17] The evidence on which the learned C.J. based his decision showed that the eldest son succeeds in the place of his father for his own benefit and that of the family but the son cannot sell the property without the consent of his own brothers. The court accepted the principle as laid down by the assessors who said,

> " If there be no son or male issue, the elder brother succeeds and if he be dead the younger brother and so on. If all the brothers be dead, the land descends to the eldest brother's male children; if they be dead, not to their issue (if any), but to the issue of the younger

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16. <u>Etim v. Eke</u> (1941) 16 N.L.R. 43.
16a. <u>Aganran v. Olushi & ors</u>. (1907) 1 N.L.R.67; <u>Johnson v. Onisiwo</u> (1943) 9 W.A.C.A. 179.
16b. <u>Adesheye v. Shiwonika</u> (1952) 14 W.A.C.A.86; <u>Onasanya v. Shiwonika</u> (1960) W.N.L.R. 166.
17. (1888) R.C.J.15.

> brother. Females cannot inherit land, they can only have the right to stay in the house. A female has no right to bring her husband to live in the family house, but she does not lose her right to return to it by marriage. Her children have the right". 18

This orthodox principle has been upheld by the Full Court in Lopez v. Lopez[19] where it was decided that under native law and custom both males and females acquire an interest in the family properly but that a female does not acquire the same rights as a male although her limited interests will entitle her to seek the protection of the Courts in respect of them. The case of Omoniregun v. Sadatu also illustrates the principle that where the rule of primogeniture applies, the successor assumes the responsibility of providing for the dependents of the deceased. The principles laid down therein are true not only to the Yorubas whose custom was involved but also to the Ibos and Hausas. The decision[20] of the same Judge in the following year must be read in the light of this judgment. In the latter judgment it was stated that -

> "Under the native custom as applicable to this case, the eldest brother of the deceased succeeds to the whole property of the deceased including his wives and his personal property

18. at p. 15, italics mine.
19. (1924) 5 N.L.R. 47.
20. In re Hotonu deceased. Ijilegbe & ors. v. Ajosseh (1889) R.C.J.14.

> so received, but may distribute or dispose of it as he pleases, controlled only by the moral obligation of doing right in the eyes of his relatives and friends." 1

This dicutm can only apply when the deceased has no children surviving him or when only females survive. In a case where any son is living the brother cannot succeed.

Another customary principle which can be deduced from the Omoniregun case is that it is the children of the deceased who succeed to his property. This rule has been recognised in a number of subsequent decisions[2] and was recently positively restated in the Federal Supreme Court by Jibowu, Ag. F.C.J. who said, inter alia,

> "It is quite clear from these two authorities (3) that real properties of a deceased person who had children surviving him go to his children, and not to [the children's] uncles, aunts, and cousins." 4.

In applying some of the principles of customary law the courts have modified some of the rules on grounds of equity. Thus in admitting the right of the children

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1. ibid. p.14, but see p.620 supra, for a repudiation of inheritance of widows.
2. e.g. Sheffi v. Williams (1892) R.C.J.19; Savage v. Macfoy (1909) Ren.504, esp. p.509; Re Sapara, (1911) Ren.605 at p.606; Oloko v. Giwa (1939) 15 N.L.R. 31.
3. The authorities referred to were Ajisafe's Law and Cus-
Macfoy (1909) Ren.504, esp. p.509; Re Sapara, (1911), Ren.605 at p.606; Oloko v. Giwa (1939) 15 N.L.R. 31.
4. Adeseye v. Taiwo & ors. (1956) F.N.L.R. 74 at p. 85, italics mine.

of the deceased to succeed the courts have held that <u>all</u> the children, regardless of sex, are entitled equally. This is a substantial departure from the rule established in the Omoniregun case and was finally conclusively laid down in Lewis v. Bankole[5], where it was decided that on the death of the founder of a family the "Dawodu" (i.e. the eldest surviving son) is the proper person to succeed to the headship of the family but on the death of the Dawodu the eldest surviving child of the founder, whether male or female, is the next in succession. The modification was further extended in Sule v. Ajisegiri[6] which laid down that where a partition of the deceased's estate takes place, all the descendants are equally entitled regardless of sex.

The recognition of the right of female descendants has been extended to a case where the parties were not fully related. Thus in Andre v. Agbebi[7] the question which arose was whether the deceased's half-brother by the same mother or his half sister by the same father was the proper person to inherit his estate as his next of kin. Webber, J. held that the uterine brother and the half-sister had equal rights to be considered the

6. (1937) 13 N.L.R. 146.
7. (1931) 10 N.L.R. 79, distinguished in George v. Administrator-General (1955) 21 N.L.R. 85.

next of kin to the deceased intestate and that they must succeed to the property in equal proportions.

All the foregoing cases relate to Lagos: it is difficult to state a customary principle on which some of them are based. In strict customary law, for example, the uterine brother in Andre v. Agbebi[8] should not have been considered at all. The judicial modification has, however, been extended beyond the Federal Capital. Thus in the recent case of Salami v. Salami & anor.[9] the plaintiff and the defendants were the only surviving children of one Salami Goodluck, a native of Abeokuta, who died intestate in the year 1927 leaving a house and farmlands in Abeokuta. Soon after the death of her father, the plaintiff, then about seven years old, was taken to Duala in the French Cameroons by her mother who was trading in that country and did not return to Abeokuta until 1953. She had received no benefit from the father's estate except some clothes and two chairs. She now sued her two brothers for an account and prayed for the partition of the property.

Irwin, J. accepted the evidence of the plaintiff's witness who deposed that at Abeokuta if a son and daughter properly performed the burial custom they were equally

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8. Supra.
9. (1957) W.N.L.R. 10.

entitled to share in their father's estate. The learned Judge then held that (a) the right of a child to inherit cannot be affected by his or her absence or minority at the time of the father's death; (b) the rules of succession under the native law and custom at Abeokuta are not different from these which appear to be well settled by a line of cases in which the parties were Yorubas, and consequently the Dawodu (i.e. the eldest son) is not entitled to a greater share than the other children and all the children are equally entitled regardless of sex.

This case illustrates a judicial application of two other principles: (i) that the right to succession among the Yorubas is established by participation in funeral expenses; (ii) that the customary allocation of a greater share of the estate to the first son is not founded on any right in law but on a mere social respect. A new principle can also be deduced: that is, that the right to succeed by those legally entitled should not be dependent upon the actual contribution to the funeral expenses (which should be met out of the estate) but that their share should be reckoned on the net value of the estate after deducting all expneses, funeral and otherwise. This seems to be reasonable application of judicial logic to the strict rules of customary law.

The customary rule governing the devolution of the property of a man who died intestate, having more than one wife, where each wife had children, was considered in the recent case of Danmole v. Dawodu[10]. The facts were as follows: One Suberu Dawodu, who at one time had four wives by each of whom he had a child or children, nine in all, died intestate in September 1940. He was survived by three of the wives and the nine children. Letters of administration to his estate were taken out by four members of the family, once coming from each wife and, consequently, representing the brach comprising the children by that wife, i.e. each "house".

The personal estate of the deceased and the rents of his realty were divided into four parts in accordance with the Yoruba customary law known as "Idi-Igi", giving each fourth to each house and taking no account of the number of children by each wife. All the parties agreed to this method which was then observed for some ten years after which time the Respondents (in the Federal Supreme Court) raised objection, contending that the property should be divided into ninths, each ninth going to a child of the deceased, per stirpes. This method of distribution

10. (1958) 3 F.N.L.R.46; sub.nom. Dawodu v. Danmole (1962) 1 W.L.R. 1053, P.C.

was known as "Ori-ojori".

The trial judge, Jibown, Ag. S.P.J. (as he then was) found that division into fourths was in accordance with native law and custom but held that the idi-igi custom was not applicable under section 17 of the Suppeme Court Ordinance because it was "repugnant to natural justice, equity and good conscience" and did not agree with the modern idea that the basis of distribution was the number of the children of the deceased intestate, which assured equal shares to all the children. He accordingly ordered a division of the rents into ninths.

On appeal, the Federal Supreme Court after hearing further evidence of the customary law called pursuant to the powers conferred by rule 30 of the rules of that Court, also found that -

(i) the relevant custom was idi-igi which was still in force and was the universal method of distribution except where there was a dispute among the descendants of the intestate as to the proportions into which the estate should be divided;

(ii) where there is such a dispute, the head of the family had to decide whether idi-igi or ori-ojori should be adopted and any such decision would prevail;

(iii) Ori-ojori was a relatively modern method of distribution adopted as an expedient to avoid litigation. The Federal Supreme Court, therefore, held that idi-igi should be adopted and that it was not repugnant to natural justice, equity and good conscience.

On a further appeal, the Privy Council held (inter alia) that there was no ground for interfering with the concurrent finding of fact that idi-igi was in full force and observance at the present time and there was no reason why it ought not to be applied to the estate of one who left children by his four wives.

Lord Evershed who delivered the judgment of the Council observed,

> "In thier Lordships' opinion the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not in a matter of this kind be readily equated with those applicable to a community governed by the rule of monogamy." 11

With the greatest respect, this judgment should be greeted as a welcome vindication of the rules of customary law which the trial judge tried to give some rude shock. There is no doubt that idi-igi is the prevailing system of succession in a plygamous household: it applies

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11. (1962) 1 W.L.R. at p. 1060.

equally to the Ibos[12] of the Eastern Nigeria as to the Yorubas of the West. It appears unfair that a "house" which has many children should share equally with another which has only one child. To this extent one could sympathise with Jibowu, Ag. S.P.J. But the learned judge did not seem to have realised that this system of division has it s compensating features: in customary law duties are borne according to houses, not per capita. For example, in a case of a contribution for family purposes, a house with one child pays exactly the same amount as a house with seven children. Such is the logic of native law!

Whether this system of affairs should be allowed to continue is beyond the taks imposed upon the Bench; the judges in execution of their duties cannot, under modern conditions become reformers of the law - it is the duty of parliament to change the law if the present social outlook favours such a change.

The principle governing the succession to the estate of a married woman in Iboland has been judicially stated in Nwugege v. Adigwe[13] in the following words:

> "(1) On the death of a married woman property which she had acquired before her marriage goes to her own family and not to her

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12. In Iboland such distribution is said to be according to "Nkpuke" or "Usekwu", literally meaning fire-place (in a kitchen) for cooking, each wife having her own such fire-place and kitchen.
13. (1934) 11 N.L.R. 134.

husband or his family but moveable properties acquired by the wife before marriage if taken by the wife to her husband's house go to the husband or his family on her death.

(2) Property acquired by a married woman after her marriage goes to her husband on her death.

(3) Where a man marries a woman who has a house, and lives with her as man and wife in that house, it goes to the wife's family on her death".

The last principle, is, however, a hypothetical proposition of native law and custom for marriage among the Ibos is patrilocal and it is unheard-of that a man marrying a woman would live with her in her house. In fact the Ibos would say that any man doing such a thing has committed an abomination.[14] The proposition suggests the modifying influence which changing economic and social conditions can exert on the principles of customary law. Today it is of great practical importance because it is becoming progressively possible for women to acquire as much property as (and in some cases more wealth than) their husbands.

The devolution of the wife's landed property should be understood in the light of a woman who acquired such property before marriage and apparently within or near to

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14. The expression would be, "O mere nsọ", or "o mere arụ."

her kinship group. If the property be acquired after marriage and it be situate within her family-group her own family will be able to claim it only if she died without any of her children surviving. If she has a child living on her death, the child is the lawful successor. Further if the property be situate outside her family group and was acquired after marriage, no member of her family would have a legal claim to it; in such an event the husband would be the legitimate successor. If the property is not disposed of during his lifetime, it will, on his death, devolve on the issue of the deceased wife, not on all his children generally, if he married more than one wife. This principle can be deduced from the decision of the Federal Supreme Court in Daniel v. Daniel.[15]

In that case the plaintiff sought a declaration of title to a "kola" tenancy, against the defendant. The property was situate in Onitsha, Eastern Nigeria, and the tenancy had been granted to the plaintiff's mother but on her death the father was in occupation till his own death. The defendant who was a son of the deceased man by another woman claimed to be entitled to the property. The Supreme Court, affirming Hurley, J. held that this claim could not be entertained and that the plaintiff,

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15. (1956) 1 F.N.L.R.50.

the son of the deceased woman, was the proper successor.

4. Effect of Wills on customary rules of succession.

It has already been pointed out that a man is capable of influencing the devolution of his property in many ways especially by either making disposition of some of it to take effect on his death or by death-bed declarations designating the course of succession. In the latter case it is mainly the respect felt for the deceased coupled with a fear of supernatural vengeance which impels the parties to comply with the deceased's wishes, if they do not contravene any fundamental rules of native law and custom.

Development of literacy has, however, resulted in the making of wills or the execution of some other documents which sometimes provide for succession in accordance with customary law but at other times in partial or total conflict with it. In such cases the question is mainly one of construction of the document in order to determine the system of law applicable.[16]

In Giwa & ors. v. Otun & ors.[17] a trust deed provided

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16. See In re. the Estate of Tom Jones, Deceased, Kate Shaw & anor. v. Taylor & anor. (1920) 3 N.L.R. 72, at p.75, P.C. Sed qu. whether customary law should not be applicable in all cases unless the deceased expressly provided otherwise.
17. (1932) 11 N.L.R.160.

that the beneficiaries and their descendants were to hold certain real property as joint tenants and tenants in common and that the property was not to be sold without the consent of all the beneficiaries. A majority of the bdneficiaries sought to have the property sold but the minority opposed any sale. On an application to the Court, Butler Lloyd, J. held that the nature of the tenure appeared to have been altered because the property was held under a Crown Grant and that on the terms of the trust deed the principle of English law, not native law and custom, were to be applied.

In Jacobs v. Oladunni Bros.[18] a testator devised his real property to all his children to "remain and be retained as a family property in accordance with native law and custom". The defendants attached the property under a writ of fi.fa issued against three of the testator's children. The plaintiff, a fourthe child, started these proceedings to have the property released from the attachment.

At the trial, Counsel for the execution-creditors stated in his argument that the deceased acquired the fee simple of the property under a conveyance in English form, that the will was in English form, and, therefore, that

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18. (1935) 12 N.L.R.1.

the children should be treated as tenants in common under English law, and, accordingly, the shares of the three children should be attached and sold.

Graham Paul, J. rejected this argument, holding that the will was clear enough in its terms and that it did not constitute the devisees tenants in common under English law. Further, the fact that the testator had acquired the particular property under a conveyance in English form did not prevent the property becoming a family property under native law and custom as effectively as if the children had succeeded to it in intestacy. For these reasons he ordered that the property must be released from the attachment. This decision agrees entirely with an earlier judgment of the Full Court in Miller Brothers (of Liverpool) Ltd., v. Ayeni.[19]

In Alake v. Halid[20] a testator provided that if one of his children should erect a "solid brick building" on a portion of the property devised on trust to all the children, that portion was to be conveyed to the child or any of his issues in fee simple. The named child did not erect the building on the property which was later acquired by the Government. The child died intestate

19. (1924) 5 N.L.R.40
20. (1935) 12 N.L.R.22.

without issue but his mother claimed an account and payment over to her of what might be found to be her son's share of the compensation received from the Government.

It was held by Graham Paul, J. that the erection of the "solid brick building" was a condition precedent to vesting of separate interest in the named child and as the condition was not satisfied the mother's claim must be dismissed regardless of the subsequent impossibility of performance owing to the compulsory acquisition. He ordered that the property in its converted form must, therefore, be held for the maintenance of the children and grand-children of the testator; that is, that it must devolve in accordance with native law and custom.

The conclusion to be drawn from these cases and others[1] decided on the same principle is that where a will provides for succession to be regulated by native law and custom, the estate will vest in the customary successors as though the deceased died intestate. This statement is, however, subject to two qualifications: firstly, if the document provides for the circle of the inheritors to be widened more than that which custom

1. eg. George v. Fajore (1939) 15 N.L.R.1; Coker v. Coker (1938) 14 N.L.R. 83.

permits, the court will give effect to the provision. Thus, in Amos Sogbesan & ors. v. Dorcas Adebiyi & ors.[2] the will provided that a brother was to be "the head of the family" and devised real property to trustees to hold the same as "family houses".

On a summons to determine who should be included within the term "family", Butler Lloyd, J. held that on a true construction of the will as a whole it was clear that the testator intended the word "family" to include his brothers and sisters and their descendants as well as his own children.

Secondly, if on a true construction of the will it is not the property in specie but the income thereof which is intended to be inherited in accordance with customary law, the court will over-ride customary law and ignore any provisions in the document which prohibit a sale of the property although it will order the distribution of the income on the proceeds of the sale to be confirmed to the customary beneficiaries as disclosed by the will. This proposition is supported by Branco & ors. v. Johnson.[3] In that case the deceased devised certain real property

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2. (1941) 16 N.L.R. 26.
3. (1943) 1y N.L.R. 70.

to trustees "to let the same and collect the rents thereof; and (after deducting therefrom the expences for repairs .....) to distribute the balance equally" among his children and after their death amongst their children per stirpes. The testator stipulated that the property devised should never be sold.

Some beneficiaries wanted the property to be sold but they were opposed by others on the ground that the testator intended to create family rpoperty in accordance to native law and custom. In an action seeking an order for sale, Baker, Ag. C.J. held, inter alia, that as it was the rents from the property which formed the subject matter of the bequest, the property should be sold. The learned judge also justified the sale on the ground that the bequest was in English form and, accordingly, that English law should apply. The decision, as Coker[4] correctly observed, ignored the fact that the testator imposed a prohibition on the sale of the property. The judgment is supportable, however, on the ground that the testator bequeathed the rents, not the realty itself, and accordingly his beneficiaries would suffer no disadvantage by the sale.

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4. Coker, Family Property among the Yorubas, p.223.

It has been judicially recognised that a landlord cannot impose new conditions on the successors of a tenant unless there has been mutual agreement. This is implicit in Etim & ors. v. Eke & Ors.[5] where Martindale, J. laid down that the grantors were not entitled to convey to strangers any rights in respect of the land unless permission of the grantees had been obtained.[6]

Finally, even if letters of administration have been granted to a customary successor (thereby changing the method of administration) he is nevertheless liable on the breach of the covenants, obligations or contracts of the deceased. This liability is founded not only on the bond which he entered into[7] but also on the fact that in customary law the successor steps into the shoes of the deceased, assuming his duties as well as his rights, except in cases where those duties or rights are purely of a personal nature.

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5. (1941) 16 N.L.R. 43, criticised above on other grounds.
6. cf. Kakrah v. Ampofoah (1957) 2 W.A.L.R.303, where Adumna-Boss man, J. held in the Ghana Supreme Court that a grantor could not impose payment of contributions on the successors to a customary tenancy because their deceased father did not appear to be liable to make such contributions.
7. West v. Taiwo & Dawodu (1888) R.C.J. 13, per Smalman Smith, J.

SUCCESSION UNDER THE GENERAL LAW.

It is necessary to add to what has already been stated in the first chapter that today no one piece of legislation relating to inheritance applies to all the Regions within the Federation because under the present set-up succession is a Regional matter. The discussion which follows, therefore, relates only to those features of the general law which are common to all the Regions. Where any differences occur, they will be mentioned expressly. The first question which naturally arises here is

When is the general law applicable?

In attempting tb answer this question it must be stressed that the term "general law" as used here indicates any system of law, local or imported, which could be applied to everybody within a Region provided that certain conditions were fulfilled. Bearing this in mind it may be stated that the general law will be applicable under the following circumstances:

(i) In every case of testacy where the document expressly or by implication excludes native law and custom. This is mainly a question of interpretation of the will. Thus in

Saibu (nee Pedro) v. Braimah Igbo[8], the deceased, Maximillan Domingo Pedro, by his will dated 17th September, 1898, devised and bequeathed real and personal property to his children. Subsequent to his death (which occurred on 10th August, 1898) two of the children by an indenture dated 6th April, 1916, sold their two-fourths part in the property to their two brothers.

On the 24th April, 1941, the whole property was advertised for sale under a writ of fifa issued against one of the two purchasing brothers. The other brother brought this action claiming release of the property on the ground that the debtor had no attachable interest therein.

Butler Lloyd, J. dismissed the action on the ground that under the terms of the will the four devisees clearly became joint tenants, but the effect of the conveyance was to sever the joint tenancy and there was no doubt that so far at least as the quarter share acquired by him in 1916 was concerned, the judgment debtor was in the position of a tenant in common.

Here there was no doubt that the will, in its terms, excluded the application of customary law and the Court, following an earlier decision of the W.A.C.A. on a Sierra

8. (1941) 16 N.L.R.25.

Leone case[9], had to apply English law which is part of the general law.

(ii) The general law also applies in cases of succession where the parties concerned are not natives. This proposition is implicit from both the old Supreme Court Ordinances and the present High Court Laws. The whole basis for the application of customary law is that at least one of the parties is a native; if none of them is a native, customary law will be excluded.

In considering the system of law applicable the Court has to take into account the domestic rules of private international law. Under the general law, the domestic rules of private international law are substantially the same as the English rules of conflict of laws. This means that succession to the rights of landlords and tenants (which is succession to immovable property) will be governed by the lex situs,[10] that is, by the general law of the Region, not necessarily by the lex domicili of the deceased foreigner. It is on this principle that it will be possible to justify the decision in Savage v. Macfoy.[11]

In that case, the deceased husband, a Sierra Leonean

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9. Millar v. Porter (1939) 5 W.A.C.A.151.
10. This lex situs, as explained previously, comprises both the Nigerian statutes and the imported English law.
11. (1909) Ren. 504.

from Freetown, came to Nigeria and settled in Lagos where he was educated. After working in various parts of the country he died in Lagos, survived by his wife whom, it appeared, he married in accordance with Yoruba customary law. The deceased had three children by the wife and six other children by another woman with whom he cohabited without performing any formal marriage ceremony.

On his death intestate his lawful wife, the plaintiff, sought a declaration that her children alone were the legitimate issue of the deceased and, therefore, entitled to the whole estate to the exclusion of the six other children.

Osborne, C.J. held that the deceased was not a "native" under Section 19 of the Supreme Court Ordinance, 1876 [12] and that as it was provided pursuant to section 14 of the Ordinance that the English common law, doctrines of equity, and statutes of general application in force in England on 1st January, 1900, should apply in Nigeria, the marriage between the deceased and the plaintiff was governed by English law. The learned C.J. held further that because

12. The Interpretation Ordinance, Cap.89 of 1958, re-enacting the previous provision of S.14 of the Supreme Court Ordinance which in turn re-enaction a similar provision of the 1876 Ordinance.

the deceased came from Sierra Leone, the customary marriage with the plaintiff was unlawful because it was polygamous in nature. The Judge said,

> "The mere fact of Macfoy having made Lagos his domicile of choice would not necessarily make him subject to or given the benefit of native law and custom, and his ordinary relations would be governed by English not by native law." 13

Later on he said that the

> "Ordinary rule applies in this [case], and that the devolution is governed by the lex situs, in this case the native law of succession." 14

Under this native law there was

> "no difference between children born in native wedlock and the offspring of fortuitous connection provided that paternity has been acknowledged." 15

He therefore ordered that all the children should share the real property equally as tenants in common.

It is respectfully submitted that although Osborne, C.J's reasoning was wrong in law, he eventually did justice to the parties concerned although the conclusion would have been the same had he adopted a right approach. It was not correct in law to say that the marriage between the deceased and the plaintiff was governed by English

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13. at p. 508.
14. ibid.
15. ibid.

law because marriage is governed by the lex domicili and the de cujus having made Nigeria his domicile of choice can lawfully marry under any system of Nigerian law. Secondly, the Judge did not apply the native law of succession in declaring that the children were tenants in common: he applied English law. Under native law the division would have been into two halves (according to "houses"), each half going to one set of children.

The case is supportable on the ground that the Court accepted that the lex situs governed succession to realty and as this lex situs incorporates both English law, Nigerian statutes and native law, the judge had to decide which of these systems to apply. He correctly decided on native law, though regrettably, he apparently had no evidence of what it was and applied the rule which appeared most fair under the circumstances.

(iii) Further, the general law applies in all cases of intestacy within section 36 of the Marriage Ordinance.[16] This section is of so great importance and difficulty that it must be cited in full.

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16. Cap.115 of 1958. Under the Nigeria (Constitution) Order in Council, 1960 No.1652, Schedule Part I, item 23, Marriage (as described therein) is a Federal matter. But succession is a Regional matter, therefore s.36 of the Marriage Ordinance can only be effective in and applicable to Lagos. If it now purports to apply to other Regions it is to that extent null and void.

It lays down as follows:-

"(1) Where any person who is subject to native law of custom contracts a marriage in accordance with the provisions of this Ordinance, and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance -

The personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding:

Provided that -

(a) where by the law of England any portion of the Estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of native law and custom, and shall not become a portion of the said hereditary revenues; and

(b) real property, the succession to which cannot by native law or custom be affected by testamentary disposition, shall descend in accordance with the provisions of such native law or custom, anything herein to the contrary notwithstanding.

(2) Before the registrar of marriages issues his certificate in the case of an intended marriage, either partly to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions

as to the succession to property as affected by marriage.

(3) This section applies to the Colony only."

It is uncertain whether the section applies -

(a) only to Ordinance marriages celebrated within the Federal territory, or

(b) to persons who die intestate in Lagos whether or not they were domiciled there at the time of the death, or

(c) only to that part of the deceased's property situate within the Federal territory.

It is submitted that under the present Federal set-up the section applies only to (i) the real property of a person marrying under the Ordinance if such real property is within the Federal Territory; (ii) any personal property of such person who dies domiciled in Lagos, regardless of where the personal property is situate. The reason for this is that succession is now a Regional matter and therefore the Federal law cannot (unless adopted) control succession in the Regions. The difficulty, however, is that so far, the section still applies in the Eastern and Northern Regions which have not expressly changed the old law in force before the setting up of the Federation. The language of the sub-section(3)

suggests, in any case, that any real property outside Lagos cannot come within the provisions.

The provision contained in section 36 was first introduced by the Marriage Ordinance of 1884 [17] which repealed the former Marriage Ordinance enacted in 1863.[18] The section applies to the property of either spouse as well as to that of any issue of the marriage notwithstanding that such issue contracted a customary union.

The Marriage Ordinance has no extra-territorial effect outside Nigeria. If a christian marriage is celebrated within Nigeria it will apparently come within the Ordinance because it cannot be celebrated in any other way than in compliance with the procedure therein laid down but if the marriage be celebrated outside Nigeria it will not be governed by the Ordinance.[19] As such a marriage is monogamous, it will be governed by English law.[19] English law applies to such Christian marriages under sections 14 and 19 of the Supreme Court Ordinance [20] and not because of the above section 36 of the Marriage Ordinance. If one of the spouses to (but not the issue

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17. No. 14 of 1884.
18. No.10 of 1863. It is not correct to say, as Coker (<u>Family Property</u>, op.cit. p.250) implies, that the first Marriage Ordinance in Nigeria was passed in 1884.
19. <u>Cole v. Cole</u> (1898) 1 N.L.R.15.
20. Or the equivalent sections of the present High Court Laws.

of) such Christian marriage dies intestate, succession to his rights as a landlord or tenant of any property situate in Lagos will be governed by English law. This is the principle of law on which the celebrated case of Cole v. Cole[1] is based.

In that case the issue was as follows:- One John Cole, a native of Lagos, after marrying the defendant, Mary Cole, in Sierra Leone (outside Nigeria) in 1864, returned to Lagos which remained his domicile throughout. A son Alfred, a lunatic at the time of the proceedings, was born of the marriage in 1866, When John Cole died intestate in 1897, his brother claimed his private estate as a customary heir. To determine the claim it was necessary to decide whether English or customary law applied. Brandford Griffith, J. and Rayner, C.J. held that English law applied to the estate of the deceased. Explaining the position of a spouse who contracted Christian marriage, Brandford Griffith, J. said,

> "Christian marriage imposes on the husband duties and obligations not recognised by native law ...... In fact a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law." 2

English law was applied in this case because the Court

1. Supra.
2. at p.22.

held the view that application of customary law would result in manifest injustice. It is regretted that in attempting to do justice Griffith, J. made some questionable observations as to the effect of a Christian marriage on the rights of the spouses, but the decision is supportable for quite another reason: even in customary law on which the brother of the deceased based his claim, he had no legal right to succeed as long as a son of the deceased was alive; the fact that he was a lunatic could only make the claimant a guardian, not a legal owner of the property.

Sometimes the Courts have been unable to draw a distinction between the property of the deceased to which English law should apply and the issue of the deceased whose rights need not be determined by English law. Thus in Adegbola v. Folaranni & ors.[3], an Awe man who had been married to the plaintiff under native law and custom, was seized and sold into slavery. In the West Indies where he lived for forty years he became a Christian and was married to another woman according to the rites of the Roman Catholic Church. Eventually he returned to Lagos and in 1876 bought a piece of land on which he later built a house. On his death intestate

3. (1921) 3 N.L.R.81.

in 1900, his wife by the Christian marriage continued to live in the house till 1918 when she died leaving the house by will the first defendant. The plaintiff, the issue of the customary marriage, claimed to succeed to the property on his father's intestacy. Combe, C.J. held that in these circumstances English Law, not native law and custom, applied and that the plaintiff was not entitled to succeed. The argument of the Court was to the effect that the customary marriage had been dissolved and the learned Chief Justice purported to have followed Cole v. Cole.[4]

The main objection to the decision is not that English law was applied to the property but that it was used as a test to determine who was entitled, and even in this respect the court ignored the fundamental principle of that law, namely, that any child who was a lawful child by his lex domicili, would be entitled to inherit on his father's intestacy. The plaintiff had become a lawful child of the deceased Awe man before the subsequent Christian marriage which ought not to have divested him of his vested rights in the same way as the dissolution of a prior Christian or Ordinance marriage, followed by a customary union, cannot divest the issue of the Ordinance

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4. Supra.

marriage of his rights as a child of his father. Unfortunately, the decision of Combe, C.J. was adopted by the W.A.C.A. in Gooding v. Manting [5] where the issue of a valid customary marriage, subsequent to the dissolution of an Ordinance marriage, was denied the right to share in his deceased father's estate.[6]

All these cases proceeded on the assumption that the right of a child in Nigeria to inherit depends on whether he could be regarded as a legitimate child in England not whether by English rules of private international law he could be regarded as a legitimate child by his law of domicile at birth. It is to the good of the whole body of Nigerian law in this matter that Gbamgbose v. Daniel [7] the Privy Council has re-established the principle that the right of a child to inherit property governed by English law does not depend on his being a legitimate child in England but by his status under his lex domicili at birth.

It has been argued earlier that as S.36 (3) of the Marriage Ordinance limits the application of S.36 to Lagos, the estate of a man who having contracted an Ordinance Marriage outside Lagos, dies elsewhere without leaving any property in Lagos, cannot be governed by English law.

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5. (1942) 8 W.A.C.A. 108.
6. See also Re Adeline Williams (1941) 7 W.A.C.A.156.
7. (1954) W.A.C.A.116.

This makes it difficult to understand the case of Administrator-General v. Onwo Egbuna[8] in which Ames, J., purporting to follow Cole v. Cole[9] held that the estate of an Ibo man who lived and died intestate in Port Harcourt (Eastern Nigeria) should be governed by English law because his marriage was in accordance with the provisions of the Marriage Ordinance. Brushing aside the valid argument raised for the application of native law, the learned Judge said,

> "The fact that Section 36 of the Marriage Ordinance applies only to the Colony appears to me to have the following consequence. It provides that any part which under English law would go to the Crown shall not do so but shall be distributed in accordance with native law and custom. There is no such provision applying to the Protectorate. It is not for me to make one, Consequently the rights of the Crown to any portion of this estate remain unaffected and are those which it has by the law of England." 10.

This case, and others decided on the same principle lead to the conclusion that the courts often apply English law to determine the successors once it is established that the deceased contracted a Christian or an Ordinance marriage. Such an approach, with respect, has no legal basis expept in relation to property in Lagos to which section 36 of the Marriage Ordinance

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8. (1945) 18 N.L.R.1.
9. Suppa.
10. at p.3.

applies. As Coker very correctly observed,

> "The nature of the marriage should only be concerned with the determination of the various issues of personal relationships and not with the incidents of succession. The lex situs is the native law of succession, and there is no reason why it should not be applied once the personal relationships in this type of cases has been ascertained." 11

(iv) Finally, the general law of succession applying in the Western Region today is the Administration of Estates Law [12] which was passed in 1959 and which is in substance a reproduction of the English Administration of Estates Act, 1925 [13] and the Intestate Estates Act, 1952.[14] The Law applies to cases of testacy and intestancy where death occured after the 22nd April, 1959. In cases of intestacy, succession is exactly in the same manner as in England under Section 1 and the First Schedule, Table of the Intestate Estates Act, 1952.

The Regional enactment also lays down that -

> "Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this Law, any customary law to the contrary notwithstanding." 15

11. Coker, op.cit., p.258.
12. No.23 of 1959, now Cap.1 of 1959 revised edition.
13. 15 & 16 Geo.5 Chap.23.
14. 15 & 16 Geo.6 and 1 Eliz 2 Chap.64.
15. Administration of Estates Law, supra, s.49 (1).

This means that from the 23rd April, 1959, contracting an Ordinance marriage for people domiciled in the Region or having real property there is an irrevocable election to take their private property out of the province of customary law and bring it into the realm of the general law.

The Administration of Estates Law makes two exceptions to this rule, namely, (i) that only property which would normally have devloved upon the Crown as <u>bona vacantia</u> shall be distributed in accordance with customary law and shall not belong to the Crown;[16] (ii) that any real property the succession to which cannot by customary law be affected by testamentary disposition shall descend in accordance with native law and custom.[17]

These provisions are similar to those of section 36 of the Marriage Ordinance. It is to be hoped that the courts in interpreting them will not take the same unfortunate view as some judges have so far taken by limiting succession to only the issues of the Ordinance marriage when the successor left legitimate children by a previous or subsequent customary union; every tribunal will now make it possible for those who are

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16. ibid. s.49 (5) proviso (a).
17. ibid. S.49 (5) proviso (b).

normally entitled by the lex situs to partake in the distribution. The decision in Gbamgbose v. Daniel[18] should be a guiding light in this respect.

Other Provisions of the general Laws.

The persons entitled to succeed to the rights of an itestate landlord or tenant together with the quantum of each successor's interest in the estate may be determined exclusively by the customary law or by the general law but once determined, the actual administration of the estate may be governed exclusively by the general law if the parties invoke it. Thus if an estate devolves under the customary law, there is nothing to prevend any of the interested parties or a claimant against the estate from applying for the assets to be administered under the Administrato-general's Ordinance[19] thereby excluding the customary system of law relating to the distribution of estates.

Under the Administration (Real Estate) Ordinance[20] which applies only to Lagos, the real property of an

18. Supra.
19. No.14 of 1938, as amended; now Cap.4 of 1958 edition.
20. No.11 of 1917; now Cap.2 of 1958 edition, repealed in the Western Region by S.60 of the Administration of Estates Law, S.60.

intestate will be administered as personal estate.[1] In granting letters of administration the court is enjoined to have regard to the rights of the persons interested in the estate[2]; obviously, the rights of such persons may depend entirely upon native law and custom. The real estate of such a deceased person shall not be administered unless the administrator satisfies the court that the personal estate is unsufficient to pay the intestate's debts, the funderal and administration expenses.[3] If no sufficient reason is adduced for administering the realty, an order made by a judge will be quashed on appeal.[4]

The Administrator-General's Ordinance is designed to apply to the actual administration of the estate whether the rights of the successors are determined under native law and custom or by the general law. The Ordinance empowers the Governor-General to appoint a Federal Administrator-General and as many assistant Administrator-Generals as may be required.[5] The office is a corporation sole.[6] A testator may appoint the

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1. ibid. s.2.
2. ibid. s.3.
3. ibid. s.2, proviso.
4. Gbamgboye & ors. v. Administrator-General & anor. (1954) 14 W.A.C.A.616.
5. ibid. s.3 (1).
6. ibid. S.3 (3).

Federal Administrator-General the sole executor of his will.[7]

The Administrator-General is empowered to petition the court for the grant of probate or letters in respect of an unrepresented estate[8], but he may, for purposes of preserving the estate enter thereon before obtaining the order of the Court.[9] Where there is uncertainty relating to succession, the Administrator-General may of his own accord or on application of a person interested in the estate[10] obtain an Order of the Court and will conduct the administration in accordance with the Court's direction or in default of such direction, in accordance with the provisions of the Ordinance.[11]

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7. ibid. s.9.
8. ibid. s.13.An "unrepresented estate" means (a) the estate of an intestate whose next-of-kin is unknown or is a minor, or is absent from Nigeria without leaving an attorney in Nigeria, or is unwilling to apply for letters within one month after the death; (b) the estate of a person who died leaving a will but in circumstances that an administrator cum testamento annexo or de bonis non be appointed; (c) every estate whereof the executors or administrator shall be absent from Nigeria without having an attorney therein.".
9. ibid. S.14.
10. This includes a creditor of the deceased.
11. ibid. S.16.

Apart from the grant to the Administrator-General, the Ordinance provides that probate or letters may be granted to a person who establishes a claim to it, on his giving security as required by law.[12] A private executor or administrator may by an instrument in writing, notified in the Gazette, transfer all the assets of the estate to the Administrator-General; if this happens, the transferor shall be exempt from liability for subsequent acts or omissions from the date of such transfer.

A grant of probate or letters to the Administrator-General may be revoked and a fresh grant made to the deceased's next of kin but any acts done under the previous grant will be deemed valid notwithstanding the revocation.[14]

On obtaining letters or probate, notice shall be published in the Gazette, calling upon all the claimants against the estate to come forward and prove their claims within such period as may be laid down in the notice. Such a publication will also operate as an information to debtors of the deceased to pay up.[15] On the expiration

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12. _ibid_. ss.17 and 20.
13. _ibid_. s.19.
14. _ibid_. ss.20-23.
15. _ibid_. s.25.

of the stipulated period, the assets may be distributed and all subsequent claims against the administrator will be barred but without prejudice to the claimant following the assets in the hands of persons who may have received them.[16] This undoubtedly means that in tracing the property the principle established in England in Re. Diplock[17] will be applied in Nigeria.

As an alternative to distributing the assets the administrator may, on expiration of the notice, pay it into the Treasury from where those entitled may, on obtaining the order of the Court, withdraw it. If no claim is put forward within five years, the assets so deposited will become bona vacantia and forfeited to the Government though the Governor-General may still distribute them among the kindred of the deceased after the expiration of the five-year period.[18]

If the assets or a balance of the assets of an estate are so small in value as to be practically indivisible amongst those entitled thereto, such assets on the balance shall, on closing the estate-accounts, be paid to the general revenue of the Federation of Nigeria.[19]

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16. ibid. S.27.
17. In re. Diplock &. Diplock v. Wintle (1948) Ch.465, C.A.
18. ibid. ss. 45-46.
19. ibid. s.34(3).

The order in which the proceeds of an estate may be distributed is as follows:-

(i) Cost and expenses in respect of the administration;[20]

(ii) Estate duty, as may be prescribed by the Governor-General under S.63 of the Ordinance;[1]

(iii) Creditors of the estate in the Order and manner prescribed by law[2];

(iv) Beneficiaries or other persons legally entitled to the balance but if they be unknown then the amount will be payable to the Accountant-General of the Federation in trust for such persons [3].

If after winding up an estate any real property remains undisposed of, the administrator may apply to the court for directions as to its disposal, and the court may order its sale, or may appoint a receiver or make any other order it deems just.[4] The assets of persons who are not domiciled in Nigeria at the time of their death will be payable to the foreign executor or Consul or Government and a receipt from such payee is a complete discharge from liability.[5]

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1. s. 39 (b)
2. s. 39 (c)
3. s. 39 (d)
4. ibid. s. 40.
5. ibid. s. 41 (1).

The Administration (Foreign Employment) Ordinance[6] applies to all natives under foreign contracts of service [7] whether they die within or outside Nigeria.[8] Under this Ordinance which applies throughout the whole Federation, the Federal Administrator-General is appointed the Official Administrator to the estates of such persons.[9] It is the duty of the Official Administrator to obtain particulars of the estate, collect the assets, publish notice of the death, and then to examine and adjudicate on all claims before distributing the balance.[10]

In cases to which the Administration of Estates by Consular Officers Ordinance[11] applies, the Consular Officer of the state[12] of which the deceased was a subject or citizen is empowered to administer the estate of its national who dies within or outside Nigeria, but leaving property

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6. No.10 of 1917, now Cap.1 of 1958.
7. '"Foreign contract of service" means any contract of service entered into under any Ordinance for the time being in force regulating such contracts, whereof the whole or any part is or may be required to be performed without the limits of Nigeria.'
8. ibid. S.3
9. ibid. s.4. See also Govt. Notice No. 1171 of 1941.
10. SS. 7 - 12
11. No. 17 of 1940, now cap. 3 of 1958 edition.
12. The States, as listed in the Schedule are, Estonia, Finland, Greece, Hungary, Japan, Thailand, Turkey, Yugoslavia; but the list may be added to.

within Nigeria.[13]

In all the Regions of Nigeria, wherever the general law applies to succession, the estate of an intestate vests in the Chief Justice of the Region until the grant of probate or letters of administration. This is expressly laid down in the Western Region by Section 9 of the Administration of Estates Law; in all the other Regions it is implied in the High Court Laws.[14]

In the Northern Region, section 30 of the Land Tenure Law provides that -

> "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 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."

There are three provisos to this section:

(a) no customary law will operate to deprive a person of his beneficial interest in the land or in the proceeds of sale thereof;

(b) a statutory right of occupancy cannot be sub-divided without the consent of the Minister;

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13. ibid. S.2.
14. In the Bank of West Africa Ltd. v. Rickett (1959) N.N.L.R. at p.131, Smith, J. held that in view of S.32 of the Northern Region High Court Law, 1955, empowering the Court to exercise jurisdiction in conformity with the law and practice for the time being in force in England, the estate of a person who dies intestate vests in the Chief Justice of the Region pending the grant of letters of administration.

(c) "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 by the Minister of a certificate of occupancy in evidence of the title of such non-native".

The effect of the provision that the succession to the right of occupancy of a non-native shall be regulated by his personal law relating to the distribution of property is obviously to introduce the interesting, if complicated, theory of _renvoi_ well-known to students of private international law. If, for example, the _de cujus_ was an English man, the law relating to the distribution of his property "of like nature" is the _lex situs_ because a right of occupacy being in substance a lease, is immovable property. If on reference to the _lex situs_ the Regional general law cannot apply, then English law will be applicable. The question could be much more complicated than it is necessary to discuss here.[15]

The Land Tenure Law also provides that

> "In the case of the devolution or transfer of rights to which English law or any other non-native law applies, no deed or will shall operate to create any proprietary right over land except that of a plain transfer of the whole of the rights of occupation over the whole of the land." 16

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15. For further discussion of the doctrine of _renvoi_ see Dicey, _Conflict of Laws_ 7th edition, 1958, pp.64-84; Cheshire, G.C., _Private International Law_, 6th edition 1961, pp.60-85.
16. _ibid._, s.31.

This section implies that a testator can devise the whole right of occupancy to whomsoever he wishes regardless of section 12 which forbids alienation without the Governor's consent. On this principle it is submitted that if the grant was made to a registered company or to a partnership as such, the rights granted can be assigned by the liquidator on winding up of the company or on the dissolution of the partnership[17], without the liquidator obtaining the consent of the Governor, provided that such assignment is of all the interests granted to the company or the partnership. This argument does not apply to a case where the right of occupancy is granted to members of a company or to the partners themselves and this, notwithstanding that they erect buildings on the land for use of the business of the association. In such a case the ownership of the right of occupancy gives to the members or partners rights which, in law, are independent of their association.[18]

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17. In strict theory a grant to the partnership will amount to a grant to the members thereof according to their respective interests in the partnership property. Because the parternship is not a legal entity. This section of the argument may, therefore, so far as it refers to a partnership, be invalid.

18. Stephen v. Pedrocchi (1959) N.N.L.R. 78, per Smith Ag. S.P.J.

Succession to statutory tenancy.

From what has been said in the last chapter, it is clear that the statutory tenancy created by the combined effect of the Recovery and the Rent Ordinances can only arise when a person in lawful occupation of land holds over after the expiration of the term for which the grant was made. None of the Ordinances contains any provision relating to succession to the statutory tenancy so created but it would appear that on the principle laid down in the Akpiri case[19], anybody whom the tenant admitted into occupation, comes within the definition of a "tenant" and, therefore, on the death of the head-tenant, will be entitled to continue in occupation.

On this reasoning, all the members of a statutory tenant's family will, undoubtedly be occupying the premises lawfully and on his death, they will be entitled to continue in occupation until the landlord obtains an order against them in the manner laid down by the Ordinances. This means that the surviving spouse and all the children of a statutory tenant are entitled to continue in occupation after his death. Further, the children will be entitled to retain possession after the

death of the surviving spouse; each child, and presumably his issue, will be entitled to continue in possession on the death of any of his brothers or sisters. In this respect the operation of the Nigerian statutes is different from the effect of the English Rent Acts under which there can be only one transmission of the statutory tenancy to the tenant's surviving spouse or a member of his family. It would appear too, that in Nigeria the right to continue in occupation is not limited to the statutory tenant's spouse or issue, but to brothers, sisters, guests and even strangers within the gates who use the premises with him before his death. In view of the doubts previously expressed as to the correctness of the decision in the Akpiri case on which this reasoning is based, a decision of the highest tribunal on the point will be most illuminating.

THE LAND TENURE LAW, 1962, No. 25 OF 1962

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3. Application.

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Schedule.

Assented to in Her Majesty's name this 22nd day of April, 1962.

G. W. Bell,
Governor, Northern Nigeria

(L.S.)

No. 25 **1962**

Northern Nigeria

IN THE ELEVENTH YEAR OF THE REIGN OF

HER MAJESTY QUEEN ELIZABETH II

SIR GAWAIN WESTRAY BELL, K.C.M.G., C.B.E.,
Governor, Northern Nigeria

A Law to define, regulate and control the Tenure of Land within Northern Nigeria — Title.

[By Notice] — Date of commencement.

Whereas it is expedient that the existing customary rights of the natives of Northern Nigeria to use and enjoy the land of the Region and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved; — Preamble.

AND WHEREAS it is expedient that native customs with regard to the use and occupation of land should, as far as possible, be preserved;

AND WHEREAS it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the boundaries of Northern Nigeria and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law;

Enactment.

BE IT ENACTED by the Legislature of Northern Nigeria:—

PART I—PRELIMINARY

Short title and commencement.

1. This Law may be cited as the Land Tenure Law, 1962, and shall come into operation on a date to be appointed by the Governor by notice in the *Northern Nigeria Gazette.*

Interpretation.

2. In this Law where the context requires or admits—

"agricultural purposes" includes the planting of rubber, cocoa and other trees and plants of economic value;

"customary right of occupancy" means the title of a native or native community lawfully using or occupying native lands in accordance with native law and custom;

"easement" means a right annexed to land to utilise other land in different holding in a particular manner (not involving the taking of any part of the natural produce of that land or of any part of its soil) or to prevent the holder of the other land from utilising his land in a particular manner;

"grazing purposes" includes only such agricultural operations as are required for growing fodder for livestock on the grazing area;

"holder" means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment nor a mortgagee, sublessee or sub-underlessee;

"improvements" or "unexhausted improvements" means anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long-lived crops or trees, fencing, wells, roads and irrigation or reclamation works, but does not include the results of ordinary cultivation other than growing produce;

"Minister" means the Minister charged with responsibility for land matters;

"mortgage" shall include a second and subsequent mortgage and an equitable mortgage;

"native" means a person whose father was a member of any tribe indigenous to Northern Nigeria;

"non-native" means any person other than a native as above defined;

"occupier" means any person lawfully occupying native lands and includes the holder of a right of occupancy; and a native or native community lawfully using or occupying land in accordance with native law and custom and a sublessee or sub-underlessee of a holder;

"public purposes" includes—

(*a*) for exclusive Government or native authority use or for general public use;

(*b*) for or in connection with measures taken against sleeping sickness or with sanitary improvements of any kind, including reclamations;

(*c*) for or in connection with the laying out of any new, or the improvement of any existing township, town, village, market, civic centre or Government station;

(*d*) for obtaining control over land contiguous to any port or river;

(*e*) for obtaining control over land required for or in connection with planned rural or urban development or settlement;

(*f*) for or in connection with the laying out of an area of land to be reserved for the purposes of trade or industry;

(*g*) for obtaining control over land the value of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the Government or a native authority or native authorities;

(*h*) for obtaining control over land required for or in connection with the purposes of any Corporation or Board established under the provisions of any Ordinance or Law for carrying out any functions of a public nature;

"right of occupancy" means a title to the use and occupation of land and includes a customary right of occupancy and a statutory right of occupancy but does not include a licence granted under section 16;

"sub-lease" includes a sub-underlease;

"statutory right of occupancy" means a right of occupancy granted under the provisions of section 6 or of any written law replaced by this Law whether by the Governor or the Minister or by any public officer or native authority duly authorised and empowered in that behalf.

Application.

3. The provisions of this Law shall apply to all rights of occupancy held or granted on or after the date of the commencement of this Law whether or not application for any such right of occupancy has been made before that date under the provisions of any written law replaced by this Law.

PART II—PRINCIPLES OF LAND TENURE, POWERS OF MINISTER AND RIGHTS OF OCCUPIERS

Definition of native lands.

4. (1) Save and except—

(*a*) all land to which a title shall have been established in accordance with the provisions of paragraph (*a*) of section 48;

(*b*) all land referred to in paragraph (*b*) of section 48;

(*c*) all land or interests therein in respect of which a title has been granted under the provisions of section 49;

the whole of the lands of Northern Nigeria, whether occupied or unoccupied, are hereby declared to be native lands.

(2) Wherever any of the lands which are or have been included in paragraph (*a*) of section 48 or in section 49 contain or are expressed to contain native reserves or lands required to be set aside for native reserves or wherever or whenever the whole or any portion of any of the lands included in paragraph (*a*) of section 48 or in section 49 shall have been acquired by the Governor or the Minister whether by purchase or otherwise for the purpose of native reserves such native reserves and lands required to be set aside for native reserves or purposes connected therewith shall be deemed to be native lands.

Control of native lands by Minister.

5. All native lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the Minister and shall be held and administered for the use and common benefit of the natives, and no title to the occupation and use of any such lands by a non-native shall be valid without the consent of the Minister.

Powers of Minister in relation to land.

6. (1) It shall be lawful for the Minister—

(*a*) to grant rights of occupancy to natives and to non-natives;

(*b*) to grant easements appurtenant to rights of occupancy;

(*c*) to demand a rental for the use of any native lands or easements granted to any native or non-native;

(*d*) to revise the said rental—

(*i*) at such intervals as may be specified in the certificate of occupancy; or

(*ii*) where no intervals are specified in the certificate of occupancy, at any time during the term of the right of occupancy;

(*e*) to impose a penal rent for a breach of any covenant in a certificate of occupancy requiring the holder to develop or effect improvements on the land the subject of the certificate of occupancy and to revise such penal rent as provided in section 25;

(*f*) to impose a penal rent for a breach of any condition, expressed or implied, which precludes the holder of a right of occupancy from alienating the right of occupancy or any part thereof by sale, mortgage, transfer or possession, sublease or bequest or otherwise howsoever without the prior consent of the Minister;

(*g*) to waive wholly or partially, except as otherwise prescribed, all or any of the covenants or conditions to which a statutory right of occupancy is subject where, owing to special circumstances, complaince therewith would be impossible or great hardship would be inflicted upon the holder;

(*h*) to extend, except as otherwise prescribed, the time to the holder of a statutory right of occupancy for performing any of the conditions of the right of occupancy upon such terms and conditions as he may think fit.

(2) No single right of occupancy shall be granted to a non-native in respect of an area of land in excess of one thousand two hundred acres if granted for agricultural purposes, or twelve thousand five hundred acres if granted for grazing purposes, without the consent of the Governor in Council.

(3) Upon the grant of a right of occupancy under the provisions of subsection (1) all existing rights to the use and occupation of the land which is the subject of the right of occupancy shall be extinguished.

Restriction on rights of persons under the age of twenty-one years.

7. It shall not be lawful for the Minister to grant a statutory right of occupancy or consent to the assignment or subletting of a statutory right of occupancy to a person under the age of twenty-one years:

Provided that—

(*a*) where a guardian of or trustee for a person under the age of twenty-one years has been duly appointed for such purpose the Minister may grant or consent to the assignment or subletting of a statutory right of occupancy to such guardian or trustee on behalf of such person under age;

(*b*) a person under the age of twenty-one years upon whom a statutory right of occupancy devolves on the death of the holder shall have the same liabilities and obligations under and in respect of his right of occupancy as if he were of full

age notwithstanding the fact that no guardian or trustee has been appointed for him.

Special contracts.

8. Rights of occupancy granted under the provisions of paragraph (*a*) of subsection (1) of section 6 may be for a definite or for an indefinite term, and may be granted subject to the terms of any contract which may be made between the Minister and the holder, not being inconsistent with the provisions of this Law or any of them.

Sale by auction of rights of occupancy.

9. (1) In the exercise of his powers under paragraph (*a*) of subsection (1) of section 6 the Minister may sell rights of occupancy by auction if the place, date and time of such auction shall have been notified in the *Northern Nigeria Gazette* not less than four weeks prior to such date.

(2) The Minister may withdraw any land from auction at any time prior to the same being offered for sale.

Certificates of occupancy.

10. (1) It shall be lawful for the Minister—

(*a*) when granting a right of occupancy to any person; or

(*b*) when any person is in occupation of land under a right of occupancy; or

(*c*) when any person is entitled to a right of occupancy,

to issue a certificate under his hand in evidence of such right of occupancy.

(2) Such certificate shall be termed a certificate of occupancy and there shall be paid therefor by the person in whose name it is issued, such fee (if any) as may be prescribed.

(3) If the person in whose name a certificate is issued shall, without lawful excuse, refuse or neglect to accept and pay for the certificate, the Minister may cancel the certificate and recover from such person any expenses incidental thereto, and, in the case of a certificate evidencing a right of occupancy to be granted under paragraph (*a*) of subsection (1), the Minister may revoke the right of occupancy.

(4) The terms and conditions of a certificate of occupancy granted under this Law or under any written law replaced by this Law and which has been accepted by the holder shall be enforceable against the holder and his successors in title, notwithstanding that the acceptance of such terms and conditions is not evidenced by the signature of the holder or is evidenced by his signature only, or, in the case of a corporation, is evidenced by the signature only of some person purporting to accept on behalf of the corporation.

Conditions and provisions implied in certificate of occupancy.

11. Every certificate of occupancy shall be deemed to contain provisions to the following effect—

(*a*) that the holder binds himself to the Minister to pay to any person or community whose right of occupancy has been revoked in consequence of the grant of the right of occupancy to the holder such sums by way of compensation for unexhausted improvements and for the damage or inconvenience caused by disturbance as the Minister may decide;

(*b*) that the holder binds himself to pay to the Minister the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation;

(*c*) that the holder binds himself to pay to the Minister the rent fixed by the Minister and any rent which may be agreed or fixed on revision in accordance with the provisions of section 23;

(*d*) that if for any reason the Minister considers it desirable to postpone the revision of the rent reserved under any such certificate, the Minister may postpone such revision for such time, irrespective of any revision period mentioned in such certificate, as he shall think fit, but that if the right to revise be subsequently exercised the rent then fixed shall be payable for the remainder of the current revision period.

Duty of occupier of statutory right of occupancy to maintain beacons.

12. (1) The occupier of a statutory right of occupancy shall at all times maintain in good and substantial repair to the satisfaction of the Minister, or of such public officer as the Minister may appoint in that behalf, all beacons or other landmarks by which the boundaries of the land comprised in the right of occupancy are defined and in default of his so doing the Minister or such public officer as aforesaid may by notice in writing require the occupier to define the boundaries in the manner and within the time specified in such notice.

(2) If the occupier of a statutory right of occupancy shall fail to comply with any notice served under subsection (1) he shall be liable to a fine of twenty pounds and in addition may be ordered by the court to pay the expenses (if any) incurred by the Minister in defining the boundaries which the occupier has neglected to define.

Easements and roads of access.

13. (1) Every right of occupancy shall be subject to any easement or road of access affecting the land at the date of the grant of or at the date of the commencement or the right of occupancy.

(2) The occupier of a right of occupancy may grant an easement over his land to the occupier of other land for a term not longer than the term of the right of occupancy which is subject to the easement and on such conditions as may be agreed between the parties not incompatible with the provisions or this Law or of any subsidiary legislation made thereunder.

(3) The holder of a right of occupancy shall, if required by the Minister, allow a road of access over the land the subject of his right of occupancy to any person occupying land which is so situate that such road of access is, in the opinion of the Minister, reasonably required.

(4) The person requiring a road of access shall pay to the holder of the right of occupancy in respect of the land to be traversed compensation in respect of any growing crops or improvements damaged or destroyed by the construction of the road.

(5) In the event of the holder of a right of occupancy and the person desiring or using a road of access over the land the subject of such right of occupancy being unable to agree as to the direction or width of the road of access or as to any matter in connection with the construction, repair or use of the road, any of the parties concerned may appeal to the Minister who may appoint any officer to determine the matter in dispute, and the decision of such officer shall be binding on all persons concerned.

Power of Minister to lay water pipes, sewers and drains.

14. (1) Any person authorised by the Minister may at any time enter upon any land the subject of a right of occupancy and may lay water pipes, sewers or drains across, upon or under such land for and on behalf of the Government.

(2) The holder and the occupier according to their respective interests shall be entitled to compensation for any crops or improvements damaged or destroyed by any action taken under subsection (1).

Power of Minister or public officer to enter and inspect land and improvements.

15. The Minister or any public officer duly authorised by the Minister in that behalf shall have power to enter upon and inspect the land comprised in any statutory right of occupancy or any improvements affected thereon at any reasonable hours in the day time and the occupier shall permit and give free access to the Minister or any such officer so to enter and inspect.

Power of Minister to grant licences to take building materials.

Cap. 121 of 1958 Laws.
Cap. 120 of 1958 Laws.

16. (1) It shall be lawful for the Minister to grant a licence to any person to enter upon any land which is not the subject of a statutory right of occupancy or of a mining lease, mining right or exclusive prospecting licence granted under the Minerals Ordinance or of a lease or licence granted under the Mineral Oils Ordinance, and remove

or extract therefrom any stone, gravel, clay, sand or other similar substance (not being a mineral within the meaning assigned to that term in the Minerals Ordinance) that may be required for building or for the manufacture of building materials.

Cap. 121 of 1958 Laws.

(2) Any such licence may be granted for such period and subject to such conditions as the Minister may think proper or as may be prescribed.

(3) No such licence shall be granted in respect of an area exceeding one thousand two hundred acres.

(4) It shall not be lawful for any licensee to transfer his licence in any manner whatsoever without the consent of the Minister first had and obtained, and any such transfer effected without the consent of the Minister shall be null and void.

(5) The Minister may cancel any such licence if the licensee fails to comply with any of the conditions of the licence.

Public right of way.

17. (1) Where it appears to the Minister that there is need for a public right of way over any land the Minister may by order create a public right of way over such land to such extent and for such purposes and subject to such limitations and conditions as may be specified in the order and a description of the limits of such public right of way shall be specified in the order.

(2) Where a public right of way is created under this section over land the subject of a right of occupancy the Minister shall pay to the holder of the right of occupancy compensation in respect of any growing crops or improvements damaged or destroyed by the creation of the public right of way and for the inconvenience caused by his disturbance.

Public right to water.

18. (1) Where it appears to the Minister that there is need for the public to take water from any river, lake, stream, or waterway he may by order create a public right to take water from any part of a river, lake, stream or waterway, other than a river, lake, stream or waterway which has been declared by Parliament to be a source affecting more than one territory, to such extent and for such purposes and subject to such limitations and conditions as may be specified in the order.

(2) Where a public right to water is created under this section the Minister shall pay compensation to the holders of any riparian interest in respect of any loss or damage suffered by them as a result of the creation of such right.

Exclusive rights of occupiers.

19. Subject to the other provisions of this Law and of any laws relating to wayleaves, to prospecting for minerals or mineral oils or to mining and subject to the terms and conditions of any contract made under section 8, the occupier shall have exclusive rights to the land the subject of the right of occupancy against all persons other than the Minister.

The right to improvements.

20. (1) During the term of a statutory right of occupancy the holder—

(*a*) shall have the sole right to and absolute possession of all the improvements on the land;

(*b*) may, subject to the prior consent of the Minister, remove, sell, mortgage or transfer any improvements on the land which have been effected pursuant to the terms and conditions of the certificate of occupancy relating to the land;

(*c*) may, without the consent of the Minister, remove, sell, mortgage or transfer any improvements on the land which are in excess of the requirements of the building conditions and stipulations set out in the certificate of occupancy;

(*d*) shall make good any damage done to the land by the removal of any improvements therefrom.

(2) On the determination of a statutory right of occupancy all the improvements on the land shall revert to or vest in the Minister without payment of compensation to the holder.

(3) The provisions of subsections (1) and (2) shall take effect subject to the terms and conditions contained in the certificate of occupancy evidencing the right of occupancy.

PART III—RENTS

Principles to be observed in fixing and revising rent.

21. In determining the amount of the original rent to be fixed for any particular land and the amount of the revised rent to be fixed on any subsequent revision of rent, the Minister—

(*a*) shall take into consideration the rent obtained or obtainable in respect of any other like land in the immediate neighbourhood, and shall have regard to all the circumstances of the case;

(*b*) shall not take into consideration any value due to capital expended upon the land by the same or any previous occupier during his term or terms of occupancy, or any increase in the value of the land the rental of which is under consideration, due to the employment of such capital.

22. (1) The Minister may grant a right of occupancy free of rent or at a reduced rent in any case in which he shall be satisfied that it would be in the public interest to do so.

Power of Minister to grant rights of occupancy free of rent or at reduced rent.

(2) Where a right of occupancy has been granted free of rent the Minister may, subject to the express provisions of the certificate of occupancy, nevertheless impose a rent in respect of the land the subject of the right of occupancy if and when he may think fit.

23. (1) If the rent demanded from the holder is raised on revision and the Minister and the holder are unable to agree as to the rent to be paid the matter shall be referred to a tribunal which shall be composed of an arbitrator to be agreed upon by the Minister and the holder or, in the absence of such agreement, to be appointed by the High Court.

Procedure where holder is dissatisfied with revised rent.

(2) The tribunal shall fix a revised rent which may be the same as or more or less than the original rent and in determining the rent it shall have regard to the matters which a Minister takes into consideration under section 21.

(3) The decision of the tribunal shall be final and if the rent fixed by the tribunal is not less than that demanded by the Minister the holder shall pay the costs of the arbitration.

24. Subject to the provisions of sections 25 and 26 the acceptance by or on behalf of the Minister of any rent shall not operate as a waiver by the Minister of any forfeiture accruing by reason of the breach of any covenant or condition, express or implied, in any certificate of occupancy granted under this Law or under any written law replaced by this Law.

Acceptance of rent not to operate as a waiver of forfeiture.

25. (1) When in any certificate of occupancy the holder has covenanted to develop or effect improvements on the land the subject of the certificate of occupancy and has committed a breach of such covenant the Minister may—

Penal rent.

(*a*) at the time of such breach or at any time thereafter, so long as the breach be not remedied, fix a penal rent which shall be payable for twelve months from the date of such breach; and

(*b*) on the expiration of twelve months from the date of such breach and on the expiration of every subsequent twelve months so long as the breach continues revise the penal rent to be paid.

(2) Such penal rent or any revision thereof shall be in addition to the rent reserved by the certificate of occupancy and shall be recoverable as rent:

Provided that the first penal rent fixed shall not exceed the rent so reserved and any revised penal rent shall not exceed double the penal

rent payable in respect of the twelve months preceding the date of revision.

(3) If the Minister shall fix or revise a penal rent he shall cause a notice in writing to be sent to the holder informing him of the amount thereof and the rent so fixed or revised shall commence to be payable one calendar month from the date of the receipt of such notice.

(4) If the breach for which a penal rent has been imposed shall be remedied before the expiration of the period for which such rent has been paid, the Minister may in his discretion refund such portion of the penal rent paid for such period as he may think fit.

(5) The fact that a penal rent or a revised penal rent has been imposed shall not preclude the Minister, in lieu of fixing a subsequent penal rent, from revoking the right of occupancy:

Provided that the right of occupancy shall not be revoked during the period for which a penal rent has been paid.

Additional penal rent for unlawful alienation.

26. (1) If there shall be any breach of any of the provisions of section 28 or section 29 the Minister may in lieu of revoking the right of occupancy concerned demand that the holder shall pay an additional and penal rent for and in respect of each day during which the land the subject of the right of occupancy or any portion thereof or any buildings or other works erected thereon shall be or remain in the possession, control or occupation of any person whomsoever other than the holder.

(2) Such additional and penal rent shall be payable upon demand and shall be recoverable as rent.

(3) The acceptance by or on behalf of the Minister of any such additional and penal rent shall not operate as a waiver by the Minister of any breach of section 28 or section 29 which may continue after the date up to and in respect of which such additional and penal rent has been paid or is due and owing and the Minister shall accordingly be entitled to exercise in respect of any such continuing breach all or any of the powers conferred upon him by this Law.

PART IV—ALIENATION AND SURRENDER OF RIGHTS OF OCCUPANCY

Prohibition of alienation of customary right of occupancy to non-natives without consent of Minister.

27. It shall not be lawful for any native holding a customary right of occupancy to alienate his right of occupancy or any part thereof to a non-native by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise howsoever without the consent of the Minister first had and obtained.

28. (1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor or the Minister to alienate his right of occupancy or any part thereof by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise howsoever without the consent of the Minister first had and obtained:

Prohibition of alienation of statutory right of occupancy without consent of Minister.

Provided that the consent of the Minister—

(*a*) shall not be required to the creation of a legal mortgage over a right of occupancy in favour of a person in whose favour an equitable mortgage over the same right of occupancy has already been created with the consent of the Minister;

(*b*) shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Minister;

(*c*) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same.

(2) The Minister, when giving his consent to an assignment, mortgage or sublease may require the holder of the statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the Minister in order that the consent given by the Minister under subsection (1) may be signified by endorsement thereon.

(3) A statutory right of occupancy granted by a native authority or local authority under any regulations made under this Law or under any written law replaced by this Law shall be transferred in the manner prescribed in such regulations.

29. (1) A sublessee of a right of occupancy may, with the prior consent of the Minister and with the approval of the holder of the right of occupancy, demise by way of sub-underlease to another person or persons the land comprised in the sublease held by him or any portion of such land.

Sub-underleases.

(2) The provisions of subsection (2) of section 28 shall apply *mutatis mutandis* to any transaction effected under subsection (1) of this section as if it were a sublease granted under section 28.

30. 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 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

Devolution of rights of occupancy upon death.

relating to the distribution of property of like nature to a right of occupancy:

Provided that—

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

(*b*) a statutory right of occupancy shall not be divided into two or more parts on devolution by the death of the occupier, except with the consent of the Minister;

(*c*) 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 by the Minister of a certificate of occupancy in evidence of the title of such non-native.

Effect of deed or will where non-native law applies.

31. In the case of the devolution or transfer of rights to which English law or any other non-native law applies, no deed or will shall operate to create any proprietary right over land except that of a plain transfer of the whole of the rights of occupation over the whole of the land.

Null and void transactions and instruments.

32. Any transaction or any instrument which purports to confer on or vest in a non-native any interest or right in or over any native lands otherwise than in accordance with the provisions of this Law shall be null and void.

Surrenders of statutory rights of occupancy

33. The Minister may accept on such terms and conditions as he may think proper the surrender of any statutory right of occupancy granted under this Law or any written law replaced by this Law.

PART V—REVOCATION OF RIGHTS OF OCCUPANCY

Power of Minister to revoke rights of occupancy for good cause.

34. (1) It shall be lawful for the Minister to revoke a right of occupancy for good cause.

(2) Good cause in the case of a statutory right of occupancy shall include—

(*a*) non-payment of rent, rates, taxes or other dues imposed upon the land;

(*b*) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of any

right of occupancy or part thereof contrary to the provisions of this Law or of any regulations made thereunder;

(*c*) the requirement of the land by the Government of Northern Nigeria or by a native authority in Northern Nigeria, in either case for public purposes within Northern Nigeria, or the requirement of the land by the Government of the Federation for public purposes of the Federation;

(*d*) the requirement of the land for mining purposes or for any purpose connected therewith;

(*e*) the abandonment or non-use of the land for a period of two years:

Provided that when land is allowed to lie fallow for purposes of recuperation of the soil it shall not be held to have been abandoned;

(*f*) a breach of any of the provisions which a certificate of occupancy is by section 11 deemed to contain;

(*g*) a breach of any term contained in the certificate of occupancy or in any special contract made under section 8;

(*h*) a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Minister under subsection (3) of section 10;

(*i*) permitting on the land a contravention of the Cinematograph Ordinance, the Cinematograph Law, 1960, or any subsidiary legislation made under either of them.

Cap. 32 of 1948 Laws. No. 9 of 1960.

(3) Good cause in the case of a customary right of occupancy shall include—

(*a*) requirement of the land by the Government of Northern Nigeria or by a native authority in Northern Nigeria, in either case for public purposes within Northern Nigeria, or the requirement of the land by the Government of the Federation for public purposes of the Federation;

(*b*) the requirement of the land for mining purposes or for any purpose connected therewith;

(*c*) the requirement of the land for the extraction of building materials;

(*d*) the requirement of the land for the grant by the Minister of a statutory right of occupancy to a person or body of persons;

(*e*) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy to a non-native without the prior consent of the Minister;

Cap. 32 of 1948 Laws. No. 9 of 1960

(*f*) permitting on the land a contravention of the Cinematograph Ordinance, the Cinematograph Law, 1960, or any subsidiary legislation made under either of them.

(4) The Minister shall revoke a right of occupancy in the event of a requisition by the Governor-General if such requisition declares such land to be required by the Government of the Federation for public purposes of the Federation or for mining purposes or for any purposes connected with mining purposes.

(5) The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorised in that behalf by the Minister and notice thereof shall be given to the holder.

(6) The title of the holder of a right of occupancy shall be extinguished on receipt by him of a notice given under subsection (5) or on such later date as may be stated in the notice.

(7) The revocation of a right of occupancy shall not affect the rights of any sublessee or sub-underlessee to whom the land or any part thereof has been lawfully underlet before a notice under subsection (5) has been received by the holder and against whom no good cause for revocation exists.

Compensation payable on revocation of right of occupancy by Minister in certain cases.

35. (1) If a right of occupancy is revoked for the cause set out in paragraph (*c*) of subsection (2) of section 34 or in paragraph (*a*), (*c*) or (*d*) of subsection (3) of the same section, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements and for the inconvenience caused by their disturbance.

(2) If a right of occupancy is revoked for the cause set out in paragraph (*d*) of subsection (2) of section 34 or in paragraph (*b*) of subsection (3) of the same section the holder and the occupier shall be entitled to compensation under the approriate provisions of the Minerals Ordinance or the Mineral Oils Ordinance or any legislation replacing the same.

Caps. 121 and 120 of 1958 Laws.

(3) If the holder or the occupier entitled to compensation under this section is a native community the Minister may direct that any compensation payable to it shall be paid—

(*a*) to the native community; or

(*b*) to the chief or headman of the native community to be disposed of by him for the benefit of the native community in accordance with native law and custom; or

(*c*) into some fund specified by the Minister for the purpose of being utilised or applied for the benefit of the native community.

36. The revocation of a statutory right of occupancy shall not operate to extinguish any debt due to the Government under or in respect of such right of occupancy.

Debt due to Government not extinguished by revocation.

37. (1) For the avoidance of doubt it is hereby declared that the acquisition by the Minister of lands other than native lands for public purposes shall be carried out in accordance with the provisions of the Public Lands Acquisition Ordinance.

Acquisition of lands other than native lands for public purposes. Cap. 185 of 1948 Laws.

(2) Lands acquired by the Minister in accordance with the provisions of the Public Lands Acquisition Ordinance shall be and be deemed to have been native lands for the purpose of this Law from the date of such acquisition and may be dealt with in accordance with the provisions of this Law, and section 3 of the Public Lands Acquisition Ordinance shall be deemed to be modified accordingly.

Cap. 185 of 1948 Laws.

38. (1) It shall be lawful for a native authority to enter upon, use, and occupy for public purposes any native lands within the area of its jurisdiction which are not—

Power of native authorities to occupy land for public purposes.

(*a*) the subject of a statutory right of occupancy;

(*b*) within an area which has been set aside by the Government for public purposes;

(*c*) the subject of any laws relating to minerals or mineral oils,

and for that purpose to revoke any customary right of occupancy on any such land.

(2) The native authority shall have exclusive rights to the lands so occupied against all persons other than the Minister.

(3) The holder and the occupier according to their respective interests of any customary right of occupancy revoked under subsection (1) shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements and for the incovenience cause by their disturbance.

(4) If a native authority shall refuse or neglect within a reasonable time to pay compensation to a holder and an occupier according to their respective interests under the provisions of subsection (3) the Minister may himself proceed to the assessment of compensation under section 43 and direct the native authority to pay the amount of such compensation to the holder and the occupier according to their respective interests.

PART VI—JURISDICTION OF COURTS, ASSESSMENT OF COMPENSATION, PENALTIES AND NOTICES

39. (1) Proceedings by the Minister for the recovery of possession of any native lands against any person who is in unlawful possession

Method of recovery of possession of native lands.

thereof may be commenced in the High Court by the Attorney-General in his own name or in the name of the Minister in all cases.

(2) Proceedings by a native authority for the recovery of possession of native lands against any person who is in unlawful possession thereof may be commenced in the appropriate native court by the native authority in whose area the land is situate where the person against whom recovery of possession is sought is subject to the jurisdiction of native courts.

(3) In any proceedings brought under the provisions of subsection (1) or (2) the burden of proving a claim by the defendant to any right, title or licence shall rest upon him.

Cap. 193 of 1948 Laws.

(4) The provisions of the Recovery of Premises Ordinance or any other written law shall not apply to proceedings under this section.

(5) Any person against whom possession of land has been recovered in proceedings brought under this section and who unlawfully resumes possession of the land shall be guilty of an offence and shall be liable on conviction to a fine of fifty pounds or to imprisonment for six months or to both such fine and imprisonment.

(6) No order made by any court for the recovery of possession against any person in proceedings brought under this section shall affect the right of any sub-lessee or sub-underlessee to whom the land or any part thereof has been lawfully underlet before proceedings were instituted and against whom no action for recovery of possession would otherwise lie.

Exclusion of law of limitation from crown proceedings.

40. No action or other remedy by or on behalf of the Minister or the Attorney-General for the recovery of the possession of native lands or for the recovery of any rent or other dues in respect of a statutory right of occupancy shall be barred or affected by any statute or other law of limitation.

Jurisdiction of courts.

41. (1) The High Court shall have exclusive original jurisdiction in the following proceedings—

(*a*) proceedings in which the right of the Governor or the Minister to grant a statutory right of occupancy over any land is in dispute;

(*b*) proceedings by way of petition of right;

(*c*) proceedings by the Attorney-General under the provisions of subsection (1) of section 39.

(2) A native court of competent jurisdiction shall have jurisdiction in the following proceedings—

(*a*) proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of a customary right of occupancy where all parties are subject to

the jurisdiction of native courts, subject nevertheless to the provisions of paragraph (*b*) of subsection (3):

Provided that nothing herein contained shall be deemed to confer jurisdiction on any native court in regard to disputes relating to intertribal boundaries;

(*b*) proceedings under the provisions of subsection (2) of section 39.

(3) The High Court and District Court (within the respective limits prescribed in the District Courts Law, 1960) shall have jurisdiction in the following proceedings—

N.N. No. 15 of 1960.

(*a*) proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of a customary right of occupancy where one or more of the parties are not subject to the jurisdiction of native courts;

(*b*) proceedings of the description referred to in paragraph (*a*) of subsection (2) where there is no native court of competent jurisdiction available to try the proceedings;

(*c*) proceedings in respect of any land the subject of any right of occupancy other than those otherwise specifically described in this section.

(4) "Proceedings in respect of any land the subject of a right of occupancy" shall include proceedings for a declaration of title to a right of occupancy.

(5) (*a*) Proceedings for the recovery of rent payable in respect of any certificate of occupancy may be taken in the High Court or a District Court (within the respective limits prescribed in the District Courts Law, 1960) by and in the name of any administrative officer or by and in the name of any other officer appointed by the Minister in that behalf.

N.N. No. 15 of 1960.

(*b*) Proceedings for the recovery of rent payable in respect of any statutory right of occupancy granted by a native authority or any customary right of occupancy may be taken by and in the name of the native authority concerned in a native court of competent jurisdiction.

(6) The following native courts shall be native courts of competent jurisdiction for the purposes of this section—

(*a*) every court of Grade 'A';

(*b*) every alkali's court of whatever grade having jurisdiction over the area in which the land which is the subject-matter of the dispute is situated, within the limits and to the extent of the grade or powers of such court;

(*c*) every other native court upon which the Governor in Council may, by order made under paragraph (*b*) of subsection (2) of section 17 or section 24 of the Native Courts Law, 1956, confer jurisdiction for all or any of the purposes of this section within the limits and to the extent of the jurisdiction or powers conferred by such order.

No. 6 of 1956.

Restrictions on power of sale under a court order.

42. No right of occupancy granted under the provisions of this Law or under the provisions of any written law replaced by this Law which is subject to a covenant, whether express or implied, by the holder not to assign, without the consent of the Governor or the Minister or a native authority or local authority shall be sold by or under the order of a court save to a purchaser approved in writing by the Minister and upon terms also so approved.

Assessment of compensation.

43. Unless otherwise specifically provided the amount of any compensation to be awarded under any section of this Law shall be such as may be agreed by the Minister or the native authority as the case may be on the one hand and the holder or occupier as the case may be on the other hand, or, in default of such agreement, as may be determined by arbitration under the Arbitration Ordinance.

Cap. 13 of 1948 Laws.

Prohibition of and penalties for unauthorised use of land.

44. (1) No person shall—

(*a*) erect any building, wall, fence or other structure upon; or

(*b*) enclose, obstruct, cultivate or to do any act on or in relation to,

any land which is not the subject of a right of occupancy or licence lawfully held by him or in respect of which he has not received the permission of the Minister to enter and erect improvements prior to the grant to him of a right of occupancy.

(2) Any person who contravenes any of the provisions of subsection (1) shall, on being required by the Minister so to do and within the period of time fixed by the Minister, remove any building, wall, fence, obstruction, structure or thing which he may have caused to be placed on the land and shall put the land in the same condition as nearly as may be in which it was before such contravention.

(3) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of fifty pounds.

(4) Any person who fails or refuses to comply with a requirement made by the Minister under the provisions of subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine of one pound for each day during which he makes default in complying with the requirement of the Minister.

Service of notices.

45. Any notice required by this Law to be served on any person shall be effectively served on him—

(*a*) by delivering it to the person on whom it is to be served; or

(*b*) by leaving it at the usual or last known place of abode of that person; or

(*c*) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode; or

(*d*) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it in a prepaid registered letter addressed to the secretary or clerk of the company or body at that office; or

(*e*) if it is not practicable after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served, by addressing it to him by the description of "holder" or "occupier" of the premises (naming them) to which it relates, and by delivering it to some person on the premises or, if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises.

PART VII—SUBSIDIARY LEGISLATION AND DELEGATION OF POWERS

Delegation of powers.

46. (1) It shall be lawful for the Governor in Council or the Minister to delegate to any native authority or local authority all or any of the powers conferred on the Minister by this Law, subject to such restrictions, conditions and qualifications, not being inconsistent with the provisions of this Law as the Governor in Council or the Minister may specify.

(2) Where the power to grant certificates of occupancy has been delegated to a native authority or local authority, otherwise than by regulations made by the Governor in Council under section 47, such certificates shall be expressed to be granted on behalf of the Minister, and subsection (1) of section 10 shall, for the purposes of such delegation, be read as if for the words "under his hand" therein were substituted the words "bearing the seal of the native authority", or "bearing the seal of the local authority" as the case may require.

(3) No delegation to a native authority or local authority shall affect the right of the Government to rents payable under this Law.

(4) Without prejudice to any other power of delegation the Attorney-General may delegate to any member of his staff the exercise of any function conferred or imposed upon him by or under this Law.

Power of Governor in Council to make regulations.

47. The Governor in Council may make regulations for the purpose of carrying this Law into effect, and particularly with regard to the following matters—

(*a*) the transfer by sale or otherwise of rights of occupancy;

(*b*) the terms and conditions upon which special contracts may be made under section 8;

(*c*) the grant of certificates of occupancy under section 10;

(*d*) the grant of temporary rights of occupancy;

(*e*) the terms and conditions upon which licences may be granted under section 16;

(*f*) the procedure to be observed in revising rents;

(*g*) the survey and demarcation of areas the subject of rights of occupancy and the maintenance of boundary marks;

(*h*) the delegation of the powers of the Minister to native authorities and local authorities under section 46;

(*i*) the grant of statutory rights of occupancy by local or native authorities (where powers of grant have been delegated to such authorities), the terms and conditions under which such grants are to be made and the variation of native law and custom, where necessary, to give effect to any regulations made for this purpose;

(*j*) the method of application for any licence or permit;

(*k*) the manner in which objections shall be lodged and disposed of;

(*l*) the manner in which and the terms and conditions upon which rights of occupancy may be sold by auction;

(*m*) the fees to be paid for any matter or thing done under this Law; and

(*n*) the forms to be used for any document or purpose.

PART VIII.—SAVINGS AND REPEAL

Saving of existing rights.

48. Nothing in this Law shall affect—

(*a*) the validity of any title to land granted to a non-native or any interest therein acquired by such non-native—

(*i*) before the 4th day of February, 1927, in its application to Sardauna Province provided that such title shall have been proved to the satisfaction of the Governor before the 31st day of December, 1930; or

(*ii*) before the 25th day of February, 1916, in its application to the rest of Northern Nigeria; and

(*b*) the rights of the Governor or of the Niger Company or its successors in title, in to or over the land specified or referred

to in the agreements or instruments mentioned in the Second and Third Schedule, or either of them, to the Niger Lands Transfer Ordinance.

Cap. 149 of 1948 Laws.

Perfecting of existing rights.

49. Where it appears to the Minister that before the 1st day of March, 1916, a native had acquired or was in process of acquiring a valid title to land in the territory which is now comprised in Sardauna Province or to any interest therein the Minister may issue to such person, or to the person who appears to the Minister to be his successor in title, a grant of such title under his hand and the seal of Northern Nigeria for such consideration and subject to such conditions, if any, as the Minister may specify in the grant, and thereupon the title so granted shall have effect as if this Law and the Land and Native Rights Ordinance had not been enacted.

Cap. 105 of 1948 Laws.

Minister to have regard to native law and custom.

50. The Minister, in the exercise of the powers conferred upon him by this Law with respect to any land, shall have regard to the native laws and customs existing in the district in which such land is situated.

Exercise of powers of native authorities.

51. (1) The powers vested in a native authority by native law and custom in relation to land shall be exercised by it subject to the provisions of this Law and of any other written law.

(2) A native authority shall not be deemed to have nor shall it exercise the power to consent to the use or occupation of land by a non-native except in so far as powers in that behalf may have been delegated to such native authority under section 46 or under regulations empowering it to grant statutory rights of occupancy to non-natives.

Repeal of Cap. 105 of 1948 Laws and saving.

52. (1) The Land and Native Rights Ordinance is hereby repealed in so far as it has effect as if it were a law enacted by the Legislature of Northern Nigeria.

(2) The repeal effected by subsection (1) shall not affect any certificates of occupancy granted under the Land and Native Rights Proclamation which certificates and the rights thereby conferred and the obligations thereby imposed shall continue to be governed by the said Proclamation as if the Land and Native Rights Ordinance and this Law had not been made.

Cap. 65 Laws of Northern Nigeria 1910.

Cap. 105 of 1948 Laws.

Consequential amendments. Schedule.

53. Each section set out in the second column of the Schedule hereto of the Ordinance or Law opposite thereto in the first column of the Schedule is hereby amended by the deletion therein of the words "Land and Native Rights Ordinance" and the substitution therefor of the words and figures "Land Tenure Law, 1962".

(Section 53) SCHEDULE

Ordinance or Law	*Section*
Crown Lands Ordinance (Cap. 45 of 1948 Laws)	2
Forestry Ordinance (Cap. 75 of 1948 Laws)	2
Land Development (Provision for Roads) Ordinance (Cap. 106 of 1948 Laws)	2
Land Registration Ordinance (Cap. 108 of 1948 Laws)	2
Nigeria Town and Country Planning Ordinance (Cap. 155 of 1948 Laws) ...	65(1)(*a*) 76(*a*) 77(1)
Public Lands Acquisition Ordinance (Cap. 185 of 1948 Laws)	2
Sheriffs and Civil Process Ordinance (Cap. 205 of 1948 Laws)	45(1) 52(2)
Townships Ordinance (Cap. 216 of 1948 Laws)	2
Northern Region High Court Law, 1955 (No. 8 of 1955)	16(1) 105(2)
Native Courts Law, 1956 (No. 6 of 1956)	19(5)
District Courts Law, 1960 (No. 15 of 1960)	13(1)(*d*) 84(1)
Northern Nigeria Radio Law, 1960 (No. 4 of 1960)	20(2)

This printed impression has been carefully compared by me with the Bill which has passed the Legislative Houses and found by me to be a true and correctly printed copy of the said Bill.

ISA ABUBAKAR,
Acting Clerk to Regional Legislature

No. 11 1958.

Eastern Region of Nigeria.

IN THE SEVENTH YEAR OF THE REIGN OF
HER MAJESTY QUEEN ELIZABETH II
ORLANDO PETER GUNNING, Esquire, C.M.G.
Officer Administering the Governemtn of the
Eastern Region.

A LAW TO REGULATE THE ACQUISITION OF LAND BY ALIENS.

[15th May, 1958]

BE IT ENACTED by the Legislature of the Eastern Region of Nigeria as follows:-

1. This Law may be cited as the Acquisition of Land by Aliens Law, 1958, and shall come into operation on a date to be appointed by the Governor in the Regional Gazette

2. In this Law:-

"alien" means:

(a) any individual other than a Nigerian and

(b) any company or association or body of persons corporate or unincorporate other than -

(i) a body corporate established specifically by or under any Ordinance or Law which empowers that body to acquire and hold land; or

(ii) a corporate body incorporated under the provisions of the Land (Perpetual Succession) Ordinance or any other Ordinance or Law containing general provisions for incorporation where such corporate body is composed solely of Nigerians, or under the provisions of the Native Authority Ordinance, the Eastern Region Local Government Ordinance, 1950, or the Eastern Region Local Government Law, 1955: or

(iii) a co-operative society composed solely of Nigerians and registered under the provisions of any Co-operative Societies Ordinance or the Co-operative Societies Law, 1955:

"court" means the High Court and the Magistrate's Court;

"instrument" means any document in writing affecting land, and includes a will;

"the Minister" means the Minister for the time being charged under section 119 of the Nigerial (Constitution) Order in Council, 1954, with responsibility for Land;

"Nigerian" means any person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendants of such persons; and includes any person one of whose parents was a member of such a

tribe and includes any individual company, association or body of persons corporate or unincorporate that is not an alien.

3. (1) The Minister may delegate such of the powers conferred upon him under the provisions of this Law as he shall think fit.

(2) Any delegation made under the provisions of subsection (1) shall be revocable at will and no delegation shall prevent the exercise of any power by the Minister.

4. (1) No alien may acquire any interest or right in or over any land from a Nigerian, unless such alien has been approved in writing by the Minister in that behalf, and then only under an instrument which, and the terms whereof, have also been so approved.

(2) Where any such right or interest has been lawfully acquired by an alien, such right or interest shall not be transferred, alienated, demised or otherwise disposed of to any other alien, or be sold to any other alien under any process of law, without the approval in writing of the Minister of such other alien and of the instrument and the terms thereof.

(3) Any transaction and any instrument by or under which an alien purports to acquire any interest or right in or over any land which has not been duly approved in

accordance with the provisions of this section shall be null and void and of no legal effect.

5. It shall be unlawful for any alien or for any person claiming under an alien to occupy any land belonging to a Nigerian unless the right of the alien to occupy or authorise the occupation of the land -

(a) is evidenced by an instrument which has received the approval of the Minister in writing; or

(b) is evidenced by an instrument which has received the approval of the Governor of Nigeria or the Lieutenant-Governor or Governor of the Eastern Region under the provisions of the Native Land Acquisition Ordinance; or

(c) was acquired, if the land is situate in that part of the Eastern Region which in the year 1900 was included in the Protectorate of Southern Nigeria, before the 1st of January, 1900, and in the case of lands situate elsewhere, before the 30th March, 1908; or

(d) is authorised by or under any ordinance or law:

Provided that, with the previous consent of the Minister it shall be lawful for an alien or person claiming under an alien to occupy land belonging to a Nigerian pending the execution of an instrument the terms of which have been approved by the Minister. Such consent may, however, be

withdrawn by the Minister at any time, if he deems it necessary in the public interest to do so.

6. Any alien or other person who is in unlawful occupation of land belonging to a Nigerian shall be guilty of an offence and liable on summary conviction to a fine of one hundred pounds or imprisonment for twelve months.

7. (1) Where it appears to the court that any alien or person claiming to be entitled under an alien, is in unlawful occupation of any land belonging to a Nigerian, the court may, on the application of the Attorney-General or any person authorised by him or on its own motion, cause a summons to be issued to such alien or person aforesaid, requiring him to appear before the court and produce the instrument by virtue whereof the alien, who is occupying the land or under whom the land is occupied, is entitled to occupy or authorise the occupation of the same, or a copy of such instrument certified in accordance with the law relating to the registration of instruments.

(2) If on the hearing of such summons the court shall find that such alien or person claiming under an alien is occupying land belonging to a Nigerian, and such alien or person fails to satisfy the court that such occupation is lawful, the court shall, notwithstanding the provisions of any written law, order such alien or person aforesaid to give up possession of the land, and shall issue such process as may be necessary for enforcing such order.

8. Notwithstanding the provisions of any written law proceedings for an offence against any provision of this Law and all civil proceedings hereunder, shall be brought in the name of the Attorney-General and may be instituted and conducted by any person authorised by him generally, or specifically in relation to any particular proceedings or class of proceedings, by writing under his hand.

9. The Governor in Council may make regulations with respect to all or any of the following matters:-

(a) The conditions upon which the approval of the Minister may be had and obtained to instruments by or under which aliens may acquire any interests or rights in or over any land from Nigerians:

(b) the terms and conditions to be contained in such instrument, and the forms of such instruments; and

(c) the fees to be paid by aliens upon the approval of the Minister of such instruments, and upon the execution thereof by the parties thereto.

10. The Native lands Acquisition Ordinance shall cease to apply in the Eastern Region.

SUBSIDIARY LEGISLATION.

NATIVE LANDS ACQUISITION (APPROVAL OF TRANSACTIONS) REGULATIONS.

W.R.L.N. 120 of 1958. (section 7).

[6th March, 1958]

1. These Regulations may be cited as the Native Lands Acquisition (Approval of Transactions) Regulations.

2. (1) Any person wishing to obtain approval of a transaction, as required by the Law, shall submit to the Commissioner of Lands an application in the form set out in the First Schedule.

(2) The applicant shall, before submitting his application, pay into the Local or Sub-Treasury most convenient to him the appropriate fee set out in the Secon Schedule, and shall deliver or send with his application the Treasury receipt obtained by him for the sum so paid.

(3) The applicant shall furnish the Commissioner of Lands with any further information which the Commissioner may require in respect of the application.

3. (1) The conditions upon which approval, as required by the Law, may be given to a transaction are -

(a) that an application for approval is made in the form set out in the First Schedule;

(b) that the interest or right to be acquired under the transaction will be acquired subject to the provisions of regulation 4;

(c) that the fees prescribed by regulation 2 are paid;

(d) that the transaction, if approved, will be evidenced by an instrument duly registered in accordance with the provisions of the Land Instruments Registration Law within one year of the date of approval.

4. The interest or right to be acquired under the transaction shall not be acquired for any greater estate than a term of years and such term -

(a) shall not exceed, including any option to renew, ninety-nine years;

(b) shall not commence more than twelve months after the application for approval of the transaction.

5. (1) An instrument of lease shall contain a covenant on the part of the lessee in a form satisfactory to the Commissioner of Lands to pay the rent at the time and in the manner stated therein:

Provided that no covenant shall be regarded as complying with this paragraph if it provides for payment in advance of the rent for an aggregate period of more than twenty years.

(2) An instrument of lease shall contain, in addition to any usual terms and conditions, the following conditions:-

(a) that the rent reserved will be subject to revision on the exercise of any option of renewal contained in the lease or every twenty years of the term created and such revised rent shall be fixed by agreement between the lessor and the lessee:

Provided that this condition will not be so framed as to apply to the rent reserved in a lease containing one or more renewal clauses where the aggregate of the original term and the term (or terms) of any renewal (or renewals) does not exceed twenty years.

(b) that if the lessor and the lessee are unable to agree as to the revised rent to be paid the matter will be referred to an arbitrator to be agreed upon by them, or in the absence of such agreement to an arbitrator appointed by a judge of the High Court in accordance with the provisions of the Arbitration Law;

(c) that the amount at which the revised rent is fixed by the arbitrator appointed pursuant to the condition specified in sub-paragraph (b) above will be such as in the opinion of the arbitrator is a fair and reasonable rent for the land demised having regard to rents obtained at the commencement of the revision period for similar lands of similar area and amenities, similarly situate, with a proviso to the effect that in fixing the rent the arbitrator will not take into account any improvements m made by the lessee upon the land demised since the date of the lease;

(d) that the decision of any arbitrator appointed pursuant to the condition specified in sub-paragraph (b) above will be final;

(e) that the provisions of the Arbitration Law will be applicable to any reference and award made pursuant to the conditions specified in the foregoing paragraphs.

6. Notwithstanding the provisions of regulations 2, 3, 4 and 5, the Governor may in any particular case waive compliance with any of the requirements of these regulations or modify the conditions or limitations contained therein.

7. The approval of the Governor shall be conveyed to the applicant in the letter form set out in the Third Schedule or to the like effect.

CHAPTER 176.

RECOVERY OF PREMISES

(Lagos)

An Ordinance to make provision for the recovery of possession of premises.

(1st June, 1945)

29 of 1945
67 of 1945
L.N. 131 of 1954
47 of 1955.

PART I. - PRELIMINARY

Short title and Interpretation.

1. (1) This Ordinance may be cited as the Recovery of Premises Ordinance.

(2) The Governor in Council may from time to time by order declare that the provisions of this Ordinance shall not apply to any town, village, place or area specified in such order and upon such an order coming into force the profisions of this Ordinance shall cease to apply to such towns, villages, places or areas as may be specified in the order: Provided that all proceedings instituted prior to and which are pending at the date of the coming into force of the said order and which are in respect of any premises in any town, village, place or area referred to in the order

order may be continued and carried through to completion, notwithstanding such order, in all respects as if the Ordinance still applied to the town, village, place or area in which are situate the premises in question.

(3) Where the provisions of the Ordinance are withdrawn from any town, village, place or area by Order in Council as aforesaid such withdrawal shall remain operative only so long as there is in force an order effecting such withdrawal.

2. Definitions:-

"agent" means any person usually employed by the landlord in the letting of the premises or in the collection of the rents thereof or specially authorised to act in a particulary manner by writing under the hand of the landlord;

"court" includes the High Court and magistrates' courts but does not include a native court;

"landlord" in relation to any premises means the person entitled to the immediate reversion of the premises or if the property therein is held in joint tenancy or tenancy in common, any of the persons entitled to the immediate reversion, and includes the attorney or agent of any such landlord, and also any person appointed to act on behalf of the Corwn in dealing with any lands,

buildings, premises or corporeal or incorporeal hereditaments vested in the Crown;

"mesne profits" means the rents and profits which a tenant who holds over or a trespasser has or might have received during his occupation of the premises and which he is liable to pay as compensation to the person entitled to possession;

"premises" includes -

(a) a house or building or any part thereof together with its grounds or other appurtenances, and

(b) land without any buildings thereon;

"rent" includes any part of any crop rendered, or any equivalent given in kind or in labour, in consideration of which a landlord has permitted any person to use and occupy any land, house, premises or other corporeal hereditament;

"tenant" includes any person occupying premises whether on payment of rent or otherwise but does not include a person occupying premises under a bona fide claim to be the owner of the premises;

"the rules" means the rules for the time being in force relating to the practice and procedure of the courts in the exercise of their respective civil jurisdiction made under the law by which such courts were established or any law amending the same.

(2) A reference to a Form means a reference to such Form as set out in the Schedule.

Jurisdiction

3. Proceedings under this Ordinance may be brought in any court of competent jurisdiction.

4. Where proceedings under this Ordinance are brought in the High Court and the amount recovered or the value of the rent as ascertained does not exceed an amount which could have been recovered without any set-off or with an admitted set-off in a magistrate's court the plaintiff shall not be allowed costs in excess of those which he could have recovered had he brought the action in a magistrate's court: Provided that when -

(a) the proceedings were in respect of a bona fide claim of right set up by the defendant under section 5, or

(b) the court certifies that there was a question of law involved which rendered it advisable for a decision thereon to be made by the High Court,

the court may award costs on the scale applicable to actions brought in the High Court.

5. The jurisdiction of a magistrate shall not be ousted

by the defendant bona fide setting up the title of a third person, unless he holds under, or claims through such third person.

6. Where the rent includes any part of a crop or any value given in kind or in labour or any amount which is not specified as of a precise monetary value proceedings under this Ordinance may be brought in a magistrate's court: Provided that if during the hearing it appears that the amount of the claim is a sum exceeding the rate of two hundred pounds a year the plaintiff may abandon the excess and proceed and thereupon the magistrate's court shall have jurisdiction to hear and determine the action, so however that :

(a) subject to the provisions of any law limiting the jurisdiction of the magistrate hearing the action, the plaintiff shall not recover in any such action a sum greater than two hundred pounds, and

(b) the judgment of the court shall be in full discharge of all demands in respect of the particular cause of action.

PART II. - PROCEEDINGS LEADING UP TO JUDGMENT.

Notices to Quit and of Intention to Recover Possession.

7. When and so soon as the term or interest of the

tenant of any premises, held by him at will or for any term either with or without being liable to the payment of any rent, shall have ended or shall have been duly determined by a written notice to quit as in Form B, C or D, whichever is applicable to the case, or otherwise duly determined, and such tenant, or, if such tenant does not actually occupy the premises or only occupies a part thereof, any person by whom the same or any part thereof shall then be actually occupied, shall neglect or refuse to quit and deliver up possession of the premises or of such part thereof respectively, the landlord of the said premises or his agent may cause the person so neglecting or refusing to quit and deliver up possession to be served, in the manner hereinafter mentioned, with a written notice, as in Form E signed by the landlord or his agent, of the landlord's intention to proceed to recover possession on a date not less than seven days from the date of service of the notice.

8. (1) Where there is no express stipulation as to the notice to be given by either party to determine the tenancy the following periods of time shall be given:-

(a) in the case of a tenancy at will or a weekly tenancy a week's notice;

(b) in the case of a monthly tenancy, a month's notice;

(c) in the case of a quarterly tenancy, a quarter's notice;

(d) in the case of a yearly tenancy, half a year's notice: Provided that in the case of a yearly tenancy the tenancy shall not expire before the time when any crops growing on the land, the subject of the tenancy, would in the ordinary course be taken, gathered, or reaped if such crops were crops which are normally reaped within one year of planting and such planting was done by the tenant prior to the giving of the notice.

(2) The nature of a tenancy shall, in the absence of any evidence to the contrary, be determined by reference to the time when the rent is paid or demanded.

9. Notices referred to in section 8 may be given at any time prior to the date of termination of the current terms of tenancies, but they shall not be effective if the time between the giving of the notice and the time when the tenancy is to be determined is less than the respective periods set out in section 8.

Summons.

10. (1) Upon the expiration of the time stated in any such notice of the landlord's intention to recover possession,

if such tenant or any person holding or claiming by, through or under him, neglects or refuses to quite and deliver up possession accordingly, the landlord may apply, according to whether he is taking action in the High Court or a magistrate's court, for the issue of a writ or enter a plaint, as in Form F, at his option either against such tenant or against such person so neglecting or refusing, in the court of the division or district, as the case may be, in which the premises are situate for the recovery of the same and thereupon a summons as in Form G shall issue to such tenant or person so neglecting.

(2) If mesne profits are claimed and the writ or plaint shows that the rate at which such mesne profits are claimed is the same as the rent of the premises judgment shall be entered for the ascertained amount as a liquidated claim and if mesne profits are claimed at the rate of the said rent up to the time of obtaining possession the judgment shall be extended to include such claim and shall be as in the second alternative in Form J.

11. Where any summons for the recovery of any premises as is hereinbefore specified shall be served on or come to the knowledge of any sub-tenant of the plaintiff's immediate tenant, such sub-tenant being an occupier of the whole or

of a part of the premises sought to be recovered, he shall forthwith give notice thereof to his immediate landlord, failure to give such notice rendering him liable to forfeit such sum as the court may consider just but not exceeding three years' rent of the premises held by such sub-tenant to such landlord, such sum to be recoverable, whatever the amount thereof, by such landlord by action in the court from which such summons shall have issued, and such landlord, on the receipt of such notice, if not originally a defendant, may be added or substituted as a defendant to defend possession of the premises in question.

12. The landlord may, either together with his writ or plaint for the recovery of the premises or in answer to any claim or counter-claim made in respect of any unexhausted improvements as hereinafter provided, claim to recover, or to set-off, rent or mesne profits, or both, accruing in respect of such premises since the ending or determination of the tenancy down to the day appointed for the hearing, or to any preceding day named in the plaint.

13. The amount claimed under any writ or plaint for arrears of rent and mesne profits shall be treated as one claim.

14. Where a tenant executes on his holding any improvements he shall be entitled, subject to the provisions of section 15, at the termination of the tenancy, on quitting his holding, to receive compensation from his landlord in respect of any such improvement which continues unexhausted.

15. A tenant shall not be entitled to compensation in respect of any improvement, unless he has executed it with the previous consent in writing of the landlord.

16. A tenant may at any time make any claim, or counter-claim before a court against the landlord in respect of any unexhausted improvement, and the court may, if it thinks it expedient, hear and determine any counter-claim, together with any claim to recover possession of the holding in respect of which the counter-claim is made: Provided that -

(a) in the case of a counter-claim, notice in writing of the particulars of such counter-claim shall be given to the landlord three clear days before the day fixed for the hearing of the claim to recover possession, and

(b) the court at the hearing shall have power to enlarge the time for the delivery of such notice as aforesaid, or for the hearing of the counter-claim.

Appraisers.

17. (1) A court may -

(a) from time to time, and at any time, appoint by writing as in Form H one or more persons to estimate the value of any unexhausted improvements in respect of which a claim or counter-claim, is made, and to report in writing as in Form I to the court thereon, and

(b) make such order as it thinks fit in respect of the expenses and remuneration of such persons.

(2) The provisions of the Stamp Duties Ordinance, shall not apply to persons appointed by the court under this section.

18. Such report in writing, purporting to be signed by the person, or persons, appointed by the court under section 17, shall be received in evidence in all courts, until it be shown that such report was not so signed as aforesaid.

Hearing and Judgment.

19. (1) If the defendant shall not at the time named in the summons or any adjournment thereof, show good cause to the contrary, then on proof -

(a) of the defendant still neglecting or refusing to deliver up the premises; and

(b) of the yearly rent of the premises; and

(c) of the holding; and

(d) of the expiration or other determination of the tenancy with the time and manner thereof; and

(e) of the title of the landlord, if such title has accrued since the letting of the premises; and

(f) of the service of the summons, if the defendant does not appear thereto,

the court may order as in Form J, K or L, whichever is applicable to the case, that possession of the premises mentioned in the palint be given by the defendant to the palintiff either forthwith or on or before such day as the court shall think fit to specify.

(2) If the plaintiff at the time named in the summons or at any adjournment thereof shall fail to obtain an order under subsection (1) the defendant shall be entitled to judgment and may be awarded costs, such judgment and award being as in Form M.

20. Where a landlord is entitled to possession of any premises, the court may issue a warrant or possession, notwithstanding that the counter-claim is undetermined or unsatisfied.

PART III. - EJECTMENT.

21. If the order of the court given under section 19 be

not obeyed, the court, whether such order can be proved to have been served on the defendant or not, shall, at the instance of the plaintiff, issue a warrant of possession, and if such order be that possession of the premises be given fortwith by the defendant to the plaintiff, the court shall at the instance and cost of the plaintiff issue a warrant of possession forthwith.

22. A warrant of possession shall entitle the plaintiff to be put in possession of the premises to which the warrant relates; it shall be as in Form N and the certificate of execution thereof shall be as in Form O.

23. Every warrant of possession shall on whatever day it may be issued, bear date of the day next after the last day named by the court in the order for the delivery of possession of the premises in question, and shall continue in force for three months from such date and no longer, but no order for delivery of possession need be drawn up or served.

24. Any warrant to give possession of premises shall justify the person named thereon or to whom it is directed in entering upon the premises named therein, with such assistant as he shall deem necessary, and in giving possession accordingly; Provided that no entry upon such warrant shall

be made on a Sunday or public holiday or at any time except between the hours of six o'clock in the morning and six o'clock in the afternoon.

25. No action and no prosecution may be brought against the judge, magistrate or other officer of the court by whom a warrant of possession shall have been issued, or against any sheriff or other person by whom such warrant may be executed, or document affixed, for issuing such warrant or executing the same respectively, or affixing such document, by reason that the person by whom the same shall be sued out had not lawful right to the possession of the premises.

26. Any person who resists, molests, assaults or in any way obstructs any officer when engaged in the execution of such warrant as aforesaid, or any person appointed under section 17 and engaged in carrying out an order of a court shall be guilty of an offence against this Ordinance and shall be liable, on summary conviction, to a fine of fifty pounds or to imprisonment for six months or to both such fine and imprisonment.

27. Any person, who has been put out of possession under a warrant of possession, and unlawfully retakes possession of the premises after possession has been given to

the landlord, shall be guilty of an offence against this Ordinance and shall be liable, on summary conviction, to a fine of fifty pounds or to imprisonment for six months or to both such fine and imprisonment.

PART IV.- MISCELLANEOUS

Service

28. Service of any notice of determination of a tenancy or of a notice to quit or any summons, warrant or other process shall be effected in accordance with the provisions of the law for the time being in force relating to the service of the civil process of magistrates' courts and if the defendant cannot be found, and his place of dwelling shall either not be known, or admission thereto cannot be obtained for serving any such process, a copy of the process shall be posted on some conspicuous part of the premises sought to be recovered, and such posting shall be deemed good service on the defendant.

Landlord's liability to Special Damages.

29. Where the landlord at the time of applying for a warrant of possession as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting on his behalf, shall be deemed

to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this Ordinance, but the party aggrieved may if he think fit bring an action for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially claimed, and may recover full satisfaction for such special damage with costs of suit: Provided that if the special damage so claimed be not proved, the defendant shall be entitled to a judgment, and that if proved, but assessed by the court at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the court before whom the trial shall have been held shall certify upon the record that full costs ought to be allowed.

Appeal.

30. Either party to any proceedings to recover possession of any premises under this Ordinance may appeal from the decision of the court to the appropriate court of appeal whatever may be the value of the subject matter in dispute.

Forms.

31. (1) Subject to the express provisions, if any of the rules the forms contained in the Schedule may, in accordance

with any instructions contained in the said forms, and with such variations as the circumstances of the particular case may require, be used in the cases to which they apply, and, whe when so used, shall be good and sufficient in law.

(2) The forms may be added to, repealed, replaced or varied by rules made as aforesaid in all respects as if the forms had originally been so made.

Application.

32. This Ordinance shall apply to and in respect of Lagos and the Southern Cameroons as though they were Regions.

CHAPTER 183.

RENT RESTRICTION

(Lagos)

An Ordinance to control and regulate the increase of rent and recovery of possession of premises in certain areas.

[25th February, 1956]

1 of 1946
19 of 1946
9 or 1948
Order
47 of 1951
L.N. 131 of 1954
47 of 1955.

1. This Ordinance may be cited as the Rent Restriction Ordinance.

(2) This Ordinance shall apply to the town of Lagos and to such other place or area to which the provisions of the Nigeria Defence (Increase of Rent) (Restriction) Regulations, 1942, have been applied under the provisions of regulation 1 of those Regulations and are still so applied on the date on which this Ordinance comes into operation.

(3) A Governor in Council may by order direct that the Ordinance shall apply with any exceptions, adaptations or modifications as may be specified in any such order to any other place or area in his Region.

(4) A Governor in Council may by order direct that the

Ordinance shall apply with any exceptions, adaptations or modifications as may be specified in any such order to any particular premises, class or classes of premises.

2. In this Ordinance:-

"Court" means the High Court or, to the extent of its powers, a magistrate's court which has jurisdiction in the place where the premises are situate, but save for the purposes of section 19 does not include a native court established under the provisions of any Ordinance or Law.

"health officer" means a health officer as may from time to time be defined in the Public Health Ordinance;

"landlord" except for the purposes of section 4 includes a landlord or sub-landlord and any person from time to time deriving title from the original landlord or sub--landlord;

"net rent" means, where the landlord paid the rates chargeable on the occupier, the rent fixed under the provisions of this Ordinance less the amount of such rates, and in any other case the rent fixed under this Ordinance;

"rent" includes any sum paid as rent or hire for the use of furniture where the premises are let furnished or where premises are let and the furniture therein is hired by

the landlord to the tenant and also, in the absence of any agreement to the contrary, any sum paid in respect of electric light and conservancy charges: Provided that this definition shall not include any agreement for the letting or hiring of furnished rooms with board.

3. (1) Unless and until the same be modified or extended by any Order in Council made under the provisions of section 1 the expression "premises" shall for the purposes of this Ordinance include any dwelling-house and any other building in which persons dwell, whether or not a part thereof is used as a shop, and any part of any premises let or sub-let separately, and if the definition of the expression of the Nigeria Defence (Increase of Rent (Restriction) Regulations, 1942, in respect of any area or areas in Nigeria, the expression "premises" shall for the purposes of this Ordinance, be deemed to include this extended definition in respect of the area or areas in Nigeria to which such order applied.

(2) Where the definition of "premises" is extended in respect of any place or area by an Order in Council made under section 1 and by reason of such extension any buildings or class of buildings which prior to such order had not been subject to the provisions of this Ordinance becomes so subject, the Governor in Council may, by the same order, state

the retrospective date on and from which the provisions of this Ordinance shall operate in respect of any buildings or class of buildings included in such extension and, upon such date being so given, the provisions of this Ordinance shall be construed to operate in respect of such buildings or class of buildings in such area as if for the date "the 1st day of July, 1941" hereinafter contained there were substituted the retrospective date so stated in the order.

(3) Where the definition of "premises" is modified in respect of any area by an Order in Council made under section 1 and by reason of such modification any buildings or class of buildings which, prior to such order, had been subject to the provisions of this Ordinance, ceases to be so subject, the Governor in Council may, by the same order, state the date on and from which such buildings or class of buildings shall be deemed to be decontrolled and such buildings or class of buildings shall be so decontrolled subject to the rights or liabilities of any person which have arisen or which may arise in respect of the period during which such buildings or class of buildings were subject to the provisions of this Ordinance.

4. (1) Where a landlord has let, whether before or after the coming into operation of this Ordinance in respect of the place or area in which the premises are situate, any

premises and his tenant not being expressly prohibited in writing from sub-letting, sub-lets such premises or any part thereof, the sub-tenants of such premises or any part thereof, shall be deemed for the purpose of this Ordinance to be tenants of the landlord.

5. A Governor may by order fix a maximum rent for any premises, class or classes of premises within any place, area or part of his Region to which this Ordinance applies or is made to apply, in cases where the normal net rent of such class or classes of premises would not exceed fifty-two pounds per annum.

6. (1) Subject to the provisions of this Ordinance as and from the 1st day of July, 1941, it shall be unlawful for any landlord to -

(a) receive or recover the increased rent of any premises to which this Ordinance applies where the rent has been increased on or after the 1st day of July, 1941; or

(b) increase the rent of any premises to which this Ordinance applies

without the order of a court.

(2) The amount by which a landlord may increase the rent of premises to which this Ordinance applies, shall

subject to the other provisions of this Ordinance, be as follows:-

(a) where the landlord has since the 1st day of July, 1941, incurred, or hereafter incurs, expenditure on the improvement which shall include the provision of additional or improved fixtures or fittings or structural alteration of the premises (not including expenditure on decoration or repairs), by an amount calculated to six per cent per annum on the amount so expended: Provided that the tenant may apply to a court for an order suspending or reducing such increase on the ground that such expenditure is or was unnecessary in whole or in part, and the court may make an order accordingly but the court shall not make an order under this provision upon the application of any person unless he proves either -

(i) that he was the tenant when the expenditure was incurred and had not given his written consent to the improvement or alteration and the expenditure thereon; or

(ii) that, the landlord having been in possession of the premises at the date when the expenditure was incurred, the applicant is the first tenant subsequent to that date and became tenant

without notice of the following particulars, that is to say -

(a) the nature of the improvement or alteration;

(b) the amount of the expenditure thereon; and

(c) the amount of the maximum increase of rent chargeable on account thereof;

(b) an amount being the permitted increase under the provisions of section 18;

(c) where under a contract of tenancy the rates to be paid in respect of any premises to which this Ordinance applies are payable by the landlord then such landlord may increase the rent payable in respect of such premises by a sum calculated in accordance with the table in the First Schedule hereto being the excess of such rates as such landlord may from time to time be called upon to pay over the sum for which such landlord was so liable on the 1st day of July, 1941: Provided that where any such premises are let to two or more tenants the sum representing the increase so permitted shall be apportioned between such tenants in proportion to the rent payable by each such tenant;

(d) in addition to any such amounts as aforesaid -

(i) where the landlord is responsible for the whole of the repairs, an amount not exceeding five

per cent of the net rent; or

(ii) where the landlord is responsible for part and not the whole of the repairs, such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by a court to be fair and reasonable having regard to such liability.

(3) (a) At any time not being less than three months after the date of any increase permitted by paragraph (d) of subsection (2), the tenant or a health officer may apply to the court for an order suspending such increase, on the ground that the premises are not in all respects reasonably fit for human habitation, or are otherwise not in a reasonable state of repair.

(b) The court on being satisfied by the production of a certificate of the health officer or otherwise that any such ground is established, and on being further satisfied that the condition of the house is not due to the tenant's neglect or default or breach of express agreement, may order that the increase be suspended until the court is satisfied, on the report of the health officer or otherwise, that the necessary repairs other than the repairs, for which the tenant is liable, have been executed, and on the making of such order the increase shall cease to have effect until the court is so satisfied.

(4) For the purposes of this section, the expression "repairs" means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability.

7. Any tenant or sub-tenant may recover from a landlord who has unlawfully received from him any such increased rent, the difference between any such increased rent unlawfully received and the rent payable before such increase and may, without prejudice to any other method of recovery, deduct from the rent payable by him to such landlord all sums paid by him since the 1st day of July, 1941, by way of such increased rent.

8. (1) Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purpose of this Ordinance, be treated as an alteration of rent and where, as a result of such transfer, the terms on which any premises are held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased whether or not the sum periodically payable by way of rent is increased.

(2) Any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as a result of such transfer, the terms on which any premises are held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purpose of this Ordinance.

9. For the purposes of this Ordinance -

(a) the rent of any premises which were standing vacant on the 1st day of July, 1941, shall be deemed to be the rent at which such premises were last let;

(b) the rent at which premises, completed after the 1st day of July, 1941, are first let shall be such rent as in the absence of agreement may be fixed by a court as a fair and reasonable rent; and

(c) where premises not being premises to which the foregoing provisions of this subsection apply were not let at a rent on the 1st day of July, 1941, and are first let after that date, the rent shall be such rent as, in the absence of agreement may be fixed by a court as a fair and reasonable rent:

Provided that where the rent agreed upon under either

paragraph (b) or (c) is less than fifty-two pounds per annum and does not represent a fair and reasonable rent, the court shall have power to fix the rent.

10. Notwitstanding any agreement to the contrary, where the rent of any premises to which this Ordinance applies is increased, no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or, where suhh increase is on account of an increase in rates, on clear week, afther the landlord has served upon the tenant a valid notice in writing of his intention so to increase the rent, which notice shall be in the form contained in the Third Schedule to this Ordinance save that where a notice of an increase of rent which at the time was valid, has been served on any tenant the increase may be continued without service of any fresh notice on any sebsequent tenant. Where a notice contains any statement or representations which is false or misleading in any material respect, the landlord shall be liable on summary conviction to a fine not exceeding ten pounds unless he proves that the statement was made innocently and without intent to deceive.

11. (1) Any landlord or tenant or other person interested may apply to a court for an order fixing the rent of any premises.

(2) Where an application is made to a court under this Ordinance the court may refuse to make an order or may make an order authorising the receipt or recovery of the whole or any part of any increased rent or an order fixing the amount by which the rent may be increased or may by order fix the rent.

(3) A court may also make any such order of its own motion on the hearing of any suit, or matter or application before it.

(4) Where an order has been made by a court fixing the rent of any premises, the order shall be binding on all present and subsequent landlords, tenants or sub-tenants or mortgagees.

(5) A court shall have full powers of rehearing, reconsideration and revision in any case in which it thinks fit to exercise such powers and at any time on application made by any party.

12. No tenant or sub-tenant of any premises to which this Ordinance applies shall be ejected therefrom save in pursuance of an order of the court obtained under the provisions of the Recovery of Premises Ordinance.

13. (1) No order or judgment for the recovery of possession of any premises to which this Ordinance applies or for

the ejection of a tenant therefrom shall be made or given unless the court considers it reasonable to make such order or give such a judgment, and either -

(a) the court has power so to do under the provisions set out in the Second Schedule to this Ordinance; or

(b) the court is satisfied that suitable alternative accommodation is available for the tenant.

(2) Accommodation shall be deemed to be suitable if it is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, to the means of the tenant and to the needs of the tenant and his family as to extent and character and in the case of business premises, if such accommodation is, in the opinion of the court, reasonably suitable and no appreciable loss will be caused to the tenant by the transfer of the business.

14. Any ejectment of a tenant shall not affect the right of any sub-tenant to whom the premises or part thereof have been lawfully let before such proceedings for ejectment were instituted, to retain possession under this Ordinance: Provided that if ejectment is ordered on the grounds of any act, breach, default or misconduct of such sub-tenant such sub-tenant shall not be entitled to retain possession.

15. (1) From and after the 1st day of July, 1941, it shall be unlawful for anyone in consideration of the grant, continuance, surrender or giving up of a tenancy or sub-tenancy of any premises to which this Ordinance applies, to require, make, or receive the payment of any fine, premium or other like sum or the giving of any pecuniary consideration in addition to the rent.

(2) Where any such payment is made in respect of any such premises after the 1st day of July, 1941, then the amount shall be recoverable by the tenant by whom it was made from the landlord by whom it was received, and may, without prejudice to any other method of its recovery, be deducted from any rent payable by him to such landlord as the case may be.

16. A Governor in Council may by order direct that the provisions of this Ordinance shall not apply or shall cease to apply to premises generally or to any particular class or type of premises either in respect of his Region or in respect of any place, area or part of his Region where, save for the provisions of such order any such premises would otherwise be subject to the provisions of this Ordinance and the premises in respect of which any such order is made shall, from the date fixed in such order, be deemed to be decontrolled.

17. Where an order has been made under regulation 3 of the Nigeria Defence (Increase of Rent) (Restriction) Regulations and for the date "the 1st day of July, 1941" another date has been substituted, the provisions of this Ordinance shall be construed as if in respect of such premises or class of premises in the area or areas set out in such order that date were substituted for thedate "the 1st day of July, 1941" wherever such date appears in this Ordinance.

18. (1) A Governor in Council may by order direct that where premises are subject to the provisions of this Ordinance the net rent so payable in respect thereof may be increased in accordance with the terms of any such order and any such increase may be by way of a percentage increase, and, from the date fixed in such order, the net rent forerly payable under the provisions of this Ordinance in respect of any premises together with such permitted increase shall be deemed to be the net rent duly payable under the provisions of this Ordinance.

(2) Any such order may be in respect of premises generally or of any particular class of type of premises and either generally in respect of his Region or in respect of any particular place, area or part of his Region to which

the provisions of this Ordinance, whether or not adapted or modified under the provisions of section 1, apply.

(3) Where an order has been made under the provisions of this section ~~of~~ the Governor in Council may, from time to time, by subsequent order increase or reduce the permitted increase and otherwise alter, vary or amend any of the provisions of the first or any subsequent order.

19. (1) Every court whether or civil or criminal jurisdiction shall, so far as is necessary, conform to this Ordinance in all proceedings, actions, suits or cases between landlords and tenants or such landlords and tenants or sub-tenants and in all applications, suits, actions, cases and matters arising therefrom in which the rights, remedies, duties or title of the same are in question.

(2) In this section the term "court" includes all courts by law established in Nigeria.

20. (1) The Chief Justice of a High Court may, with the approval of the Governor, make rules in respect of any or all of the following matters:-

(a) regulating the procedure on applications to and hearing by the court, and the fixing of fees for the filing, service and hearing of applications;

(b) permitting a tenant or sub-tenant whose landlord

or sub-landlord refuses to accept any rent tendered to him, to pay the same into court and for regulating the payment out to the landlord of any sum so paid, the hearing and determination of applications in respect of the same, and the fixing of fees to be charged in respect of such payments;

(c) prescribing the forms to be used for the process and procedure of the courts; and

(d) generally for carrying into effect the pruposes of this Ordinance.

(2) In this section the reference to the Governor shall, in relation to Lagos and the Southern Cameroons, be construed as references to the Governor-General.

21. (1) Every order made by a board shall be deemed to be and to remain in full force and of full effect until varied or set aside by the order of a court.

(2) Every application pending before a board on the date on which this Ordinance comes into operation shall, notwithstanding the revocation of the Regulations, be heard and determined by the board concerned and every board shall continue to exercise its functions until the determination of such pending cases as if the Regulations had not been revoked.

(3) Until rules are made under the provisions of sec-

tion 20, the rules made, powers prescribed and fees fixed under the provisions of regulation 12 of the Regulations shall, mutatis mutandis, apply to and be used in proceedings before a court under the provisions of this Ordinance.

(4) Save as otherwise provided in this Ordinance the provisions of the Interpretation Ordinance which relate to the repeal of an Ordinance, shall apply to the revocation of the Regulations as if the revocation of the Regulations were the repeal of an Ordinance.

(5) For the purposes of this section "the Regulations" means the Nigeria Defence (Increase of Rent) (Restriction) Regulations, 1942, and "a board" means a Rent Assessment Board established under those Regulations.

22. This Ordinance shall apply to and in respect of Lagos and the Southern Cameroons as though they were Regions.

FIRST SCHEDULE

(Substituted by No. 19 of 1946)

Amount of the increase of the rent (in pence) permitted where the rent payable is:-

RENTS IN SHILLINGS.

		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
	9d.		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2	2	2
	10d.	1	1	1	1	1	1	1	1	1	2	2	2	2	2	2	3	3	3	3	3
	11d.	1	1	1	1	1	1	2	2	2	2	3	3	3	4	4	4	4	5	5	5
1s.	0d.	1	1	1	1	2	2	2	3	3	3	4	4	4	5	5	5	6	6	6	7
1s.	1d.	1	1	1	2	2	2	3	3	4	4	5	5	5	6	6	7	7	8	8	8
1s.	2d.	1	1	2	2	2	3	4	4	5	5	5	6	6	7	8	8	8	9	9	10
1s.	3d.	1	1	2	2	3	4	4	5	5	6	6	7	8	8	9	10	10	10	11	12
1s.	4d.	1	1	2	3	3	4	5	5	6	7	7	8	9	9	10	11	11	12	12	13
1s.	5d.	1	2	2	3	4	5	5	6	7	8	8	9	10	10	11	12	12	13	14	15
1s.	6d.	1	2	3	3	4	5	6	7	8	8	9	10	11	12	12	13	14	15	16	16
1s.	7d.	1	2	3	4	5	6	6	7	8	9	10	11	12	13	14	14	15	16	17	18
1s.	8d.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
1s.	9d.	1	2	3	4	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	22
1s.	10d.	1	2	4	5	6	7	8	10	10	12	13	14	15	16	18	19	20	21	22	23
1s.	11d.	1	3	4	5	6	8	9	10	11	12	14	15	16	17	19	20	21	23	24	25
2s.	0d.	1	3	4	5	7	8	10	11	12	13	14	16	17	18	20	21	22	24	25	27
2s.	1d.	1	3	4	6	7	9	10	11	13	14	16	17	18	20	22	23	24	25	27	29
2s.	2d.	2	3	5	6	8	9	10	12	14	15	17	18	20	21	23	24	25	27	28	30
2s.	3d.	2	3	5	6	8	10	11	13	14	16	18	19	21	22	24	26	27	29	30	32
2s.	4d.	2	4	5	7	8	10	12	13	15	17	19	20	22	24	25	27	29	30	32	33
2s.	5d.	2	4	6	7	9	11	12	14	16	28	20	21	23	25	26	29	30	32	33	35
2s.	6d.	2	4	6	8	10	11	13	15	16	18	21	22	24	26	28	30	31	33	35	37

NOTES

1. Where the rent payable is not an exact number of shillings the rent shall be taken to the nearest shilling.

2. Where the rent is an exact number of pounds the permitted

increase shall be calculated by multiplying the appropriate amount in the last column by the number of pounds.

3. Where the rent is made up of one or more complete pounds and a number of shillings the permitted increase shall be calculated by multiplying the appropriate figure in the last column by the number of complete pounds and adding thereto the appropriate figure in the column representing the number of shillings remaining.

4. The permitted increase of rent is obtained in each case by dividing the original monthly rent in shillings by 12 and multiplying the result by the rate increase.

SECOND SCHEDULE.

POSSESSION OR EJECTMENT WITHOUT PROOF OF ALTERNATIVE ACCOMMODATION.

A court shall, for the purposes of section 13 of this Ordinance, have power to make or give an order or ejectment for the recovery of possession of any premises to which the Ordinance applies or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if -

(a) the rent lawfully due by virtue of this Ordinance is in arrear for one month after it has become due; or

(b) the tenant has been guilty of the breach of an express covenant or agreement of the tenancy; or

(c) the tenant has given notice to quit in consequence whereof the landlord has contracted to sell or let the premises or has taken such other steps as a result of which he would be seriously prejudiced if he could not obtain possession; or

(d) the premises are reasonably required for any purpose which is in the public interest;

(e) the tenant or any person residing or lodging with him or being his sub-tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been used as a brotherl, or has been convicted of using the premises or allowing the premises to be used for an illegal purpose, or that the condition of the premises has deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any such person, and where such person is a sub-tenant or lodger, that the tenant has not taken such steps as he ought reasonably to have taken for the removal of such sub--tenant or lodger;

(f) the premises are so overcrowded as to be dangerous or injurious to the health of the inmates, and the court is satisfied that the overcrowding could have been abated by the removal of any lodger or sub-tenant (not

being a parent or child of the tenant) whom it would, having regard to all the circumstances of the case, including the question whether other accommodation is available for him, have been reasonable to remove, and that the tenant has not taken such steps as he ought reasonably to have taken for his removal;

(g) the premises are the subject of an abatement or similar notice issued by a public authority and compliance with the terms of such notice is only possible through the ejectment of the tenant: Provided however that the court may impose a condition for return of the tenant when compliance has been made with the terms of such notice;

(h) the premises require substantial repairs on account of which it is necessary for the tenant to vacate possession; Provided however that the court may impose a condition of return of the tenant when the repairs are completed;

(i) the premises are reasonably required by the landlord for occupation for -

(i) himself; or

(ii) any son or daughter of his over eighteen years of age; or

(iii) his father or mother:

Provided that an order of judgment shall not be made

or given on any ground specified in paragraph (i) of the foregoing provisions of this Schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.'

E.R.L.N. No. 128 of 1958.

ORDER.

The Increase of Rent (Restriction) Ordinance

(Chapter 93)

THE PORT HARCOURT MAXIMUM RENTS ORDER, 1958

(Date of Commencement: 1st April, 1958)

In exercise of the powers conferred upon the Governor by Section 5 of the Increase of Rent (Restriction) Ordinance, which powers have been delegated to the Minister of Town Planning, the following Order is hereby made:-

1. (1) This order may be cited as the Port Harcourt Maximum Rents Order, 1958, and shall come into operation on the 1st day of April, 1958.

(2) This Order shall apply throughout the area of the authority of the Port Harcourt Municipality and the area outside the Municipality known as Mile Two Diobu which is more particularly described in the First Schedule of this Order.

2. For the purposes of this order "rent" includes any sum paid as rent or hire for the use of furniture when a room is let furnished or where a room is let and the furniture therein is hired by the landlord to the tenant and also any sum paid in respect of conservancy charges and general rate but shall not include any sum paid in respect of electric light.

3. (1) The maximum rent per month that may be charged by

a landlord for one living room of an area measuring one hundred and twnety feet square or less in a house described in the Secon Schedule which is rented as a living room shall be, in the case of houses in the area of the authority of the Port Harcourt Municipality, the amount shown in Column (4) of the Second Schedule, and in the case of houses in Diobu Mile Two, the amount shown in Column (5) of the Second Schedule.

(2) The maximum rent per month that may be charged by a landlord for one living room measuring more than one hundred and twenty square feet in a house described in the Secon Schedule which is rented as a living room shall be an amount calculated, in the case of houses in the area of the authority of the Port Harcourt Municipality at the rate of the amount shown in column (4) of the Secon Schedule, and in the case of houses in Diobu Mile Two at the rate of the amount shown in Column (5) of the Second Schedule, per one hundred and twenty square feet for each square foot of such room.

The Port Harcourt (Maximum Rents) Order, 1952, is hereby revoked.

FIRST SCHEDULE.

Starting at a concrete pillar marked P.B.X. 1535 on the left bank of Illechi Creek; thence upstream in a general

north-westerly direction for a distance of about 4350 feet to a concrete pillar marked P.B.X. 8253; thence continuing in a general northerly direction to concrete pillars marked P.B.X. 1576, P.B.X. 1577, P.B.X. 1578, P.B.X. 1579, P.B.X. 1580, P.B.X. 1581, P.B.X. 1582, P.B.X. 1583, P.B.X. 1584.

Thence in a general easterly direction to a concrete pillar marked P.B.X. 1575; thence along a path in a general southerly direction to a concrete pillar marked N.L.D. 6, thence from N.L.D. 6 in a general South Westerly direction along concrete pillars P.B.X. 1544, P.B.X. 1480, N.L.D. 5 to N.L.D. 4, thence from N.L.D.4 in a general South-Easterly Direction through concrete pillars P.B.X. 1473, N.L.D. 3, P.B.X. 1522, P.B.E. 1519 to N.L.D. 2; thence from N.L.D. 2 in a general South-Westerly direction through concrete pillars N.L.D. 1, P.B.X. 1542, P.B.X. 1543, P.B.X. 1534, P.B.X. 1518 to P.B.X. 1535, the starting point.

SECOND SCHEDULE.

DESCRIPTION OF HOUSE			MAXIMUM RENT PER MONTH	
Category (1)	Roof (2)	Walls (3)	Houses in Port Harcourt (4)	Houses in Mile two Diobu (5)
			£ s d	£ s d
A1	G.C.I. Aluminium or concrete	Cement Block, or burnt brick or sandcrete	1.16.0.	1. 6. 3
A2	G.C.I. Aluminium or concrete	Mud Block cement plastered	1. 4. 0.	0.18. 3
A3	G.C.I. Aluminium or concrete	Mud Block not cement plastered	0.18. 0.	0.13. 6
A4	G.C.I. Aluminium or concrete	Mud-wattle	0.16. 0.	0.12. 0.
B1	Mat or Palm thatch	Cement block or burnt brick or sandcrete	1. 0. 0.	0.15. 0.
B2	Mat or Palm thatch	Mud block cement plastered	0.15.0.	0.11. 3.
B3	Mat or Palm thatch	Mud Block not cement plastered	0.13.0	0. 9. 9.
B4	Mat or Palm thatch	Mud-wattle	0.10.0	0. 7. 6.

MADE at Enugu this 25th day of March, 1958.

E. EMOLE
Minister of Town Planning.

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