TITLE AND MANAGEMENT OF LAND UNDER NATIVE LAW AND CUSTOM OF THE PEOPLE OF THE MIDDLE-BELT OF NIGERIA

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This A thesis submitted to the Postgraduate school Ahmadu Bello University, in partial fulfilment of the requirements of the Degree of Master of Laws (LL.M,)

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FEBRUARY, 1985

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D E C L A R A T I O N

This study has been solely undertaken by me while registered for the degree of Master of Laws of the Ahmadu Bello University, Zaria.

Any Contributions from other parties in relation to this study are duely acknowledged.

CANDIDATE

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DEAN: POST-GRADUATE.

ACKNOWLEDGEMENT

It gives me a great pleasure at this juncture to express my profound gratitude to those people who have in one way or the other contributed to the success of producing this dissertation.

At the outset, my profound gratitude goes to Dr. M.G. Yakuba my Supervisor who found time to supervise this dissertation in addition to his numerous administrative duties arising from his official capacity as the Dean of Law of this Faculty. His suggestions and critical examination of some of the facts and law as contained in this dissertation have not only served to guide me but have often spurred me to improve rather than despair.

I would also like to express my sincere gratitude to Alhaji M.B. Shani, my Head of Department for the moral and financial support he gave me. It was due to his assistance that life became tolerable and thus enabled me to endure the great deal of reading, writing and travelling involved in the the preparation of this dissertation.

Furthermore, I am grateful to my parents and my brother who on many occasions have been saddled with the responsibilty of taking care of my family during my study.

My sincere vote of thanks should also go to my wives for their unalloyed moral support.

Lastly my thanks also go to Mallan Abubakar Baba Ndakotsu and Mr. Sunday O. Ajaegbu for their secretarial services; the entire members of the Presidents Kennedy Library, my informants and all those Area Court Judges and Members whose names cannot be conveniently mentioned here.

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ABSTRACTS

The term "Middle Belt" was introduced into the literature on Nigeria by Forde in 1946 when he used the term to describe the area of the Central zone in Nigeria where the political Cultural, economic, social and population characteristic are quite distinct from those of the forest land of the South and Sudan zones of the North. The region has been specially defined as the area roughly coinciding with some parts of the former provinces of Adamawa, Benue, Ilorin, Kabba, Niger and Plateau,

The whole of the Middle Belt region is an open Savannah. The main occupation of the inhabitants is farming. This includes crops such as millet, yams, cassava, rice, guinea-corn, beans, and m beni-seed, cotton, ground-nuts, shea-nuts, palm oil, palm-kenels and timbers.

The Middle Belt consists of numerous groups of people or communities. They include: the Tiv, Igala, Idoma, Bassa, and Agatu of the Benue State. The Alago, Egbura, Afo, Gwari, Mijili and Eggon of the Southern part of Plateau State. And the Nupe Community of the Niger State.

The areas covered by this dissertation include Nasarawa, Keffi, Akwarga, Lafia and Awe Local Government Areas of Plateau State; Suleija Local Government Area of Niger State the whole of Benue State. Others are: the Koton Karfi District of the Kogi Local Government Area of Kwara State and lastly, the New Federal Capital Territory, Abuja.

In the past, land did not commend an enhanced economic value in the Middle Belt, inspite of the fact that much impor-tanfce was attached to it as a primary source of maintenance. This low economic value of land was attributed to three

factors. Firstly, Land was plentiful. Secondly, the population of the Middle Belt was sparsed due to exeessive wars and raids by the Hausas and the Fulani's of the far North. Thirdly, with the exception of the few traditional transactions such as loans and pledge there were virtually no transactions involving land due to the absence of ash economy.

Under these conditions, the tenurial system of the peoples of the Middle Belt was bound to be a simple, ordinary and tumid one; evolved principally, to meet their simple requirements. Because of this, land was owned by villagers, Communities or by family members in a form of group. Hardly was land owned by an individual. This led to a conclusion that under native law and custom, the concept of individual ownership of land was foreign to native ideas.

Therefore, under the ancient traditional land law, the bases of ownership of land are two. First,land is owned by communities. Under this system, the title to the communal land is vested in the community as a whole. And in most cases the management of the communal land is the responsibility of the Village head or chief who in loose mode of speach is referred to as the owner. He allocates, collects tributes and all proceeds arising from the management of the communal land.

Secondly, the family land. Similarly, a family land or property is the property of every member of the family. It is owned **jointly** indivibibly and no part of it is capable of being owned by an individual member. The management of it is the responsibility of the family head who in most cases acts in consultation **with** the principal members of the family.

However, because of the modern developments, a third type of ownership of land namely, individual ownership is in the bud in the Middle Belt, particularly in the urban centres like Gboko, Makurdi, Lafia Nasarawa, Keffi just to mention a few.

Earlier, it was mentioned that in the Middle 3elt of Nigeria, in the past, transaction involving land was unknown. With the arrival of the modern cash economy transactions such as sale, gift, loans and pledge are on the increase. Inshort, alienation of land which was hitherto not possible can now be made provided that the consent of the Majority of the principal members has been obtained by the head of the family.

In the whole, a careful perusal of the customary land law in the Middle Belt of Nigeria today would show that, the system evolved in order to meet the simple, ordinary and local requirements of the peasant farmers. Economic consideration, therefore, was the least factor taken care of by the system in the past. Rather, the communal nature of landholding was seen as an important factor which could sustain and promote social cohesion in the community or family. For instance, the communal or the group farming system is a device which provides both social and individual securities which could be resorted to in time of need.

However, despite these lofty ideals of the customary land tenure, it was observed that, the communal nature of customary landholding is unsuitable in the context of modern developments. Several reasons could be accounted for this. Firstly, customary land law does not provide adequate security of title held under it. This is because under native law

custom, the use of documents to prove title is dispensed with. In most cases, therefore, title to land is proved by oral evidence which is usually not coherent.

Secondly, there is the problem of uneasy disposition of property even at the time when-the need to dispose it is dire. This is so because of the doctrine of concurrence which provides that for a valid alienation to take place under native law and custom, there must be the concurrence of the family head with the majority of the principal members of the family. In view of the realities of the present circumstances it is always not easy to get such required concurrence.

Thirdly, the community of landholding has been a major factor for the lack of economic incentive which is vital for the developing and enhancing the value of properties in the Middle Belt.

Fourthly customary land law does not provide a general rule for the distribution of land equitably among the communities. This, it could be noticed that certain communities or families have enough tracts of land while others are suffering from acute shortage of lad. Infact there is no limit as to the number of accrage or hectre a family could hold at a time. These and other reasons are the major problems which customary land law suffers.

Inview of the above mentioned shortcomings it is suggested that security of title should be guranteed by compulsory registration of titles, held under native law and custom.

Secondly, there should be established a committee known as Family Property Management Committee which should

be responsible for the management of family property. This will check frauds and minimise heckering and squables which always threaten the stability and cordial relationships which normally exist in families.

Thirdly, there should be an effective means of land distribution whereby vacant lands could be allocated to families and commmnities who have not enough of land to farm. One way of doing this is by settlement schemes

Fourthly, individualization of land through the grant of certificate of Occupancy should be encouraged. Already in the Urban towns of the Middle Belt region this method of ownership of land is rapidly gaining recognition.

In the main, it can be concluded that the problem which has beset title and management of land under native law and custom in the Middle Belt of Nigeria is that of the tenure system itself. The system despite its advantages cannot cope with the demands of the people economically. Therefore, notwithstanding the availability of land in abundance, land owners in the Middle Belt still live in abject poverty. This is because, the system is obsolate, antiquated and un-incentive. The only hope is that, as the society grows and becomes more sophisticated the system will eventually die a natural death. This pessimism is particularly eminent with the establishment of the present Land Use Act.

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ABBREVIATIONS:

A.C.	-	Appeal Cases Reports
F.S.C.	-	Selected Judgements of the Federal
G.L.R.	-	Ghana Law Report
J.A.L.	-	Journal of African Law
L.G.A.	-	Local Government Area
L.L.R.	-	Lagos Law Report
N.B.J.	-	Nigerian Bar Journal
N.L.R.	-	Nigerian Law Report
N.M.L.R.	-	Nigerian Monthly Law Report
S.C.	-	Supreme Court
W.A.C.A.	-	Selected Judgements of the West African Court of Appeal.
W.A.L.C.	-	West African Land Committee.

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CHAPTER I

GENERAL INTRODUCTION

Land in the Middle Belt in the past, had no high economic value. However, this is not to be understood that it had no value at all. For, land had been a source of economic, social and political prestige and honour. Those communities that had enough land to farm were considered as brave powerful and rich ones. This was because, they might have acquired it through series of wars with their opponents as a result of which they defeated and confiscated the land of their opponents. Therefore, any Community controlling and managing large land tract those days, were regarded as powerful and brave.

Therefore, the importance of land, was more or less, political or social. The economic value was considerably low. This was because, the only way by which land was used was by tilling it for subsistance crops or to build houses for residence. Sale of land or commercial transaction in land was almost unknown.

This limited economic use for which land was put to, was due largely to the fact that transaction affecting land was virtually absent. This in turn, was caused by several important factors. First, the population of the Middle Belt was sparsed. Secondly, land itself was plentiful. Therefore, there was no need for scrambling or speculating for it. And this had given room for shifting cultivation. Thirdly, land had no much exchange value. In other words, it could not be sold, since there was no need for it, although transactions such as loan, pledge and assignment were sometimes carried out due to inequality of land fertility. These

and other factors have led to scanty literature on the land tenure systems of the Middle Belt people. It was not until of recent that the study of the land tenure system in the region was attempted by some colonial administrators.[1] Even the researches conducted by these administrative officers were not done with deliberate attempts to know the Customary land tenure of the Middle Belt people. This is because the administrators relied heavily on the anthropological aspects of the people of the Middle Belt rather than legal research.

Therefore, there is the need to further explore in detail the system of land tenure of the various Communities or tribes in the Middle Belt. This is necessary and desirable in view of the diversified and heterogenous nature of the Communities in the Middle Belt region which, inevitably, has led to the differences in their land tenure systems. These differences sometimes are minute and ignorable, but atimes, they are conspicous and attractive and could provoke academic exercise.

2. THE MIDDLE BELT

Before I delve into the geographical background to discuss the location and the extent of the region referred to as the Middle Belt of Nigeria, it will be of great importance to first consider the historical background of the peoples that constitute or inhabit the Middle Belt.

The Middle Belt of Nigeria has been for a long time a focal area of migration, commerce and conquest.[2] Legends have it that

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1. BOHANNAN, The Tiv of Central Nigeria (1953) London, International African Institute, BOHAMNAM, Tiv Economy (1968) Evanston, N. West University Press, S.S. AMEH, Ph.D. Thesis for Yale University, U.S.A.

2. FORDE, D. The Peoples of the Niger-Benue Confluence (1955) London. International African Institute, p. XIII.

with the exception of one or two tribal groups, namely, the Tiv and Nupe, all the peoples of the Middle Belt are offshoots of that complex and multi-tribal groups of migrants called the Kwararafa. Among this complex group are: the Jukun of Gongola State; Idoma and Igala of Benue State, Alago, Afo, Egbura, Agatu of Plateau State and etc. These peoples were said to have migrated to their present location i.e the Middle Belt of Nigeria from the far East when they became disloyal to their ruler or rulers as a result of religious difference. They travelled South wards until they settled in the present Middle Belt region.[3] But the Tiv and the Nupe group of peoples have different ancestors. The former, according to the local tradition hailed from South-East Africa and are said to belong to the Bantu tribe, while the latter has its traditional relationship with the Kingdom of Beni.[4]

The Middle Belt region was in the olden days heavily and insistently attacked, raided and depopulated by the Fulanis and Hausas of the North. The people had their early contact with the outside world as early as 1830 - 1833 when Richard Lander, MacGrego Liard and Oldfield succeeded in their expeditions of the area.[5]

The term "Middle Belt" was introduced into the literature of Nigeria by Forde in 1946 when he used the term to describe the area of the Central zone in Nigeria where the political, cultural, economic, social and population characteristics are quite distinct from those

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3. HOGBEN, S.J., The Muhammadan Emirates of Nigeria (1930), Oxford, University Press, p. 198.
4. MACDOWELL, C.M. Introduction to the Problems of Land Ownership in Nigeria (1963) Zaria, Research Memo Series p. 14.
5. FORDE, D. Ibid. p. xiii.

of the forest land of the South and Sudan zones of the North. The region has been specifically defined as the area roughly coinciding with some parts of the former provinces of Adamawa, Benue, Ilorin, Kabba, Niger and Plateau.[6]

The region is characterised by sparsepopulation and low rural economic development, while its potentialities for development have not been fully realized as a result of its shortage in human resources. The economy is based mainly on food crops production such as guinea-corn, millet, yams, cassava, beans, and maize. The export crops are of little significance, though they include: beni-seed, cotton, groundnuts, shea-butter, palm kernels, and etc. The Belt continuous to play a major role in food crops production for the increased population of the Southern, Eastern, and far Northern States. The Middle Belt, in recent times has been regarded as the 'frontier zone' of Nigeria.[7]

3. THE SCOPE OF THIS DISSERTATION

This dissertation, as the name suggests, will deal primarily with land tenure system of the peoples of the Middle Belt. Within the Middle Belt region, the areas to be covered by this dissertation are the Local Government Areas of Nasarawa, Lafia, Keffi, Akwanga, and part of the Federal Capital Territory, Abuja.

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6. ADENIYI, Land Tenure as a Socio-Cultural Factor in the Rural Development in the Middle Belt of Nigeria (1973) Ibadan, Ibadan University Press, pp. 281 - 283, BUCHANON, The Northern Region of Nigeria, "The Geographical Background of its Political Duality" (1953) Geographical Review, pp. 451-473.

7. United Nations Food and Agriculture Organization (1965) Agricultural Development in Nigeria 1965 - 1980 (Rome).

From Nasarawa Local Government Area the native Communities whose land tenure system will be discussed are: the Egbura, Gade, Afo and Agatu. In Akwanga Division, the land tenure system of the Nada or the Egon people will also be considered. While in Lafia and Keffi Local Government Areas the land tenure system of the Gwandara, Alago and Mijili (Koro) peoples will also be referred to. These local governments areas are all located at the Southern part of the present Plateau State.

In the Federal Capital Territory, Abuja emphasis will be laid on the land holding system of the Gwari people.

Any attempt to discuss title and management of land of the peoples of the Middle Belt of Nigeria under native law and Custom without referring to the three major tribes of Tiv, Idoma and Igala will be incomplete and deceptive. This is because, they form the majority of the populace of the peoples of the Middle Belt. Therefore, in the course of writing this dissertation I will always make some allusion to their Customary landholdings, in broad terms. This is because, extensive researches of their land tenure systems have been made by other writers.[8]

Lastly, reference will be made to the land tenure systems of the Nupe and Gwari peoples of the present Niger State.

4. MEANING OF TITLE AND MANAGEMENT OF LAND

A. TITLE TO LAND

The "term title to land" in its juristic use cannotes facts or combination of facts which create rights and duties.[9] Furthermore,

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8. See BOHANNAN, The Tiv of Central Nigeria (1953) London, International African Institute, BOHANNAN, Tiv Economy (1968)Evanston, North Western University Press, S.S. AMEH, Ph.D Thesis for Yale University, U.S.A.

9. PATON; G.W. A Text-Book of Jurisprudence (1964), Clerandon Press, Oxford p. 271 (3rd Ed.).

Under the English land law, the phrase means the ultimate authority in land. That is to say, the amount of degree of control one has in or over land. It also means the lawful right of possession.[10] It may also mean the facts which if proved, will enable a plaintifff to recover, and the defendant to retain possession of the land.[11]

Sometimes, the phrase "title to land" is used synonymously with ownership. That is to say he who has a title to a piece of land has the right to use and enjoy the land, together with the right to posess alienate and right of reversion.

Under native law and Custom, title to land, strictly speaking, is not normally vested in an individual absolutely. It is usually vested in a Community, village or family. No any individual has the right of alienating it single-handedly, or has the right to use and enjoy it to the exclusion of other members of the Community or family. Consequently, the concept of individual ownership is totally foreign to native law and Custom.[12(a)]

However, with the advent of the foreign concept an individual can now own land or have title comparable to that of his counterpart under English law.[12] Thus, in the case of ALADE v. ABORISHADE their Lordships stated viz:

> "In Nigeria in the olden days it was to all intents and purposes impossible for family land to be alienated at all ;..... the whole of the land was owned by large family Communities, portions of it being granted to

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10. STONHAM, The Law of Vendor and Purchaser (1964) Australia, page 887.

11. LAWSON, Intruduction to Law of Property (1958) Oxford, Clarendon Press page 85.

12(a) Amodu Tijani v. S. Southern Nigeria (1921)3 A.C. 399.

12. (1959) S.F.S.C. 167.

> members of the family. In Nigeria as in England however, modern developments have rendered necessary the breaking of these large family estates, and it is a well established principle of Native law and Custom that family land can now, provided the consents of proper persons are obtained, be alienated to strangers and such alienation if carried out in a proper way operates to confer upon the alienee the whole of the interest, in the portion of land concerned, of the family to whom it originally belonged. In other words, the alienee gets what may be termed as absolute title to land comparable to that obtained in England by way of fee simple."

Thus, in the Middle Belt, today the situation is not different from what is described above. That is to say, in the Middle Belt, the principle of land law that title to land is always vested in the Community, family and not in the individuals under strict Customary law, does not represent the current practice within the peasants. Therefore, an individual can now acquire title to land but the Community still has reversionary rights in case of no person to succeed. Also, if the owner should die intestate and he is survived by children, the nature of the holding would inevitably fall to family land again.

B. MANAGEMENT OF LAND

Management may be defined as the co-ordination and integration of all sources both human and technical to accomplish specific result. Thus, management entails supervision, orderly handling and manipulation for better result.

But legally and with particular reference to the management of family or Communal lands under native law and Custom, the word "management" means the administration of Communal or family property or land by the village or family head for the Common benefit of all the members of the family.

Therefore, management of land under the traditional law comprises of the allocation of land to members of the family, the collection of rents, tributes, and the instituting of court action or the defending of such court cases where title to land is in despute or is in emminent danger of being lost.

Among other things, management of land includes the exercise of power of alienation, the right to keep and distribute any proceed accrueing from any transaction affecting family property, partition, the fiduciary duties of the family head to be transparently honest and sincere in all his dealings with the family property. The accountability and loyalty to the members of the family or Community are integral parts of the management of land under native law and Custom.

Therefore, the management of family land in modern times is an essential part of Customary land law which has pre-occupied the minds of modern writers on the subject.[13] This is because with the increasing value of land, economically, rather than political and social values, management of family land has become necessary so that maximum benefit may be derived. Therefore, better utility and profit orientation call for proper management of family land since this could not be achieved without proper management.

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13. KASUMU, A.B. & JAMES, W.R. Alienation of Family Property in Southern Nigeria (1966) Ibadan, Ibadan University Press; EZEJIOFOR G, Alienation of Family Property in Nigeria (1974) XII Nigerian Bar Journal p. 47.

5. THE MEANING OF LAND

In the ancient Roman Law, land is not only the physical soil, but it includes all the buildings permanently attached to the soil or permanently fastened to anything which is attached to the soil.[14] Therefore, according to this concept he who owns land owns what is beneath and above it. This principle is expressed in a Roman maxim Quicquid plantatur solo solo cedit; a principle which now forms part of the English land law.

The tustle which is now raging high is whether the principle - quicquid plantatur solo, solo cedit applies to Customary land law. Justice Coker (as he then was) answered in the affirmative.[15] He said, "the maxim quicquid plantatur solo solo cedit which is the maxim of most legal systems is also a part of Yoruba native law and Custom". He went further to argue that no one member of the family has a right to build his own house on the family land without the consent of the others. Therefore, in defiance of this rule, any member of the family who builds his own house on a portion of the family property, it is submitted that, the maxim quicquid plantatur solo solo cedit will apply, "subject only in appropriate cases to equitable reliefs specially pleaded and justified".

But according to Obi,[16] a remarkable aspect of African Customary Law is the fact that land does not include things growing on, or

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14. JAME, R.W. Modern Land Law in Nigeria (1973) Ile-Ife, University of Ife Press, p. 13.

15. COKER, G.B.A. Family Property Among the Yorubas (1966), London, Sweet & Maxwell pp. 45-147.

16. OBI, S.N.C. The Ibo Law of Property (1963) Sweet & Maxwell p. 32.

attached to, the soil and that neither economic trees nor houses form a part of the land on which they stand.

In his contribution to this contraversial debate, Lloyd[17] claims that under the Yoruba Native Law and Custom, a distinction is made between land (the soil) and improvement thereon.

According to Olawoye[18], land includes the surface of the earth, the sub-soil and the air space above it, as well as all things that are permanently attached to the soil. But it does not include minerals. They are considered to belong to the State in general.

Dr. Yakubu[18(a)], in his view, says that "there is a strong presumption that, the maxim quid quid plantatur solo, solo cedit does not apply because the law treats land and fixtures differently He emphasized that, "the general practice has certainly shown that the maxim does not at all apply under the native law and Custom of land tenure"[19].

After having heard the views of the academics, it is petinent at this juncture to carefully examine the decided cases on this very important and controversial principle of land tenure. These are quite a number of decisions which seem to be clear authorities that the maxim is part of the Customary Law. In NWOGEM v. NZEKWU[20], it was held in a previous action that the respondents were the owners of certain land. In the present action, the respondents

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17. LLOYD, P.C. Yoruba Land Law.

18. OLAWOYE, C.O., Title to Land in Nigeria (1974) Lagos, Evans Brothers Ltd., at p. 4.

18(a). YAKUBU, M.G. Ph.D. Thesis (Unpublished) University of Birmingham (1980) Vol. 1 p. 60.

19. Ibid. p. 61.

20. (1959)4 F.S.C. 138; Francis v. Ibitoye (1936) 13 N.L.R. 11.

were also granted the possession and injunction restraining the appellants from interfering with their ownership and possession. Meanwhile, the appellants have erected some buildings on the land. The appellants claimed to be allowed to demolish the building and remove the materials but their claim was dismissed as misconceived, since the buildings formed part of the land and therefore belonged to the owner of the land.

In OKOIKO v. ESEDALUE[21], the plaintiff claimed the redemption of land which was pledged by his grandfather to the defendant's grandfather for three pieces of cloth which were equivalent to £15 or (₦30.00) in value in modern currency. The defendant who had earlier planted economic trees demanded £1,000 in compensation for the economic trees. It was held that pledged land is perpectually redeemable at no extra cost than was borrowed. On appeal by the defendants to the Supreme Court, the lower court decision was upheld. The Supreme Court went further to say:

> "It is also clear, nevertheless, that the pledgee has no right to any compensation or credit for the plantations, which accrued to the pledged land on the principle of quicquid plantatur solo, solo cedit. The law is that the pledgee should quit the land as from the date of judgment in favour of the pledgor".

This decision after a decade was affirmed and applied in the case of OTOGBOLU v. OKELENWA[22]. The facts of this case are as follow. The appellant instituted an action in the High Court against the respondents claiming a declaration of the title to land. He aversed that the parcel of land in dispute was originally flooded land, reclaimed by his grandfather who occupied it until his death. The land by succession devolved on the father of the plaintiff who was the spritual head of the Umajada family. The plaintiff further

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21. (1974)3 S.C. 15; Ezeani v. Njidike (1964) All N.L.R. 402.
22. Judgment of the S.C. delivered on 19/6/81.

alleged that the defendants had neither common ancestory nor any blood relationship with the Umajada family, but were descendants of strangers who had settled on Umajada family land. The defendant claimed that the disputed land was never flooded nor reclaimed but had been Umajada family land from time immemorial. They claimed that they were the members of Umajada family related to the plaintiff by blood, and common ancestory and that on the death of the plaintiff's father, the first defendant had become the spiritual head of the family and in that capacity granted the fifth defendant the land in dispute in order to build a house. The trial judge gave judgment in favour of the plaintiff holding that both the land and the building thereon was the property of the plaintiff, "for, he who owns land owns what is on it". The defendant appealed to the Federal Court of Appeal which reversed the judgment. On further appeal by the plaintiff/appellant to the Supreme Court, it was held that, applying the well established principle of quicquid plantatur solo solo cedit, the fifth defendant had forfeited the house he built on the disputed land inspite of the fact that he completed the building with the permission of the High Court, and he cannot be said to have been misled by the High Court.

There are few cases which show that the maxim does not apply under Customary land law. In the Ghanaian case of SANTENG v. DARKWA[23], the facts of which are briefly stated as follow: A family member without any assistance from other family members built a house on a family land. He contended that the house so built was his absolutely and not for the entire members of the family. At the trial court it was held that the house belonged to the family. In other words, the house became family property along with the land. Strother Stewart J. delievering the judgment of the W.A.C.A. reversed

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23. (1940) 6 WACA 52.

the decision of the trial court holding that the house was the property of the builder. He observed:

> "No custom was proved that when a house was built on a site of ruined house, the building becomes family property. And I know no such custom, I can find no authority for the proportion that the mere using of the site brands the house with the stamp of the family property. Although, of course, the site of which the house was built remain family property".

The problem with Stewart J. in this case is that in his view, the definition of land under native law and custom should not include development carried out by an individual members of the family receiving no financial aid or labour from any of the members. In his view, the land and what is on it are two different things and can be owned by two different persons. This view of the learned judge seems to be compatible with the provisions of the Land Use Act, 1978 and the Land Tenure Law, 1962, Under both laws, there is a difference between land and the development on it. Thus, a holder of a statutory right of occupancy has the sole right to and absolute possession of all the improvements on the land.[24]

But Aitken J., in CODJOE v. KWATCHEY[25], was of the view that in order to brand the house with the stamp of family property, the contribution by the family must be substantial, and not slight. Thus, in this case, a native bought a plot of land with money acquired from his own private trade. Later he built a house on it, using a gate, some boards and iron sheets from a demolished family house. The plaintiff claimed that the property become family property by reason of this. In dismissing the case, the

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24. See section 20 L.T.L. 1962; Section 15 L.U.A. 1978.

25. (1935) 2 W.A.C.A. 371.

judge said:

> "Is any assistance in money on kind, however slight, sufficient to impress a block of buildings worth thousands of pounds, otherwise erected by a man entirely at his own expense and on valuable land he himself has purchased with the character of family property? Surely, there must be some limit to such principle of native law if this court is to enforce its observance..... and I venture to suggest as such a limit, the proviso that the family's contribution, whether in money or in kind, must be a substantial contribution before the court will hold that the whole of the land and buildings in question in any case have been thereby impressed with the character of family property. What will amount to a substantial contribution must, of course, always be a question of fact depending on the particular circumstances of every case."

In the Nigerian case of OLUGBEGOR v. OKONKWO[26], the Supreme Court held that where a person acting in good faith puts up buildings or makes plantations on another's land, the owner of the land may take-over the improvements subject to his compensating the person who puts up the building or makes plantations on the land.

From the foregoing discussions it is understood that there is no unanimity of opinions either among the academicians or the judges that the maxim applies under native law and custom. It is my strong submission, therefore, that the state of the law regarding this principle is yet to be ascertained.

In the Middle Belt, the practice among the Communities varies from one place to another. For instance in Egbura land, if a member of a family built a house on a family land without the consent of the other members of the family, and if later, this building becomes the subject of litigation, the family member who built the house cannot as of right demolish the building; because under native law and custom the building once erected become the property of

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26. Unreported, Suit No. S.C./181/1972.

the family. But where a family member doesn't want a house which he built solely from his own personal labour to be branded with the stamp of family property, the usual method of acquisition of land is to ask for a grant from the Village Head for a virgin land. If this is done, both the land and the development upon it belong to the grantee absolutely and upon his death only his heirs i.e. his children can inherit it. No any member of the house has a right to go into possession of this house except with the consent of the founder's children.

Under the Eggon and Agatu Native Law and Custom, where a family member built a house upon a family land without seeking for the consent of the family members, and no any protest is registered for so doing, it is assumed that the house so built is intended to be used by all members of the family. Upon the death of the builder his children cannot claim the absolute ownership of the property because they will be barred by reason of the maxim quicquid plantatur solo solo cedit.

Moreover, where land is leased or borrowed, unless there is an agreement to the contrary the leasee or the borrower is not entitled to reap the fruits of the trees standing on the borrowed or leased land. Even where improvements have been made e.g. where the borrower or the leasee has planted some economic trees or built a grainary or hut or dug a well, at the expiration of the lease he cannot uproot the economic trees so planted, or tell the lender or the lessor to pay for them. Neither has he no power or right to demolish the grainary or hut so built.

Where trees which are permanently attached to the soil are sold, e.g. coconut, dried tree for firewood, mango or pawpaw trees it does not mean that the buyer becomes the owner of the land on which the tree stands. Also where gravels have been dug from one

place and heaped at another place, the owner of the land upon which the gravels were heaped does not automatically become the owner of the gravels so heaped.

But this is not to say that the maxim applies very inflexibly. Thus, the practice with the peasants in certain cases is that, there is a division between developments which were brought to the land by a family member and other properties which are naturally found on it.

If a member built a house and put it for rent, he is entitled to the proceeds resulting from such a lease. But he cannot sell the house without the consent of the family members; because the land upon which the house stands is not his property.

As it has already been mentioned, it is my submission that the debate as to whether the maxim quicquid plantatur solo solo cedit applies to property held under Native Law and Custom, is not yet over. The only hope we have for the solution of the problem is with our Courts as the final arbitors and we look forward for opportunity to present itself so that this principle should be discussed with all its ramifications. As of how, the issue is like a Gordian Knot yet to be untied.

CHAPTER II

TITLE TO LAND

1. Introduction:

Under native law and custom, the often-quoted statement is that land belongs to the Community, Village or family and never to an individual. Hence, the concept of individual ownership is quite foreign to native idea.[1]

Therefore, from this statement it can be deduced that the basis of ownership of land in Nigeria under native law and custom may be either communal[2] or family.

2. TYPES OF TITLES IN LAND

A. Communal Title

Under native law and custom a piece of land may be tagged as "Communal land". This means that the land belongs to the Community which may be a form of a tribe or group of tribes with a Common ancestor. Under this type of landholding, the title to Communal land is normally vested in the Community in general as a corporate group. Such a group has the right to deal with the land as it wishes subject to such limitation as it may be imposed by any law. It is the corporate group which has the ownership of land with all its attributes. That is to say, the Community has the right to alienate subject to concurrence of agreement, the right to use and enjoyment of the land. It has the right to possess and the right to reversion.

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1. Amadu Tijani v. Secretary Southern Nigeria (1921) 2 A.C. 397.

2. COKER, G.B.A. Family Property Among the Yorubas (1966) London, Sweet & Maxwell p. 33, argues that the basis of ownership is only family.

In the Communal land no any individual can exercise these rights to the exclusion of others. No member has any identifiable portion of the Communal land which he can point at, as his own absolutely. However, where a portion of Communal land has been allotted to a member of the Community, such member becomes the "owner" so to say. He can maintain an action for trespass against a Community member who enters into the land wrongfully.

Thus in the case of OKOH v. OLOTU[2(a)] the plaintiff had been in possession of land belonging to a certain quarter for at least 12 years and planted trees thereon, and the quarter knew about it and acquiesced. The deffendants who were members of the quarter, came on the land and destroyed the trees planted by the plaitiff, and their defence was that the land had never been given to the plaintiff. The plaintiff agreed that the land belonged to the quarter. He had incurred expense in planting the trees and growing them on the land, of which he was in possession. It was held that the plaintiff was and had in fact been in possession for some 12 years and had incurred expense to the knowledge and acquiescence of the quarter owning the land; he had therefore maintain an action for damages against the defendants, though they were members of that quarter, for their trespass of destroying his trees.

Under the Communal ownership of land, no member has a separate title of ownership of the whole or any part of the land. He simply holds the land together with the other members of the Community.

2(a). (1953) 20 N.L.R. 123; Lewis v. Bankole (1908) 1 N.L.R. 81.

It is said that "a member of the Community holds nothing by himself in the Communal land and yet holds the land together with the other members of the Community."

In the Middle Belt of Nigeria, Communal land varies from one place to another. Sometimes, it includes land which is under the control of the people of a village or town. For instance, we talk of Dekina land, Idoma land, Tiv land and Egbura land. These mean lands which belc ; to these various Communities. Thus, each Community and the land belonging to it may be called "Communal land".

But a times, Communal land may include the land which comprises each emirate. For example, Lafia, Keffi, Nasarawa and Akwanga emirates lands, may be regarded as Communal lands. This means that the emirate land belongs to all members of that emirate as a corporate group and it may consist of several Communities or tribes with several ancestors.

Communal land as the basis of ownership or title to land has received some judicial pronouncements. Thus in AMODU TIJANI v. S.S. NIGERIA[3] it was stated succintly thus:

> "The next fact which is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native idea. Land belongs to the Community, village or family".

To further confirm this customary law proposition, Meneondes C.J. in his evidence before the Northern Nigeria Lands Committee in 1906 pithily described the nature of the Communal landholding.

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3. (1921) 2 A.C. 399 p. 404.

Thus, he said:

> "The idea underlying tenure in the native Community is that land is the property of the people, and that the Chief is a trustee of the people and that every free man in the Community is entitled to as much land as he reasonably require to support himself and his family and is entitled to keep that land as long as he uses it for the purpose for which it was granted and as long as he behaves himself".[4]

A lot of misconception has been formed about this concept of Communal landholding, most especially by those who are extroverts of the African societies. The concept does not mean that the land is cultivated on tilled together, and crops plainted, harvested and stored together in one or more graineries from which all members of the Community feed. This is not the Communal notion which the concept of Communal land bears under nature law and custom. Rather, it means that there is for instance, a tract of land which belongs to all members of the Community by virtue of being born free in that Community. And each member is entitled to a portion to build a house or farm and he is absolutely entitled to all profits accrueing from that land as a result of his direct personal labour. In other words, an individual member in the Community is entitled to the usufruct of the land in his possession only. Other rights of the individual member is that he is entitled to be consulted in the management of the Communal land. He is also entitled to share the proceeds arising from such management of the Communal land.

In the Middle Belt of Nigeria Communal landholding is practised by all Communities. One hardly sees land which is not owned by a Community or tribe. As one travels across

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4. Cd. 5103, p. 66.

the region, one passes tracts of land belonging to different tribes or native Communities in a form of emirates or "town land". It is therefore submitted that Communal landholding is the primary source of landholding or ownership from which family ownership stems out.

B. FAMILY TITLE

According to Mr. James and Kasunmu,[5] the term family has primarily two different meanings under Customary law. Firstly, in its narrow view, it means immediate family i.e. the children of the person whose family is in issue. But in an extended meaning of the term, it means the descendants of a Common ancestor.

Lloyd,[6] defined "family""as a corporate body created upon the death of the founder holding an interest in land. It includes all his or her descendants in the male line (in case of agnatic lineage) or in both male and female lines (in the case of cognate descent group). New member of the group belonged to it by virtue of their birth and they aceede to their rights at the time of their birth".

Dr. Elias has defined the term "family" as the smallest social unit in the body polity which is variously composed of a man, his wife or wives and their children. According to Dr. Musa,[6(a)] under the Customary law, the usual type of family is the extended one. This, he says includes brothers, cousins, their wives, children and grandchildren.

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6. Yoruba Land Law (1962) London, Oxford University Press, p. 31.

6(a). Ibid, Op. cit. p. 201.

In the Middle Belt, in most Communities, the extended form of family is the one obtainable. For instance, the Tiv Community is such a well organized type of the extended family system with several members who at times may constitute a town or village.

Under the Egbura native law and custom the word 'family' may mean the descendants of the founder i.e his children and grandchildren. This is to say, anybody born free who can trace his lineage to the founder is within the definition of the term family. Thus, one hears people saying "this land belongs to my great grandfather" or "this land belongs to this house".

(i) NATURE OF FAMILY PROPERTY

In the case of COKER v. COKER[7] family property was defined as a property which a father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are entitled to reside there with their mothers and his married sons with their wives and children. No one has any chargeable or alienable interest in the family property. It is only with the consent of all those entitled to reside in the family property that it can be mortgaged or sold.

In OGUNDAIRO v. ABEJE[8], family property was defined as the property which devolves from father to children and grandchildren under native law and custom, and which no individual child or member of the family can dispose off by his or her will, until the property is partitioned and each child or member of family has his or her separate share of the whole.

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7. (1938)14 N.L.R. 83 at p. 86.
8. (1967) L.L.R. 9.

In the case of AJOBI v. OLOKO[9] the court said that "the primary purpose of a family property is, as the name implies, to provide a place where members of the family can reside if they desire.....".

In the case of COKER v. COKER (supra) emphasis was laid on blood relationship or relationship by affinity. Thus, for one to lay a claim as a family member he must be related to the founder of the family by blood either agnate or cognate as the case may be. This, therefore, means that if we subscribe to this view, the domestics and the slaves are automatically excluded from the membership of the family. However, the slate is not wipped clean as far as the relationship by affinity is concerned. This is because according to the definition in COKER v. COKER[10] wife or wives are considered to be members of the family. But, under strict native law and custom, do wives constitute members of the family? This perhaps, is the reason that prompted Olawoye to say that "the answer to the question who are members of the family must coincide with the answer to the question who are those entitled to claim as heirs of the founder of the family at the material time?

Under the Egbura native law and custom and the Customary law of the Afo, Alago, Tiv and Idoma peoples of the Middle Belt, women generally don't inherit their deceased husbands. The reason for their exclusion from inheritence is not far to seek. Very importantly, is the fact that woman are not blood or biological relations of their husbands. Only members who are biologically related to the deceased can claim the right to inherit from him. Therefore, it is submitted that the definition

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9. (1959) L.L.R. 152.
10. (1938) 14 N.L.R. 83.
11. OLAWOYE, C.O. Title to Land in Nigeria, (1974) Lagos, Evan Brothers Ltd., p. 27.

which included women among those upon whom family property will devolve on the death of the founder of the family is wholly inaccurate.

The fact that widows don't inherit their deceased husbands doesn't mean that they cannot inherit at all. They can do so from the family where they were born. Therefore, under strict native law and custom of the Tiv, Idoma, Egbura, Alago and Agatu Communities of the Middle Belt women can only inherit from their various families and not from the families of their husbands. But they would not be ejected from their residents by the fact that their husbands are dead and they are not entitled to inherit. In many cases, they continue to live in the houses built for them by their husbands until they themselves die. Therefore, their interests is of the nature of possessory or usufructuary one lasting only during the life time of the possessor.

(ii) Title

Title to any family land is vested in the family as a corporate body or entity. This principle was amply and succintly stated in the case of OGUNMEFUN v. OGUNMEFUN[12] the facts of which are stated very briefly: The grandfather of the parties to the action died intestate leaving real property to which he was seised in fee simple. He left two children, a boy and a girl, surviving him. When the girl died, she made a will given her relatives her share in the property of X. It was held that upon the death intestate of Thomas Williams Davies, the founder of the family, the property devolved on his children

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12. (1931) 10 N.L.R. 82.

as family property. The court held that the devise was invalid because:

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

From the above statment one can see that family ownership is a basis of landownership and this statement is true of all peoples of the Middle Belt. In other words, in the Middle Belt, family ownership of land, like the Communal ownership is a characteristic of Customary land law which has a Universal application to all Communities or tribes. Land is held by numerous families which constitute Village or Community.

The idea of the land being in the hands of fixed families, may presuppose that no new families are created any more or when they are created they may not have land, since land is in fixed hands already. The practice under the Alago Customary law is the same with that of Afo, Egbura and Mada Communities. When a member of the family needs a new portion of family land to farm or build a house and there is none to be given to him from the"family pool", the affected member, with the head of the family would approach the village head or chief for a portion of uncleared Communal land. If, finally an allotment is made, the person to whom this allotment was made becomes the "owner" of this land. If he dies the land will devolves to the children of the grantee but not to the general members of the family. This is the process by which creation and expansion of family land takes place.

At this juncture, it is petinent to look at one important issue which is connected with family landholding - i.e. the

nature of interest of an individual member in the family property.

(iii) INDIVIDUAL INTEREST IN GROUP TITLE

Of recent, there have been ragged debates that the use of the term "ownership" of land to describe an interest in land under native law and custom is unsuitable and misleading and above all, it is said that such a terminology is aimed at equating ownership of land under the English law with that of native law and custom.[13] Therefore, there have been suggestions for other suitable and appropriate terminologies to describe an individual's interest in either Communal or family land such.

In the case of OGUNMEFUN v. OGUNMEFUN,[14] although no such terminology was profferred but the court after stating with lucidity the basis of the Customary landholding went further to consider the nature of the individual interest or holding in such circumstances. It says:

> "Each individual member of the family has in addition vested in him or her what may perhaps can be described as a right of user during his or her life time. That individual right of user is purely and simply a life time interest. On the death of the individual that interest reverts to the whole family though by reason of the user enjoyed by the deceased individual during his or her life, the family will generally permit his or her children to have among them the same user as their parent had if the circumstances of the family and the property permits".

From the above quotation, it can be discernible that the interest of an individual in his own portion of land allotted to him by the head of family or chief is a life interest only.

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13. Enimil v. Tuakyil (1952) 13 WACA 10, Amadu Tijani's Case (1921) 2 A.C. 399.

14. (1931) 10 N.L.R. 82.

That is to say, after his death the title to the land reverts to the family or Community if he has no heirs. If the deceased is survived by heirs, the heirs will inherit him, although, it is said that this is subject to some circumstances.

Therefore, inheritence to land held under native law and custom held by one's deceased parent is not automatic. Under Customary law of the Egbura people of the Middle Belt, once a person died, and he is survived by a male child, if the child is a minor e.g. 7 years old, he cannot as of right inherit the land which was given to his father. If any adult member of the family is interested in that farm to till, he will be given. But if the surviving child of the deceased is an adult who is capable of farming that land and there is no any member who is interested in that portion of the land, he automatically takes over the land. However, if the surviving child is a female, whether a minor or adult, married or unmarried she would not be entitled to the land left behind by her father as of right. In this circumstance, the title to the land reverts to the family as a corporate group. But if the house is a residential one, all children left behind by the deceased are entitled to live, use and enjoyment of the house.[15]

Thus, apart from the right of user which an individual has in the family property. Other terminologies which have been suggested are: possessory right, occupational or usufructuary rights.

The interest of an individual is said to be possessory because he is in possession of the portion of the family property

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15. Coker v. Coker (1938) 14 N.L.R. 83.

as such he has the right to exclude all other persons from trespassing into the land.[16] This means that once a family land has been allotted to a family member he can exclude all intruders including other family members. Therefore, while that individual has a possessory right, the ultimate title to that land is vested in the family. While a member is in possession he has no right to exercise any right which will deprive the family of the right of reversion. In other words he cannot alienate whatsoever the family land in his possession.

In KUMA v. KUMA[17] it was said that the nature of Customary landholding is in the form of Usufructuary interest. That means, the occupier is entitled to reap the fruits of the trees standing on the land, if any. Or, if he tills the land, he is entitled to the benefit or income of his labour. In other words, his own interest in the family land is to exploit its resources for his own benefit while the ownership of it or title to it, in the main, remains with the family.[18]

Notwithstanding the call for the use of an appropriate terminology to describe individual interest in the Communal or family lands, the practice with the peasants in the Middle Belt is that, individuals still refer to their portions of land as "my land" (as if he has absolute title to it) or my farm or my house - which means the improvements on the land. The terms "our land" or "our house" are seldomly used. Therefore, it is my strong submission that, the on going debates on the search for better terminology to describe individual interest

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16. Wuta Ofoi v. Danquah (1961) 1 W.L.R. 1238.
Amankor v. Obiefuna (1974) 3 S.C. 67.

17. (1940) 5 W.A.C.A. 4.

18. Amodu Tijani's Case (supra).

in the family land is merely an academic exercise and uncalled for.[19] Little has it, any relevance with the realities of the present condition.

C. INDIVIDUAL TITLE

In the ancient times, individual ownership of land was a phenomenon which was unheard. In the words of Raynor C.J. quote,

> "The next fact which is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native idea. Land belongs to the Community, Village or family, never to the individual".[20]

In the Middle Belt of Nigeria, within the Tiv, Idoma, Igala Communities of the Benue State, the concept of individual ownership is a phenomenon which is just seeing the light of day. Whereas, within the Afo, Gade, Egbura and Agatu of the Nasarawa Local Government Area and the Mijili, Alago and Mada Communities of the Lafia Local Government Area of Plateau State the concept is yet to be known.

In the course of my research, what I have noticed is that, within the peasants, and a times among the strangers who are not conversant with the Customary land tenure, there is a tendency to lable individual farming as individual ownership of land. The two phrases are different and they

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19. ALLOT: Towards a definition of Absolute Ownership (1961) J.A.L. 93, BENTSI-ENCHILL. Does African System of Land Tenure require special terminology? (1965) J.A.L. 114, SIMPSON, Towards a definition of absolute ownership (1961) J.A.L. 1947.

20. Raynor C.J. in the papers he presented to the West African Land Committee in 1906. Cited with approval by Speed C.J. in case of Amodu Tijani v. S.S. Nigeria (1921) 2 A.C. 399 at p. 404.

cannot be used interchangeably. But what is the difference between the two phrases?

In order to understand individual farming, it is petinent to briefly consider the system of family landholding which before this time was predominant but now fading away. The system was that in the olden days ten to twenty strong men or more would work on one farm which was owned together. Usually, the group would be headed and supervised by one of the family members called the family head. His roles were that he was incharge of all matters affecting family members. He paid their taxes, married for them fed their wives, and children. All members of the family owned allegiance to him. The land which they farmed belonged to them all as members of the same family, jointly and indivisibly.

But nowadays, a practice has evolved whereby each member farms for himself and cater for himself, wives and children and still live in the family house and farm the family land. He reaps the fruit of his labour, he alone. This is individual farming of land and not individual ownership of land. Individual ownership of land pre-supposes that the individual has the title to land. He is entitled to the use and enjoyment of that land to the exclusion of all others. He can alienate it without the consent of any other member.

But according to the practice described above - i.e. individual farming, the individual is not the owner. He has no title to the land. He only has the possessory or the usufructuary right. He has no proprietary right.. The ultimate title is in the family. Therefore, the assertion that individual ownership of land is becoming a popular practice at least in the

Middle Belt of Nigeria, I strongly submit, is not in consonance with the prevailing practice within the Communities of the Middle Belt. For instance, Cole has confused individual ownership with individual farming of land and has lebled the latter as individual ownership when he says:

> "In the olden days farming was mostly Communal, i.e. joint cultivation of the land by the extended family or family group and there was Communal storage of the produce. Nowadays this still takes place but it is the exception rather than the rule. Most farming is done on an individual basis, i.e. by the farmer and his immediate family - his wife or wives and his children. The breakdown through from family or kindred holding to the individual basis has not, however, brought with it as yet any perceptible development of the concept of individual ownership. It is no longer kindered or family group tenure - it is individual tenure. But the principles governing this tenure remain almost uncharged".

To be amply clear, there is no doubt that the view expressed above is asserting that individual farming means individual ownership. As I have earlier stated, the practice with the peasants is that even where they farm individually, they still live in the family land and the land which they farm is family land. The tenurial system remains unchanged.[21(a)]

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21. Report on Land Tenure, Niger Province (1949) Kaduna, paragraph 40, pp. 16-17.

21(a) See Tables 1, 2 and 3 at pages 32-34.

A SURVEY OF LANDHOLDING SYSTEM AMONG EGBURA TRIBE OF NASARAWA L.G.A., PLATEAU STATE

NAME	AGE	MARITAL STATUS	RESIDENCE FAMILY/INDIVIDUAL HOUSE	FARMLAND FAMILY/INDIVIDUAL	TYPES OF FARMING FAMILY OR INDIVIDUAL	REASONS
1. *Saluhu Agbari	50	Married	Family House	Family Land	Family Farming	Family He
2. Sani Agbari	43	-do-	-do-	-do-	Individual Farming	To care f better.
3. Adamu Agbari	35	-do-	-do-	-do-	-do-	-do-
4. Umari Agbari	32	-do-	-do-	-do-	-do-	-do-
5. Ibrahim Agbari	30	-do-	-do-	-do-	-do-	-do-
6. Isa Agbari	26	-do-	-do-	-do-	-do-	-do-
7.**Usman Agbari	22	Unmarried	-do-	-do-	Family Farming	I am not Married.
8.**Musa Agbari	20	-do-	-do-	-do-	Family Farming	-do-
9.**Abubakar Agbari	19	-do-	-do-	-do-	Family Farming	-do-

*Family Head

**Members Who Still Farm For The Family Head.

TABLE 2:1

AGBARI FAMILY

A SURVEY OF LANDHOLDING SYSTEM AMONG BASSA TRIBE OF NASSARAWA L.G.A., PLATEAU STATE.

NAME	AGE	MARITAL STATUS	RESIDENCE FAMILY/INDIVIDUAL HOUSE	FARM LAND FAMILY/INDIVIDAUL	TYPES OF FARMING FAMILY OR INDIVIDUAL	RE
1. *Kaura Gwatana	45	Married	Family House	Family Land	Family Farming	Head Family
2. Wodi Gwatana	44	-do-	-do-	-do-	Individual Farming	To ca myseli perly.
3. Seneni Gwatana	32	-do-	-do-	-do-	-do-	-d
4. Enyinzo Gwatana	21	-do-	-do-	-do-	-do-	-d
5. **Ozabutu Gwatana	20	Unmarried	-do-	-do-	Family Farming	Not ye marrie
6. **Simakada Gwatana	19	-do-	-do-	-do-	-do-	-d
7. **Soko Gwatana	15	-do-	-do-	-do-	-do-	-d

*Family Head.

**Members Who Still Farm For the Family Head.

TABLE 2:2

GWATANA FAMILY.

A SURVEY OF LAND HOLDING SYSTEM AMONG GWARI TRIBE, NASARAW L.G.A., PLATEAU STATE

	NAME	AGE	MARITAL STATUS	RESIDENCE FAMILY/INDIVIDUAL HOUSE	FARM LAND FAMILY/INDIVIDUAL	TYPES OF FARMING FAMILY OR INDIVIDUAL	REMARK
1.	*Sukoilo Katayi	65	Married	Family House	Family Land	Family Farming	Becaus I'm Ol
2.	Kure Katayi	50	-do-	-do-	-do-	Individual Farming	To car myself better
3.	Jemiye Katayi	53	-do-	-do-	-do-	-do-	-do-
4.	Manahi Katayi	30	-do-	-do-	-do-	-do-	-do-
5.	**Jemidaga Katayi	22	Unmarried	-do-	-do-	Family Farming	I will for my when I marrie
6.	**Akunya Katayi	16	-do-	-do-	-do-	Family Farming	-do-

*Family Head.

**Members Who Farm with the Family Head.

TABLE 2:3

KATAYI FAMILY.

(ii) FACTORS RESPONSIBLE FOR INDIVIDUALIZATION OF LAND HOLDING

Earlier on, I said that individual holding of land is a concept which is just emerging in the Middle Belt. Therefore, at this juncture, it is necessary to consider factors which have led to the creeping in of this "foreign idea" into our traditional system of land tenure.

In the Middle Belt, farming has been the predominant occupation with most Communities and families. In the past this was done in a Communal or family manner. A times, a family may run to to nearly one hundred members. Therefore, the problem of caring for them adequately was always there. Thus, a member's need could not be met very quickly - and satisfactorily. It was told that even the two basis responsibilities of the head of family i.e. to marry for his members and to pay his annual tax were in most cases not accomplished easily. On top of this many family members went about without adequate clothing. Therefore, the condition of the members apart from "feeding from the family pot" daily was pathetic and wreched. In short they lived in object poverty not withstanding their large number.

Moreover, it is a common fact that, some family heads were arrogant, extravagant and would not have the interest of the family members at heart. They mismanaged family fund arising from the Communal or family farms. Some indulged in marrying many wives and led ostentatious living; all these at the detriment of the family members.

In most cases, as the family enlarged gradually, it became exceedingly difficult to control and take care of the members adequately or to the members' satisfaction. Therefore, members

who felt that they could not continue to bear the difficulties any longer, started to find way out by quitting family house or land to build their own houses and farmed separately. By this severence, a member would established his own family consisting himself, wife or wives and his children who could be taken care of adequately and satisfactorily. Therefore, in the main, it is the Socio-economic factors that led to the incursion of this foreign land tenure into the Customary land tenure.

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

With the establishment of peaceful government in most parts of the Middle Belt, both the strong and the weak, the low and the high can now choose to build his house or farm separately. Thus, the essence for which Communal or family ownership was founded is dying a natural death - namely, to muster strengths to check any possible invasion by outsiders. The Middle Belt being the focal point of insistence attacks and raids, the Communities there were bound to live in a Communal or family system to forestall attacks from such invaders. With the stamping out of hostilities of one tribe against the other

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22. FORDE, D. Peoples of the Niger-Benue Confluence (1955) London, International African Institute, p. XIII.

individual ownership of land is evolving at a snail rate.

In the modern time, the need to practice individual system of land tenure has been made more important than before. Nowadays, an individual's responsibities have increased manifold. Thus, an individual has to pay for the school fees of his children, provide medical care, better clothing and housing. He wants to live a more descent and meaningful life, not always in object poverty and squalor. This social progress which an individual is struggling for to achieve is not possible with the ancient system of landholding in the form of Communal or family system. These and other factors interlia have made it possible for the individual ownership of land to creep into our traditional system of land tenure which hitherto did not accept individual holding of land.

3. HOW TO CREATE TITLE

In the introductory Chapter of this dissertation I briefly attempted to define what the term title to land means. Under this heading, I will enumerate and discuss the various ways by which title to land under native law and custom can be created.

a. GIFT:

A gift is the gratituous transfer of the ownership of land from the donor to the donee. It essential requirements are that it must be free from any undue influence, it must be voluntary and unbargained. Therefore, where a gift took place and it is proved that the gift was done involuntarily or with coercion or bargain, it would be declared null and void.

However, in most cases, gifts have underlying motives. For instance, gift of land to a stranger may be done in order

to reward him for his contribution for the progress and well-being of his host. Instances of these specific contributions may include a case where a stranger is industrious in the farm, or in appreciation of the stranger's military powers and assistance during the slave trade[23], or he has been so transparently good and honest in his dealings with his host. Thus, in AGBLOE v. SAPPOR[24], a part of family land was given as a gift to Sappor in appreciation of his generous efforts in redeeming family property which was pledged by a previous head of the family, who could not redeem it.

A times, a gift of land may be made as a form of bait to lure a stranger to live in a place.

B. ABSOLUTE AND CONDITIONAL GIFTS

(i) ABSOLUTE GIFT: A gift of land may be absolute or conditional This may depend on the terms of the gift.

A gift is absolute when it is not dependent on any condition. Such a gift has the same legal effect as sale. That is to say it confers absolute title or ownership of land with all its incidents.

In JEGEDE v. EYINOGUN[25], it was held that a family could make absolute transfer of its land by way of gift. This decision is in constrast with the decision in OLOTU v. DAWUDA[26], where it was held that native land cannot under any circumstances be transferred or given out absolutely. But in view of the Privy Council's decision in OSHODI v. BOLOGUN[27] and OSHODI v. DAKOLO[28] it is now a well establis-

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23. Agedegudu v. Ajenifuga (Unreported) F.S.C./413.
24. (1947) 12 W.A.C.A. 187.
25. (1959) 4 F.S.C. 270.
26. (1904) 1 N.L.R. 57.
27. (1936) 2 All E.R. 1632.
28. (1930) A.C. 667.

native law and custom that family land could be transferred by any means absolutely on the concurrence of agreement of the principal members of the family.

In the Middle Belt of Nigeria, amongst the Tiv, Idoma and Igala of the Benue State, the Alago, Mada and Nijili of the Plateau State, absolute gift was known and practised and was used as a token of appreciation of someone's good deeds.

(ii) CONDITIONAL GIFT

A conditional gift is one where there is no absolute transfer from the donor to the donee. In other words, it is a temporary transfer of ownership with the grantor reserving the right of reversion. Its incident is that the grantee acquires the right of user which endures for specific or indefinate period of time and may be transferred to his descendents.

It has been argued whether gifts of land under native law and Custom can be conditional. According to Dr. Musa G. Yakubu[29] there is nothing like conditional gifts. To him, all gifts of land under native law and Custom are absolute and could not be recalled by the donor if the donee subsequently misbehaves. He said once a gift was made subject to the good behaviour of the donee, it was no longer a gift but something else.

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29. See his Ph.D. Thesis (Unpublished) University of Birmingham (1980) Vol. I pp. 132.

According to Olawoye[30], a gift of land under native law and custom can be conditional "and where such is the case a Customary tenancy is said to be created".

Mr. Justice Ollenm in his lectures[31] declared that "a gift of land validly made is irrevocable".

But Bantsi-Enchill holds a contrary view. He said:

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

According to this remark, if a donee does not behave in good manners to the donor he is liable to forfeit his gift. It was argued that most gifts under native law and Custom fall under conditional gifts. This is because according to strict native law and Custom, land cannot be given out outrightly under any circumstances.

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30. Title to Land in Nigeria (1974) Lagos, Evans Brothers Publishers, p. 44.

31. Principles of Customary Land Law in Ghana (1962) p. 115.

32. Ghana Land Law (1964) London, Sweet & Maxwell p. 366.

There is no definition of what amounts to good behaviour. But I strongly submit that it must be some behaviour which is acceptable to the grantor and which does not amount to depriving the grantor of his reversionary title. For example, under the Egbura native law and custom, if a grantee should commit adultery with the wife of the grantor or his near relation e.g. his brother's wife or the grantor's father's wife, the grant would be revoked even if it was meant to be absolute.

Similarly an act of theft would not be regarded as good behaviour. Thus, where a grantee indulges in stealing farm produce from his grantor's farm he (grantee) would be told to quit the land even if the grant was made initially to be absolute.

Other acts of the grantee which would be considered as not of good behaviour may consist of incessant quarrelling, especially if the grantee and the grantor are living in the same house. In other words where enemity has got its way in between the grantor and the grantee, the grantor would not hesitate to revoke the grant.

Where a gift is conditional, any breach of the condition may result into forfeiture of the grant. Thus, where a piece of land was given out for farming and the grantee turned it into a residential house, the grantee would be told to quit the land and to determine the grant as revoked.

In the Middle Belt of Nigeria, gift of land under native law and custom is a well and familiar practice within the Nupe, Egbura, Alago and Gade of the Lafia and Nasarawa Local Government Areas of Plateau State. The same practice is familiar to Tiv,

Idoma and Igala of the Benue State. But it is done very sparingly and discriminately. From the research conducted, outright gift to a stranger is rare. In most cases gift of land are made to only relations who would not be entitled to land as of right. For instance, it is the habit of the Gwari people to move from their fathers house where they are entitled to a portion of land as of right to their mothers house where they are not entitled to land as of right to ask for a gift of land there.

A gift under native law and custom of the people of the Middle Belt needs not be in writing.[33] Consequently, most gifts are done orally. But they must be made in the presence of witnesses. Under the Alago, Mada, and Mijili native law and custom, and of course, the Egbura's, a gift of land is always followed by a"drinking party". That is to say, the grantee would buy wine and kola and cerebrate the occasion by gathering people either in his own apartment or in the grantor's house to witness the grant. Normally, the reason for such a gathering would be mentioned and the drink taken to seal the grant.

(b) BORROWING OR LOAN OF LAND

To borrow a land means to acquire a grant of an interest for a short duration of time for the purpose of enabling the borrower to put the land for a particular use. Owing to the shifting or fallow system of agriculture it is naturally to be expected that a family head, whose family land reserve is in fallow and therefore has no spare land to meet the interim demands of rising adolescent members of his household, would approach or other members of the Community for a temporary loan

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33. Molomo v. Olushola (1954) 21 N.L.R. 1, Alake v. Awawu (1932) 11 N.L.R. 39.

of the needed land[34]. From here, it may be deduced that among the factors that made the borrowing of land practiceable, are the type of agricultural system we operate i.e. whether shifting or fallow, or, because of the ever increasing population of a family, there comes a time when the family land becomes inadequate and the head of the family, therefore, is compelled to borrow land from another family.

Among other reasons which may necessistate the borrowing of land is the high economic value of a particular crop which grow well in a particular land. For instance, in the recent years the Eggon people of Akwanga Local Government Area of Plateau State have been moving down the hills to Lafia Area to borrow land in order to plant yams which have high economic value.

Similarly, the Gade people of Area in Nasarawa Local Government Area have been migrating to Loko and Udegi Areas to borrow land to plant rice which economic value has risen very astronomically of recent.

It is also very common to see farmers around Lokoja and Koton-Karfi in Kwara State borrowing marshy-lands for the purpose of planting paddy rice.

Population pressure may be a factor which will necessitate a Community to borrow land from another Community. Thus, the Mijili people with high population and all been devouted farmers have little land to go round all members of the Community adequately. Therefore, they moved to Doma South of Lafia to borrow land to farm.

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34. ELIAS, T.O. Nigerian Land Law and Custom (1960) London, Rantledge & Kegor Paul Ltd. pp. 191 - 192.

Lastly, the infertility of the soil may force the owner of such land to borrow land which is fertile to farm. Thus, because of the hilly nature of Langtang Division of Plateau State, most of its inhabitants have been moving down to Shendam where land is fertile and suitable for the growth of yams, millet, and Corn.

As regard. consideration for the loan, there is no Common standard. Sometimes money may be accepted in view of the present condition. But in the ancient times, consideration for borrowed land might take place in two respects. Firstly, the borrower might agree to surrender a proportion of his annual harvest to the lender. Secondly, the borrower might agree to work in the farm of the lender in lieu of the usual annual produce.[35]

Where land has been borrowed and the borrower could not effectively work it; what becomes the liability of the borrower? According to Elias,[36] the lender may recall off the land borrowed, and the borrower dispossessed of it and the deposit, if paid by the lender returned to him. This statement of the learned author is misleading, because, it tries to equate borrowing with hire.

Under the strict native law and custom of the peoples of the Middle Belt of Nigeria, a person who intends to borrow land does not need to deposit some money in advance.

Secondly, if the land borrowed is under utilised, it is not the concern of the lender. He can only recall the land if he (the borrower) has something to do with it.

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35. ELIAS, T.O. Nigerian Land Law (1974) London, Kegan Paul & Rontledge, p. 158.

36. Ibid. p. 158.

Sometimes, the right of the borrower to the land borrowed may not include the right to reap the fruits of the economic trees standing on the borrowed land. Where this right is excluded, it is obvious that the borrower would keep off the trees and concentrate in cultivating it only. But at times, the borrower may be given the right to harvest such fruits and to share them between him and the lender.

Normally, borrowed land is to be used for planting of crops which may be harvestable or lifted yearly. Thus, it is not allowed to plant economic trees on the borrowed land which would not be lifted at the expiration of the agreed time. Also, erecting of permanent structures on the borrowed land is totally prohibited under the Egbura native law and Custom.

The incidents of borrowing land is that, the duration of the borrowing lapses as soon as the crop is harvested. Therefore, where the land was borrowed for the planting of rice, the interest of the borrower determinates as soon as the rice was harvested.

(c) CONQUEST

This is one of the methods of acquisition of title or ownership of land. In the past, especially in Africa, powerful tribes were notorious for their hostilities against the weaker ones. Slave raids and wars were the order of the day. And by way of force of arms, weaker tribes or Communities were conquered and subdued. Therefore, whenever there was a conquest, the ownership of the land of the conquerred tribe or Community passed to the conquerror. For instance, when the British conquerred the Fulani people between the year 1902-1903[37] it (British Government) proclaimed itself to

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37. MCDOWELL, C.M. An Introduction to the Problems of Land Ownership in Northern Nigeria (1966) Zaria, Research Memo Series p. 28.

be the owner of all lands which were hitherto vested in the conquerred Chiefs and Emirs.[38]

In the Middle Belt of Nigeria, there occurred several raids and wars between tribes and each tried to conquer one and another. Apart from these internal crisis, there were series of invasions from the Hausa and Fulani people of the far North.[39] For instance, it was on record that the former Panda Kingdom was raided by the Fulanis on two separate occasions in 1833 and 1853. This had led to the claim by the "Angwe" people (corrupt word for Fulanis) that the title to the land which now comprises of Nasarawa Local Government Area was vested in them by virtue of conquest.[40]

In Lafia the Kanuris (Beri-beri) claimed that the title to land comprising Lafia town and its environs was vested in them (Beri-beri) by virtue of having conquered the Gwandara people and established their suzerainty over them.[40(a)]

Similarly, in Abuja, the once powerful Habe Kingdom was whittled down and stripped of its former glories by Fulani Conquest and domination and by virtue of this conquest the Fulanis claimed to have been entitled to the ownership of the land now known as Abuja Emirate.[41] They forced the Habe chiefs

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38. Ibid., p. 43.

39. FORDE, D. Ibid., p. XIII.

40. HOGBEN, S.J. The Muhammadan Emirates of Nigeria (1930) London, Oxford University Press, p. 45.

40(a). Ibid., 308.

41. COLE, C.W. Report on Land Tenure Nigeria Province (1946) Kaduna, p. 1.

to pay tributes both human and materially, but the Habe Chiefs would not succumb or yield to such domination or conquest.

In the past, acquisition of title to land by conquest was a source of pride of manlihood. But nowadays, it is seen as an act of uncivilization. However, where that evidence is available and has been established it would be admitted as evidence of title.[41(a)]

(d) CESSION

Under native law and custom, title to land can be acquired by way of cession although this is seldom.

By Cession we mean a bilateral agreement between two parties whereby one of the parties surrendered or renounced his rights and title to land or territory in favour of another. The famous Cession in Nigeria was that which took place on 6th August, 1861 when King Docemo ceded Lagos to the Queen of Great Britain, "her heirs and successors for ever, the Port and Island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging".[42]

The legal effect of Cession is that the root of title of the land comprised in the treaty thereby passed to the party for in whose favour the treaty was entered into.[43]

The legal requirement necessary for the validity of such Cession is that the parties should have got the powers to enter into them.

41(a). Nwa v. Nwalusi (1962) 1 All N.L.R. 681 at p. 684.

42. IRVING, R.F. Principal Enactments and Cases Relating to Titles to Land in Nigeria (1916) London, Stevens and Sons, p. 319.

43. Amadu Tijani's Case (1909)2 A.C.399; Oduntan Onisiwo v. A. G. S. Provinces (1912)2 N.L.R. 77; A.G. v. J. Holt (1910)2 N.L.R. 1.

In the Middle Belt of Nigeria, little is known about Cession. This is because in most places of my research, it was discovered that what the natives termed as Cession is in fact not. For instance, most cases of conquest were followed by agreement or treaties whereby the conqueror laid down some rules to be followed by the conquered. It is these type of agreements that the conquered in most cases stipulated the payment of homage, and to be loyal to the conqueror that the natives are familiar with. In reality, this is not the same with the treaty of Cession which normally emanates from the free will of the parties and not preceeded by any force of arms.

(e) SETTLEMENT

Under native law and custom, settlement is one of the methods of acquisition of title to land. Even in the English theories of property, there is one which says that "he who first reduces into possession a piece of property has the best of justifications for remaining in control and claim title to it.[44]

By settlement it means, the original founder or discoverer of a certain land who acquired no grant from anybody. In otherwords, it means the first settler, discoverer or founder of land for the purpose of settlement.

Normally some motives do preced settlement. Consequently, some settlements come into being after some disagreements with the ruler of the settlement area. A times settlement comes into being as a result of a search for better place of farming and hunting; or as a result of political, sociological and economic grounds.

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44. PATON, G.W.A Text-Book of Jurisprudence (1964) Oxford, Clarendo Press, pp. 485.

For a first settler to claim title to land by way of settlement he must show some evidence of temporary or permanent settlement. For instance, he must build a hut or stockade on the land so discovered. This will enable him to claim a superior title to the land there. In most cases of settlement under native law and custom, the first settler after discovering the place will cultivate it and later the farm is turned into a house.

The legal effect of settlement is that the person or group of persons, or Community so properly called the first settlers become the owner of the land. Their title is Supreme and unimpeachable. They may order subsequent settlers to pay tributes, rents, or homage or not to enjoy certain amenities found there.[45] Therefore, it follows that a first settler in a place, has all the rights vested in the person who has the ownership of the land. He is the person who can alienate any portion of that land to the subsequent new comers. Normally, the first settler becomes the village head of the settlement area.

Settlement as a method of creating title to land under native law and custom was a subject of a court case recently. Thus, in the case of AJALA v. AWODELE[46] the plaintiff claimed a declaration of title and injuction to restrain the defendants from entering into a parcel of land. The plaintiff argued that their ancestors were the first people to settle on the said

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45. Amachere v. Kalio (1914)2 N.L.R. 108 where the plaintiff Community claimed fishing right over Calabar River to the exclusion of the defendants.

46. (1971)N.M.L.R. 127, See Ajibade v. Akande, Suit No. 1/257/81 of Ibadan H/Ct. on 12/1/83.

disputed land. The court after a thorough consideration of the historical evidence in the case, decided in favour of the plaintiffs and remarked viz:

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

Thus, where a party who is seeking for declaration of title to land can establish to the satisfaction of the court that his ancestor was the first settler on the land now being the subject of dispute, he is automatically entitled to such declaration. But one of the commonest and most frequent problems with most of the Communities of the Middle Belt is that in case of any dispute as the title to land between the first settlers and the conquerors of the settlers whose title will prevail? This question is necessary here because, Middle Belt being a region which was used as a battle field on several occasions was bound to have groups of people who would assert that they are the "owners" of the land either by virtue of being the first settlers or conquerors. This has been the case between the Egbura of Panda Kingdom now Nasarawa Local Government Area and the Fulanis there. The former claimed to be the first settlers or the founders of the Kingdom, whereas the latter claimed to have the superior title to land because they conquered the indegenous inhabitants of the place.

Similarly, the Gwandaras of the Lafia Local Government Area of Plateau State are facing the same problem with their counterpart - the Kanuri people. The former are the original founders of the area, whereas the latter are the strangers who claimed to have title to land by virtue of being the Conquerors.

Although there is no any decided case on this matter, but it is my submission that the title of the Conquerors will prevail. This has been the practice in almost all those areas where there is such dispute. To further buttress this submission, it is important to make allusion to the Fulani Conquest of Northern Nigeria in 1804 which took the form of Jihad. After the Jihad all lands conquered by the Fulani became the property of the Fulani by virtue of conquest.

Similarly when the British Conquered the Fulanis of the Northern Nigeria in 1902-1903, they also asserted that they were the owners of the Unoccupied lands which devolved to them by virtue of having Conquered the Fulanis.[47]

Therefore, where settlement may be a conclusive evidence of title to land, if there is a dispute between the first settlers and the Conquerors of the first settlers, the title of the Conquerors will prevail.

(f) SALE OF LAND

In the recent years one of the quickest and the simplest methods of creating a title to land is through sale.

By sale, we mean a permanent transfer of rights over land for a monetary consideration.[48] However, the theory of sale of land in the olden days was not known to Customary law of the people of the Middle Belt. Therefore, all that was said in LEWIS v. BANKOLE[49] was true and co-terminus with the prevailing situations in the Middle Belt. In that case

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47. McDOWEL, C.M., Ibid p. 29.
48. OLAWOYE, C.O. Ibid. p. 43.
49. (1909)1 N.L.R. 82.

Speed C.J. said,

> "It is perfectly well-known that by strict ancient native law and custom all property was family property and all real property was in alienable. Family property can be leased, thangh it can not be sold by strict native law and custom even if all the members consented....."

To further support this rule of the inalienability of land under the Customary law is the case of OKIJI v. ADEJOBI[50] which was decided two decades ago. In this case the plaintiff averred that he bought the land in dispute from the defendant's ancestors 200 years ago. The defendant claimed that the land in dispute was a family land and based their ownership on traditional evidence. The judge, Ademola Adetokumbo, C.J. of the former Western Region held:

> "Much as I realise how difficult it is to prove a transanction of this nature so many years ago, I do not believe the plaintiff's assertion that there was a sale. It is most unlikely 200 years ago that land would be sold at all. A stranger could be given land on payment of the usual tribute but on out and out sale was rare, if made at all."

On appeal to the Supreme Court, Brett F.J. delivering the judgment of the Court affirmed the trial court judgment without any hesitation. He further said,

> "I am not prepared to dissent from this finding which is in accordance with the general trend of judicial decisions or dicta about the sale of land among the peoples of West Africa".

From these remarks one is put into a dilemma as to whether under strict native law and custom, sale of land was absolutely prohibited or there was no need for the sale of land in the past.

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50. (1960)5 F.S.C. 44.

With regards to the former i.e. total prohibition of sale, it is submitted that the prohibition is based on heresy. For, it is not based on any religious belief or founded on any Customary law. That is to say, there is no law which made it an offence to sell land. And one of the features of native law and custom is that it must not only be a custom but, it must have the force of law.

Furthermore, in order to substantiate this submission, it is important that we refer to the modern development brought into this area of Customary land law. It is now a well established principle of native law and custom that land can now be sold, if the consent of the principal members have been sought.[51] This shows that, the sale of land is not totally prohibited. What is required is the concurrence of the principal members to make any sale under native law and custom valid and effectual.

Therefore, it is my contention that in the past, land was not a merchartable Commodity and that was largely due to the fact that no need called for its sale. Nowadays, because of the introduction of cash economy and as the result of interaction with the people outside the Middle Belt, the anachrostic position that land was not saleable has been done away with. It is now saleable, only subject to one important condition, that, the majority of the principal members must have consented.[52]

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51. Oshodi v. Balogun (1936) 4 W.A.C.A.; Oshodi v. Dakolor (1930) A.C. 667; Alade v. Aborishade (1960) 5 F.S.C.167.

52. Ekpendu v. Erika (1959) 4 F.S.C. 79.

In the Middle Belt sale of land is no more a new thing. It is done, especially in urban towns such as Makurdi, Otukpo, Gboko in Benue State and in Keffi, Lafia and Nasarawa in Plateau State. However, in the rural areas, the practice is rare.

4. PROOF OF TITLE TO LAND

Under native law and custom, a party who seeks for a declaration of title to land must prove such a title. In other words, the onus of proving title to land lies squarely on the person who asserts his title to such land.

Therefore, a party who seeks for a declaration of title to land under the customary tenure must prove among other facts, traditional evidence of title, evidence of acts of ownership within living memory, and in the case of grant factual evidence from an undisputed owner. In addition he must also prove acts of possession.

(a) TRADITIONAL EVIDENCE OF TITLE

A party (Community, family or an individual) who seeks a declaration of title to land has to prove by traditional evidence some acts of ownership. These acts, under native law and custom may include the facts of being the first settlers or conquerors. For instance, the Egbura Community of Toto and Umaisha Districts of Nasarawa Local Government of Plateau State, in their claims as the owners of the land they inhabit now, always rely on the traditional evidence of title. They said, according to the traditional evidence their ancestors were the first to settle there. That the Gwari, Bassa and Gade peoples came and met their ancestors there.[53]

53. FORDE & BROWN, Peoples of the Niger - Benue Confluence (1955) London, p. 55.

Therefore, the Egbura people claimed to be the owners of the land and would only loan land to other members of the Community i.e. Gwari, Basa and Gade.

The danger attendant with this method of proof of title is that, as time goes on, from one generation to another, the evidence would not be said to be within living memory. Then what becomes of the evidence? Is it hearsay or not? It was contended that, ordinarily, such evidence would be excluded as hearsay. But in the case of COMMISSIONER OF LANDS v. ADAGUN[54] an attempt to lebel such evidence as hearsay was rejected by Graham Paul J. who observed that,

> "It is the undoubted practice in this country to accept as admissible in cases as to title to family land, evidence of the tradition of the family ownership. Literate among the people does not go back very far and the oral tradition is generally the only evidence available as to ownership of land earlier then the memory of living witness".

But this unfortunate situation has been forestalled by the Evidence Act of 1945 which has taken into consideration the unwritten nature of the native law and custom. Section 44 of that Act provides that where the title to or interest in family or Communal land is in issue, oral evidence of family or Communal tradition concerning such title or interest is relevant.

However, the slate is not wiped clean, inspite of this saving provision of the Evidence Act, because, one of the problems connected with the oral tradition is that, in the process of transmission from one generation to another there

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54. (1937) 13 W.A.C.A. 206 at p. 206.

is likelihood of the tradition being distorted or concocted. In KOJO v. BONSIE[55] Lord Denning suggested that where there is a conflict between the oral evidence of the two parties, the court should not hesitate to weigh and compare them, and in the final analysis, it should base its judgment on one which is more probable.

In the Middle Belt, oral tradition as a means of proving title to land has always been referred to in disputes relating to Communal or family lands. In Keffi, Nasarawa, and Lafia Local Government Areas of Plateau State, the origional settlers always rely on oral tradition to prove their title whenever there is a dispute between them and the strongers i.e. Hausa, Fulani and Kanuri peoples. Similarly the strangers, many a times, rely on the oral tradition that their great grandfathers conquered the inhabitants and subjected them to their reign.

(b) EVIDENCE OF ACTS OF OWNERSHIP

This evidence is to the effect that in a claim for a declaration of title, the onus is on the plaintiff to prove acts of ownership extending over a sufficient length to warrant the inference that the plaintiffs were exclusive owners.[56] To satisfy this requirement, acts of ownership such as long occupation, the grant of leases and tenancies, the receipt of rents or tributes arising from such grant are of absolute important and relevant.

At one time, it was said that evidence of acts of ownership must be numerous and positive. This means that one,

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55. (1957)1 W.L.R. 1223 at p. 1226; Abinabina v. Enyimadu (1953)12 W.A.C.A. 171.

isolated act of ownership is, obviously not enough. At least there must be more than one act. Thus, mere occupation without any other act was held not to be positive act of ownership.[57]

The question is, if occupation is not a positive act, what else can be more positive? Land, it is said, cannot be controlled like a cap, book or money. Therefore, occupation, obviously is an act which can be said to be positive especially if it is long enough to justify ownership. The problem, perhaps may be that occupation however long may not satisfy the requirement that the "act should be numerous". But it is my contention that a single, long occupation should satisfy the requirement, most importantly, if it has been peaceful and undisturbed.

In the case of SUNDAY OKOROCHUKWU v. CHIEF WILSON ETIBI[57(a)] the appellants and defendants appealed against the judgment of Okadigbo J. granting title to land in dispute to the respondents and appellants on the ground, inter alia , that they had proved their title by their act of ownership in installing a tenant on the land who had been there for over twenty-one years. The appellant claimed that the tenant was in fact their caretaker (although the tenant gave evidence for the defendants) and that in any case the act of ownership of the respondents were not sufficiently positive or numerous to found title. Counsel for the respondents submitted in reply that there is no rule of law that one substantial act of ownership is not enough to prove title. It was held that

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57. Aderemi v. Adedire (1966) N.M.L.R. 398.

57(a) Judgement of the F.C.A/E/151/78 of May 6, 1981 cite in (1982) N.C.L. Rev. 254.

there cannot be a better act of ownership than for a man to put a tenant on a disputed piece of land for twenty one years when that tenant to the knowledge of the others side was there and was not disturbed. The numerous acts being insisted upon most always vary with the type of law. The court went further to say that, "A single act may sometimes be sufficient. The courts have never laid down a number of acts required before a decree is granted in favour of the party claiming title".

In the Middle Belt of Nigeria, acts of ownership normally include physical occupation by way of farming the land or building on it. Acts tantamout to denial of title or adverse to the interest of the owner are always rare, since disputes are also seldom. Therefore, to most families, the quickest way of proving title to land is long occupation coupled with the fact that it has been undisturbed. Acts of denial of title such as alienation without the consent of the owner, or collecting rents or tributes or physical challenge of the owner's title are not common.

Under the Egbura native law and custom, acts of ownership will include harvesting of locus-beans trees, palm trees or felling of trees for timber without receiving any permission from anybody who may purport to be the landlord. It was told that, evidence that a family was in the habit of arranging hunting expeditions of a particular land and was collecting shares of all the four-legged animals killed during such hunting expeditions was a sufficient evidence on acts of ownership under native law and custom of the Egbura people.

5. LOSS OF TITLE

Title to land under native law and custom as we have seen above, can be acquired in certain ways. Reciprocally, indeed, there are actions or inactions which could divest a person of his title to land. Some of these actions are: long possession, extinction of occupational right, abandonment and forfeiture on misconduct.

(a) LONG POSSESSION

Under the traditional law of landholding, the general rule is that once a person successfully established his ownership of land, unless he divested himself of his title or like manner, he remains the owner for ever, even if he has been out of possession for a long time, indefinately.[58]

However, because of the rigour and hardships which the general rule works, the courts in the exercise of their equitable jurisdiction have often tended to relax this rule by saying that a person who has been in continuous and undisturbed possession for many years in the belief that he has a valid title should be protected.

This rule which modified and diluted the general rule is contained in a celebrated case of AWO v. COOKEY GAM[59] the facts of which are as follow: The defendant was in possession of the disputed land for over twenty-one years undisturbed, and in respect of which they had collected rents for a long term of years with the knowledge and acquies of the plaintiffs

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58. OLAWOYE, C.O. Title to land in Nigeria (1974) Lagos, Evans Brother Ltd., p. 119.

59. (1913)2 N.L.R. 100.

who now disputes the defendant's title and sought for declaration of title in their favour. It was held that it would be wholly inequitable to deprive the defendants of property of which they have held undisturbed possession and in respect of which they have collected rents for so long a time of years with the knowledge and acquiescence of those who now dispute their title, even if it were clear that they entered into possession contrary to the principles of native law.

The court went further to say that:

> "We do not decide this point in accordance with any provision of English law as to the limitation of actions, but simply on the grounds that the court will not allow a party to call in aid principles of native law, and of all principles, which, as in this case, were developed in and are applicable a state of society vastly different from that now existing merely for the purpose of bolstering up stale claim".

From this observation it is discernible that two factors were responsible for this stand taken by their Lordships. Firstly, their Lordships were amply clear that under native law and custom Limitation Act does not apply to bar actions.

Secondly, their Lordships were equally aware that prescription is not a principle of native law custom.[60] Therefore, the only basis upon which they could justify their decisions was to invoke the rule of equity.

Notwithstanding the interference of equity into this area of Customary land tenure, the position in the Middle Belt with some groups of people remains unchanged. For instance, within the Alago, Afo, Agatu Communities of Lafia

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60. Akinloye v. Eyiyola (1968) M.M.L.R. 92.

and Nasarawa Local Government Areas of Plateau State, long possession cannot operate to divest the owner of his title to land. To these groups of peoples, land once acquired, becomes the property of the owner for ever or in perpetuity. No amount of long possession by another person can confer title on that other person and devest the owner of his title.

But the danger here is that when the two laws are in conflict i.e. native law and custom and equity, it is the latter which will prevail.[61]

Secondly, native law and custom applies only if it is not repugnant to natural justice, equity and good conscience.[62]

The invocation of equity into this principle of native law and custom, it is said is to standadise customary land law with the English land law; but to the detriment of Customary land law. For it has lost its touch with the practice of the people, at least in the Middle Belt.

In the Middle Belt, the practice in relation to farm and residential lands varies, essentially. With regard to farm land, under the Egbura native law and custom, a family who is in possession of a tract of land cannot be dispossessed or loss its title by the mere fact that another person has been in possession for few years. Lost of title by way of long possession by another party can only take place if he has been in possession for the upwords of 50 years. Strictly, there is no definite time when long possession could hatch

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61. Awo v. Cookey Gam (1913) 2 N.L.R. 10, Kojo v. Wuso (1934) 4 WACA 96.

into ownership or confer title to land.

However, if the land has been left to grow fallow for many years and the family who left it could not be traced, then the land reverts to the Community. Consequently, the village head could allocate it to any deserving member of the Community.

But of recent a practice has emerged whereby a definite period of fallow is allowed. After the expiration of the period, a person ceases to be in possession and ultimately lost his right over the fallow. For example, in Abuja the laid down period is 5 years after which all rights over fallow land cease. In Kuta, Niger State, the period of fallow has been fixed at seven years.[63] In Toto District of Nasarawa Local Government Area of Plateau State, if a family member leaves his portion of land to grow fallow, he could reclaim the land after these years. If he fails to do so, another member of the family who is in need of the land can farm it after consultation with the family head.

If the property is a residential one, long possession by another party cannot operate to defeat or oust the title of the owner. This is because, in as far as the property is habitable, or even if it is not habitable, the title of the owner subsists. The occupier who is in possession cannot claim the ownership of the property however long he remains in occupation or possession.

(b) ABANDONMENT

Under native law and custom, one of the usual ways by which title to land may be lost is by abandonment of occupational rights. This takes the form of quitting the land for

63. COLE, C.W. Ibid. paragraph 71, pp. 26-27.

a long period of time with the intention not to come back. Or, by surrendering the occupational or possessory rights to the owner. Abandonment of land, may also take the form of not using the land for the purpose of which it was granted.

However, it is my contention that the principle operates only to defeat the rights of a stronger but not a member of the family or Community. For instance, we cannot say that the abandonment of a portion of land granted to 'A' a family member, divested him of the title to that land. This is because the ultimate title to land is in the family and 'A' as a member has not devested of himself of that title by way of abandonment.

But if 'B' is a stranger and a portion of a family land was granted to him for occupation. If 'B' abandon's it with the intention not to come back to that land again, then, he has lost his rights on that land. Thus, abandonment, is a principle which operates effectifully against a stranger only, and not against a member of family or Community.

There are several reasons which may lead to the abandonment of property. Some of these reasons are natural and artificial. For instance, unsuitability of land for agriculture, lack of drinking water, erosion, sickness.[64] Among some artificial reasons are, the ever increasing search and hopes for a better place of living and the desire to avoid enemies.

In the Middle Belt area it is a common place to see ruined and abandoned houses here and there. Abandoned houses

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64. Baikie v. Offiong (1923)5 N.L.R. 29.

left to fall into abeyance are not unrare in Nasarawa, Keffi, Toto, Lafia towns. The occupiers, I learnt have left for unknown destinations for fortunes.

The legal effect of abandonment is that once it is proved, the possessory or the occupational rights of the occupier is lost. Thus in the case UKWA & ANOTHER v. AWKA, LOCAL COUNCIL[65] the plaintiff granted the land in dispute to the defendant in 1939 for the purpose of building a central market. The site was unpopular and another site was chosen for the same purpose in 1949. It was held that there was a proper case of abandonment by the defendant.

(c) FORFEITURE ON MISCONDUCT

One of the ways by which title to land can be lost under native law and custom is by forfeiture on misconduct. This brings us again to the controversial principle of Customary land law that a gift of land is always subject to good behaviour of the donee. Professor T.O. Elias,[66] (as he then was) and Mr. Bentsi-Enchill[67] are agreable on this principle. Professor Nwabueze, however seems not to agree with this rule of native law and custom.[68] For, after quoting Bentsi-Enchill's view on this principle remarked rather vaguelly viz, "this would seem to be the correct view of the Customary law on this point".

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66. ELIAS, T.O. Nigerian Land Law and Custom (1951) London, Rontledge & Kegan Paul, p. 181.

67. Bentsi-Enchill, K., Ghana Land Law (1964) London, Sweet & Maxwell p. 366.

68. Nwabueze, B.O. Nigerian Land Law (1972) Enugu, Nwanife Publishers p. 367.

According to Olawoye,[69] this principle applies only to conditional gifts. In view of the variety of views given by these eminent writers, the true position of the law is not yer ascertained. But as I have said earlier[70] and in view of the research conducted within the Egbura Community, there is probability of the application of this rule.

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69. OLAWOYE, Ibid. p. 44.

70. See p. 30 of this Chapter.

CHAPTER III

MANAGEMENT OF LAND

1. Introduction:

In the Introductory Chapter of this dissertation, I briefly defined what the word "management" means in its every-day usage. I also defined it and elaborated it concept especially as it relates to the management of land under native law and custom. In this Chapter, I intend to discuss below, in detail, the management of Communal and family lands under native law and custom with all its legal implications. I will also examine the roles which the village and the family heads play in the management of such Communal and family lands.

2. The Village Head

Under native law and custom, the management of Communal land is usually entrusted in the hands of the Village Head or Chief who by virtue of his Customary reverence and pre-eminence is for all intents and purposes regards as the owner of the Communal land. Apart from land disputes, the Village Head oversees or superintends other activities of the Village. For instance, he is always the Chairman of most cultural, social and religious activities. In the past, the Village Head used to be a member of the three governmental organs of his Village, namely, the President of the Council of elders which responsibilities were executive, legislature and judiciary. He is always informed of all the activities going on in his Village. All strangers stay in his Village subject to his authority or permission. He is a very influential and powerful man.

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1. Amadu Tijani v. Secretary of Nigeria (1921) 2 A.C. 399.

In the Middle Belt, the office of the Village Head, in most Communities is heridatry. The only exception, I was told is the office of the Tor Tiv which devolves at random. In other words the office is not limited to only few families as it is the case with other Communities or Villages.

(a) Appointment

Under the Customary law of the Egbura people of Nasarawa Local Government Area, Plateau State, ascension to the post of Village Head is by election by the members of the council of elders who represent the entire members of the Village or Community.

In the olden days, before anybody was fit to contest for the post of a Village Head, he might have belonged to a certain ruling house of the Community. And before a house is recognized as one of the ruling Community, the founder of that house might have been the first settler or among the first settlers. In some cases the founder of the Community might have been a war hero who had contributed greatly in the fighting and conquering the first and the original inhabitants of that area and established his suzerainty over the original inhabitants. Therefore, a chief is a head of a Community

to administor and represent their affairs internally and with the far away ruling authority.

(b) His Powers

The Village Head or Chief is empowered under native law and custom to settle land disputes. He is the person entrusted with the management of Communal land. His authority with regard to the management of Communal land is by virtue of his official position as a Chief or Village Head. His authority is not personal to him. It is an official post and it is exercised only after consultation with and in conformance with the decisions of the elders without whose consent and agreement he could not act.[2]

Therefore, a Village Head or Chief forms a Central figure in the management of Communal land under Customary landholding. Thus, in the ceremonious case of AHMADU TIJANI v. SECRETARY OF SOUTHERN NIGERIA (Supra) Speed C.J. quoting with approval from Lord Haldane's Report of the West African Land

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2. COLE, C.W. Report On Land Tenure, Nigeria Province (1946) Kaduna, para. 19.

Committee (1898) succintly enumerated the roles and influence of a Village Head in the management of Communal land. He said:

> "Land belongs to the Community, Village or family. But in every case the Chief has charge of the land. He is to some extent in a position of a trustee and as such holds the land for the use of the Community. He has control of it and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. He cannot make any important disposition of the property without consulting the elders of the Community and their consent must in all cases be given before a grant can be made to a stranger".

The above observation, although antiquated in duration, is still valid and efficacious even at the present time. This is to say, long after this observation was made (1898) the practice obtainable today amongst the native Communities of the Middle Belt has not changed even slightly. But one thing which one can query from the above observation is that, since a Chief or Village Head is the Custodian of land within his jurisdiction, and that anybody who wants a piece of it has to ask him for it, can he therefore refuse to grant it?

Under the Egbura native law and custom and that of Agatu and Alago group of peoples of Lafia Local Government of Plateau State, a Village Head has no right to refuse the granting of a

portion of Communal land to any deserving member of the Community. This is because Communal land as the name implies is jointly owned by each and individual member of the Community. In the olden days, when no any other profession was known other than farming, such a denial by the Village Head of a portion of Communal land could be tantamount to a denial of means of lifelihood. Luckly, this seldomly happened because, land those days was in plentiful and therefore nearly all the requests by members were not hard to meet.

Therefore, where a member in a Community allocates a portion of Communal land to himself without the consent of the Village Head what happens? Since it is a Communal land, it is my contention that the self-allottee has not violated any Customary law warranting him to be punished. But if that land has already been given to somebody, it can be taken away. However, in some areas the self allottee would incur some warning.

But in Toto District of Nasarawa Local Government Area a curtain is drawn between land required for building of a house and that required for cultivation. I have discovered during my research that the requirement for the prior consent of the Village Head is more stringent in relation to land required for buildings. In the aforementioned District, I have observed that in most occassions the consent of the Village Head was not sought before cultivation of Communal land. Even the strangers i.e. the Yoruba and the Ibo group of peoples I have discussed with told me that they did not seek for the consent of the Village Head before they started cultivating the portions in which I saw them planting cassava. But this is not possible with residential lands. The consent of the Village Head must be

sought in all cases. Therefore, in the main, the requirement that it is only the Village Head who must allocate land, strictly speaking does not apply very rigidly, particularly, with regard to farm lands.

The power of the Village Head extends to the collection of tributes and rents from the grantees who hold land under his hands. In most cases the task of collecting tributes and rents are performed by his designated agents who are specially chosen by the Village Head himself.

It is the responsibility of the Village Head to initiate court action or defend it on behalf of the Community when there is any case challenging the title or any matter connected with Communal land.[3] If a Communal land is acquired for public purpose, compensation to the members of the community will be paid to him for disbursement to such affected members. Thus in AMODU TIJANI v. S.S. NIGERIA[4], the appellant was one of the Idejo white cap Chiefs of Lagos. By a notice dated 12th November, 1913, certain land situated at Apapa were acquired by the Government of the Colony under the Public Land Acquisition Ordinance, 1903 for public purposes. The appellant as the Chief of Oluwa family claimed compensation on behalf of the Community of which he was the head. It was held that the appellant was entitled to claim compensation for further distribution among the members of the Community. The Privy Council went further to make the following observation:

> "The Chief is the agent through whom the transaction is to take place and he is to be dealt with as representing not only his own interest but other interests affected".

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3. Cobham v. Bassey (1924)24 N.L.R. 92.
4. (Supra).

In relation to alienation of land, his consent is necessary and where alienation of Communal land took place without his consent such alienation is null and void. Thus in AGBLOE v. SAPPOR[5], four principal members of the Tettey-Ora family conveyed a portion of the family land by a written document to Sappor as a gift in appreciation of his generous efforts in redeeming family property which was pledged by a previous head of the family who could not or would not redeem it. The current head of the family and the remaining principal member did not sign the conveyance either because they deliberately refused to do so because they did not approve of the action or because they were not approached out of the belief that they would not support the family. The West African Court of Appeal was faced with the problem of, whether according to native law and custom, Sappor had title to the land. The court decided that he had not because, the alienation of family property is valid only if the head of the family and the principal members concur. The court went further to say that,

> "a conveyance of such property cannot give any title to the grantee unless the head joins therein, even if he supports the alienation, and an alienation of such property without the concurrence of the head is void ab initio".

This principle was re-affirmed and reinstated in the recent case of GANIYU ADESOKAN & 2 OTHERS vs. ALHAJI MUSA LASISI & 3 OTHERS[5(a)], where the minority section of the family compring the 2nd, 3rd, and 4th defendants executed a lease of the property without the consent of the head of the family.

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5. (1947) 12 W.A.C.A. 187.

5(a). Judgement of the High Court of Ibadan, Oyo State. Delivered on Thursday, 4th March, 1984. Suit No. 1/197/82.

It was held that by the authority of EKPENDU v. ERIKA[5(b)] and LEWIS v. BANKOLE[5(c)], the conveyance was null and void.

3. THE FIDUCIARY DUTIES OF A VILLAGE HEAD

The duties listed above are bestowed on the Village Head or the Chief legally as the Chief of his Community or Village. Among other duties which the head of Community is bound to perform are his fiduciary obligations which are entrusted upon him as a trustee of his people. As such he should not misuse or use the Communal property for himself. From the research conducted, it seems that most Village Heads do not observe or comply with this Customary law requirement. For example, there exist instances where a Village Head allowed palm-wine tappers to tap palm trees standing on the Village Communal land and he collected shares of which he was supposed to share with the elders of the Village but to the chagrin of everybody in that Village the Village Head used the profits which accrued there from personally. The same Village Head was said to be harvesting oil palm trees and selling them without crediting any amount in the Village purse without any complaint from any member of the Village or Community.

However, it was contended by a Village Head that it is not possible to share the profits which accrued from the management of Communal land nowadays, because, members of his village have not been contributing money to helping him solve matters affecting the Community in his area of authority. He justified his expropriation of profits arising from the management of Communal land by saying that in most cases he is left

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5(b). (1959)4 F.S.C. 79.

5(c). (1908)1 N.L.R. 81.

to shoulder the responsibilities which were formerly borne by all members of the Village both males and females alike. He said that in the past, whenever there was a calamity in the village e.g. epidemic diseases, draught and etc., it used to be the responsibility of the members of the Village to contribute money to offer prayers and sacrifice in order to get rid of the calamity. But now no donations from the members of the village are forthcoming despite passionate appeals by him and some members of the Council of elders. Under this circumstance, as a head of his Community who is entrusted with the welfare of his people, he has no any other choice than to provide money for such services out of his own purse. This he does with the hope that he will defray his expenses by collecting tributes from the palm wine tappers, and the proceeds of the palm oil which he harvests from time to time.

From the cursory look of the action of the Village Head, one could easily be tempted to say that the action of the Village Head is a violation of his fiduciary responsibility - which says that he should not misuse or use the proceeds collected from the management of the Communal land for his own benefit. However, the nature, concept and scope of the institution of trust under native law and custom is not the same with that of English law. Even if they are, the fact that the Village Head has expended some money for the benefit of the Community affords him the protection of law. Consequently, it is my contention that his action is justified.

Furthermore, the interest of the Village Head should not conflict with the interest of the Community. Thus in the case

of ADEDIRE v. IFE DIVISIONAL COUNCIL, the Oni of Ife as a trustee of Communal land and on behalf of Ife Community together with the Native Authority Council, granted a concession over a forest reserve to a trading company of which he was a director and a share-holder. It was held that the concession conflicted with his fiduciary duty and consequently, it was set aside.

The fiduciary duties of the Village Head entails his accountability of the management of the Communal land to his members. Thus, in the case of ODUNSI v. BOLAJI,[7] the Government of Western Nigeria then paid the sum of ₦200,000 (£100,000) to one Sulu Bolaji who was the head of the Chieftancy family as a compensation for the acquisition of Ashogbon Chieftancy family land. The defendant used that money for the purchase of a Chevrolet car, a house and two plots of land. It was held that the defendant was liable to render an account to the plaintiffs, because as the court said,

> "The plaintiffs are left in ignorance as to the exact amount due to them and as to the facts from which such amount could be ascertained. In these circumstances their only remedy is to ask for an account".

In view of this decision, one can asserts categorically that the on going family feuds in many families and Communities in the New Federal Capital Territory relating to the payment of compensations are undiserable and unfortunate. Perhaps, it is petinent to elaborate further what I discovered in the course of my research there: There, I had the opportunity to hear disputes concerning mismanagement and expropriation of compensations paid to those who opted to go out of the Federal Capital Territory and to be resettled at a place of their choice. What

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6. (1963)1 All N.L.R. 39.
7. (1968) N.M.L.R. 203, Osuro v. Anjorin (1946)18 N.L.R. 45.

happened was that compensations were paid to many families and Communities. Some heads of the families or Village Heads used the money to buy cars, machines, heavy radio cassettes, and led expensive life style. They did not care to build houses with the compensation money to resettle members displaced from the Federal Capital Territory. These have been the sources of rift of discords among many families and Communities. Regretably, none of these cases has ever surfaced in the court of law, let alone to predict what the decision would have been like.

In addition, a Village Head must be loyal to the members of the Community. That is to say, the Village Head or Chief must be very faithful and truthful in the management of Communal land. As a person accupying a position analogous with a trustee under the English law, he must not mismanage Communal land entrusted in him for he would not only render an account for what actually accrued to the family or Community purse but also what ought to have been accrued.

4. Management of Some Economic Trees and Land

From the above responsibilities of the Village Head, one can understand that he occupies a prominent and exalted position in the management of Communal land. In the Middle Belt of Nigeria, the management of Communal land like in all other parts of the country is done by the Village Head. In the course of this research, very interesting revealations were made with regard to the management of Communal land under native law and custom of the Eggura people. This account which is stated below seems to apply to all Communities in the Middle Belt with only slight variations in some cases.

For this discussion, I will break the headings as follows: (i) Management of oil palm trees (ii) Management of locust beans trees and shea-nuts trees (iii) Management of rivers and streams (v) Management of hunting farms or bush and forest.

(a) MANAGEMENT OF OIL-PALM TREES

If a Communal land has palm-oil trees in it, under Egbura native law and custom, the power to harvest the yields is vested in the Village Head. Normally, the Village Head appoints his agents who take care of the tracts of Communal land in his domain and he assigns the responsibility of overseeing these lands to such agents.

In the past oil palm trees were harvested periodically e.g. quarterly by the male folks of the Community. It was, and still, it is the responsibility of the women to crush the yields and process them for oil. The palm oil used to be sold and the proceeds realised kept by the Village Head himself, his wife, or any member of the council of elders or his family. The money so realised was in the past used to meet expenses which would otherwise be borne by the Community if such proceed was not available. For instance, if a Village should need money urgently to be given to a member who was to travel to represent the Village Head in a certain occassion outside the Village, the palm oil proceed could be given to him as transport and feeding money.

It is the Village Head who has the power to authorise palm wine tappers to tap wine from the palm trees. In the past, the practice was that, palm wine tappers would give as a tithe

some specific quantity of palm-wine to the Village Head and his Council of elders one day in a week. Upon the receipt of the wine, the Village would call for the meeting of the members of the Council of elders and served them with the wine.

Recently, Village Heads have formed the habit of selling their shares of such weekly allotments of palm-wine meant for himself and the members of the council of elders and only to misappropriate such proceeds.

(b) THE MANAGEMENT OF LOCUST-BEAN TREES

Under the Egbura native law and custom it is the Village Head who has power and access to the economic trees standing on the Communal land especially the locust beans trees.

In the olden days before the discovery of the "Maggi sauce" by the modern food specialists, locust beans was an essential food ingredient with considerable economic value. Its trees were, therefofe, considered as exclusive preserve of the Village Head. Members of the Community could not harvest locust bean trees without the prior consent of the Village Head.

Locust bean tree, being an economic tree which is harvestable annually, always provide busy days both for the male and female members of the Egbura Community. The male members climb trees to harvest the yields while the female members would husk the pods and also wash them. Locust beans were sold and the proceeds used to meet some communal expenses such as entertaining of visitors of very important personalities from far and near. Or, the money

so realized could be given to somebody who was chosen for an official journey to be used as transport-fare or feeding money.

With the exception of these two economic trees namely palm tree and locust bean trees nearly all the economic trees are accessible and could be reaped or harvested by the members of the Village or Community. For instance, shea-nuts, mango trees, pawpaw and other natural fruits unless they were planted by somebody on the Communal land, they could be reaped or harvested by any member of the Village.

Every member of the Village has access and the right to cut firewood from the Communal land as much as he wishes without first resorting to the Village Head for permission. An individual may fetch firewood from the Communal land and sell it and he would not be bound to give account to the Village Head.

(c) MANAGEMENT OF RIVERS AND STREAMS

Under native law and custom, land includes rivers and streams. These are very important natural resources needed for the rapid economic development of a Village or Community. Within the Egbura, Afo, Alago and nearly all the tribes of the Middle Belt of Nigeria, rivers and streams are God-giving assets which belong to all members of the Community. They are accessible to all and can not be claimed by an individual, family or Community.[8]

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6. In Amacheree v. Kalio (1914)2 N.L.R. 108 a claim by a certain Community of a Sole right to fishing in the old Calabar river to the exclusion of some Community was held contrary to natural justice, equity and good consignee.

Although streams and rivers are communal prperties to be enjoyed by all members of the Community, the responsibility to supervise or oversee the proper utilization of them may be vested in the hands of the Village Head. For instance, the consent of the Village Head is needed before arranging for a large scale fishing expedition or party.

Under the Egbura native law and custom fishing party or expedition is arranged every year by the village members particularly when an occasion is at hand e.g. Sallah. The first catch by every participant must go to the "Village port" as a rule. These are collected by some people designated with such duty by the Village Head. At the end of the day the fish collected are sent to the Village Head who in turn share them among the members of the council of elders. And these member would subsequently share the fish among members of their families or ward.

In the recent times, fish cought from fishing expeditions are normally sold and proceeds divided among the members of the council of elders and the Village Head. At times, the proceeds are kept to meet any eventual expenses incurred by the Village Head in carrying out his official duties.

Apart from fishing expedition, individual fishing in the streams and rivers are recognized. With regards to this, no consent needs be obtained before any individual who wants to fish could do so. An individual could fish for his own consumption or sell. And where he chose to sell, the proceeds realised belonged to him alone and, therefore, not bound to account for it.

Since all streams and rivers are the properties of every member of the Community, they are accessible and enjoyable by every member male or female, young or old without any discrimination. He or she can fetch water from the stream for his domestic use or sell it and the proceeds realized belonged to the seller and he is not also bound to render account of what he realised from such sale.

(d) MANAGEMENT OF FORESTS, HUNTING FARMS OR BUSH

Forest and hunting farms or bush are major Communal lands in the Middle Belt region upon which Communities depend upon to some extent for exploitation.

The management of forests and hunting farms are entrusted on the Village Head for the benefit of all the members of the Village. Therefore, the cutting or felling of all important economic trees are done subject to the prior permission of the Village Head. Whereas, the felling of minor trees for fire-wood and other purposes are done without his consent.

With regard to hunting farms, the right to it is Communal. Every year, particularly during the dry season, hunting parties are arranged just at a time when any festival is approaching. Like fishing expedition, hunting parties entail to the surrendering of the right leg and a skin of any four-legged beast killed to the Village Head. The Communal hunting party forms an important part of the Gwari, Egbura, Afo Gade, Bassa and Alago day to day social life in the non-farming season.[9]

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9. COLE, C.W. Ibid. Paragraph 47.

Apart from Communal hunting arranged yearly, individual members of the Community have right to hunt in the Communal land in the night or day times. They can also set traps. Traps setting is one of the professions which the Tiv and the Gwari group of peoples are fond of. At times some people take it as hobbies, but in the Middle Belt of Nigeria, nearly in all Communities, traps setting is considered as one of the full-time occupations more importantly, at this time, when bush meat is costly.

From the foregoing, one can realise the role which a Village Head plays in the management of Communal land.

Secondly, it shows how Communal land which is the property of every member of the Communtiy is exploited, tapped and managed for the benefit of individuals and the whole Community. Communal land provides services to every member of the Community without hindrance or molestation. No action for trespass lies against any member. In the main, it provides a residual land where every member can resort to in time of want or need.

5. THE DIFFERENCE BETWEEN COMMUNAL AND FAMILY PROPERTIES

Throughout the length and breadth of this dissertation, mentions have been made on several occasions, of the foremost types of property known and recognized under the ancient native law and custom. These are, Communal and family properties. It is pertinent, therefore, to consider the difference, if any, between them.

Communal land, as the name implies means, that tract of land which every member of the Community has access to its use and enjoyment. It is the land which belongs to the whole members of the Community. Whereas, a family property is said to be a property which was set aside by the founder of a family for the use and enjoyment of his wives, children and grandchildren.[9(a)]

Therefore, one important difference between Communal and family properties may be the number of people who are entitled to use and enjoy the property. In the family property, the use and enjoyment is limited to the wives, children and the grandchildren of the founder only. Wheareas, in the Communal property, there is no restriction as to the classes of the people who are to use and enjoy the property. The land is for all and sundry.

However, in an extended family system, a family may run into several hundred members the size of which may be conveniently described as a Community. For instance, in the Tiv land, people live according family or clanish groupings, and each clan may have several members. The land which belongs to this clan or family may be designated as family land, although it may well be described as Communal land, too. In the main, a family property is within Communal property, if looked at from an inward position. Whereas, from the outward standing point, a Communal property is one which comprises of variety of family properties. It is argued that,

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9(a). Ogundairo v. Abeje (1967) L.L.R. 9.

since the word "family" in its political and social meanings, is the smallest unit of polity, it presupposes that family property preceeded Communal property. In other words, Communal property grew out of family property. While, according to one school of thought it is from the Communal property that the family property was carved out. Which ever is the correct view, it is my submission that Communal property, in term of size, is larger; while the family property is smaller in most cases. With this explanation, it is hopped that the difference would be kept in mind in order to understand the discussion which follows more thoroughly.

6. THE MANAGEMENT OF FAMILY PROPERTY

As earlier stated that the basis of ownership of land under Customary law is family ownership.[10] This is because, title to family land is vested in the family jointly and not in the head of the family or any member of it. Thus, in the case of VANDERPUYE v. BOTCHWAY,[11] Coussey, J. said that "the family is the unit for the purpose of ownership".

However, because of the present business efficacy, convenience and expediency coupled with the requirement of native law and custom not all members of a family have the control and management of family land at the same time. Therefore, the control and management of family land is vested, usually, on the head of the family.

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10. Ogunmefun v. Ogunmefun (1931)10 N.L.R. 82; Lewis v.Bankole (1908)1N.L.R. 82; Amadu Tijani's case (supra).

11. (1951)13 W.A.C.A. 164 at 168.

(a) THE HEAD OF THE FAMILY

The head of the family as the name implies is a person who heads or head. other members of his family and chairman family meetings and conferences in which family matters are discussed.

The answer to the question who can be the head of the family in a particular family has not received the unanimity of opinions of our judges and academicians. According to Yoruba native law and custom of Lagos, it was given in evidence that only the oldest male child of the founder of the family can become the head of family. That female child could not become the family head even if she was older than the male child.[12] However, this evidence was rejected by the court.

Dr. Elias (as he then was) maintains that it is only males who could be heads of family. Among the arguments given in support of this supposed incompetence and incapability of a woman to become a family head is that when they get married, they have to leave the family house to stay with their husbands and consequently, this would affect the effectiveness of her management and administration of the family affairs, in particular, her roles in relation to family property.

The plausibility of this arguement is doubted in view of the fact that, under native law and custom, there is what is commonly known as"extended family" system. Under this system it is hard to get a situation whereby a female head of family could not be assisted by a male member of the family.

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12. Lewis v. Bankole (1908)1 N.L.R. 82.

13. ELIAS, T.O. Nigerian Land Law and Custom (1956).

It is my submission that even where a female member is recognized as a family head she would always be assisted by other male members. Therefore, the argument that when she marries, she goes to her husband's house is untenable. In the Middle Belt within the Alago, Agatu and Egbura Communities, I have discovered that even where a male is the head of the family, he does not shoulder all the administration and management of family property. He is usually assisted by other principal members of the family. At times, these heads of family are old and the only role they play is a ceremonial one. Therefore, if a female member is forceful and strong, it is my opinion that she can become the head of family, especially if she possessess business acumen to manage family property economically and effectively.

In Egbura native law and custom of the past, a women could not become a family head. The same rule applies under the Alago and Agatu Customary laws. In all these Communities two reasons have been given to buttress such discrimination against the femalefolk. The first is that, women are naturally weak and cannot fight to defend the title to family land whenever such title is challenged.

Secondly, that a woman however courageous is not allowed to bury a dead body. Thirdly, a woman is absolutely prohibited from entering into the room where "juju" or idols are kept to offer sacrifices. According to the Alago and Egbura native law and custom these duties form the primary roles of the family head and since woman cannot perform then they are ipso facto disqualified from becoming heads of the family.

In relation to the first reason given above, it is my contention that, with the establishment of a civilized system of government cruelty, hostility and extortion have become the things of the past. If there is a dispute as to the validity of title to any piece of land the appropriate course to take is to go to the court of law to resolve the matter legally and peacefully. Therefore, the arguement that woman cannot take arms against their opponents who might challenge the title to family land is also not tenable. Even where there was a need to fight to defend family property, not only women would fight. Every member is supposed to participate.

Secondly, the fact that a woman is not courageous to bury the dead does not amount to her disability to be head of family. For one of the criteria for becoming a head of a family is not courageousness.

Thirdly, with the arrival of Islam in Nigeria, and particularly in the Middle Belt, large number of Alago, Agatu, Egbura, Igala and etc. are now Muslims. Therefore, the reason that women are not allowed to enter into fetish can not be maintained.

On the whole, the question whether a woman can become a head of the family depends upon the Customary law of each Community in the Middle Belt. But it is my strong submission that in the light of the present social and economic realities, a woman, if found to be strong and forceful and understands the importance of land and has the acumen of managing it, should not be disaqualified from becoming the head of the family on the flimsy excuse that she is a women, and woman only.

(b) Alienation of Family Land

In the past, alienation of land was unknown to Customary land law.[26] Several reasons were said to be responsible for this. Among them are: that the need for alienation was not great or it was virtually absent as there was no shortage of land. There was also the belief that land is owned not only by the present generation, but also by the past and future generations.[27]

In the Middle Belt in particular, the population was thin or sparse and therefore every family had enough land. The limited use for which land was put also contributed for the non-alienability of land in the past. For instance, land was only used for cultivating subsistence crops and for building residential houses. There were no industries, big scale commercial houses, large government projects e.g. dams, reservoirs, electricity projects, schools, hospitals etc. However, the idea of alienation crept in as a result of social and economic developments and above all as a result of contract with other Communities outside the Middle Belt. These developments have increased very much the roles of the family head in the management of family property. Thus, in the area of alienation the role which the family head plays may be stated as follows:

(i) Where alienation took place with the consent of the family head.

(ii) Where alienation took place without the consent of the family head.

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26. Adagun v. Fagola (1932)11N.L.R. 110.

27. Chief Elasi of Odogbolu before the West African Land Committee (1898).

(c) ALIENATION WITH THE CONSENT OF THE FAMILY HEAD

As the manager and administrator of the family property, it has been held in scores of cases, that any alienation done by the principal members of the family is only valid, if it is done with the consent of the family head. Thus in ACBLOE v. SAPPOR[28], four principal members of a family conveyed a portion of land which belonged to the family by a written document to Sappor as a gift in appreciation of his generous efforts in redeeming family land which was pledged by a previous head of the family who could not redeem it. The current head of the family and the remaining principal members did not sign the conveyance because the family head did not approve the action. It was held that, the alienation of family property is valid only if the head of the family and the principal members concurr. And that such alienation of family property without the concurence of the head is void ab initio.

Similarly, in the case of LUKAN v. OGUNSUSI[29], the land in dispute originally belonged to the Ajemba family. In 1952 the plaintiff purported to buy it from the family and the conveyance was executed by three members of the Committee Managing the affairs of the family. In 1964, the defendant bought the same land from the family and conveyance was executed by the head of the family and two of the three men who in 1952 conveyed the land to the plaintiff. After the sale, the defendent took posession of the land and started building operations. He was promptly challenged by the plaintiff and when he paid no heed this action was commended for damages for trespass and for

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28. (1947)12 W.A.C.A. 187.

29. (1973)5 S.C. 40.

injunction. It was held that the sale to the plaintiff was without the concurrence of the head of the family, hence void ab initio.

Therefore, the role of the family head is important and is so revered that his consent has been made a condition precedent to any valid alienation.

(d) ALIENATION WITHOUT THE CONSENT OF THE FAMILY HEAD

Converse to what has been discussed earlier, a situation may arise where the principal members without the concurrence of the head of family alienate family land. The legal consequence is that such alienation is void ab initio. In the case of EKPENDU v. ERIKA[30] some principal members purported to have sold a house without the consent of the head of the family. It was held that the purported sale was void.

We have seen that alienation by the family head without the consent of the principal members in voidable. What happens in emergency situation? Has the head of the family in his inherent power of administration of the family property any right to act without the consent of the family head? This question is timely because of the present economic and social conditions that have necessitated the mobility of each and individual members of the family. In the past, it was possible for a person not to travel outside his village or town. Therefore it was easy and possible to gather all members of the family together to discuss matters affecting family property. But at present because of business requirements and other things it is not possible that all members of the family would in all

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30. (1959)4 F.S.C. 79.

cases be at home or their village and would be able to attend meetings whenever such a meeting is called. And when this is not possible, and there is a need to take decision so as to save the family property from being ruined or taken away by another family. Would the family head stand with his hand akin-bow or unbothered? Or if he acts, would his action bind the members of his family? In the case of ARALAWON v. AROMIRE[31], the acting head of the Aromire Chieftaincy Family obtained a loan of ₦210.00 for the purpose of meeting the cost of repairing the Chieftancy Iga and family law suits without consulting the members of the family. One of the defences was that the Iga was in a ruinuous state and therefore it was not possible to call a family meeting for fear that it would totally collapse. Therefore, the acting family head sought to bind the family to settle the loan. Carey J. held that the family was not liable on the ground that it was not an emergency act, therefore the consent of the Senior members of the various branches was necessary. He observed:

> "The Head of the family undoubtedly has power to bind the family in routine matters, but before borrowing appreciable sums of money, disposing of or, charging family property etc., except possibly where he acts in an emergency for the benefit of the family, he must consult the senior members of the family and get their approval".[32]

From this observation or remark, it is palpably clear that in cases of emergency the head of the family in his inherent power of administering family property may act without the consent of the senior members of the family. This is one of the qualifications to the rigid rules laid down in the case of

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31. (1940)15 N.L.R. 90.

32. Ibid. p. 91.

EKPENDU v. ERIKA[33], that alienation by the head of the family without the consent of the principal members is voidable.

However, it must be borne in mind that despite the enviable position which the family head occupies in a family, if it can be shown that he acted fraudulently in the management of family property he would not be clothed with such official position. Thus, if the head of family alienates secretly either alone or in colloboration with some or all principal members and the land is described as belonging not to the family but to them personally the alienation is void not voidable.[34]

7. His Representative Capacity

On many occasions the relationship between the head of the family in relation to the family property has been described as that of the representative capacity. This means that anything done by the head of the family outside the family circle was done not in his capacity as the owner (in a lose sense) but with the voice or consent of the other members of his family. If any outsider wants to do anything with the family property he is the person to be consulted first. Therefore, the head of the family may represent his family in legal, social, political and economic matters affecting his family.

(a) LEGAL REPRESENTATION:

As far as the legal matters are concerned, it is the responsibility of the family head to take legal steps to institute actions against anybody who tries to threaten the security of family property. And if title to family property is challenged by anybody it is the head of the family who is to

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33. (1959)4 F.S.C. 79.

34. Olowo v. Oshinubi (1958) L.L.R.2.

defend such title with the cooperation of other members of the family. Thus in the case of KWAN vs. NYIEN[35] (a Ghanian decision), it was said that,

> "As a general rule the head of the family as a representative of the family is the proper person to institute all suits for the recovery of family property".

Also in the case of MUHAMMADU v. ZENUWAA[36], the West African Court of Appeal (WACA) observed that:

> "The proper person to bring an action for this nature is the head of the family. We are satisfied that the claimant is in this case not the head of the family."

Although these two cases are not Nigerian decisions but the rules of Customary law contained in them apply with equal force in the Middle Belt. For instance, under the Alago and Egbura Native Law and Custom, a family head, as I have been saying occupies a high position. He enjoys much obedience of his family members as such if there is any action regarding family property, usually it is the family head that is always pushed forward to institute or defend such action. Even if other family members attend such venue where the proceedings is taking place i.e. Court or the Chief's palace it is the voice of the family head that would be heard first. Even where a junior member is rich to finance the court action alone, the money for cost of the law suit would always be given to the head to take necessary actions. Hardly would any junior member of the family say anything in contradistinction with what the head of the family says.

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35. (1959) G.L.R. 67.

36. (1934)2 WACA 172.

In matters of compensation, if a family property has been acquired compulsorily, it is the family head that will receive the compensation for the onwards disbursement to the family members. Thus, in AMADU TIJANI v. S.S. NIGERIA[37], the Colonial Government acquired some tracts of land belonging to Oluwa family of Lagos compulsorily. Chief Amadu Tijani Oluwa brought this case claiming compensation on behalf of the family members. The bone of contention in the court was under what capacity did the Chief claim the compensation. The Privy Council finally held that Amadu Tijani Oluwa was not claiming the compensation on his own capacity of the family member but on a representative capacity as a family head. That, on that capacity he would distribute the money to all members of his family.

Similarly, in the case of ARCHIBONG vs. ARCHIBONG[38], a compensation was paid to some Community in Calabar. The defendant as a family head respresented his family at the Committee which was charged to share the compensation among the various faniles in the Community. The family of the defendant suffered some loss as the result of the inactiveness of the family head who represented the family. It was held that the head of the family was bound to account for what transpired in the Committee in which he represented the members of his family. Therefore, his duty to account for the what took place in the Committee was largely based on his capacity as the representative of his family.

However, where a family head is reluctant to take action to defend the security of his family property because he is interested in seeing the property being taken away due to some reasons, this rule expressed above would not apply rigidly. In

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37. (Supra).
38. (1943)18 N.L.R. 117.

other words, if a head of the family is reluctant or unwilling to take action to protect family property, the rest of the members may collect money or pledge a portion of that land to secure loan to take action to protect the land. Or if a junior member is able take financial burden singl-handedly, he would be allowed by the principal members of the family to defend such family title to land.

In BASSEY v. COBHAM[39], a member of the family claimed to have reclaimed a swanp-land and by that virtue was entitled to absolute ownership of that land. The plaintiff who was not the family head brought an action to dispute this claim of the defendant and the defendant denied the plaintiff's right to bring the action. It was held that the head of the family as regards family land is in a position to protect title to family land and if he chose not to do so, any member may assert a right to its protection.

In the Middle Belt instances where a family member may take action to protect family property do not border on the unwillingness of the family head to protect the family property. Thus, where a family head is too old, or he is sick, or he is not present at home due to sickness or ill-health and he can't come to initiate or take action to protect family property, his deputy or any member can take action to protect family property. In this respect even a woman who is pushful even though she is not the head of the family may take necessary action to protect the security of the family property. In the past action to defend or protect family property was in most cases taken to the Village head and the cost was small. Therefore, it was not difficult to initiate or defend any challenge

39. (1947) 18 N.L.R. 117.

of title to family land by any person.

(b) SOCIAL, POLITICAL AND ECONOMIC REPRESENTATIONS

The legal representative capacity of the family head is not the only duty of the family head. His duties include social, political and economic duties.

His social responsibility includes the representation of his family members in all social matters taking place outside his family circle. For instance, under the Egbura Customary law the head of the family represents his family in all festivals, ritual taboos, cults, religious rituals, and etc. arranged by the Community at the Village level or outside it. All contract of marriages are entered into before him. If death occurs outside the family, it is the duty of the family head to lead members of his family to condon the relatives of the bereaved person. Conversely if something good happens in another family, it is his responsibility to send a delegate to congratulate the family affected. In short the welfare of all other members of his family is saddled upon him and it is incumbent upon him to solve them for them. That is to say he clothes, feeds, marries and takes care of all other problems which a family member may encounter. In short he takes charge of all social problems affecting his family.

As most of the family heads are members of the Council of elders, they therefore represent their family members in the Committee of the Council of elders. In this way family heads perform or discharge their political duties. In the Middle Belt which consists of several tribes or Communities this responsibility is usually an enermous one. Thus, the

family head represents his family in all meetings in which political matters are discussed. For instance if there is a dispute with regards to land between two different Communities. It is the responsibility of the family head to attend a meeting if one is called in order to settle that dispute.

Lastly, the economic responsibility of the family head is that he sees to it that all tenants pay their rents, tributes, or tithe punctually. He in some cases keeps the accounts of the family money. He manages the family property for better economic result or profit. He renders account of all the proceeds accrueing from the family property by way of mortgage, lease, pledge, or sale. He collects and pays tax of all members of his family to the Village Head.

In the past when family labour was at its peak, it used to be the family head who would sale all the produce of the farm and make a safe keeping of the money realised. In short the responsibility of the family head is an enermous one and it would be unrealistic to attempt to enumerate them all, for, they abound in every conceivable matter affecting the family.

8. THE ROLE OF THE HEAD OF THE FAMILY

The position of the head of family is very important in the management of family property. As such he is sometimes called a trustee, and administrator or manager, or a representative of the Management Committee. It is this responsibility that it is intended to be discussed in the remaining part of this Chapter.

(a) AS A TRUSTEE

Sometime, the head of family is referred to as a trustee of the family property. In essence, this means that the head

of the family hold the family property for the benefit of the entire members of the family.

However, the concept of trust owes its origin from the English law. Under that law, a property could be owned by two separate persons. One, the trustee who has the legal ownership of the trust property. The second, is the beneficiary who has the equitable ownership or interest.

Under native law and Custom this difference is totally not there. That is to say the relationship between the head of the family and the members of the family vis-a vis the family property is not that of the trustee and the beneficiaries. Both the head of the family and the rest of the members hold family property as legal owners jointly and in separable. Therefore, there is no split of ownership legal or equitable. The head of the family is the person in whom the powers of the management of the family property is vested. Therefore,his position differs from that of a trustee in English law. It was because of this difference that the Privy Council in the case of OYEKAN v. ADELE,[14] cautioned against "the fallacy of seeking to apply English concepts of legal owner and equitable beneficiary to cases which are quite incapable".

In ARCHIBONG v. ARCHIBONG,[14(a)] certain beach land belonging to the Community of Duke Town, Calabar, had been compulsorily acquired by the Government, which later leased it out at a rent to certain European firms. Discovering that the land was no longer required for public purposes, the heads of the five houses making up the Duke Town Community authorised Rev. Effiong, who represented Calabar in the Nigerian Legislative

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14. (1959) 1 W.L.R. 876 at p. 883.
14(a). (1947) 18 N.L.R. 117.

Council, to negotiate with the Government for the surrender of the land, the substitution of the Etuboms as landlords in place of the Government, and the payment over to the Etuboms of rents already collected by the Government. Having succeeded in getting the Government to accede to this requests, the Rev. Effiong then called a meeting of the Etuboms, at which he pulled out the sum of £1,759 in notes as the balance, after deduction of expenses of the total amount of £3,000 which he said the Government had paid to him by way of arrears of rent. Overjoyed by the success of the negotiations and by what apparently they regarded as a windfall, the Etuboms accepted this sum without any question as to whether £3,000 was in fact all that the Government had paid or how the sum of £1,241 had been expended; they went even further and made a present of another £500 to the Rev. Effiong. A further £500 was set aside for town use, and given to Rev. Effiong to deposit it in the bank; this he did in his own name. The balance of £759 was then shared out among the five houses, the Etuboms and the elders in certain proportions. The plaintiff who were the heads of two sub-branches of one of the four families in Archibong House, brought this action on behalf of their family against the Etubom of that House for an account of the share properly due to their family as a branch of the Archibong House out of the £300 paid by the Government. The basis of their claim being that the defendant had been guilty of breach of duty in approving without satisfactory explanation the deduction of £1,241 as expenses, the payment of £500 as a present to Rev. Effiong and the banking of the sum of £500 by Rev. Effiong in his name.

It was held that the defendant should be held liable to account in order to justify his action in accepting a share

for the House short of £440. The court held that this was necessary because the head of the family who represented the family "must be regarded as a trustee" although his obligations to the cestuis que trust are not nearly so high as those of trustee known to English law.

(b) ACCOUNTABILITY

The rule that a family head must account for all his dealings with the family property to the members of his family is one of the obligations arising from his fiduciary relation with the members of his family. This obligation becomes more obvious if one looks at the position of the head as a trustee. This is because, strictly speaking, under the English law of trust, there is an obligation that the trustee must render an account and furnish the beneficiary with all reasonable information - concerning the management of the trust property.[15] This obligation is enforceable against the trustee at the instance of any person with interest in the trust property, and if the trustee refuses, unreasonably, to render an account he may be held liable for the cost of an action to compel him to account.[16] Thus, in the of ARCHIBONG v. ARCHIBONG,[17] it was held that the family head was liable to account for the management of his family property. In OSURO v. ANJORM,[18] the plaintiff claimed that the property which was placed under the management of the defendant was a family property and therefore he should account his management of the property to the family. It was held that a family head was liable to account for for the management of family property to the members of his family, and any

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15. Tiger v. Barclays Bank (1962) W.R.N.L.R. 32.
16. In Re Skimner (1904)1 Ch. 289.
17. (1947) 18 N.L.R. 117.
18. (1947)18 N.L.R. 45.

member who was disatisfied with the accounts could go to court for further clarification.

However, the question which is wagging the tongues of most of our academics and judges is what will happen to a family head who has refused to account for his management of the family property. Thus, in NELSON v. NELSON,[19] it was held that under Ghanian native law and Custom if a family head was found to be delinquent or has refused to account for his management of family property, the only remedy available against him is to remove him. It was held also that he could not be compelled to account for his management.

This arguement seems plausible but it is not in accordance with the prevailing Custom. From the research conducted, at least in the Middle Belt of Nigeria, within the Tiv, Idoma, Igala, Afo, Egbura, Alago and etc. the Custom is that once a person becomes a family head by virtue of being the eldest child of the founder of the family he has come to stay as such. However bad, dispotic and delinquent he is, he will not be removed. This is because he ascends to the position not by voting or election. But because of his age and his position in the rank and file of the family. The allegiance paid to the head of a family, it was said, is hereditary and based on blood relation.

Secondly, until of recent, in all cases, the head of a family is usually the eldest child of the family, and under native law and Custom any act which could be slightly construed as rudeness against the head of a family was abhored and viewed

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19. (1951) 13 W.A.C.A. 248.

seriously. In this circumstance, therefore, the Ghanian decision which recommended removal of the head of a family who failed to account for his management of family property was out of touch with the reality obtainable in a typical African family system.

On the other hand several decisions have shown that a head of a family can be compelled to account for his management of family property. Thus in the case of OSURO v. ANJORM[20], a member was on two occasions compelled by court action to give account of his management of family property.[21] The principle of accountability by the head of the family to the members of his family of the management of family property is not a principle of native law and Custom. It is a principle introduced into our Customary landholding by our former foreign judges who tried to equate the position of the family head with that of a trustee under the English law. Therefore, one can not disagree with Dr. T.O. Elias[22] (as he then was) when he said that:

> "There is no doubt that the present confused and uncertain legal position of the head of a family, has been unavoidably accentuated by the impact of an exotic legal system upon our native law and custom. The reason for this is not far fetched. At different stages in the history of Nigerian legal system, the decision makers were non-Nigerians who had comperatively little knowledge of our Customary law. The effect of this uncertainty is the streamlining of our Customary law with foreign rules resulting in the creation of a system that is neither native law nor foreign".

(c) ALLOCATION OF FAMILY LAND

One of the primary duties of the family head under native law and Custom is the allocation of land to the family members.

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20. (1947) 18 N.L.R. 5.
21. See also Odunsi v. Bolaji (1968) N.M.L.R. 263; Taiwo N. Dosumu (1966) N.M.L.R.94; Archibong v. Archibong (1947) 18 N.L.R. 117.
22. ELIAS, T.O., Colonial Laws (1962) London Stevens pp. 289-291.

This responsibility has for quite a long time being accorded with judicial recognition. Thus, in the case of AMADU TIJANI v. SECR[illegible] SOUTHERN NIGERIA[23], the Privy Council quoting from the Report of the West African Land Committee (1898) said:

> "Land belongs to the Community, Village or family, never to the individual. But in every case the Chief or the Head of the family..... has charge of the land..... And every member who wants a piece of it to cultivate or build a house upon goes to him for it....".

In most cases the term "allocation" is used synonymously with the term "allotment" but a fine cutting may be drawn in between the two. According to Kasumu and James[24], allocation occurs when the head of the family in his sole discretion gives part of the family property to one of its members to occupy. Allotment on the other hand occurs when a family head or chief makes an outright grant of land to either a family member or to a stranger. Thus, the consequence of each transaction is different. Where allocation was made, the interest acquired was that of the beneficial user only. In other words the allocatee merely has the possessory right or interest in the land so allocated to him. He is not the owner of the portion so allocated to him.[25] This is an important feature of Customary landholding.

But where allotment took place, the allottee has the ownership of the portion allotted to him. It is an outright grant with no reversionary title to the family or Community.

However, a closer look of the two terms would support the idea which Kasumu and James discredited i.e. - the using of the

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23. (1921) 2 A.C. 399 at p. 404.
24. Alienation of Family Property in the Southern Nigeria (1966), Ibadan, Ibadan University Press, p. 4.
25. Majekodunmi v. Tijani (1932) 11 N.L.R. 74.

two interchangeably. This is because the consequences which would arise depend upon the intention of the allocator or allottor i.e. the Chief or the family head. Thus, where the word "allotment" was used to express a temporary grant to a stranger, and where the interest acquired was in dispute, obviously the court would not depart from the intention of the family head at the time when he was making the grant. Thus, intention of the nature of the interest which was sought to be transferred matters greately. Correspondingly, where the Village or family head used the term "allocation" when it was his intention to transfer outrightly the ownership in the property to the allocattee, it is this intention which the court would likely go by.

Therefore, on the whole, in either case what really matters is the intention of the family head at the time he was making the allocation or allotment; but not the mere use of the terms. Therefore, the difference, although significant in consequence, is rather academic than practice.

In the Middle Belt, this responsibility of the family head is still practiced vigorously. In nearly all the Communities, when a family member needs a tract of land to farm or to build a house for himself, he would first consult the head of the family. If there is a specific area where he likes to cultivate he would make this known to the family head. If family has abundant of land and nobody has ever requested that land, the head of the family will instantly give his consent. But where there are many members who are interested to farm on the family land, and the family has not enough, the little it has will be shared among the needy members of the family.

However, this does not mean that a family member would in all cases ask for the permission of the family head before he could

cultivate a portion of family land. If for instance, there are two or three members in a family, and the family has plentiful of land, a member who is interested to farm any part of its can do so without necessarily asking the head of the family for it. Thus, the statement that "any member who wants a piece of it (family land) to cultivate or build a house upon, goes to him for it" does not apply very rigidly.

But in the case of a stranger he would always ask for the consent of his host before he can cultivate any portion of the family land. At first, he would direct his request to the family head who in turn would convene a meeting of the principal members of his family and place the request before them. Therefore, he cannot make any important disposition of the family property without consulting the principal members of the family. It is only when the principal members approve the request that the allocation is valid.

CHAPTER IV

THE EXTENT OF THE MEMBERS AND NON-MEMBERS RIGHTS AND PARTICIPATION IN THE MANAGEMENT OF FAMILY PROPERTY

1. INTRODUCTION

Except the individual system of landholding, generally all members have equal rights to use and enjoy family property. Thus, the individual rights in the family property may be trenchantly put as follows: (a) The right to a portion of family property. (b) the right to be consulted in the management of family property. (c) the right to share the surplus income arising from the management of family property. It is from these view points that I intend to discuss the extent of the member's rights and participation in the management of family property. In the later part of this chapter, I will also discuss how and why these rights and the right to participate in the management of family property are exercised or denied to some certain members of the family.

2. MEMBERS' RIGHTS

(a) The right to be consulted in the Managemen of Family Property

It is a well established principle of native law and custom of the people of the Middle Belt of Nigeria, that an individual member of the family is entitled to a portion of family property. In the past, this right was so important and so recognized that any slightest impugnment of it would amount to a denial to a family member his means of livelihood. This was because land was the only asset which one could till or farm for substenence. Therefore, the right to a portion of family land has through the ages been preserved and enjoyed by every member of the family.

One Chief Justice of Nigeria once said that,

> "The idea underlying land tenure in Africa is that land is the property of the family" and that the head of the family is the trustee of the family. And that every free man in the Community is entitled

> to as much land as he can reasonably acquire to support himself and his family. He is entitled to keep that land as long as he cultivates it, as long as he behaves himself or as far as circumstances permit"1

Inview of this statement one can assert with confident that it is an unalienable right of every member of the family to be allocated with the family property in order to sustain himself and his family?

Certainly, from the above remark it could be inferred with certainty that a member's right to a portion of family land is an inalienable one, as such he has to be granted if he requests for it. But the true position is that, in the past, particularly in the Middle Belt, when the population was thin, land was plentiful and the uses for which it was put into were only limited to cultivation of staple food, and building of residential houses; it was possible for every family member to be allocated with land as of right if he requested for it. However, he could not demand as of right a particular portion of the family land.

However, with the present development, the right of the individual member to a portion of family land is subject to several qualifications or circumstances. One of them is the availability of such land. Therefore, where a member of a family requires a portion of land out of the family land, and there is none to be given to him, because the only scarce family land is in fixed hands, he cannot demand as of right any portion of family land. A family may face this difficulty if the number of its members is greater than the size of the family land. Therefore, it is submitted that, the right to a portion of family land which used to be as of right before, is no longer the same. It is now always subject to the availability of land.

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1. MENEONDES C.J. before the Northern Nigeria Land Committee 1906. See Cd. 5103 p. 66.

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But in practice this rarely happens, and when it does several ways may be employed to solve the problem. Under the Customary law of the Alago people of Doma District of Lafia Local Government Area of Plateau State, if this problem should arise in a certain family, the first method for solving this problem would be that the head of the family would report to the Village head who has the charge of the Communal land, who would allocate a fresh land to the family member concerned.

Secondly, the affected family member if he is a young man, would be allowed to share with the eldest member of the family who, though has land but is not making use of it all. This may continue until when there is a vacant land or fallow where the affected member maybe allocated.

Thirdly, the family head or the affected member may borrow land from any family which has extra land to lend. This will continue until there is a vacant land or fallow in the family land which could be allocated to the member concerned.

Another problem connected with the individual right of a member to a portion of family property is: Whether he holds a portion of their family property subject to good behaviour?[2] This question is important, because at least some decisions have shown that it is so. For instance, in the above quoted observation of Meneodes C.J. it was said that a family member is entitled to keep his own portion of land "as long as he uses it and as long as he behaves himself". This pre-supposes that if a family member misbehaves himself he could be evicted and finally has his holding forfeited.

Therefore, in order to answer this question (whether in affirmative or negative) it is important to understand the position of the member of the family and the nature of interest

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2. NWABUEZE, B.O. Ibd. at p. 160 - 161.

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he holds in the family property. The right of the member of the family to a portion of family property does not depend upon the pleasure of the family head. It is a right which is inherent in every member by virtue of his membership.[3] He is therefore a co-owner, or joint owner of the family property. His interest in some cases is analogous to ownership.[4] His position and interest is quite different from the position of the Customary tenant. A Customary tenant may have his tenancy forfeited for disrespectful behaviour to the grantor e.g. adultery with the wife of the grantor , or stealing the farm produce of the grantor, forfeiture cannot be meted out against a member of the family for misbehaving against any other member of the family. Therefore, if a member of the family should do anything which purports to completely destroy the rights of the family or confer a power to destroy the rights of the family or temporarily suspend the rights of the family over the property,[5] the only power of the family head or the faily head together with all the principal members is to declare such action as null and void. The family cannot on this ground deny him the right to a portion of family property, once the land is there in abundance. Even where a family forfeited such a family property, he could still be given another portion as long as there is still vacant land available. Therefore, it is my contention that a family member does not hold a family property subject to good behaviour. He is a co-owner and therefore no amount of misbehaviour can deprive him of his right to a portion of family property. His right is heredi tary and cannot be wittled so easily.

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3. NWABUEZE, B.O. Ibd. p. 156.
4. ELIAS, T.O. Nigerian Land Law and Custom /1951/ London, Routledge & Kegan Paul p. 97.
5. Kasumu & James, Alienation of Family Property in the Southern Nigeria /1960/ Ile-Ife, Ibadan University Press Ltd., pp 4 - 5.

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Supposing that the head of the family arbitrarily denies a member of his family a portion of the family property, what right avails in favour of such a family member? In other words can such a member compel the family head by Court order to allocate him with some portion of the family property? In the case of AJIBOLA v. AJIBOLA,[6] the plaintiffs sought to recover possession of certain premises from the defendants on the grounds that they (plaintiffs) were the descendants of the original allottee and that the defendants had persistently refused them the use and enjoyment of the family property. But the defendants contended that the property belonged to his father absolutely and that he was the only son of his father as a result of this he had exercised exclusive acts of possession over the premises for a long time, and therefore the plaintiffs were not entitled to any portion, possession or use and enjoyment of the property. It was held that every member has a right to share with others in the use of family property. That it is a right which he can enforce against the family head or any other member who is unlawfully depriving him thereof. That the member is entitled to go to Court to compel the family head to give him allotment and he can also move the Court to exercise its / equitable jurisdiction to order whatever the Court may consider just in the circumstance of any case.

Similarly in the case of SALVADOR v. SALVADOR[7] S. died intestate leaving two children D. and M. and a property. Earlier, before this case, there was a dispute concerning this same property as a result of which it was divided between D. and M. Some of the children of M. i.e. the plaintiffs were not allowed by the others i.e. the defendants to live or occupy the said property. The court ordered for the partition of the property.

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6. /1947/ 18 N.L.R. 125. 7. /1959/ L.L.R. 52.

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Although, these cases are not from the Middle Belt, it is my view that the Middle Belt law will not be different. Therefore, a family member who was denied the right to a portion of family property has the right to compel the family head to give him one by Court order. Apart from this, there are other remedies which are available in his favour, namely the partition of the property or sale. The Court it was said, would do this under its equitable jurisdiction to see that justice prevails.[8]

When a family member has been allocated a portion of the family land, can the member in possession sue for trespass? In the Middle Belt, people dread Court actions. Therefore, in most cases trespass is not taken very seriously unless it is committed to cause intentional damage. It is common to see members of the family, especially their wives trespassing into other members portions of the family land in order to fetch firewood, collecting herbs and etc. But it can be argued that where there is a complaint of trespass by one member into the portion of another member's [illegible], the trespasser will be liable. In the case of AGBLOE v. SAPFOR[9] the Chief and other principal members of T. family were ordered to pay 60 Naira damages for trespass committed through their unlawful entry into land lawfully occupied by a member.

But there is a danger of holding a family head liable for trespass. This is because of his responsibility as a trustee or administrator of the family property. As such, if he is to be held liable for trespass committed on the member's portion of land, this would unduly restrict and hamper the proper execution of his duties as the overseer of the family property.

Secondly, if we concede that he is a trustee of the family property, it would be absurd and illogical to hold him liable

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8. Ibid at p. 53.

9. /1947/12 W.A.C.A. 187.

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for trespass because as a trustee, he is required to enter into the property at all times in the execution of his powers vested in him under the trust.

A family member is not entitled to alienate his allotment to a stranger. If it has become necessary to do so, e.g. to lease or pledge, he must seek for the consent of the other members of the family. The prohibition originates from the fact that he is only in possession of the property. He is not the owner, although he is a co-owner. He cannot deal with the property in the ways he likes so as to deprive the family the aultimate title to the land. In the case of OGUMEFUN v. OGUMEFUN,[10] it was held that no part of family property is capable of being alienated absolutely by an individual member even if it has been allocated to him without the consent of the other members of the family. The Court went further to analyse what nature of interest an individual member has in relation to the portion of the family property which is in his possession thus:

> "Each individual member of the family has in addition vested in him or her what may perhaps can be described as a right of user during his or her life time. That individual right of user is purely and simply a life interest. On the death of the individual that interest reverts to the whole family though by reason of the user enjoyed by the deceased individual during his or her life, the family will generally permit his or her children to have among them the same user as their parent had....."

From this observation, it is discernible that an individual cannot alienate his portion of the family property to a total stranger. However, his children can succeed him in enjoying that portion of the family land in the same manner in which their father did while he was alive. But whether the children are to suceed their father as of right or they have to seek for the consent of the head of the family before they go into

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10. /1910/10 N.L.R. 82.

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occupation and possession is another matter altogether.

But under the Egbura native law and custom, once a family member dies leaving his portion of the family land his children, if he has any, would automatically step into his shoes and make use of the property without asking for the consent of the family head. But where there are other members of the family who are looking for the family land but couldn't, they too whould be entitled to share with the children of the deceased person. Where, the children of the deceased are minors, in which case, consultation is not possible with them,[11] any member who is interested to use the portion left behind by the deceased could do so provided that the consent of the head of the family has been sought. But where the land is not needed by any member of the family, the land may lie fallow until when the children are o of age and they will be entitled to use the land in the manner in which their deceased father did. The consent of the head of the family is not necessary.

We have seen that a member of the family cannot alienate his own portion of the family land without the consent of the head and the rest of the principal members of the family. Equally true, is the fact that he can not discharge his debt by having his portion of the family land attached. In other words a judgement creditor cannot attach a writ of fifa to a portion of family property in possession of the judgment debtor. Thus, in the case of MILLER BROTHERS v. AYENI[12] the appellant sought to attach the interest of the respondent debtor in certain family property, the latter's brothers resisted the appellant's claim on the ground that their brother had no separate and alienable interest in the family property which the appellant could seize in satisfaction of his debt. This, the Court agreed.

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11. MOGAJI V. NUGA /1960/5 F.S.C. 107.
12. /1924/5 N.L.R. 40.

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Therefore, in the main, once a member of the family has requested for a portion of the family land and he is given or granted, he dares not do anything with that land which may deprive the family of the title to the portion of the land. His own interest is that of the possessory right, usufructuary or beneficiary rights which subsists during the life-time of the holder. The title to it reverts to the family when he dies living his children or even none. The right to a portion of the family property, is therefore, the ritht to use and enjoy the property during the life-time of the holder and nothing more.

(b) THE RIGHT TO SHARE INCOME

In the past, when land did not asume its present high economic value, and in particular, the cash value, the rights of the family member were: the right to a portion of family land, and the right to have a say in the management of the family land. During that time, since economic transactions affecting land was nil, because of the absence of dash economy, there was no income arising from the management of land, and, therefore, there was hardly any income which the family members could share.

However, one practice which was then prevalent and still prevailing among the various Communities of the Middle Belt, is the practice of payment of what is called"tithe". By this practice, a borrower of the family property might agree to surrender a certain proportion of his farm produce to the family head in appreciation of the borrower's kind gesture to loan him land to farm.

Under the Egbura, Alago, Gade and Afor native laws and Customs, tithe is exclusively the property of the family head. It is never shared among the family members, even if the family head has surplus of farm produce. It is his property. It is a perquisite attached to his official position as the family head.

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Unless in some exceptional cases where he authorises another family member to collect tithe no any family member has a right to collect it.

However, in the modern time, with the emergence of the cash economy, land has acquired high economic value. Transactions such as sale, mortgage, lease, are usually concluded in return for handsome amount of money. With the multiplicity of purposes which land is inevitably required for, compulsory acquisitions are common and wherever land is acquired. Compulsorily, normally compensations are paid to the head or village head for onwards disbursement to the family members.[13] Therefore, sources through which income may accrue to the family are numerous and are increasing daily.

Whenever such income accrues to the family what is the right of the individual member in relation to the money? In other-words, is there any right which a family member has in such money or proceeds?

Generally, the right to share any proceed or income arising from the management of family property like the previous right is an inalienable one. This is because as a member of the family, he is entitled to it by virtue of being born free in the family. Above all, he is a co-owner of the family property. He, like any other member owns the property jointly. Therefore, if there is any transaction in connection with the land e.g. Sale or if compensation is paid, all members are entitled to share the proceed as of right.[14]

Therefore, the next important question is: what happens where a family member is denied the right to share the income arising from the management of family property; can he compel the head of the family by Court Order to share the surplus with him? And in the event of persistent perusal to share the surplus the surplus of any income due to the family from the manage-

13. Amadu Tijani V. Secretary, Southern Nigeria /1921/2 A.C. 399, Alse S. 35(3) LUA and S.29(3) L.T.
14. Odunsi V. Bolaji /1962/ LLR 217, Ojaro V. Odunsi /1964/ NMLR 12

ment of the property, what remedy or remedies abound for a family member?

The answer to these questions are not far to fetch, since at least one case has shown us the direction. In THOMAS V. THOMAS,[15] the plaintiff alleged that the defendant (the head of the family) had retained for himself rents received from the house and had treated the house as his private property. Although the allegation was not proved, but the Court held that where there has been persistent refusal by the head of the family or the head with some other members of the family to share in any surplus of income derived from the family property after necessary outgoings have been made, and if any members' right is infringed, he can come to Court, which will enforce the right by partition and/or sale if necessary.[15]

Therefore, in all cases of refusal to share the surplus of income arising from the management of family property, the agrieved party has the right to compel whosoever denied him right to share from the income. Apart from this, the Court in its equitable jurisdiction has the right to order for the partition on Sale of the property if it thinks that, that is the only way where justice could be done to all parties.

Another question which can be asked is can a family head refuse to share the income arising from the management of family property, on the grounds that he has been paying rates, rebuilding the family house and settling other outgoing alone?

In this same case of THOMAS V. THOMAS[16] these facts were taken into consideration in arriving at the conclusion that the allegation against the defendant was unfounded because there

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15. /1932/16 N.L.R. 5.

15(a) Lopaz V. Logez (1924)5 N.L.R. 47.

16. (Supra).

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was no surplus to be shared. With great respect to the learned Judge, Butler LLoyd, I dare venture to say that the premices upon which he stood to arrive at this decision is a precarious one. It is a trite law that family property, as the name implies, belongs to the whole family, and every individual member has the right to use, enjoy, and to have a say in the management of it. Therefore, if a family head manages family property in the manner in which it was alleged in this case and on that basis denied a member the right to share in the income which accrued therefrom, it is the responsibility of the Court to call him to render account of his management and to restrain him from managing the property as if it were his private property. His restraint is necessary because sooner or later there is likelihood of the family head or his immediate descendants to assert exclusive right over the property concerned. Therefore, it is submitted that the grounds of payment of rates, rebuilding the family house single handedly should not be the bases to deny any member's right to share the income arising from the management of family property.

But where the only intention of a member or members is to have the property sold and the proceeds divided, the court has the right to deny the sale provided that the nature and the purpose of the property could be maintained and served.[17] Thus in the case of SALVADOR V. SALVADOR[18] the founder of the family died intestate. The property which he left and which is the subject matter of this case was divided into two to the two branches of the family. In one of such branches the plaintiff was denied the right to use and enjoy the property, and above all, the head of that branch collected rents from the family property and misappropriated it. It was held that the property should

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17. Ajobi V. Oloko /1959/ L.L.R. 152.
18. /1959/ LLR. 52.

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be sold and the proceeds distributed among the family members in order to ensure that justice was done. The Court in addition remarked that

> "The Court will not as a rule order a partition or sale of a family property merely because some members want the property for reasons best known to themselves, to be converted into Cash. But where it is possible from a consideration of all the circumstances, to keep the property in the family without such retention, entailing considerable hardship and disatisfaction, the Court will exercise its rights to order partition, and if this is impossible, a sale of the property concerned and the proceeds shared among the members of the family".[19]

The remedy to compel an unwilling head of the family to share family income with the rest of the family member or members, or the order for the partition or sale of the family property where necessary, are not the only remedies available for any member whose right to share in the surplus of income from the family property is infringed. Among other remedies which he can be entitled, is the order that the family head should render account of what he has collected during his management of family property. More importantly, a family member, if he feels that his own share is less than what he ought to have received, he can also seek for order of the Court to compel the head to explain how and why he incurred some shortage. Thus, in the case of ODUNSI V. BOLAJI[19(a)] the head of the family refused to disclose to the other members of the family the actual income that was derived from the family property. The Court in deciding in favour of the petitioners said:

> "The head has refused to give the plaintiffs their shares derived from the property, or to render an account to them. The plaintiffs are left in ignorance as to the exact amount due to them and as to the facts from which such amount could be ascertained....."

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19. Underlined - emphasis added.

19(a) /1962/ L.L.R. 217.

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It can be understood from the above remark that the right of the member to share family income, extends also to the right to reasonable explanation as to how the family money has been used or expended. Thus, in the case of ARCHIBONG V. ARCHIBONG,[20], the defendant was the family head who represented his family in a meeting where that which accrued from the Community land was shared among various families. Because of the defendant's failure to oppose a certain decision which was carried out in the meeting, his family suffered a loss of £440. The question then was, whether the head of the family was bound to explain reasonably why the family should suffer the loss of such a colossal amount of money. The Court held that he was bound.

But one controversial arguement which is raging high is that can a junior member of the family get an order to compel his senior member or the head of his family, at best, to explain how the head or thet senior member approperiated the family money? In the case of TAIWO V. DOSOMU[21] which followed the decision of NELSON V. NELSON[22] (Ghanaian) a principal member of Dosumu family brought an action against the family head and claimed a full and true account of all money and profits that have passed through his hands as a result of the control and management of Dosumu family property. The defendant contended that he was not accountable to the plaintiff as an individual member of the family and above all the plaintiff being a junior member of the family was not allowed under their native law and custom to bring an action against the head of the family to render an account.[23] The lower Court held that "in as much as the defendant was the head of the family the action could not be

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20. (1947) 18 N.L.R. 117.
21. (1966) N.M.L.R. 94.
22. (1951) 13 W.A.C.A. 248.
23. Emphasis supplied.

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maintained against him. It therefore dismissed the action. The plaintiff appealed to the Supreme Court. After a severe criticism of the action of the lower Court for treating as judicially noticed, a native law and custom of a certain Community in Ghana in a Nigerian Court, the Supreme Court went ahead to distinguish the case of Nelson[24] from that of Taiwo V. Dosumu[25] and did not come out clearly to say whether a junior member could sue a family head for an action to render account or not. However, previous to these decisions, the West African Court of Appeal had held in the case of FYNN V. GARDINER[26] that "it was a well-settled principle of native law and custom that junior members of the family cannot call upon the head of the family for an account". But nothing prevents him to sue on behalf of the members of his family if he has been duely authorised to represent the rest of the family members. Therefore, in the case of KOSOKO V. KOSOKO[27] where a member was absent from the family house because of his prolonged illness which made consultation with him in matters affecting the family house impossible. He instituted an action seeking the Court to compel the head of the family to render account of his management of the family property right from the time he was away to the time when he instituted this action. Held that his action could not be maintained. Carey J. observed:

> " "I am not satisfied that the plaintiff, who apparently is not supported by his brothers and sisters, has any right in the circumstances disclosed, as a solitary individual to demand from the head of a large family who has the support of the family behind him, except for one other member, an account of the family's dealings with the family property, unless he can point to a definate delirquency amounting in effect to a breach of trust by the family representatives".

Therefore a junior member cannot sue a family head on account of the family head's dealing with the property except on two grounds. One, if the junior member is acting on a repre-

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24. (Supra). 25. (Supra). 26. /1953/14 W.A.C.A. 260.
27. /1937/13 N.L.R. 131.

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sentative capacity. Secondly, if there is a a definate allegation as to the delinquency of the head of the family.

After the discussing of the general law as contained in the case law, it is pertinent to examine how this principle of native law and custom applies in the Middle Belt. Among the Mada, Alago, Agatu of the Lafia Local Government Area of Plateau State, the Custom in the past was that, the head of the family by virtue of his position as the eldest child of the family was almost regarded as the "owner" or the trustee of the family property. He could deal with the family property in any manner he wished in so far as he did not act in such a way as to tantamount to depriving the family of the title to the property.

Secondly, as I have stated earlier, in the past there was no transaction affecting land which could attract income to the family purse. Because of these reasons there was no action compelling the family head to render account of financial management of the family property.

The wake of cash economy, has changed the Customary position. According to the research conducted in Doma, Lafia and Adogi towns of Lafia Local Government Area, there are divergence of customs within the Communities. According to one Community if the family head should rent family house and collect rents; it is his responsibility to maintain the house and keep it in good condition and he cannot seek help from other members to contribute in order to put the building into a good condition and habitable only to rent out for his own benefit.

But on the other hand, if a family property is compulsorily acquired as a result of which family member's rights are affected, it is incumbent on the family head to share the income with the members, If the head of the family fails to do so, the only remedy which is available against that family head is to compel him to share or render account. But the family members have no

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right to depose the head of the family. According to this Community, a family head occupies a sacrosanct position especially if he is forceful and strong. Anybody who tries to raise eye-brows on him, would do so at his own risk.

Furthermore, under native law and custom, a junior member is not known to misbehave and to be rude to the senior members of the family to the extent that a junior member could take the family head to court. They contended that court action within family members is very much dreaded because it has the features of death. In otherwords, anybody who takes you to Court would jubilate when he sees your death, they said. In short according to the custom of this group of people it is not possible to compel the head of the family to explain how he appropriated family property. The only thing which the members can do is to bear with him as a despotic leader until he dies.

But according to the customary law of another Community a family head cannot be deposed if he is found to be delinquent but he could be sued to account for how he manages the family property by a junior member of the family. It is the contention of this Community that since every member of the family is a co-owner of the family property, it would be fair to allow him sue the head of the family once there is a reason to do so. This right should be accorded to every member whether he be the most junior or most humble in the family. And in my opinion, this is the correct view. This is because, the right to sue should not be depended on the Seniority or rank and file of the family members in the family. Under most legal systems of the world, the right to sue is always bestowed upon the agrieved person, and not based on the "age"[28] and position of the agrieved person. A

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28. The word "age" is not used here to mean the age of minority. Rather, it is used to show lesser age in terms of birth only.

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family member whether junior or senior has an interest in the family property and this bestows him with the right to sue anybody in the family who tries to infringe such right against him. Therefore, it is my submission that an individual member of the family, be he a junior or senior member, and acting not on a representative capacity has a right to sue the head of the family if his rights have been infringed and in addition the right to compel the head of the family to render account.[28(a)]

(c) THE RIGHT TO BE CONSULTED

Alienation of family property is one of the important aspects of managing the property. Before alienation of any family land is concluded it is required by native law and custom that the majority of the members of the family must be consulted. The principle of consultation, therefore, forms the cardinal element of the management of family property.

The requirement of consultation in all matters affecting family property has many purposes. First, it is to afford every abled member of the family to have a say or participate in the management of family property in which he has interest or ownership.

Secondly, the principle of consultation serves to democratise dealings affecting family property. Thus, by democracy, the majority's will will always prevail over the menace and whims of the family head who would like to manage family property for his own selfish ends.

Thirdly, it serves to eliminate possible frauds which could be pepertrated by the family head or the family head with few of the family members.

Fourthly, it serves as a check and balance upon the powers of the family head. Thus, any decision carried out by the head of the family without consultation with the principal members

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28(a). Emphasis added.

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of the family or any member of the family, could be declared as voidable, at the instance of that family member.

In the past, this right like any other right was not often exercised. The reason for this was not for to fetch. Simply, there was no need for consultation, since there was nothing to alienate land for, and if there were, they were few. For instance sale of land which could form the substance of such consultation was totally prohibited. Lease was unknown, since every family had enough land to farm and to build houses. Loan and pledge more perhaps the only transactions which could bring consultation among family members.

But in the recent times, the need for consultation has increased tremendously. This of course, is due largely to the fact that land has become a central theme of daily contracts and transactions. Its uses are not only limited to the cultivation of subsistence crops by means of ancient and antiquated tools or the building of residential houses. Land can now be sold,[29] mortgaged, leased and etc. and these have in turn increased instances where consultation among members of the family could oftenly take place.

In all these transactions, in order to acquire a valid interest or title, it is a customary rule of law, that every member of the family should have a say before the transaction is concluded or effected. Thus, in the exercise of the power of management, the head of the family is required to consult and obtain the concurrence of the members before concluding any transaction affecting family property. It is said , this is a requirement of law and not just a matter of convenience to be observed or disregarded by the family head as he pleases.[30]

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29. Oshodi V. Balogun, /1936/4 W.A.C.A. 1; Alade V. Aborishade /1960/5 F.S.C. 16.

30. Adedubu V. MaKanjuola /1944/10 W.A.C.A. 33.

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Since, it is the requirement of law that every member of the family should be consulted in the management of family land, it is no gainsaying that the right of consultation like the other two previous rights already discussed is an inalienable right of the family member which cannot be wittled down by the head of the family or any person or group of persons in the family. Thus, in the case of NELSON V. NELSON,[31] the founder of the family died intestate leaving behind a landed property. The eldest son of the deceased received some compensation which was paid to the family when the property was compulsorily acquired by the government. The compensation was used to purchase another property. All these dealings were carried out by the eldest son alone without the consultation of the rest of his brothers. The respondents (brother) brought this action challenging the action of the appellant, claiming that, as the children of the deceased person, the property devolved by virtue of native law and custom, and as such they had the right to be consulted in all matters affecting the family property. It was held that they were entitled to be consulted under native law and custom.

Furthermore, what may amount to consultation depends on the facts and merit of each particular case. But it has been said that, the right to consultation includes the right to give and withhold consent before any important dealings with the family property is ~~interest~~ into. It also includes the right of members on the family council,[32] and the right to choose the person who is to be the head of the family.

It is often said that a member of the family has the right of being consulted in the management of family property.[33] One question which one may be prompted to ask is that: If a family head desires to sell a family property, is it incumbent

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31. /1951/13 W.A.C.A. 248.

32. JAMES, R.W. Modern Land Law of Nigeria /1974/ Ile-Ife, University of Ife Press Ltd, Page 89.

33. Lewis V. Bankole /1908/1 N.L.R. 82,

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upon him to convene the meeting of all the members of the family or he is only required to consult the principal members of the family? Ordinarily, it seems that all members would be consulted, since all of them have interest to be protected as co-owners. But, expediency, convenience and logic may not permit that to happen. Therefore, the requirement for consultation whenever it arises, in most occasions, is done not by all members, but by those who are capable and eligible to be consulted.

In the Middle Belt, in the past, when hostilities, cruelties and warfares were the orders of the day, most members of the family hardly travelled outside their village for fear of being taken away by any powerful group of persons or community.[34] Perhaps, then, it was possible to gather all members of the family to hear their opinions before any decision affecting family property could be taken. However, today the situation has remarkably changed. The freedom of movement is much freer now. Means of mobility are now obtainable easily. And coupled with these facilities is the fact that most communites are now civilized, with central governments which guarantee the rights of individuals. The consequence of this is that, one hardly finds a family where all members belonging to it are resident within the family house. Consequently, the requirement for consultation of every principal member or the majority of them is not easy to come by. But in Ekpendu V. Erika,[35] a decision which took place about four decades ago, it was held that alienation without the consent of the family head is void ab initio. And, alienation without the consent of the principal members is voidable. Subsequent decisions till date have followed this decision without distinguishing the circumstances of the

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34. COLE, C.W. Report on Land Tenure, Niger Province, /1946/ Kaduna, paragraph 21.

35. /1959/ 4 F.S.C. 79.

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present day as mentioned above from that which existed some fouty years ago. Therefore, it is my submission that the decision of Abbott, F.J., in that case that "a sale of family property which the head of the family carries out, but which other principal members of the family do not concur, is voidable, while a sale made by principal members without the concurrence of the head of the family is void ab initio" does not mean that all principal members in either case must be consulted and his consent obtained. The requirement of consultation would be said to have been met if the majority or the representatives of the each branch of the family is duly consulted before any alienation is carried out.

Perhaps this view may be in consonance with the view expressed by Osborne C.J., in the case of LEWIS V. BANKOLE[36] where he said,

> " "The right to be consulted is in my opinion fully established, but this does not mean that each individual grand-child is entitled to participate in the consultation; the evidence goes to show that, there can be only one voice and one vote for all the children of a deceased child".

Although I humbly disagree with the view that "a grand-child is not entitled to participate in the consultation; I quite agree with the view expressed in this dictum that not every member of the family can be consulted in the management of family property. This is particularly so when categories of people like the minors, and sometimes women are involved. Even where they are consulted their levels of participation is virtually absent or low. This, under the Egbura Native law and custom, the right to consultation, although legally recognized as a right which belongs to all members of the family, in practice, its exercise is only limited to some few members of the family.

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36. /1908/1 N.L.R. 82 at p. 104.

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3. THE EXTENT OF MEMBERS PARTICIPATION

We have seen that under native law and custom, land is a God-giving asset to the Community, Village, or family and never a property of an individual.[37] That in a loose mode of speech the family head or the village head is always referred to as the owner or trustee of the land.[38] And that the Village or family head manages communal or family land for the benefit of the Community or Family.[39]

Therefore, against this background, one would have thought that since land is the property of all, every member of the family, irrespective of age, sex or status would obviously have equal right to participate in the management of it. Legally, this appears to be so, but in practice it is not. This is because there are groups of persons who although form part of the Community are either prohibited from owning land in the Community or they are not forces to be reckoned with in the management of family property. Among these groups of people are the women, minors, slaves, servants,and strangers. It is my intention to focus my discussion on these groups of people with regard to their participation in the management of family property, if at all they do, and if they don't, why?

(a) WOMEN:

There is no doubt that the female members of the family have the three basic rights - i.e. the right to a portion of family property, the right to share the surplus arising from the management of family property and the right to be consulted in the management of family property. But these rights are one thing and their exercise is another. Women generally do not exercise these rights or participate equally with their male

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37. Amadu Tijani's Case (Supra).
38. Archibong V. Archibong /1947/ 18 N.L.R. 117.
39. Amadu Tijani's Case (Supra).

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counter-parts in the management of family property.

In the Middle Belt of Nigeria, within the Egbura, Agatu and Alago Communities women play a very negligible role in the management of family property not only in the past but in this modern time. Several reasons have been given among which are: First, it is said that, if a woman gets married she goes away to live with her husband and she herself becomes a part of the immovable property of her husband which can be inherited. In this circumstance, if she is allowed to possess interests in the family property, it will equally mean that if she goes away she will carry them and if she is inherited, her interest also would be inherited along with her. It is in order to prevent this, that native law and custom precludes a woman taking any beneficial interest in the family property.[40] This reason is equally responsible for the unequal participation in the management of family property, since a woman after being married she becomes a domant member of the family, more particularly when she marries far away from her Community or home. At this time if she is entrusted with the family property there is the possibility of her not managing it properly to the satisfaction of the family. In the Middle Belt, female members who married far away from their homes are known not to be acting actively in the management of family property.

Secondly, women are notorious for being <u>weakly and feeble minded.</u> They could be easily coerced, influenced to give away interest which they might possess, thereby depriving her family the interest to any property which may be in her possession.

Thirdly, in the Middle Belt, in the past, land was known to be a property which was for the exclusive use of the man. Land was only for the use and enjoyment of man, to till and exploit

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40. COKER, G.B.A. Family Property Among the Yorubas, /1966/ London, Sweet & Maxwell, p. 179.

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for the purpose of maintaining his wives and children. A duty which was incumbent upon him to discharge, since women were not primarily saddled with this responsibility it was considered that they had nothing to do with land. Therefore, any matter touching its management was not the duty of a woman. It was never the right of the woman to claim the right of inheritance equally with her male counter part, although she had all the rights bestowed upon her by virtue of being a free born member of the family.

Thus, in the case of MARIANA LOPEZ V. DAMINGO LOPEZ,[41] the plaintiffs, as descendants of one Anthony Lopez, sought an order of the Court for a partition of the family property. The plaintiffs were females and children of the female children of the original owner of the property and the founder of the family. In their statement of claim or defence it was never averred that female members could not claim on the ground of their incapacity to hold land. The trial Court held that under native law and custom females have no legal capacity to inherit. Consequently they could not ask for partition. The judge remarked as follows:

> "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".

On this ground the plaintiffs appealed. It was surprising that the judgment of the lower Court was reversed. Combe C.J. delivering the judgment of the Full Court Observed:

> "....I am by no means satisfied that in no circumstances could the court order a partition of the family land on the application of a female. A case might arise in which an order of partition would be the only effective means of ensuring that a female and her issue shall live on her father's lands without being disturbed by other members of the family, and I can see no reason for holding that the court could not order partition in such a case."

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41. /1924/5 N.L.R. 50.

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From the facts of this case, it could be gathered that the plaintiffs sought for partition on the ground that they were not allowed to use and enjoy the family land. Be it as it may, the decision of the lower court conforms with the practice that is commonly available in the Middle Belt. Thus, in the Middle Belt within the Egbura and Alago Communities if any of the rights of the female member is suppressed as it was in this case, the position of the native law and custom is that partition cannot be effected at the instance of a female member however unjustly she was denied the right to use and enjoy the family property. Therefore, the decision of the lower Court which was described as a "non sequitur"[42] is more in keeping with the realities and practice obtainable within most Communities in the Middle Belt. The decision of the Full Court is divorced of the realities of the Custom in operation, and it is submitted that it was an attempt to say that under native law and custom female members of the family enjoy equal rights with their male counter parts, which I submit with great respect, it is not, particularly in the Middle Belt.

With regard to house wives, their position is even clearer. Although the definition of the word "family" whether used in extended or restricted forms includes wife or wives of the founder of the family. But in fact a house wife under native law and custom when closely examined is not entitled to the attributes which other family members are entitled. For instance, the right of the house wife is only limited to use and enjoyment during her life-time. Her interest in the family property is the least if compared with the interest of the other members of the family. If the wife of a founder of a family has no issue, she would be entitled to nothing even if it is agreed within the family members that the property should be partitioned. She

42. COKER, G.B.A. Ibd. page 180.

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cannot exercise any right which a family member can exercise, however faintly and loosely.

It is a trite law that native law and custom is not rigid and immutable system of law, but one which develops to meet the exigencies of each particular period. Therefore, in the Middle Belt, the level of exercise by women of the individual rights in the family property in some communities has by no means witnessed a gradual improvement in the recent times. Thus, women in some families can now exercise their rights fully with their male counter parts without any discrimination. A woman can therefore demand as of right that since she was not consulted before the sale, lease or pledge of the family property, the transaction should be declared voidable at her instance. Or that her right to use and enjoy the property was denied, and, therefore, the property should be partitioned equally among the members under native law and custom.[43] She could even ask for Court order that a delinquent family head should be ordered to render account. The recognition and the exercise of these rights by women in the family are due to recent developments in the customary land holding. In the past, although the rights of the women in the family property were recognised, their exercise was restricted and limited by them. The exercise of these rights wherever it is done by women is as a result of recent innovation in the area of customary landholding.

(b) MINORS

Minors, like the women in every society or community forms the fulcrum upon which the growth and the future of that society or community depends. As such they occupy and represent some special roles and interests in every society. They are full members of the society. As such they are co-owners or joint

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43. Lopez V. Lopez /1924/5 N.L.R. 50.

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owners of the family property. Consequently, they are entitled, inherently of course, to all rights which by virtue of their birth accrued to them - e.g. the right to a portion of land, the right to share the surplus of income arising from the management of family property.

Therefore, it necessarily means that in all matters affecting family property, minors should be involved, if not for any reason, but for the mere fact that they will be the managers of family properties in the future. But it is surprising to see that the contrary is the case. That is to say in nearly all matters affecting family property minors are not involved. Their exclusion stems from the fact that they cannot, at that age of their lives, appreciate the value and nature of most matters touching the family property.

Under native law and custom, there is no laid down fomular for determining when the age of minority ends and when the age of majority begins. This problem is compounded by the fact that under native law and custom the art of writing which could be helpful to determine the age of majority of every child born to the family is unknown.[44] From the research conducted in Toto District, Nasarawa L.G.A. of Plateau State, it was told that in the past, whenever a dispute arose as to the age of majority of a person, recourse were usually had by referring to major events which took place at the time when the person whose age was in dispute was born. For instnace, people commonly refer to important events such as Hitler war (i.e. World War II); the building of Makurdi Bridge - 1932, or conflagration of Toto town - 1960. A times, the age of majority is resolved by referring to the death of an important man in the Community e.g. a chief or a member of the family. While sometimes, resort is

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44. Rotibi V. Savage /1944/17 N.L.R. 77, Alake V. Awawa /1932/11 N.L.R. 39.

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sort by making allusion to the time when the family was farming a certain farm land before it shifted to another place. All these attempts are bound not to be accurate because with the passage of time, human memory becomes tendencious, short and dim.

Apart from these methods of trying to determine the age of majority, recourse could be made at the physical maturity of the person concerned. According to my informant, the appearance of hairs at certain parts of the body e.g. armpit, signifies maturity of a person. If a woman, menstruation always signifies the end of minority. The fact that a woman has been married is not a sign of her maturity under native law and custom. This is because she can be married at at tender age of ten. But it was held that age of majority could be determined after the attainment of the age of 15 lunar years.[45]

The legal effect of the age of minority in the management of family property is that, the consent of the person so properly called a minor is not necessary before any alienation of family property could be effected. Thus, in the case of MOGAJI V. NUGA,[46] a piece of land which belonged to four branches of a family was sold by its head with the concurrence of the heads of two branches. The head of the third branch was not consulted at all, while the only surviving member of the fourth branch was a minor at that time. It was held that consultation with him (the minor) was not necessary.

In BUKAR FALATA V. YA DOWOMA,[47] one Baba Shehu sold a family house to the appellant. His mother a widow, brought this action to set aside the sale on the ground that her son was too young to convey the property. The trial Court decided in favour of

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45. Bukar Falata v. Ya Dowoma /1970/ N.N.L.R. 105.
46. /1960/5 F.S.C. 107.
47. /1970/ N.N.L.R. 105.

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the purchaser. The appellant appealed to the Upper Area Court, which reversed the trial court's decision by holding that the Vendor Baba Shehu was incompetent to convey the property because of his immaturity. It was averred by his mother that Baba Shehu was not of age, and still at school and was under her guardianship. More importantly, the house was not sold with the consent of the mother. It was held that the Sale by Baba Shehu was valid. The High Court came to this conclusion becuase of the difficulty that was encountered in determining the age of maturity of Baba Shehu, It stated that, the decision of the trial Court was affirmed because, in that Court the Vendor i.e. Baba Shehu was produced personally before the Court and this was not done at the Upper Area Court. It therefore decided that the trial Court which saw Baba Shehu was more competent to decide his legal capacity. And consequently the decision of the trial court was affirmed and that of the Upper Area Court quashed.

Although the High Court gave judgment in favour of the appellant on a reason which I submit is erroneous, for the fact that the widow who was then a joint owner was not consulted, was enough to nullify the sale, the matter at stake is the legal incompetence of the minor Baba Shehu to convey the property. From this case it could be descernible that under native law and custom that a valid conveyance could only be possible if it was done by a person who has attained the age of majority only. Therefore, a minor is incompetent to convey a family property.

However, if alienation is such one that would deprive the family the title permanently, the interest of the minors will be borne in mind. Thus, it is my humble submission that the minors should be represented in such circumstances or else they will be at liberty to set aside the transaction when they reach the age of majority.[48]

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48. Onade V. Thomas /1952/11 N.L.R. 104.

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Other family matters which a minor cannot do because of his legal incompetence are that he cannot sue to protect the family title to property. He cannot be appointed as a head of the family.[48(a)] But he can be a principal member of his family.[49] He cannot collect rents and tributes unless he has been specially assigned to do so.

Under the native law and customs of the Egbura, Gade, Afo and Alago peoples of the Middle Belt, a minor once born free has no any disability as far as the sharing of proceeds arising from the sale of family property is concerned, or compensation paid as a result of compulsory acquisition of such property. The minor will ordinarily take through his guardian.

Also if partition is effected on a family property, both young and old would take their shares equally. However, the procedural rule is that a Senior member of the family has to take his shares first. The size of a minor's property depends upon his need, labour capacity and the circumstance of the family.

4. THE POSITION OF THE NON-MEMBERS.

The trite law of the customary landholding is that land is the property of the people and that every free member[50] in the Community is entitled to as much land as he can reasonably acquire to support himself and his family.[51] This presupposes that before a person can rightly claim to be entitled to a portion of land, or the right of consultation or the right to share the surplus arising from the management of family property and etc., he must fulfill two conditions. First, he must be a member of the community or family upon which title to land is

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48(a) In Bendel State, a minor was appointed as a Chief of his Community.

49. Mogaji V. Nuga (Supra).

50. Emphasis Supplied.

51. MEONDES C.J. before the West African Land Committee 1906.

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vested. In order to satisfy this requirement, a person must be one whose parents were members of any tribe or tribes indigenous to a certain Community.[52] In a case of a family, he must be a person who is entitled to inherit from the founder of the family. Under this condition, an Idoma man in a Tiv Community for all intents and purposes would be regarded as a non-member of the Community. Similarly, a Tiv man in Igala land or Community is regarded as a non-member of the Community. In case of family property, a non member of the family would be a person who on the basis of biological connection he is excluded from inheriting from the property of the founder of the family e.g. a domestic or slave.

Secondly, a person in a family or Community most be a free member not subject to any social or political disability. In other words, he must be a free born person - not a slave, servant or a stranger in the Community or family. If he is any of these, he would be termed as a non-member of the Community or family.

Therefore, it is only after a person has satisfied these conditions in a community or family that he can validly claim and enforce all rights which a member in a family is entitled to in the management of communal or family property as of right. In the rest of this Chapter. I will discuss the rights of these groups of people who, in loose form of speech, form part of the members of the community but do not participate actively or exercise any right in the management of communal or family property. These groups of people as it has been rightly pointed out are: the slaves, servants and strangers.

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52. OGUCHE V. ILIASU /1974/ N.N.L.R.

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(a) SLAVES:

In the early stages, when humanity has not risen to the full appreciation of the reciprocal rights and duties of man: when law are the mandates of one, or of the few, for the many; when the will of the strong was the rule of life and the guide to conduct - then the necessary inequality, social or physical or mental engendered by nature among the human race, invariably takes the form of slavery, and a system springs into existence which allows absolute power to the superior over the inferior.[53] This complete subserviency of the weak to the strong has helped the later to escape from the legendary curse laid on man - "in the sweat of thy face shalt thou eat bread till thou return to the ground", and allowed them to employ the leisure thus acquired in congenial pursuits.[54]

Similarly, the situation in the Middle Belt in the olden days was not better than that described above. The Belt was the centre of slave trade. Slavery and slave trade raged fiercely among various Communities. Whenever a community fought and conquered another, the conquered would be subdued and enslaved. Oldfield and Laird who were the early explorers of the Middle Belt areas between the years of 1832-1833 saw that, the Middle Belt region was raided by Fulanis and noticed that the markets round the confluence were major centres of slave trade.[55] This social inequity continued until the abolition of slavery by the Abolition of Slavery Ordinance, 1916, the effect of which was to make everybody equal.[56]

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53. Maxim de Cloiseul D' Aillecourt, Paris, 1809, quoted in, "The Spirit of Islam", Ameer Ali (1974) Chatto & Windus, London, p. 258.

54. Ameer Ali, Ibd. page 258.

55. FORDE, D. The Peoples of the Niger-Benue Confluence /1955/ London, International African Institute, P. xiii.

56. Abasi Okon Ekpan V. Henshaw (1930)10 N.L.R. 65.

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The social result of slavery is that in some families the slave descendants have been absolved and assimilated into the blood descendants of some communities or families. Thus, there are some fussion in some Communities or Families of the blood and slave descendants together. This fussion, had in some cases, compounded the problems of ownership and management of family property under native law and custom. For instance, it is very common within the Egbura Community to hear that some people are squarters and they don't have land because they are the offshoot of slaves. Atimes, the same reason may be given to suppOrt descrimination meted against a member for disallowing him interest in land or the right to participate in the management of family property.

The underlying principle of Customary landholding is that of the freedom of birth.[57] This means that if a person's lineage could be traced to a slave ancestor, automatically he would be excluded from ownership and management of land in the family or community. Consequently, he cannot claim as of right all rights which an individual member has in the family property. The legal incidents that were attached to the status of slavery before the emancipation was that, as slaves themselves were regarded as properties, disposable at the will of their masters, they were entirely and completely disqualified from holding property and whatever property was acquired by the slave accrued to the master. The notion of native law and custom was that the property of the slave, who himself was a form of property, belonged, like the owner, to the master of the slave.[58] Thus, in the case of EKPAN V. HENSHAW[59] the defendant sought to obtain letters of administration to the estate of one Effiong Okon Ata, a brother of the plaintiff. The said Effiong Okon Ata was

57. Mary Slessor, before the West African Land Committee 1899.

58. Sanusi Alaka V. Jinadu Alaka /1909/ 1 N.L.R. 55 at p. 56, Kodieh Afram's Case.

59. /1930/ 10 N.L.R. 65.

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a slave of the household of the defendant, who claimed that according to native law and custom since the plaintiff's brother was a slave and a form of property, he and all that he owned were the properties of the family of the defendant and as such the property should be administered by the defendant, who was a Chief, a free born and head of the family. It was held that the defendant was not entitled to the grant and his claim was rejected.

In IBIRIKWU V. OHANYEREWA[60] the plaintiff had claimed a declaration of title to land, damages for trespass and an injunction against the defendant who he alleged to be Osu or slave, and as such possessed no right in the land. At the High Court, judgment was given in favour of the laintiff. The defendant appealed on the ground that the abolition of Osu system Law, 1956 of the Eastern Region of Nigeria had "rendered the action incompetent. It was held that the law removed with immediate effect any disabilities which may previously have debarred a person from holding any form of interest in land on the ground of being Osu. But it did not confer any specific interest on persons previously disqualified. It merely enables them after the commencement of law to acquire such interest.

From the above two cases, it could be discerned that under native law and custom the legal effect of being a slave was that, a person branded with such a social stigma was not entitle to acquire any interest or hold such interest in land. Consequently, if there was any matter concerning the management of land he wouldn't be called to voice out his opinion. In the case of ADINNU V. IZUKANRE,[61] (Un-reported) a slave member who was also the eldest member of a family claimed to be its

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60. /1959/4 F.S.C. 212.
61. NWABUEZE, B.O. Ibd. at page 173.

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head by virtue of his age and also to be entitled to exercise the prerogative of the head in regard to the family land and fishing pond. He and other slaves members of the family had claimed an account from the free born for fishing in the family fishing pond without inviting them. The defendant pleaded that as descendants of slaves, the plaintiffs were not entitled to participate as of rights in the fishing pond and this contention was accepted by the Court.

Therefore, a slave or a slave descendant cannot as of right demand the use and enjoyment of family property. He is equally not entitled to share the surplus arising from the management of family property. This is because, all these rights can be exercised only by a free born member of the family or community.

However, where a slave or his descendants have been allowed to use and enjoy family property, they would do so without paying any tribute, rents and atimes tithe. But under the Egbura Customary land law a slave is bound to pay a tithe - i.e. some proportion of farm produce harvested by a slave or his descendant to his master, as one of his duties to his overlord. Slaves descendants do not pay rent and tribute because they are not tenants. The payment of tithe has been made compulsory because that is the life-ware and the essence upon which slavery is based. The payment of tithe is a token that the slave owes some duties to his master. It also shows that the slave is not the owner of the property which he uses and enjoys.

With the passage of time there are now the fusions of blood and slave descendants into a single family in most cases. But where such difference could be traced, discrimination on such basis are still practiced, most especially when the relationships between the blood and slave descendants are not cordial. In Egbura land references to some people as descendants

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of slaves are common and always constitute the rift of discord in many families. In some communities in the Middle Belt, the ordinance which abolished and emancipated the slavery and slaves hardly had any effect. Although there is no more slave trade throughout the length and breadth of the Belt, the social stigma of slavery and slave trade are still being borne by some groups of people. That is negating the essence of the slavery Abolition Ordinance, 1916. Slavery was remarked by an eminent writer to be the natural product of passion and pride so strongly marked in certain phases of the Communal and individual development. It bore from its outset the curse of inherent injustice. It has existed among all nations, and has died away with the progress of human thought and the growth of a sense of justice among mankind.[62]

(b) SERVANTS

The Middle Belt region has been and is still one of those areas in the country where the feudal system of administration is practised. The reason which led to this conclusion is that, the region is mostly inhabited by chiefly tribes. Except the Tiv group of people who has only one Chief i.e. the Tor Tiv; almost all the communities have several Chiefs who superintend the activities and the welfares of every village and its inhabitants.

In the past the system of operation of these Chiefs was not different from the English system or concept of feudalism. Under this system, a chief could have several men and females in his palace who rendered various services to him and his wives. These services included the feeding of the Chief's horses by strong and stout men specially allocated for this purpose. Atimes they included some strong men who were

62. Ameer Ali, The Spirit of Islam /1974/ London, Chotto Windus, p. 258.

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experts in farming. Their duty was to farm to feed the Chief's family members. Some were chosen to run the errands of the Chief and his wives. While others were selected to carry out the function of rituals only. All these people were suppose to live in the Chief's compound. The Chief was also responsible to feed, clothe and marry for them. With the passage of the time these people became assimilated into the Chief's family, and hardly could any curtain be drawn between the descendants of the Chief and those of the servants.

Another way by which feudalism manifested itself with its consequential element of servitude is that, in the past, we were told that the Communities in the Middle Belt were brutish ferocious and warriorsome, Strong tribes would trammel upon the weak ones. Consequently the weak family had to attach itself to a strong family and render services to that family in recognition of protection given it by the strong family. As time went by, the weak family was assimilated in to the strong one and the members of the weak were later recognized as servants.

In the Middle Belt, in the past, it was the custom of the Egbura, Alago and Agatu peoples who, due to his poverty could not afford to pay his tax, feed, clothe or marry for himself to migrate to a noble and wealthy family to stay in order to render services freely and gratuitously with the anticipation that the wealthy family would pay his annual tax, feed, clothe and marry for him. Like in other instances mentioned above, such persons were eventually fused into the family membership and later identified as servants . They become a non-blood member of the family.

The Customary incidents of being a servant is that he is not entitled as of right to any portion of the family property. This is because, a servant is not a blood member and

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and consequently can not hold any interest in the family property. They are also excluded from ownership and management of family property. And where land has been granted to a servant, he would use and enjoy it only during his life-time. His children can not inherit it, at all.

On rare occasions servants can be invited to participate in the discussion in which family property is the subject-matter. But whatever they say in relation to the property are not binding on the family even if the relationship between the blood descendants and the servant or his descendants is cordial and good. Where the relationship is not cordial, normally the servants or the desendants of the servants would not be consulted.[63]

The exclusion of servants from the management and sharing of profits accrueing from the management of family property was the subject of judicial discussion in the case of L.E.D.B. FAHNM.[64] In this case the family property was acquired compulsorily. The servants contended that they were entitled to share in the monetary compensation paid by a statutory corporation. It was held that the servants were not entitled to share pari-passu with the children of the deceased the monetary compensation paid for the acquisition of the property of the deceased ancestor. Coker Ag. F.J. who delivered the judgment of the Court observed:

> " I am not able to find any authority on which ground the contention that domestics (servant) and/or their descendants are entitled on a distribution of monetary compensation for family property compulsorily acquired to aliquot and precise shares. Orthodox native law and custom regarded slaves, servants and domestics as personal properties as chattles of their overlords and the progressive improvements to their status by modern legal developments have not elevated them to the position of equal partners with the overlord's children in the distribution of monetary compensation for property acquired in the circumstances of this case.

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63. Coker, however agreed that under the Yoruba customary law a servant can oppose an unauthorised sale or disposition of family property. See Coker, Ibd. page 190

64. Unreported F.S.C 140/1962 decided on April 16,1963. See Coker lof at P. 88.

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From this observation, it is clear that servants do not have equal right with the blood members / of the family. Consequently, too, the involvement of servants in all matters affecting family property is at the behest of the family members and therefore a servant can not claim such involvement as of right.

(C) STRANGERS:

In the past, families or Communities lived in isolation and hardly intermmigled. Apart from the social sanctions of primitive society, if any outsider was so foolbardy as to Venture outside his own Community's sphere of influence into others he would promptly be siezed and taken as a captive. In such circumstances Communities were apt to be very exclusive and self /. contained.[65] Therefore, people who were not members of a certain Community or family were regarded as strangers. In order to preserve the rights of the members of the Community or family, political control of land was exercised by way of prohibition of alienation to strangers.

The word, "stranger" under native law and custom means a person who is not/ a blood member of a certain family or Community who has title to land under native law and custom. Therefore, in Egbura Community, a Hausa or Fulani man is regarded as a stranger. Likewise in Tivland any person who is not a descendant of a Tiv Community or tribe, would be regarded as a straner e.g. an Igala or Idoma man living in Tivland is a stranger.

Similarly, in a family, any person who is not a blood member is a stranger. For example, if in a family X, all the members are laying claims to the membership of the family by virtue of being descendants of the founder of the family, any person who does not belong to this family by way of cognate

65. COLE, C.W. Report on Land Tenure, Niger Province /1946_7, Kaduna, paragraphs 21-22

or agnate relationship would be, for this reason be termed as a stranger.

Another way by which a person can be termed a stranger under native law and custom is that: if he belongs to a different village or town. The fact that he belongs to the same tribe with the rest of the members of the community is immaterial. For instance, a Hill Eggon man from Kagbu Village is a stranger in Nassarawa Eggon, although he is of the same tribe with the people of Nassarawa Eggon. Similarly, an Egbura man from Umaisha is regarded as a stranger in Toto, which is also an Egbura speaking group of people.

The legal effect of being a stranger is that a person so properly called a stranger is considered as a non-member of the Community for the purposes of ownership and management of communal or family property. Consequently, all rights which are inherently conferred upon a member of the community or family cannot be exercised by a stranger. For instance a stranger has no right whatsoever to demand that he must be consulted in the management of family property. Equally he has no right to demand as of right that compensation paid in respect of family or community land which was compulsorily acquired must be shared with him.

We have seen that strangers are not members of the community or family. But in most cases they may be granted <u>some portions</u> of communal or family property in a form of loan or gift. The method by which loan of property could be secured under native law and custom by a stranger is different from the method of acquiring land by a member of the community or family. Normally, the procedures in Afo, Agatu, and Egbura Communities is that a stranger must first ask for a loan from his host. If the host is a head of the family, the latter after a consultation with

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the principal members of the family can loan a portion of family property to the stranger, if there is any vacant property to be loaned. However, if the host is not the head of the family, the tradition is that the host would first approach the head with the request of the stranger which will be tabled in the meeting of the family members. If land is available and the principal members consented, then land would be loaned to such a stranger.

Where a family has no land to lend, the request could be channelled to the village head. The latter will in most cases seek for the consent of the members of the council of elders before such loan could be made.

In order for a stranger to qualify for a loan in this way, it will be necessary for the stranger to reside in the village unit first for a probationary period of up to a year or so. He must conduct himself in a manner satisfactory to the local populace and proved himself acceptable to the community. If he satisfies these conditions land would be loaned to him to farm in precisely the same conditions or terms with the family members. He could exercise some equivalent rights over the land given to him so long as he identifies himself with the community or family and remains acceptable to them.[66]

Therefore, it can be seen that, one of the conditions of which a stranger could get a loan of land is his acceptability to the community or by members of the family in which he lives. In order to gain this, a stranger must be transparently honest in all his dealings with his host. He may be a person who has rendered selfless services to his hosts. He must not be a person of questionable character. For example, a stranger who is notoriously known for bad character e.g. committing adultery with the wives of his hosts, or if it has been proved that he

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66. COLE, C.W., Ibd. paragraph 35.

is a thief, would be denied a piece of land. Even where he managed and secured a piece of land before his character became manifested to the Community or family, the grant could be recalled, for, it is a trite law under native law and custom that a grant to a stranger is always subject to good behaviour of the grantee.[67]

In the past, a stranger would not be granted with a piece of land to build a house. He could only be given a loan of a completed house to reside in. This measure was to prevent a possible claim of ownership by a stranger in due course. However, he could be given a vacant land to farm.

Where a stranger has secured a loan of land, it is customary that he pays some certain amount of his farm produce to the grantor annually in recognition of his tenancy. Within the Alago, Tiv, Idoma and Igala Communities of the Benue State, a stranger is not normally allowed to harvest fruits of trees standing on the land loaned to him. This is because, under native law and custom ownership of land is concomittant with the power to harvest the fruits of the trees standing on the land.

Although strangers are part of the Community or family in which they reside, but in most occassions they don't participate actively in the management of communal or family property. For example, the consent of a stranger is not necessary in the disposition of family property under the Afo, and Egbura native law and customs. Therefore, if a family intends to sell a property which has been loaned to a stranger, can it do so without first, taking the trouble to consult the stranger? The answer is that if the stranger has interest in the land, e.g. crops, it becomes imperative on the family to consult the stranger before selling the land.

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67. Jagede V. Eyinogu /1959/ 4 F.S.C. 270.

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Likewise, where a family decides to alienate a residential house which has been loaned to a stranger, the stranger will be consulted since such an abrupt ejection may cause hardship to the occupier.

However, where the relationship between a stranger and his host is cordial a stranger's advise may be sought. But the overlord or the host will not be bound to take such an advice. Consequently, where the relationship is sour his advice will not be sought, let alone to take it.

We have seen that, with the passage of time, slaves, servants and their descendants in some community and families became assimilated into the blood members and hardly could any difference be drawn between the blood members and the non-blood members of the family. Similarly, in most communities, families or towns in the Middle Belt of Nigeria, there had occurred the assimilation or the fussion of the blood members of the communities or families into the non-blood members. The fussion which has become so hardened could not be traced again due to dim memory and antiquatarianism. For instance, in towns such as Makurdi, Lafia, Keffi, Nasarawa, Suleja, Lokoja, and Otukpo, one finds the Hausas, Fulani, Kanuris, and even Yorubas who have become completely assimilated into the indegenous communities or tribes. The consequence of this is that, such a rigid demarcation between a stranger and a blood member of a family or an indegenous member of the community is gradually fadding. Thus, one is not surprised to see a Hausa or Fulani man in Makurdi or Keffi where the indegenous tribes are Tiv, Afo or Gwndara peoples claiming the right of ownership of land under native law and custom.

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However, this does not mean that in the Middle Belt, legally speaking, we do not have strangers. Therefore, where evidence can be adduced to show that a person or his ancestor is a stranger, he will accordingly be branded with that stamp which carries with it some disabilities of entitlement to land.

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CHAPTER V

LAND TRANSACTIONS

1. Introduction:

In the past, actual details of land transactions by the peoples of the Middle-Belt region of Nigeria were, perhaps, few if any at all. The reasons for this were that the area was sparsely populated. This was due to frequent slave raids by the Hausas and Fulanis of the far North and the fierceful warfares among the natives themselves.

Secondly, land had no exchange value because it was plentiful. Every Community, tribe or family was self-sufficient in land. There was no money to buy land, And even if there was, it was not necessary to buy since it was in abundance and the demand was little.

Thirdly, the use to which land was put did not encourage land transaction. The traditional agricultural system was confined to the farming of subsistence crops only. Coupled with this, was the fact that the method was tideous and, consequently, did not allow the farming of large hecters of land.

In the modern times, land has become a precious commodity and freely transactable. These transactions include pledge, gift, loan and sale which will be discussed in detail below.

2. PLEDGE:

Among the various methods of land transactions known to customary land law both in point of time and importance is perhaps the pledging of land. Pledging has been in practise from ancient time.[1]

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1. MEEK: Land Law & Custom in the Colonies [1946] London, Oxford University Press, page 262. However, it was contended that, the pledging of land was unknown before the advent of the British Administration in West Africa. See W.A.L.C. Report, No.1048 page 173 7 James, Ibd. page 224.

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What is a Pledge?

The definition of what is a pledge is contained in the case of ADJEI V. DABANKA[2] where Michellin J. said, "it is a kind of indegenous mortgage by which the owner-occupier of land, in order to secure an advance of money or money worth, gives possession and the use to the pledge creditor until the debt is fully paid or dischaged.

From this definition, we can understand that in the early days, the practice of pledging was limited to land only. But in addition, it was also known that pledging took the form of human beings, trees, crops, houses etc. If a family has enough land and it has no money or it heeds something worth of money, it can pledge its land.

(a) Nature of Pledge:

In the olden days, land used to be pledged for many purposes. Under native law and custom of the Egbura people, land used to be pledged for the purposes of raising money to pay bride-prices, to pay government tax, or offset medical expenses or to pay debt left behind by a previous family head.

Where land was the pledged property, the owner occupier would deliver his possession to the pledge creditor. The latter would farm the land from his own labour for specific number of years (if that was fixed) or until the pledgee was able to repay the money.

Therefore, the incidents of pledge under native law and custom is that the pledgor would always part with the land, In other words, the pledgee takes over the possession of land and continues to use, enjoy and manage it until the expiration of the agreement time or until he repays the money. It is this taking over of possession by the pledgee that distinguishes the pledge from the English mortgage. It is said that if the

2. /1930/1 W.A.C.A. 63 at p. 66 - 67.

agreement is intended to give the creditor some proprietary estate or interest, in the property, then irrespective of the fact that the creditor takes possession of the property under an express stipulation or by operation of law, the transaction is a mortgage. In a mortgage transaction, the legal or equitable title to the property is transferred from the mortgagor to the mortgagee.[3] On the other hand, in a pledge, actual possession of the property is the whole gist of the creditors security - the pledge may, therefore, be classified as a possessory security while the common law mortgage is a proprietary security. Therefore, it is out of the possession granted under the agreement that the pledger's right springs.[4]

Sometimes the subject-matter of a pledge may not be land, but an object attached to it. For instance, an owner of a land may decide not to pledge it but to pledge the trees e.g. palm-oil, locust-bean, kola-nuts, mango and raffia trees. While, atimes, only a house will be pledged. In any of these circumstances the pledgee will go into the possession of the property, use and enjoy it until the money he gave on loan is repaid to him. Where the pledge property is a tree, the sale of the produce does not under native law and custom accures to the repayment of the money borrowed. It is only an interest which accrued from the pledge property.

However, it was contended that this practice is contrary to natural justice, equity and good conscience. Thus in the case of KUAHEN V. AVOSE,[5] the plaintiff sought to eject the defendant from the possession of certain palm-trees at Gedu in the Badagry area of Lagos State. It appeared that, for the purpose of raising money to pay tribute due from the people of

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3. James, Modern Land Law of Nigeria /1973/ Ile-Ife University Press, page 229.

4. James, Ibd. page 229; Adjei V. Dabanka /1930/1 W.A.C.A. 63.

5. /1889/ noted in Elias, Nigerian Land Law & Custom (1956) London, Rantledge & Kegan Paul Ltd. page 189.

Gedu to one Omitutu, King of Apapa, the palm-trees in question had been pledged in the alleged sum of 1,360 bags of cowries (equivalent to almost ₦680.00 Nigerian Currency) by the defendant's great-grandfather to the plaintiff's father. The annual produce of the palm-trees was estimated at ₦24.00 year, while the highest tribute payable was only ₦18.00 a year. For about thirty years the palm trees had been farmed by the pledgee and his descendants. Smalman C.J. (Ghana) held that under such circumstance the amount of the produce realised should be taken into account, and some portion of it set aside each year against the original debt until it is liquidated, when the palm trees will revert to the pledgor. This decision is based on the fact that whatever money might have been advanced by the pledgee must have been repaid many times over, the pledgor was entitled to resume possession of the palm trees. In the view of the learned Chief Justice, it was unjust and inequitable and opposed to natural justice, that the pledgee should be allowed to farm the trees and hold them until the original debt be paid, giving and rendering no account of the value of the produce, which in this case amounted to more each year than the amount paid as tribute.

In a similar case of AMOO V. ADIGUN,[6] the plaintiff has in October, 15, 1952 pledged his shop at Ibadan to secure a loan of £35 from the defendant, who thereupon entered into the possession of the shop until the loan was repaid. He then hired the shop to a tailor at a rent. The plaintiff now claims an account of rents collected by the defendant during his possession as a pledgee, and payment of an amount found due on the taking of such account. The trial judge held that the plaintiff was entitled to credit for the defendant's exploitation of the

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6. /1957/2 W.R.N.L.R. 55.

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shop. Accordingly, he ordered an account against the defendant and the payment to the plaintiff of the amount found due upon the taking of such account. This decision was said to be based on the proposition made by Dr. Elias that a pledgee's occupation and use of the pledged property is intended to give him an equivalent credit.[7]

This assertion of Dr. Elias (as he then was) met with vehement criticisms.[8] The statement may be true and reflecting his experience of Yoruba native Law and Custom. But from the research conducted among the peoples of the Middle Belt of Nigeria, the use of land by the pledgee is regarded as an interest on the loan and not as a repayment of the capital or any part of the capital.[9]

Secondly, if the assertion by the learned and eminent author is correct what became of the equivalent credit where the human person was pledged? In the earlier years, it was possible for a man to pledge his own person, his daughter or son in return for the use of a piece of land, working for a number of days each week on the lender's farm and the remaining days of the week on the land borrowed. The work used to last for several years. A tale was told where a young Chap was pledged and he was not redeemed until after he married, because of only twenty pathings. Here, was the service rendered equivalent to the credit of twenty pathings? Only twenty-pathings were paid for his redemption and no more. Here we can see clearly that the service rendered by the pledger outmuched the money borrowed. The work of the pledger was treated or considered as an interes'

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7. ~~Elias, Nigerian Land Law and Custom~~ /1951/ London, Routledge & Kegan Paul at page 188.

8. James, Ibd. page 236.

9. MEEK, Land Tenure & Land Administration in Nigeria and Cameroons /1957/ London, Her Majesty's Stationery Office, page 203.

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on the loan and not as a repayment of the loan itself. This is one of the features of most customary mortgages which differentiates it from the English Common law mortgage.

In the Middle Belt of Nigeria, within the Egbura, Alago and Agatu Communities the work of the pledger or the interest which accrues from the land from the direct labour by the pledgee is not intended to be an equivalent credit of the money he loaned to the pledgor. What a pledgee gets as a result of tilling the land is his own profit which accrues by virtue of his being in possession of the pledged property. Although native law and custom is said to be a blanket description[10] and thus differs from one place to another, I submit, humbly that the view of the learned author is not in accordance with what is commonly available within most of the African Communities.

(b) REDEEMABILITY OF PLEDGES

Unlike the mortgagee under English Common Law, the pledgee in Africa and in Nigeria in particular, obtains no permanent right over the land. There is no right of foreclosure; the land remains redeemable for all times, although it is not restored to its owner until the debt has been repaid in full.[11] The right of redemption is reflected in the proverbs of the various communities e.g. "a debt on land can never be furnished", "a thing which is pledged is never lost", "debt dries but never rots", and "once a pledge always a pledge".

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10. Park, The Sources of Nigerian Law, (1963) London, Sweet & Maxwell page 65.

11. MEEK, Land Law and Custom in the Colonies (1946) London, Oxford University Press, p. 256.

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Against this background it is understood that the pledged property is redeemable whenever the money borrowed is repaid in full. Thus, it was emphasized that in native Customary jurisprudence, if a piece of land is pledged, the pledgor will have the right of redemption no matter how long the land remained in the possession of the pledgee.[12] In KOFI V. KOFI[13] a piece of land was pledged in 1869 for 6/6d. It was held that the land could be redeemed in 1936 by paying back the 6/6d notwithstanding the lapse of 60 years.

One peculiar characteristic of a pledge is that only the exact money loaned has to be refunded to the pledgee. No extra money will be demanded even if the pledgee has improved the land by planting economic trees. In OKOIKO V. ESEDALUE[14] the respondents had improved the pledged land substantially by planting economi trees and the Nature of the land was initially put at ₦2,000.00 but later reduced to ₦1,600.00. The appellant refused to pay. The Supreme Court held that a pledge is perpectually redeemable for the amount of the original loan and nothing more.

(c) THE RIGHTS OF THE PLEDGEE

(I) USUFRUCTUARY ENJOYMENT

It is said that one of the features of pledge is the taking over of the possession of the pledged property by the pledgee. This, therefore, has necessarily conferred upon him the right of usufructuary enjoyment of the property. If it is a piece of land, the pledgee is entitled to the full profits of the land. He is allowed to live on the land and

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12. IKEANYI V. ADIGHOGU /1958/ 2 E.R.N.L.R. 38.
13. /1930/ 1 W.A.C.A. 284.
14. /1974/ 35 C. 15.

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cultivate it and he may allow others to do so also. Under Egbura native law and custom, a pledgee cannot build a house on a pledged land, nor must he plant economic trees on it. If he does so, no extra money would be paid at the time of redemption.

If the pledged property is a house or trees, the pledgor similarly has the usufructuary right over them. He can rent the house and collect rents[15] or he can reap the crops. But where land only was pledged, the pledgee has no usufructuary right to reap the trees standing on the pledged land.

(II) PROTECTION OF THE PROPERTY

Under the ancient native law and custom when land was in abundance, land disputes were rare or none at all. However, where a piece of land which is a subject of a pledge is in dispute, the right person to sue is the pledgee. His right to sue stems from the fact that he is in possession.

Therefore, only in exceptional cases, where the injury caused is of the permanent nature that the pledgor is entitled to sue or initiate action to that effect. Nevertheless, it was contended that a pledgor cannot sit with his hands crossed and see the pledgee initiating or defending his (pledgor's) title to the land without his participation or contribution in cash or kinds.

(III) INTEREST ON LOAN

Under strict native law and custom interest is not chargeable on pledge. The question of interest is not known to early customary law. It was not until of recent and due to our contact with the Western Civilization that interest becomes chargeable on pledge. Therefore, where a

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15. Amoo V. Adagun /1957/2 W.A.C.A. 35.

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property was pledged e.g. land, the profit which accrued as a resul of the tilling of it would be the interest. Customarily, when a pledge (simpliciter) is to be given, normally there is no strict demarcation between the amount of pledge and the interest which is to accrue, and parties are always silent as to this. Under the Customary Law of Tiv, Idoma, Alago and Nupe it is morally wrong to charge interest on loan.

(IV) MANAGEMENT

It is said that a pledgee is required to perform all the duties of an owner-occupier, e.g. in the case of a farm-land, he must exercise the duties of a farmer acting with reasonable dellingence.[16] Thus, in LUPOWO V. ADEBISI (Unreported)[17] it was held that by and under customary law, when a piece of land is tendered as a security for a loan, the lender is under a duty to perform all acts of good husbandary in respect of the farm, which act includes the spending of money and labour to improve the farm.

In Egbura, Alago, Afo and Agatu native law and customs a pledgee is not bound to manage the pledged land. This is because, if he manages it properly, he is entitled to the profit. Conversly, where he mismanages it he will incurr some loss. The obligation to manage a pledged property arises only in two respects. One, where the pledged properties are economic tress such as locust bean trees, pawpaw, palm oil and raffia trees. Here, the duty to keep their surroundings clear from grass so that they will not be burnt by bush fire rests squarely with the pledgee.

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16. James, Ibd. page 234.

17. Suit No. UB/156/59, Ilesha Grade B Customary Court.

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Secondly, where the property pledged is a house. The pledgee in this case is bound to make the house habitable. He must take care of the roofs and the surroundings.

(V): DUTY TO ACCOUNT

The question whether under strict native law and custom a pledgee is under obligation to render account of his management of the pledged property has provoked hot debates both in the academic and on the bench. Dr. T.O. Elias (as he then was) supported the view. He said, that under the indegenous system the pledge creditor obtains possession of the land from the very inception of the deal and also enjoy the usufruct of the land for as long as it is considered necessary to give him equivalent credit.[18]

James,[19] in his contribution to this highly ragged debate said "the liability of the pledgee to account is a recent development by the judges of the Superior Courts who indiscriminately equate principles of native law and custom with the English Common Law principles". In his opinion, Elias is wrong when he states that the pledgee's duty of account is a part of the indegenous system.

Obi[20] and Chubb[21] are of the opinion that under Ibo native law and custom, "a pledgee is not under a duty to account for his possession of the pledged property, because, redemption is by payment of the original loan, or discharge of of the original obligation without interest".

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18. Elias, Nigerian Land Law & Custom (1951) London, Rentledge & Kogan Paul p. 188.

19. James, Ibd. p. 296.

20. Obi, Ibo Property Law /1963/, Ibondon, Butterworths, p. 120.

21. Chubb, Ibo Land Tenure /1966/ Ibadan, University of Ibadan Press, Paragraph 59, page 31.

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Also Dr. Ezejiofor[22] strongly condemned the dictum of Smalman Smith C.J. who said that the traditional rule of non-accountability of the pledgee is contrary to natural justice equity and good conscience. He says, "since the pledgor can redeem at any time whether or not the pledgee has derived sufficient income from the land to make up the lost interest and the pledgee cannot resist the redemption on the ground that he has made too little income or non at all, it will not be fair to compel the pledgee to render an account in those cases where the pledgor belived that the pledgee has made too much profit from the land." He emphasized that, "pledge, under native law and custom is a delicate transaction which the court has to handle rather cautiously, unless it is intended to destroy it completely".[23]

A careful examination of the judicial decisions about this principle showed that there is no unanimity of opinion among the judges, too. At least the decision of a case (Ghanaian) does not support the principle of accountability of the pledgee under native law and custom. The case is DAAPAH V. POKO[24] where it was said, "the essence of a native mortgage is that the mortgagee gets possession and enjoy the profit without accounting for them." In that case, the loan was for £60 and it was agreed that the pledgor was not to be in possession until after 13 years. It was established that the farm yielded a net annual profit of £20 - £60. The WACA, in allowing redemption after 4 years explained "one of the grounds of the condition was that since the pledgee was not

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22. Ezejiofor, /1975/ Nigeria Law Journal 71.
23. Ezejiofor, Ibd. page 71.
24. WACA judgment of 13/6/1950; Reported in Ollennu op. cit. p. 173.

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to account for the profit he has made, it will be unconscionable to allow him to receive any more profit by way of interest than he had already received. That, it seemed, the hardship which may be caused to a pledgor who has pledged a profit making concerned is mitigated by the rule which allowed him to redeem the property at any time".

In KUAHEM V. AVOSE[25] Smalman Smith C.J. explained the view that where palm trees were pledged to secure a loan, the amount of produce realized from the trees should be taken into account and some portion of it set aside each year against the original debt until the loan is paid off. The learned C.J. considered that a custom by which the pledgee was entitled to farm the land and hold them until when the debt is refunded without having to account when the loan was refunded was unjust inequitable and contrary to natural justice.[26]

A decade of years ago, the decisions in Kuahen V. Avose (supra) and Amoo v. ADIGUN (supra) were upheld by the Supreme Court in the case of OKOIKO V. OZO ESEDALE[27] where Elias C.J. said,

> "It seems to follw from these two cases that the Court will in all proper cases take into consideration the nature and character of the use to which the pledgee has put the land while in possession so that any unjustified benefit there derived by the pledgee may be brought into account when the pledged property is redeemed. No longer, it would seem, can the pledgee in possession take all the benefits from his commercial exploitation of the land and still get back his original capital".

But in practice, particularly with the Communities of the Middle Belt of Nigeria, namely, Tiv, Idoma, Alago, Igala, Egbura, Agatu etc., under strict native law and custom, the

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25. /1869/ (Unreported) noted in Elias, Ibd. p. 189.
26. Amoo V. Adigun /1957/ W.R.N.L.R. 55.
27. /1974/3 S.C. 15 at page 32.

pledgee is not under a duty to account for his possession of the pledged property: People normally pledge farmland and not shops. In order to obtain some profits from the land, the pledgee has to spend some money and labour. But, in most occassions he does not keep account of money of what he gets in return from the land. This is because, it is not usually in the agreement that he should render account of what he gets. Thus, his accounts of out-going will be of little value.

Secondly, a person who is in possession of the land at the time of redemption would have inherited the land from his ancestors, and it will be impossible for him to render account of the exploitation of the land by a person who was in possession before he was born. Therefore, the requirement for accountability by the pledgee will be difficult to challenge since it is only he who has the knowledge of it. Moreover, it will be unlikely for him to show that he has made an excessive profit.

Thirdly, customary law permits the pledgee to repledge the pledged property to the third party. If this happens, the repledgee takes over the possession of the property and its enjoyment until the pledgee has got his money back. If the repledgee is in possession when the land is redeemed, who must account to the pledger? The pledgee or the later pledgee?

As I have said earlier, interest on loan is not a principle of native law and custom, It is the development brought about by modern economics and commerce based on the capitalistic tendency of the Western World. Strict Customary law abhores interest on loans.

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(d) RIGHTS AND DUTIES OF THE PLEDGOR

Like the pledgee, the pledgor has under Customary law some rights and duties. These include the right to deal with the property as an owner, the right of redemption and he is entitled to an account of profit by the pledgee.

(i) TO DEAL WITH THE PROPERTY AS AN OWNER

Unlike mortgage under the English law where the legal or equitable title is vested in the mortgagee, the title to the pledged property under the Customary law is vested in the pledgor. This is becuase, under native law and custom, the pledgee is vested with the possession and enjoyment of the property only. The pledgor, therefore, retains his ownership or title, and can exercise all rights which an owner can exercise except that he cannot repledge. This must necessarily be so because, the repledgee would like to go into possession which would ultimately conflict with the interest of the first pledgee. This is not possible, since the concept of equitable pledge is not available under the Customary law.

It was also said that the pledgor can sell the pledged property.[28] But this is rare. Under Egbura native law and Custom a pledgor cannot sell a pledged property. Because, an intolerant purchaser would not wait until the pledgor/vendor redeems the property before he goes into possession. Above all, what happens if the Vender/Pledgor cannot redeem the property as early as possible after the sale? It was said that there are many instances where Lands pledged could not be redeemed as a result of which the pledgees of such lands now claim the ownership of them.

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28. James, Ibd. p. 239.

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(ii) RIGHT OF REDEMPTION

One of the most important rights of the pledgor which he can exercise over the pledged property is the right of redemption. As it was stated earlier, it is an inalienable right of the pledgor to redeem his property at any time he wishes. This is expressed in the maxim once a pledge always a pledge. There are two meanings which have been ascribed to this maxim.

First, it is said that lapse of time, however long, is not a bar to the pledgor's right to redeem. In the case of IKEANYI V. ADIGHOGU,[29] the plaintiff had pledged a piece of land to secure a loan of 160 manillas worth of £1:6:8. They claimed that they were entitled to redeem it on payment of that amount. The defendants on the other hand claimed that it was a "showing" tenancy. The transaction took place at a time beyond human memory and the defendants had been in possession ever since. Mbanefor J. said,

> "A pledgor has the right of redemption and it does not matter for how long the land has been pledged, for, in native customary jurisprudence as in English law once a pledge always a pledge".

Also in AGBO KOFI V. ADO KOFI[30] certain lands were pledged in 1869 as security for the sum of 6/6d. In 1926, the pledgor brought this action to redeem the lands. The West African Court of Appeal (WACA) held that the pledgor's successors were entitled to redeem the lands after 57 years.

From these two decisions, can one assert with confidence that this maxim is valid for all times? Although the maxim has received some judicial recognition, but because of the nature of the customary transaction which requires no writing,

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29. /1959/ F.S.C. 5.
30. /1933/1 W.A.C.A. 248.

it is my view that the maxim operates subjects to some limitations. For instance, if land is pledged today and there is no written document to keep the transaction alive, after some years when the parties to the oral contract might have died, and all witnesses not alife. The successors of the pledgee may lay claim bona.fide that the land is theirs. In the absence of any document it would be difficult for the successors of the pledgor to prove that the transaction was a pledge and not something else. Under native law and custom, the situation described or contemplated above is forseable, and when it happens the maxim is defeated.

Secondly, this maxim also means that the right of the pleagor to redeem his property at any time cannot be fettered by any contract. If it is done, the contract will be declared null and void. Thus, in the case of DAPAH V. POKU,[31] a Coconut farm was mortgaged to secure a loan for £60. The agreement provided that the pledgor should recover the farm only after 13 years. After four years, the pledgor sought to redeem the land. The trial court held that the pledge must continue for the full 13 years. On appeal to W.A.C.A. this judgment was reversed. The Court observed that:

> "It has been argued for the respondent that the provision in Exhibit 'A' that the mortgagor was to regain possession of the farm at the expiration of 13 years is inconsistent with its being a native mortgage. One might, however, put it another way and say, if it is a native mortgage, any condition inconsistent with the native customary law would be invalid, in other words that the mortgagee could not defeat the fundamental principles of native law by making such a condition".

Inview of this decision a stipulation that the mortgagor should pay extra money on the money loaned would be inconsistent with the maxim. Thus, in the case of OKOIKO V.

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31. /1950/, Unreported, WACA decision; now reported in Oliennu, op. cit. 173.

ESEDALUE,[32] the plaintiff claimed the redemption of Omokpa land which was pledged by his grant father to the defendant's grand-fathers for three pieces of cloth which were equivalent to £15 or (₦30.00) in value in modern currency. The defendant who had earlier planted economic trees demanded £1,000 in compensation for the economic trees. It was held by the trial Court that pledged land is perpectually redeemable at no extra cost than was borrowed. It is submitted that such demand is inconsistent with the maxim, i.e. once a pledge always a pledge. This is because, if the pledgee should insist on extra cost and the pledgor fails to pay, the right of the pledgor to redeem his pledged property at his pleasure will suffer.

Under the customary law of the Alago, Agatu and Mada people of Lafia Local Government Area of Plateau State, if agricultural land was pledged and the pledgee had planted his crops, the pledgor cannot redeem it until the crops are harvested. If the pledgor takes steps to redeem the property when the crops are yet to be harvested (which is very seldom indeed) it is submitted that he would be made to pay for the crops.

Where economic trees are pledged, the pledgor has the right to redeem them at any time even if the pledgee has not harvested the fruits of the trees.

Also, where a residential house is pledged, the pledgor could also redeem the property at anytime. Under the Egbura native law and custom, houses are rarely pledged. In the past this was not possible because, the pledgee would not get any benefit since no body would take it for rent.

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32. /1974/3 S.C. 15.

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(iii) ENTITLEMENT OF AN ACCOUNT BY THE PLEDGEE

Under the traditional law, a pledgee is not bound to account for his management of pledged property to the pledgor.[33] This is because the pledgor pays no interest on the money borrowed. Secondly, the pledgee in possession is not bound to exploit the property in a manner so as to give him equivalent credit. However, in recent times, judicial decisions have shown that the judges in their characteristic way of law-making, have gone to change the position of a customary pledgee by imposing the duty of accountability only him. This, it was said, is based on the need to do justice and to see that an applicable custom conforms with its validity tests, one of which is that, it should not be repugnant contrary to natural justice, equity and good conscience.[34] The State of the law is that the pledgor is entitled to an account by the pledgee; a right which was achieved through long judicial develppment.

(3.) GIFT

A gift is the gratituous transfer of the ownership of land from the donor to the donee. It essential requirements are that it must be free from any undue influence, it must be voluntary and unbargained. Therefore, where a gift took place and it is proved that the gift was done involuntarily, or with coercion or bargain, it would be declared null and void.

However, in most cases, gifts have underlying motives. For instance, gift of land to a stranger may be done in order to reward him for his contribution for the progress and well-being of his host. Instances of these specific

33. Daapah V. Poku (Supra) p.22.

34. Kuahen V. Avose (Unreported, Supra).

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contributions may include a case where a stranger is industrious in the farm, or in appreciation of the stranger's military powers and assistance during the slave trade,[35] or he has been so transparently good and honest in his dealings with his host. Thus, in AGBLOE V. SAPPOR[36] a part of the family land was given as a gift to Sappor in appreciation of his generous efforts in redeeming family property which was pledged by a previous head of the family, who could not redeem it.

At times, a gift of land may be made as a form of beit to lure a stranger to live in a place.

(a) ABSOLUTE AND CONDITIONAL GIFTS:

(i) ABSOLUTE GIFT: A gift of land may be absolute or conditional. This may depend on the terms of the gift.

A gift is absolute when it is not dependent on any condition. Such a gift has the same legal effect with sale. That is to say, it confers absolute title or ownership of land with all its incidents.

In JEGEDE V. EYINOGUN[37] it was held that a family could make absolute transfer of its land by way of gift. This decision is in contrast with the decision in OLOTU V. DAWUDA[38] where it was held that native land cannot under any circumstances be transferred or given out absolutely. But inview of the Privy Council's decision in OSHODI V. BOLOGUN[39] and OSHODI V. DAKOLO[40] it is now a well established native law

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35. Agedegudu V. Ajenifuga /Unreported/ F.S.C./413.
36. /1947/12 W.A.C.A. 187.
37. /1959/4 F.S.C. 270.
38. /1904/1 N.L.R. 57.
39. /1930/2 All E.R. 1632.
40. /1930/ A.C. 667.

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and custom that family land could be transferred by any means absolutely on the concurrence of agreement of the principal members of the family.

In the Middle Belt of Nigeria, amongst the Tiv, Idoma and Igala of the Benue State, the Alago, Mada and Mijili of the Plateau State, absolute gift was known and practised and was used as a token of appreciation of some one's good deeds.

(ii) CONDITIONAL GIFT

A conditional gift is one where there is no absolute transfer from the donor to the donee. In otherwords, it is a temporary transfer of ownership with the grantor reserving the right of reversion. Its incident is that the grantee acquires the right of user which endures for specific or indefinite period of time and may be transferred to his descendants.

It has been argued whether gifts of land under native law and custom can be conditional. According to Dr. Musa G. Yakuba[41] there is nothing like conditional gifts. To him, all gifts of land under native law and custom are absolute and could not be recalled by the donor if donee subsequently misbehaves. He said once a gift was made subject to the good behaviour of the donee, it was no longer a gift but something else.

According to Olawoye,[42] a gift of land under native law and custom can be conditional "and where such is the case a customary tenancy is said to be created".

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41. See his Ph.D. Thesis (Unpublished) University of Birmingham (1980) Vol. 1 pp. 132.

42. Title to Land in Nigeria /1974/ Lagos, Evans Brothers Publishers, p. 44.

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Mr. Justice Ollennu in his lectures[43] declared that "a gift of land validly made is irrevocable".

But Bentsi-Enchill[44] holds a contrary view. He said,

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

According to this remark, if a donee does not behave in good manners to the donor he is liable to forfeit his gift. It was argued that most gifts under native law and custom fall under conditional gifts. This is because according to strict native law and custom, land cannot be given outrightly under any circumstances.

There is no definition of what amounts to good behaviour. But I strongly submit that it must be some behaviour which is acceptable to the grantor and which does not amount to depriving the grantor of his reversionary title. For example, under the Egbura native law and custom, if a grantee should commit adultery with the wife of the grantor or his near relation e.g. his brother's wife, or the grantor's father's wife, the grant would be revoked even if it was meant to be absolute.

Similarly an act of theft would not be regarded as good behaviour. Thus, where a grantee indulges in stealing farm produce from his grantor's farm he (grantee) would be told to quit the land even if the grant was made initially to be absolute.

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43. Principles of Customary Land Law in Ghana (1962) page 115.

44. Chana Land Law /1964/ London, Sweet & Maxwell page 366.

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hesitate to revoke the grant.

Where a gift is conditional, any breach of the condition may result into forfeiture of the grant. Thus, where a piece of land was given out for farming and the grantee turned it into a residential house, the grantee would be told to quit the land and to determine the grant as revoked.

In the Middle Belt of Nigeria, gift of land under native law and custom is a well and familiar practice within the Nupe, Egbura, Alago and Gade of the Lafia and Nasarawa Local Government Areas of Plateau State. The same practice is familiar to Tiv, Idoma and Igala of the Benue State. But it is done very sparingly and discriminately. From the research conducted, outright gift to a stranger is rare. In most cases gift of land are made to only relations who would not be entitled to land as of right. For instance, it is the habit of the Gwari people to move from their fathers house where they are entitle to a portion of land as of right to their mothers house where they are not entitled to land as of right to ask for a gift of land there.

A gift under native law and custom of the people of the Middle Belt needs not be in writing.[45] Consequently, most gifts are done orally. But they must be made in the presence of witnesses. Under the Alagos, Mada, and Mijili native law and custom, and of course, the Egbura's a gift

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45. Molomo V. Olushola /1954/21 N.L.R.I. Alake V. Awawu /1932/11 N.L.R. 39.

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to borrow land to plant rice which economic value has risen very astronomically of recent.

It is also very common to see farmers around Lokoja and Koton-Karfi in Kwara State borrowing marshy-lands for the purpose of planting paddy rice.

Population pressure may be a factor which will necessitate a community to borrow land from another community. Thus, the Mijili people with high population and all been devoted farmers have little land to go round all members of the community adequately. Therefore, they move to Doma South of Lafia to borrow land to farm.

Lastly, the infertility of the soil may force the owner of such land to borrow land which is fertile to farm. Thus, because of the hilly nature of Langtang Division of Plateau State, most of its inhabitants have been moving down to Shendam where land is fertile and suitable for the growth of yams, millet, and corn.

As regards consideration for the loan, there is no common standard. Sometimes money may be accepted in view of the present condition. But in the ancient times, consideration for borrowed land might take place in two respects. Firstly, the borrower might agree to surrender a proportion of his annual harvest to the lender. Secondly, the borrower might agree to work in the farm of the lender in lieu of the usual annual produce.[47]

Where land has been borrowed and the borrower could not effectively work it; what becomes the liability of the borrower? According to Elias,[48] the lender may recall off the land

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47. ELIAS, T.O. Nigerian Land Law /1974/ London, Kegan Paul & Routledge, p. 158.

48. Ibd. p. 158.

borrowed, and the borrower dipossessed of it and the deposit, if paid by the lender returned to him. This statement of the learned author is misleading, because, it tries to equate borrowing with hire.

Under the strict native law and custom of the peoples of the Middle Belt of Nigeria, a person who intends to borrow land does not need to deposit some money in advance.

Secondly, if the land borrowed is under utilised, it is not the concern of the lender. He can only recall the land if he (the borrower) has something to do with it.

Sometimes, the right of the borrower to the land borrowed may not include the right to reap the fruits of the economic trees standing on the borrowed land. Where this right is excluded, it is obvious that the borrower would keep off the trees and concentrate in cultivating it only. But a times, the borrower may be given the right to harvest such fruits and to share them between him and the lender.

Normally, borrowed land is tobe used for planting of crops which may be harvestable or lifted yearly. Thus, it is not allowed to plant economic treas on the borrowed land which would not be lifted at the expiration of the agreed time. Also, erecting of permanent structures on the borrowed land is totally prohibited under the Egbura native law and custom.

The incidents of borrowing land are that, the duration of the borrowing lapses as soon as the crop is harvested. Therefore, where the land was borrowed for the planting of rice, the interest of the borrower terminates as soon as the rice was harvested.

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6ti) SALE OF LAND

In the recent years one of the quickest and the simplest methods of creating a title to land is thorough sale.

By sale, we mean a permanent transfer of rights over land for a monetary consideration. However, the theory of Sale of land in the olden days was not known to customary law of the people of the Middle Belt. Therefore, all that was said in LEWIS V. BANKOLE[49] was true and co-terminus with the prevailing situations in the Middle Belt. In that case Speed C.J. said,

> "It is perfectly well-known that by strict ancient native law and custom all property was family property, and all real property was inalienable. Family property can be leased, though it cannot be sold by strict native law and custom even if all the members consented....."

To further support this contention of the inalienability of land under the customary law is the case of OKIJI V. ADEJOBI[50] which was dcided two decades ago. In this case the plaintiff averred that he bought the land in dispute from the defendant's ancestors 200 years ago. The defendant claimed that the land in dispute was a family land and based their ownership on tranditional evidence. The judge, Ademola Adetokunbo, C.J. of the former Western Region held:

> "Much as I realise how difficult it is to prove a transaction of this nature so many years ago, I do not believe the plaintiff's assertion that there was a sale. It is most unlikely 200 years ago that land would be sold at all. A stranger could be given land on payment of the usual tribute but an out and out sale was rare, if made at all".

On appeal to the Supreme Court, Brett F.J. delivering the judgment of the Court affirmed the trial court judgment without any hesitation. He further said,

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50. /1960/5 F.S.C. 44.

> "I am not prepared to dissent from this finding which is in accordance with the general trend of judicial decisions or dicta about the sale of land among the peoples of West Africa."

From these remarks one is put into a dilemma as to whether under strict native law and custom, sale of land was absolutely prohibited or there was no need for the sale of land in the past.

With regard to the former i.e. total prohibition of sale, it is submitted that the prohibition is based on heresy. For, it is not based on any religious belief or founded on any customary law. That is to say, there is no law which made it an offence to sell land. And one of the features of native law and custom is that it must not only be a custom but, it must have the force of law.

Furthermore, in order to substantiate this submission, it is important that we refer to the modern development brought into this area of customary land law. It is now a well established principle of native law and custom that land can now be sold, if the consent of the principal members have been sought.[51] This shows that, the sale of land is not totally prohibited. What is required is the concurrence of the principal members to make any sale under native law and custom valid and effectual.

Therefore, it is my contention that in the past, land was not a merchantable commodity and that was largely due to the fact that no need called for its sale. Nowadays, because of the introduction of cash economy and as the result of interaction with the people outside the Middle Belt, the

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51. Oshodi V. Balogun /1936/4 W.A.C.A. 1; Oshodi V. Dakolor /1930/ A.C. 667; Alade V. Aborishade /1960/5 F.S.C. 167.

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anarchronistic
~~anarchronistic~~ position that land was not saleable has been done away with. It is now saleable, only subject to one important condition, that, the majority of the principal members most have consented.[52]

In the Middle Belt sale of land is no more a new thing. It is done, especially in urban towns such as Makurdi, Otukpo, Gboko in Benue State and in Keffi, Lafia and Nasarawa in Plateau State. However, in the rural areas, the practice is rare.

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52. Ekpendu V. Erika [1959] 4 F.S.C. 79.

CHAPTER VI

APPRAISAL OF THE CUSTOMARY LAND LAW

1. INTRODUCTION

From the previous Chapters, we have seen a great deal of the operation of Customary land law of the proples of the Middle Belt region of Nigeria. The question which readily comes to mind now is: has the customary land law in the context of the present developments and the needs of the people served the purpose for which it is meant or not? This question is very necessary, if we have to define "law" in terms of its purpose or use. Since customary land law is the law which regulates customary land tenure, it is obvious that it has something to achieve, because it evolved as a result of the behaviouristic pattern of the people.

Therefore, in order to know whether the customary land law has served its purpose, it would be better, first and foremost, to examine the contributions it so for made for the progress and betterment of the people whose conduct (in relation to land) its supposed to regulate. It is after this that we can properly diagonose the problems with which Customary land law is facing. In the end, after the analysis of the problems, I will endeavour to make suggestions for the improvement of customary land law, if it will ever continue to exist as a law at all, in view of the present Land Use Act.

2. THE PRINCIPLE OF CONSULTATION

Under native law and custom, consultation is a cardinal principle governing alienation of family property. In other words the principle of consultation requires that every member of the family should have a voice in the management of family property. The ideal of this customary land law rule

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is that: firstly, it ensures fair dealings in the management of family property. That is that, everybody is given an opportunity to say his view or express his opinion in all matters touching the administration of property in the family.[1]

Secondly, it serves as a check and balance on the powers of the family head. Thus, if a family head should unilaterally dispose family property without proper consultation with the principal members or one of the principal members the aggrieved principal members or member has a right to challenge the exercise of the power of the head of the family for unilaterally disposing the family land.

Conversely, on the part of the family head, if the principal members should alienate family property without consultation with him, he can declare the alienation as null and void, and without legal effect.[2]

Thirdly, the principle of consultation serves to check fraudulent dealings in the management of family property. Because of this principle, a member of family cannot secretly or fraudulently effect any transaction affecting family property. If he ventures doing so, the transaction would be declared null and void. In this way, the principle of consultation acts as a device to check the excesses of the family head who may like to manage family property in a manner not benefiting the members of the family.[3]

In the whole, the principle of consultation is an important one in the management of family property. It ensures democracy, confidence and attempt to exclude any possibility of fraudulent dealings and related malpractises if observed very sparingly.

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1. Lewis V. Bankole /1908/1 N.L.R. 81.
2. Lukan V. Ogunsusi /1972/5 S.C. 40.
3. Salvador V. Salvador /1959/ L.L.R. 52; Odunsi V. Bolaji /1962/ L.L.R. 217.

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3. BALANCING OF INDIVIDUAL INTEREST WITH THE COMMUNAL INTERST

The balancing of individual interest against communal interest has been the key role which customary land law plays. This may be illustrated if we consider some prohibitions imposed on some communal lands. In the Middle Belt within the Egbura, Gwari, Gade, Afo and Agatu Communities, it is common to see areas or portions of land and forest not cultivated, normmally at the vicinity of each village. The usual reason for non farming on these lands and forests is always connected with taboos and superstitions. That the farming on these lands and forests will bring calamity and disaster or misfortune to the farmer who venture cultivates the lands. Or, the village community may suffer from the wrath of such behaviour.[4] Research conducted into this fact showed that these lands and forests surround some communal shrines and fetishes. The reason for prohibition of farms arround them is to keep them secret from women and children. Cutting of trees and grass in these areas are totally prohibited. In Ara Village, Nasarawa District, Nasarawa L.G.A. of Plateau State, the prohibition is so strict that if by mistake one fetches firewood from the prohibited lands or forests he would compensate his act by offering a goat and some pots of locally brewed bear to a shrine. Stories were told of several occasions of which the village was befallen with serious calamities of epidemic diseases due to the impunitive disobedience of the prohibition.

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4. COLE, W.C. Ibd. paragraph 37.

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The balancing of individual interest with the communal interest under customary law can be understood, when again, we carefully consider the principal objectives behind the concept of communal ownership of land. As the name implies, Communal lands, particularly in the Middle Belt, provide lands for all; where members of the community or village go to fetch firewood, to cut thatching grass, to fish or hunt. It provides a residual land for emergency need by a stranger or a community member, either to farm or build a house. Atimes some land which are lebelled communal lands are exclusively reserve for special purpose in time of need. In this way, the interest of a member is weighed against the interest of the Community. In most cases, the interest of the Community prevails when individual interest conflicts with the communal interest.

4. TRANSFER OF INTEREST

Yet, among the functions which customary land law performs is the controlling or restriction of transfer of title indiscriminately from one family or community to the other. For instance, customary land law prohibits indiscriminate transfer of land to a stranger. Moreover, the total prohibition of sale[5] of land in the olden days was a covertous attempt aimed at restricting transfer of land. Similarly, the total denial of ownership of land to slaves[6] or descendants of slaves, domestics and strangers is a clear manifestation of the restriction which customary law places on transfer of title.

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5. Okiji V. Adejobi /1960/ 5 F.S.C. 44

6. Henshaw V. Henshaw /1941/ 10 N.L.R. 65; Ebirikwu V. Ohanyerenwa /1959/ F.S.C. 212.

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The restriction of land to only community members in the past was necessary in the Middle Belt. It was the only asset on which every family depended for the growing of staple food. Any family which had no land or sufficient land was bound to labour for some landlords in order to secure load of it. Land, had very little economic value if compared with what is obtainable today, however, its importance was nevertheless recognized. Consequently, it was rigidly controlled and its transfer or alienation was impossible or very much restricted. It was because of this restriction that women in some Communities such as Alago, Agatu and the Hill Eggon have been denied outrightly ownership of land, and consequently they could not transfer them to their matrimonial homes.

5. SOCIAL SECURITY ASPECT

It was memtioned earlier on that the concept of communal ownership of land is communalistic and socialistic in pattern and philosophy. These concepts sprang from the nature and mode of life which the peasant farmers of the Middle Belt of Nigeria lead. The communal pattern of landholding evolved as a mean to check the hostilities of the strong communities against the weak ones who were being plundered, looted, extorted and exploited. Communal ownership of land therefore evolved in order to form a formidable fort against the menace of the invaders and thereby providing social security which could not otherwise be provided through individual mode of ownership. The bigger the Community or family the more secured it becomes. It is even believed that, the bigger the family is, the larger the farms will be and the more likelihood they will produce crops.

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As regards individual security, the concept of family ownership takes care of that. That is to say, family ownership provides assurance to members of the family in time of need and distress. A member may be saved from the wrath of sickness and other natural calamities such as drought, or poor harvest, by depending on other family members for his substance. In otherwords, if a family member is incapacitated to farm for one reason or the other, the responsibility of feeding or taking care of himself and his family will be born by other members of the family. Therefore, Customary land law in this form provides life assurance for individual member of the family.

In the past, old people in the Middle Belt had heavily depended on family life assurance. Even with the emergence of modern insurrance by Insurance Companies, the situation has not changed. In rural areas, family assurance in this manner, has been the major kind of security which many old men often resort to in time of need. A device which Customary land law still provides to forestal agony, distress and calamity at the time of dare need.

It is because of these noble and lofty roles which Customary land law serves that make it to be ever-enduring and ever-desiring by the peasant farmers despite the call on the legislature to give it the coup de grace.[7]

The ideals and glories which have been mentioned above about the customary land law were meant to meet the requirement of the simple, ordinary peasant farmer. This was possible in the past because, the society itself was not complicated. Above all there were few or no land transactions. With progress in the level of development and the

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7. Lewis V. Bankole /1908/ 1 N.L.R. 82 at p.83, Per Speed C.J.

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growing awareness in land transactions especially in the urban centres of the Belt, the timid ordinary customary land law is no more suitable. This is because it cannot satisfy the socio-economic and political aspirations of the communities. In short, customary land law in its unalloyed form cannot cope with the modern developments despite all the glories it possesses. Therefore, as a system of tenure, it is not self-satisfactory and complacent. In the rest of this Chapter, its deficiencies or demerits will be considerd.

6. INHIBITION OF INCENTIVE

Under native law and custom the rule which runs through the fabric of customary land tenure is that land belongs to the community, Village or family and never to an individual.[8] This principle is so well established that it has become the customary Common law of Nigeria. But the premises or the ground which it covers is gradually eroding. This is because, the principle which served the aspiration of the old peasant communities in the past is now seen as a clog in the wheel of development of the customary land law. To buttress this submission, the reasons are: Firstly, the Communal ownership of land militates against easy disposition and disposition, of course, is one of the essential characteristics of ownership of land. The require-ment of the concurrence of the village/family head with the members of the council of elders or the principal members of the family in most occasions is found to be inexpedient. This is so, even where there is a genunine reason which necessitates the disposition of communal or family land.

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8. Amodu Tijani's Case /1921/2 A.C. 399 at p. 444.

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In the past, when people hardly travelled outside their village, it was easy to assemble all members of family at a twinkle of an eye. But nowadays, it is not possible with the increased rate of mobility, peace, law and order that prevail within the Belt. Therefore, it is always difficult to gather members of the family for any decision affecting the management of family property. It is my submission that the Communalistic pattern of ownership militates against free transactions of land. It is because of this reason that the earlier generation of judges were unmistakably disenchanted with it and lost no opportunity in discrediting it and consequently advocated for its demise. In LEWIS V. BANKOLE,[9] Speed Ag. C.J. who was one of the most impatient critics of Communal ownership of land said,

> "The institution of Communal ownership has been dead for many years. I don't want for a moment to be understood to be speaking with any disrespect of the customs of your ancestors. There was much that was admirable and much which I hope will be retained for many years in the family system which they evolved, but it can hardly be denied that their ideas as to ownership of property were utterly unsuitable to modern requirements, that those ideas have been dying a more or less natural death ever since the people of this Country entered into commerce with European nations and that sooner or later either the legislature of the colony or this Court in the exercise of its equitable jurisdiction will have to give the coup de grace to the whole system."

This observation which was made about half a century ago is still valid at the present time. Communal ownership of land, notwithstanding its glaring social advantages, however, is fraught with economic problems which leaves much to be desired. More conspicous of these problems is that land held communally cannot be mortgaged to secure

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9. /1908/1 N.L.R. 81 at 83.

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credit for the development of it. This economic dis-incentive on various occasions has been criticised. It has been said to be responsible for the large tracts of land now lying waste and undeveloped. Professor Arthur Lewis[10] commented on the communality of land as an economic dis-incentive factor in the following terms:

> "The extended family system has tremendous advantages in societies living at subsistence level, but it seems not to be appropriate to societies which its economic growth is occurring. In such societies, it is almost a drag on effort. For growth depends on initiative and initiative is likely to be stifled if the individual who makes effort is required to share the reward with many others whose claims he does not recognize."

This remark, although it can be said to be over emphasized, in that, under the traditional system of tenure, a well affluent and easy-to-do family member can build a house for the rest of the poor members of the family to live in; but it has some ~~i~~orta of truth, particularly, in the context of the contemporary development and set up of the extended family system. In the Middle Belt, in large families, where communal ownership of land co-exists with communal labour or farming of land, the problem foreshadowed by Professor Arthur Lewis is always prevalent. It has been observed that some senior members of the family do little for the economic progress of the family. In short, they kill both the economic and the moral incentives of the younger members of the mamily. This, in some families has led to some members breaking away from the communal labour in the farms.

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10. Theory of Economic Growth /1955/ London, p. 114.

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Yet, another vehement and most bitter attack on the traditional land tenure system with regard to its economic unsuitability was made at a conference held in East Africa in 1956.[11] In that conference, the traditional system of landholding was cursed, condemned and described as unincentive for modern development. The conference observed as follows:

> "It may, by failure to provide adequate incentive to the individual to put effort or money in the land, militate against its conservation and development. It may owing to limitations of permanent cash crops, and generally to better farming methods. It may make it impossible for the farmer to raise loans on the security of his land for purposes designed to increase its productivity. It may, as scarcity enhances the value of land and an exchange economy begins to develop, place too great a strain on the public spirit for the traditional authorities charged with its allocations".

From the foregoing observation, it can be understood that communal ownership of land is devoid of economic as well as moral incentives. It kills the incentive of a dedicated and patriotic family member, Therefore, it is a wound against the general economic development of the family members.

On the otherhand, if communal ownership is viewed through its old spectacle, it would be found that, it has and has been serving satisfactorily the purposes for which it is required.

Firstly, communal ownership does not exclusively prohibit the individual members of a family from making use of the land to serve their economic needs. Thus, a member can alienate (though not absolutely) his interest in the portion of the land which is in his possession. He is entitled to

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11. Conference on Land Tenure in East Africa at Arusha, Tangayika, February, 1956; Cited by Dr. M.G. Yakubu /1980/ Ph.D. Thesis (Unpublished) University of Birmingham, at p. 216.

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retain all rents collected from buildings erected personally by him without any help either in form of labour or cash from the members of te family if he has planted economic trees, he is also entitled to reap them for his personal use without rendering account of it to the family.

Secondly it provides for a perpetual, and heritable holdings. And it ensures exclusive possession and user with reasonable security and tenure.[12]

Thirdly, the communal land tenure is communalistic and socialistic in concept. The fact that it does not place much emphasis on individual/or economic concept should not be seen as being imferior to the individual concept of landholding. Thus, Professor Oluwasanmi[13] remarked as follows:

> "The assumed superiority of individual right in land over communal ownership can be validated only when it can be conclusively demonstrated that the former has superior economic and social advantages that are lacking in the latter. Such conclusive proof of superiority is yet to be advanced by the advocates of indiviaual rights in land. Instead, it must be observed that communal tenure enjoys certain inherent social advantages that are absent from the individual form of tenure."

According to this observation, communal ownership of land has some social advantages which the individual ownership of land lacks. But does the communal ownership have economic advantages which the individual ownership have? It is my submission that economic advantages rather than the social advantages are the underlying principles of every land tenure law of every country. For instance, it is the ability to alienate land absolutely e.g. sell that has made

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12. Dr. M.G. Yakubu, Ph.D. Thesis 1980 (Unpublished) University of Birmingham, p. 223.

13. OLUWASANMI, "Land Tenure and Agricultural Improvement in Tropical Africa" [1957] Journal of Farm Economics at page 731.

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the value of land in recent times increased tremendeously in most urban towns of the Middle Belt. Land is wealth. And the ability to convert it into cash by way of absolute transfer has placed it over and above the customary tenurial system of Communal ownership which does not freely allow economic transaction of land.

Whichever way one sees it, it is worthy to mention the historical developments that preceeded the development of each system. While the communal system of tenure developed in response to meet the simple, ordinary requirements of the peasant farmer of growing his food crops to feed the teeming members of his family; the individual ownership of land stemmed from a capitalist conception with the economic objectives as its upmost interest.

7. SECURITY OF TITLE

Another serious and inherent problem which customary land law suffers from, is the problem of insecurity of title. This has arisen primarily because of one of the salient characteristics of customary law, namely, it is unwritten. This has in several cases been accorded judicial notice.[14] Even in modern times, with the arrival of writing, the situation has not changed at least. For, there is no law which makes it compulsory that contracts or transactions touching land under native law and custom must be done in writing or evidenced in writing.

In the Middle Belt, the story is not different. In most contracts affecting land, the only evidence available are those of communal or family tradition of ancestors

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14. Alake V. Awawu [1932] 11 N.L.R. 39; Ogunbambi V. Abowab [1951] 13 W.A.C.A. 222.

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setting on the land and the cause of its devolution or transmission ever since. Owing to the passage of time the evidence have lost their coherence. They have become concocted and adulterated. In most cases they were given to suit the interest of the party who requested such evidence to be given in proving his title. This was the situation in the case of INYANG V. ITA,[15] where his Lordship Berkeley J. had to caution that such evidence should not be relied upon or weighed very heavily. He remarked as follows:

> "A good deal of evidence was given by both sides on this question of native law and custom. This kind of so called expert evidence must always be treated with very great caution. The evidence of these experts is invariably coloured each by his own personal interests. The only way in which such testimony can be safely treated is to refrain from attemping to estimate individual credibility and to concentrate on drawing conclusions from the general trend of the evidence."

Therefore, under these circumstances one can not see very clearly the danger posed by insecurity of title resulting from oral evidence which are in most cases tendentious, dim and susceptible to failure. This has resulted into many cases of fraudulent sales of land. For instance, in the case of OGUNBAMBI V. ABOWAB[16] Verity, Ag. P. commented in a regretable manner as follows:

> "The case is indeed in this respect like many which come before this court: one which the family either by design or inadvertance sell or purport to sell the same piece of land at different times to different person..... The Olota family are alleged to have agreed to sell their land to the respondent's predecessor in title, to have received the purchase money and let purchaser into possession and then, in 1948, they cheerfully accepted a further sum of money from and executed a conveyance in favour of another purchaser". For more often than not they sell a law suit and very often that is all that is purchased.[17]

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15. /1928/ 9 N.L.R. 84
16. /1951/ 13 W.A.C.A. 222.
17. Emphasis added.

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8. BOUNDARIES

Another important aspect of Customary land tenure which has contributed to the insecurity or uncertainty of title is the problem relating to boundaries.

In the past, the common practice with the natives was that, whenever land was given either on loan, pledge or gift it had to be marked and defined. The normal method of coing this, was by pointing to some trees, hills, molehills, river-banks, streams, rocks and etc. at the four corners or the tract of land loaned, pledged or given as a gift. Whereas, in some cases the boundaries were often not defined. The borrower, pledgee or the grantee would only be told in an unspecified term that he could cultivate as much land as he could do. No reference would be made as to what exact portion of land was given.

The shortcomings with these forms of boundary demarcation were that, just like the oral evidence, with the passing of time, the memory of the people who fixed the boundaries would become dim and susceptible to failure. The trees and molehills would not be exactly identified. The parts of streams and riverbanks which were agreed to be the boundaries would not be exactly known. Since, these boundaries were not backed by any written record, consequently broubles had ensue either between the lender and the borrower or the donee and the donor or as the case might be. In some cases the trouble would be between the successors in title. Sometimes, these desputes would culminate into litigations before the Community head. However, among other problems, there always was the need to know what portion of land was given out as loan, gift or pledge with s p e c i fic i t y.

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In order to know this, resorts were always had by calling witnesses who were there at the time of the transaction to narrate what had actually transpired between the parties. Normally, the only evidence which could be available to the Community head would be those of the people who had not witnessed the transaction but were merely told by oral narration of what had taken place. This problem was in the past rampant with land alienated for the purposes of agriculture i.e. for cultivation.

In the modern times, in the Middle Belt, the practice has never changed significantly. In the course of this research, I saw a practice whereby a small portion of bush was left in between two adjecent farms to form part of the boundary between the two family lands in Toto District, Nasarawa L.G.A. In Riyom area of Barikin Ladi L.G.A. of Plateau State, what could be said to be a parmenant boundary is now practised by planting what is called "aduruku" trees in rolls in between farms which have been nicely planned and laid out. Sometimes, the boundaries in this area were marked by planting some shrubs which are ever-green always.

The problem of boundary is an important one in all matters relating to proof of title to land. Customary land law, unlike the English land law, is still very much lacking in finding a lasting solution to it.

However, inview of the demand for land in the past which was not as high as it is today, one will also find that the problem of boundary had never been so great and important as one would aspect / This is because of several reasons and among them are: Firstly, there was enough land for every member of the Community or family. Therefore, there was no

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need to dispute over land which would necessarily engender the problem of boundary.

Secondly, the population was sparse. Therefore, there was totally absent the possibility of having to dispute over land in respect of which boundary demarcation was important. It was rare under such circumstance for a family or members of the community to dispute over land. There was no need to demarcate lands with concrete becons, walls, or permanent fence particularly in lands earmarked for cultivation. In residential areas, however, permanent boundaries were and still common.

Thirdly, since most people in the past lived strictly according to ethinicity, they shunned any matter which could bring rancour and disunity among themselves. As a result of this, they had always come to reconcile in any case of dispute relating to land. The problem of boundary was therefore not taken very seriously.

In the present day, of course, the problem of boundary constitute a serious threat to insecurity of land. It has also been the cause of many litigations between communities and families in the Middle Belt.

9. ACCOUNTABILITY BY THE HEAD

In the past, profits which used to accrue from the management of family property were few or none at all. Actual cash profit was not available because of the absence of cash economy. Nevertheless, there were transactions such as loan and pledge from which profits were received in form of kinds. For instance, if a family had loaned its own portion of land to a stranger for agricultural purposes, the latter had to pay tribute or tithe at

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the time of the harvest of his agricultural products to the family head. Even where sylvan products such as palm-oil baobab, palm-kernels, shea-nuts, locust-beans and mangoes were sold, the head of the family was absolutely entitled to the retension of the proceeds which accrued from the sales of such products. He was not bound to share it with the family members.

Similarly, the head of the family enjoyed this privi-ledge even if the proceed arose from the sales of the agricu-ltural products which were jointly farmed and harvested by the family members.

In the recent past, even after the introduction of the cash economy in the Middle Belt, it was not strictly, a principle of customary land law, that the family head should account for his management of family property. In the course of this research, it was discovered that communities such as Bassa, Gwari, Gade and Egbura of Nasarawa Local Government Area of Plateau State knew no such Customary obligation which imposed on the family head the duty to render account of his management of the family property.

The reasons for the absence of this obligation are not far to seek. Firstly, the family head is recognized as the owner of the family property.

Secondly, it was part of the perquisites of his office to use and enjoy all benefits arising from his management of the family property.

Thirdly, the family head was responsible for the feeding, clothing, payment of taxes, payment of bride-prices and to marry for all male members of the family.

Therefore, the overall social welfare of the entire members of the family-whether male or female, an adult or

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minor was the primary duty of the family head. In this circumstance, the administration of the family property was for the benefit of the family members. The then family heads led very simple life, and took the interest of their family members to be upmost in their management of the family property.

However, the emergence of cash economy in the modern times coupled with the increased responsibilities, sophistication of life and the desire by most heads of the family to live beyond their means have made the principle of accountability very necessary in the management of family property.

The importance of this principle needs not be emphasised. It will check those unscrupulous family heads who may like to manage family properties just like their's. It will also infuse confidence in the minds of the members of the family, since every member could be sure that whatever the family head does in the course of his management he will be asked to render account of it.

Despite this modern innovation which is aimed at protecting and safeguarding the interest of the family members, the principle of accountability has not been without any short-coming. Firstly, the principle cannot be strictly and properly observed because most of the peasant farmers of the Middle Belt are illiterate. Thus, they don't have the rudimentary knowledge of book-keeping which is essential in maintaining accurate records of what transpired in connection with family property.

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Secondly, since the stool of the headship of families moves from one member to another, there is always the problem of accounting accurately what a successor took-over from his predecessor. This also is linked with the problem of records or documents which are not necessary in transactions affecting Customary law. Therefore, where a member is even literate he may willingly choose not to be recording his business in writing so as to avoid strict accountability.

The principle of accountability, therefore, is an important one. It ensures probity, frugality and scrupulousness in the management of the family property by the head of the family. However, it is my submission that Customary land law, is yet to provide satisfactory means by which the principle could be accurately and effectively applied.

CHAPTER VII

SUGGESTIONS FOR REFORM

1. INTRODUCTION

From the foregoing Chapters, I have tried to analyse the nature of customary landholding and its management. I have also endeavoured to examine the roles of customary land law and the extent to which it satisfies or fulfils these roles by way of critique. At this juncture, it is pertinent to highlight the various aspects of Customary land law which require some reform in one way or the other. I will not hesitate to sound a warning that these suggestions which I have proferred are not in any way exhaustive. In my view, these suggestions are the ones which we dire need in the Middle Belt in order to make customary land tenure system meet the socio-economic changes brought by modern developments.

2. SUGGESTIONS

(a) ALIENATION OF PROPERTY

It has been mentioned times without number that among factors which constitute formidable barriers against proper and effective economic use of land under native law and custom in the Middle Belt in particular and in the country in general is the rule of customary alienation.

It requires that alienation of family land by a family head without the consent of the majority of the principal members of the family is voidable.[1] While alienation by the principal members without the consent of the family is void ab initio.[2]

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1. Ekpendu V. Erika /1959/4 F.S.C. 79.
2. Lukan V. Ogunsusi /1972/5 S.C. 40, Agbloe V. Sapper /1942/12 W.A.C.A. 1871.

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Since the development of these customary rules of alienation, it has been found that the rules do not work well to facilitate the alienation of family property. It is tempting to suggest that since family property is the property of all members of the family, it necessarily means that, its alienation should be carried out by or with the approval of all or the majority of them. But practically, this will hardly facilitate dealings in family land. This is because often a family is made up of many members and it will undoubtedly be rather difficult to assemble all of them each time it is proposed to sell family land. For instance, some members may not be consulted by nature of their legal incapacity,[3] or some may be sick as a result of which he has left the family house and receiving treatment somewhere else, or because of some unavoidable circumstances some members may not be opportuned to attend a meeting scheduled to discuss matters affecting family property. These and other unforeseable matters may arise and all boil down to make the doctrine of concurrence uneasy. The law that the majority of the principal members[4] or all the principal members should concurr before any alienation is valid is not in touch with the reality or the possibility of everyday occurrence.

In order to play safe and to avoid family feuds, hatrate, beckering and discord which have characterised the alienation of family property, it is suggested that a committee to be known as the Family Property Management Committee be set up in all families. The committee should be charged with the responsibilities of managing the affairs of the family property. This is the surest way of alienating

3. MOGAJI V. NUGA /1960/ 5 F.S.C. 107.
4. Bello Adedubu and Anor V. Makanjuola /1944/ 10 W.A.C.A.33

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family property. This is because it will minimise frauds, and squables which do not augur well for a healthy and Stabe family cohesion. It should not mather whether the committee is made up of ordinary members alone or a combination of them and principal members.

The suggestion for the formation of a committee to manage family property seems to be the convenient and equitable arrangement for the disposition of family property. This is because, firstly, the intending purchasers or dealers would know for certain the persons to deal with in order to acquire a valid title.

Secondly, the family would cease to be menaced by the whims of its heads. In the Middle Belt, particularly in urban areas where alienation of property is daily increasing, there are waves of acts of mismanagement of family property by many a family heads who in most cases sit down and take decisions single-handedly in matters connecting with family property. Some of these family heads are so influential and forceful that they could not be challenged by members of the family. And any member who is so bold enough to challenge him may incurr the displeasure of the family head, a situation which no family member would like to find himself. Therefore, to avoid this situation, the suggestion for the establishment of the committee of managers of family property is inevitable.

It is hoped that through the judicial encouragement and the realization by the people of its merits, it will in future be the only method for the disposition of family property. After all, the most important attribute of customary law as a dynamic and flexible institution, is

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its adoptability to changing circumstances.[5]

Once such committee of trusted members is duly elected and given full powers, it should be incompetent for the head or any other member or members to validly dispose of family property. Any alienation by anybody other than the Committee should be null and void.

But one important snag which may likely bedevil this suggestion is that, it is not always that the members would concurr unanimously in their decision. If this happens, what will be the solution? It is my submission that under the principle of democracy the wills of the majority will prevail. Therefore, a sale by majority members will be valid. Thus in the case of ESSAN V. FARO,[6] a meeting was convened in which nearly all members of the family attended. In the meeting it was decided that the family should raise money by the sale of some of its properties, and a committee was appointed to consider the property to be sold. In the meeting some members dissented. It was held that the sale was voidable at the instance of the minority dissenters. As it was said already, unless it is proved that the majority members acted fraudulently or adversely to the interest of the entire members of the family, their actions should always be valid and should not be declared void or voidable, as the case may be, upon a flimsy claim of the minority family members.

(b) SECURITY OF TITLE:

In Chapter 6, we discussed the advantages and the disadvantages of the traditional system of land holding. One of the disadvantages, it was said, included inadequate

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5. EZEJIOFOR, G. Ahienation of Family Property in Nigeria /1974/12 N.B.J. page 55.

6. /1947/12 W.A.C.A. 135.

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security of title to land. This was because, under the customary land law. It is not compulsory that an agreement relating to land must be in writing or evidenced in writing[7] as it is the case under English law. In the past, this was satisfying because in the Middle Belt the land tenure system and the land use which evolved, was fashioned out to meet the need and conditions of a typical peasant and his subsistence economy. Land was then in abundance. There was no cash economy to necessitate land transaction; although transactions such as pledge loan existed. There were none or many greedy and unscrupulous land-lords and land speculators. Frauds, cheating, rack rents, profiteering were all absent in land matters. Consequently, land disputes were few if not none at all.

However, with the intrduction of cash economy which gave rise to the commercialization of land and land transactions, the uses of land have multiplied. The combined effect of this on the land is that, title to it has become risky and precarious, and, therefore, necessary to be protected and assured. It is in view of this that the suggestion for registration of title to land has become imperative on every land owning family and community.

The merits which are expected to be derived from this innovation by the peasants are: Firstly, it is an incentive for alienation. Anybody who deals in a registered property would do so with some degree of certainty and confidence, e.g. be he a purchaser or mortgagee.

Secondly, according to one point of view, the most effective means at our command for preventing land from

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7. Alake V. Awawu /1932/ 11 N.L.R. 39; Mogaji V. Olushola /1954/ 21 N.L.R. 1.

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becoming the inheritence of a paupa, or at least a poverty-striken, is to afford the greatest possible facilities for its conveyance from one party to another,[8] and such facility among other things, is the registration of title.[9] This means that, one of the advantages which canbe derived from registration of title to land is that the transfer of it from one land to another will be simple and easy. Moreover, since registration of title to land is aimed at making the title certain, a poor wretched successor in title can make use of the title to obtain credit for the development of the land.

Thirdly, it makes the title secured and ascertained. It reduces the amount of land disputes and litigations. In fact the lack of registration of title to land under native law and custom has been traced to be the root cause of a regrettable degree of loss and waste through litigation, difficulty of obtaining leases, and purchase. It is also responsible for the hampering of commercial development by its adverse effect on capital investment.[10]

The importance of registration of title to land under native law and custom , was stressed in the report submitted by the United Nations Housing Mission, when it visited Ghana in 1954. The report which is very expository and amply lucid is quoted in extenso hereunder as follows:

> "It has long been acknowledged that a serious need exists for clearing titles in certain areas of the Gold Coast and for instituting a system of land registration. Those reforms are essential to recon

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8. LIVERSAGE V., LAND Tenure in the Colonies /1945/ Cambridge, University Press, page 113.

9. Emphasis mine.

10. NWABUEZE, B.O. Ibd. page 619.

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> the rights of people to their land, to secure those who have purchased property against eviction and to assure people who built their home, that they can do so without feat or uncertainty. It has been iterated and reiterated that, only when a sound system for buying and selling property exists, will the fundamental wealth represented by the country's land be brought into use for the benefit of the people. All too often, though no one may be disputing ownership to land, the imputed owner is unable to establish his ownership, cannot borrow money with which to develop his land, nor sell it to those able to develop it. A legal mechanism able to define and record his interest is needed to enable him to bring his land into use.

The report further goes on to expantiate the evils and mischief of the current customary land tenure thus:

> "The evils and mischiefs of the current situation are known. They rise to obstruct important programmes involved with the country's growth. They loom in the conflicts between title holders in the rural areas and owners and tenants in the burgeoning cities. They affect large land owners and small. They have cast many persons into uncertainty as to their rights. Almost every phase of the housing problem which the team of United Nations Experts has explored has brought forth the uncertainties of land tenure as a primary obstacle. It has been emphasised in conferences with architects and builders have been obstructed in their operation; by small folk seeking to build a roof over housing loans or carrying out legislative policy; by those concerned with advancing the building and loan movement; and by local government officials".[11]

Similarly, in 1962, the Government of the defunct Western Nigeria, appointed a committee under the chairmanship of Dr. P.C. LLoyd to consider the registration of title to land in the Region. In its report, the Committee made the following observation:

> "The problem which arise from the uncertainty of title to land in the Region are too well known to need lengthy exposition. A man who wishes to purchase or lease land cannot find out who are the right people to convey it to him; many men buy their land twice from rival claimants or from two sections of a family. Having acquired the land a man is reluctant to develop it, being unsure of his rights to it. When he does take the plunge and build a house or plant permanent crops he finds that his lack

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11. Simpson Report, Ibd. paragraph 20.

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> of secure title prevents him from readily selling the property or from mortgaging it to raise credit for further expansion of his business. Well known is the unscrupulous debtor who has cited his house as security for a loan and who immediately defaults claiming, successfully, that the building is on family land and cannot, therefore, be attached for his debts. Once caught out, creditors are extremely reluctant to advance money to build a house on what seems likely to be family land, or to loan money with a house on family land as security. Creditors presume, therefore, that all land within the traditional built up area of a town is family land until the contrary is shown. Another serious aspect of the problem is that valuable land lies unused because it is not clear, by customary law, who are the persons empowered to dispose of it. These issues have contrinuously been raised before the Minister of Lands and Labour by credit organization, such as banks and building societies".

A Committee set up in Lagos to investigate the problems of the Nigerian business man reported that his inability to raise credit was one of his foremost handicaps.[12] The question now is, whether these situations that prevailed in Ghana, Western Region and Lagos are of common application to the Middle Belt of Nigeria? Their Lordships in the case of TAIWO V. DOSUMU[13] held that a trial judge in Nigeria would not be justified in treating decisions of WACA upon the customary law of certain communities in Ghana, as a basis for judicially noticing a similar custom in Lagos. Similarly, it was held in SANTOS VS. IKOSI INDUSTRIES LTD[14] that it does not follow that the custom that beach land belongs¾to the entire community is universally recognized.

But, from the quotations above, it may be established that the situation in Ghana is not different with Lagos. It is submitted that the situations described above are

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12. Report of the Western Regional Legislature, Sessional paper No.2, paragraph 2, cited in Nwabueze, Nigerian Land Law, p. 620.
13. /1966/ N.M.L.R. 94.
14. /1942/8 W.A.C.A. 29.

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similar and still prevail in the Middle Belt. Here only few titles under customary land law are registered. In this research, I visited the land Registry in Nasarawa L.G.A. of Plateau State. I found that there is no single title held under native law and custom which was registered. The same applies in Hafia town which is more cormopolitan in the area covered. From my investigations, one could conclude that, the idea of registration of family property held under customary law is not known to the peasant farmers of the Middle Belt.

From these reports, it can be understood that the absence of registration of land held under native law and custom has contributed not only to the economic drawback of many families who own large tracts of land, but it is also the root cause of many litigations for declaration of titles to land.

The indispensability of registration of title to land in every developing society could not be over-emphasized. Simpson in his Report stated that:

> "In a territory where settlement (i.e. adjucation) and registration of title was the invariable prelude to any development, and where in the big towns it has been so long established that it had come to be regarded almost as the natural order of things, it is very difficult to imagine how administration can proceed without it."[15]

This means that in a society, where there are adjucations arising as a result of land transactions, registration of title to land is inevitable. It does not only facilitate the quick dispensation of land matter e.g. declaration of title to land, it has also come to stay as part of the social phenomenon.

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15. Ibd. paragraph 19.

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Compulsory registration of every title held under the Customary law is therefore desirable. The usual method of establishing title to land by oral evidence is fraught with perils. First, as time goes on, human memory becomes dim. Secondly, atimes, the eye-witnesses who could have given useful evidence might have been dead. Therefore, the only evidence at the disposal of the court will be hearsay stories. Title to land of registered will be free from all these shortcomings. Once a title to land has been registered in a land registry, it will be there indefinately and can be consulted from time to time when any transaction affecting that land is to be made.

(c) INDIVIDUALIZATION OF LAND

It has been said several occasions that the nature of customary land-holding, namely, Communal or Family ownership is not conducive for modern development.[16] The alternative which is sought to replace this legendary system of tenure is the individual system of ownership. That is to say a system whereby an individual has an absolute title to aland and that title is supreme or not subordinate to any superior title. A system which vests an individual with proprietary rights rather than conferring usufructuary, possessory or occupational rights.

The call for individualization of land was born from the fact that the communal and family systems of ownerships constitute a stumbling block against economic development and use of land. Hence it was said that in the system of landholding which is based on a conception of a collective rights in the land, the most conspicous effect of economic

16. Per Speed C.J. in Lewis V. Bankole /1908/1 N.L.R. 82.

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development will appear in the progressive individualization of holdings.

Alot of advantages have been conceived for this much needed change. Some of them include the fact that alienation of land e.g. sale, mortgage, lease and etc. will not have to undergo such rigorous exercises of consent of both the principal members and the family head. That it is faster and more resolute for an individual to take decisions in connection with his land than a situation where numerous members have to be consulted and each with his varying interests to protect. That in the modern time, alienation of such land or property for the purpose of raising capital for its development is granted only on the basis of individual ownership; the facility which every land owner in the present industrial and commercial conditions cannot turn his back against.

Among the advantages which is expected to be derived from the progressive individualization of ownership is that, it acts as a catalytic to land development. Thus, the idea is that there should be a positive incentive to the improvement of fertility of land. This is most easily achieved where the occupier is also the owner, provided that ownership is real and not illusory. "The ideal of a farmer owning his farm, improve it by his own efforts in the certain knowledge that he will reap the full benefit of his own improvements and hand the property on to his descendants in better condition than he received it, is a tempting one: Therefore, the customary landholding where the occupier is not the owner goes to see the demise of this temptation.

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However, it is my submission that its undue acceleration may hasten the disintegration of the present social structure.[17]

Another matter which readily comes to mind in connection with this suggestion is the form which it will take. Certainly, individualization of land as I said earlier, entails proprietory ownership rather than possessory or beneficial user. If a radical departure from the ancient system is to be made in order to cope with the socio-economic demands of the present time, the form of individualization suggested is that which will take the form of proprietary interest or ownership. That is to say, that which excludes the reversionary interest of the community or the exercise of any control by it.

Advantages which may accrue as a result of the individualization of land are numerous. Firstly, transfer of land will be facilitated since the doctrine of concurrence of the head of the family with the principal members in any alienation will be eliminated or dispensed with.

Secondly, it is an inceptive for obtaining capital. As of now, credit is hardly given to holders of communal ownership of land. An individual with a valid title to land could obtain loan for the development of his land. This is an economic advantage which every person with land particularly in the urban areas in the Middle Belt is seeking for.

Thirdly, it is my submission that if land is owned individually, the management of it will be more effective or the decision touching the land will be quicker. In some families, there is no proper management of properties. This has resuited into the loss of heavy income. In otherwords,

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17 See Chapter 6, for the advantages of Communal ownership of Land.

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individualization of land will boost the morale of the owner who will be more concerned with the management of the property, while the communal ownership of land kills this morale.

However, where there is a considerable density of population, the growth of the individual ownership of land may lead to a situation where some people will be landlords and others landless. Ultimately this may lead to feudalism. But it is submitted that if the vast empty land in the Middle Belt is properly worked out and managed carefully, the call for the individualization of land will be free from this speculation.

(d) LAND DISTRIBUTION

It is often said that all land in Nigeria is "in fixed hands". This means that under native law and custom, there is no single tract of land which is not owned or rather which is ownerless. This is because, land under the customary law is held by communities, village or families spread in a territorial pattern. Thus, if one should take a work across the length and breadth of the Middle Belt one would find that he works from one territory to another and each territory is under the control of a chief or community who claims the ultimate right of ownership or title to it. This pattern of ownership does not permit the existence of ownerless land.

However, one conspicous problem of the customary land law is its distribution. There is no general rule of distribution of land within the area of family or village land. For instance, there is no specific number of hectres of land which an individual, family or community is entitled

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to hold. In the past in the Middle Belt, the amount of land which a family or a community could hold depended on how much it could fight wars and confiscate the land of its victims. Communities and families who succeeded in conquerring other families or communities ended up with vast land under their domain. This had resulted into the irregular distribution of land. It is a common feature in the Middle Belt to see a family with large tract of land stretching over several hectres unused, while others have little or not enough land at all. Alot of reasons may be advanced to support this irregularity in the distribution of land.

Firstly, the irregularity is linked with the complex agricultural technique of the natives with its many different types of cultivation and its irregular system of rotation of crops.[18] For example, a farmer may hold three or four large farms for the purpose of crop rotation. Although, the method of farming by crop rotation is an ideal one, it is only suitable where land is in abundance and the demand is law.

Secondly, every farmer owns a certain number of fields, some under cultivation while others are lying fallow - which he tries to distribute over different sites so that he can utilize different types of soil. In Lafia and Doma areas, farmers are in the habit of holding several patches of land for the growing of variety of crops. E.g. marshy land near water courses for the cultivation of rice, dry sand soil for the cultivation of ground nuts, beans and beniseed. While heavier soil is kept for the growing of yams, corn, maize and etc.

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18. NADEL, S.F. BLack Byzantium /1942/ Oxford, Oxford University Press, page 184.

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Thirdly, the problem of distribution of land is also as a result of the very method of settlement of the native communities, whereby land lying within the vicinity of villages are heavily concentrated and the land which lies far away of the villages within the range of 15 - 30 km are less farmed. This method of settlement is common in the Middle Belt areas except in Tiv land where there is a fairly spread of settlements here and there in a scattered form.

Therefore, because of these reasons, in many parts of the Middle Belt one sees tracts of land lying waste, neither inhabited nor cultivated but said to be owned by some Communites or families. Ironically, however, there are some group of people who suffer serious shortage of land for cultivation. For example, the Hill Eggons of the Akwanga Local Government Area and the Mijilis of Agyaragu Tasha of Lafia Local Government Area, all suffer from acute shortage of farmlands. As a result they have to travel to Doma-South of Lafia L.G.A., Loko and Uegi areas of the Nasarawa L.G.A. to seek land for cultivation.

Atimes, even within a village, some families have abundance of land lying idle. Whereas in some families there is scarcity of land due to the burging number of family members. From enquiries, it is discovered that some landlords are deliberately refusing to grant these tracts of land to their fellow townsmen who needed them badly for farming. The reason they often give for their refusals are that, it has become habitual with grantees to deny the title of their overlords, especiallly where the grantee is a wealthy and influential person.

Secondly, where there is a denial of title by the grantee, they said, the ultimate place to settle the

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dispute is the court of law. This, the people said, they dreaded very strongly since it will involve waste of money and their valuable times. Therefore, the safest course is to leave the land idle with the hope that if the members of the present generation cannot use the land their children, grandchildren or greatgrand children will one day use the lands.

Inview of the foregoing, it is suggested that there vast, idle and unoccuppied tracts of land and forests should be surveyed and their owners contacted so that they can be used for agricultural resettlement schemes. Under this arrangement, communities whose areas are over-crowded due to burging population, or communities whose areas are naturally not suitable or fertile for agriculture can migrate and settle in these vast and empty lands. Already, one such agricultural resettlement had since been established in 1949 in Jema'a, in Kaduna State now. There what happened was that a small group of families from the village of Zawan near Jos, now Plateau State indicated their willingness to migrate to the suitable area near the Jos - Wamba road in Jama'a District in the Southern part of the present Kaduna State. The Emir of Jama'a granted the use of the land in the first instance and allowed the settlers to remain as a separate Birom Village subject to the District head of Jama'a District, but independent of the Village Head in whose area they had settled. The area was since declared a resettlement area under Regulation No.1 of 1950.[19]

If this suggestion is accepted, the advantages which will follow are numerous. The resettlement schemes will

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19. MEEK, C.K. Land Tenure and Land Administration in Nigeria and Cameroons /1957/ London, Her Majesty's Stationery Office, p. 299.

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provide fertile virgin lands of the Middle Belt to those farmers who wish to move from the congested and deteriorating farmlands of the region to the schemes. For instance, the Hill Eggons of Akwanga Local Government Area whose farmlands are naturally not suitable due to its rocky nature, can easily move to the resettlement schemes which could be established in any part of Lafia Local Government Area which has fertile virgin land for farming.

Similarly, the Mijili people, who due to congestion do not have enough land to farm, and are now drifting to the Southern part of Doma, and Nasarawa can do so more easily and legitimately.

At this time of our development, when agriculture is been given the utmost attention it deserves, it is depressing to see vast, idle uncultivated tracts of land. The availability of land is one of the necessary ingredients for the successful implementation of the policy of self-sufficiency in food production. The Middle Belt is blessed with this ingredient. Therefore, no effort should be left in dislodging the effort of those who hold land and cannot make use of them and would not let others who want to make use of them do so with ease.

(e) THE CHOICE OF FAMILY HEAD

Earlier on, in Chapter Two, I have analysed who, the family head is, his responsibilities and obligations. Also I have considered the problem associated with his choice. The suggestion which I intend to give here is that, where due to some cogent reasons, a family decides not to appoint a management committee but to retain a family head, the stool of the family head should hot devolve automatically.[20]

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20. Lewis V. Bankole /1908/1 N.L.R. 82.

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The creteria for the choice of family head, I submit should include among other things, his ability to make the best use economically, of the family property. He must be a dynamic person. He also must not be too old and conservative as not to know the value of having such a property or how to deal with it. The choice of a person who understands the economic value and the commercial nature of property would help to make maximum profit from the property. Also it will facilitate the implementation of any useful reform e.g. registration of family title. Only a dynamic person conversant with modern transactions in land would care to see that every inch of family property is used for the benefit of the family. In the Middle Belt today, the problem facing many families, particularly those in urban areas is the lack of knowledge of how their family properties can be utilized for the benefit of the family members, economically. As such, the land owned by such families has not in any way being used to improve their standard of living. Therefore, with the help of a family head who is able to manipulate the management of family property efficiently, such verse and empty lands can be alienated to those who needed them, thereby, deriving maximum economic profit.

(f) THE ACCOUNTABILITY OF THE VILLAGE/FAMILY HEADS

We have seen that the responsibility of managing communal land under the traditional law is vested in the village head or chief. This is because, he has charge of all land in his territory and he is to some extent in a position of a trustee and as such holds land for the use and benefit of the Community.[21] This necessarily means that,

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21. Amadu Tijani V. Secretary Southern Nigeria /1921/2 A.C. 399.

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the village or family head is bound to render account for his management of communal or family property.[22]

Naturally, the Middle Belt region is blessed with natural resources such as forests, with plenty economic trees like raffia, palm trees, iroko and mahagony trees. The Belt is also bleassed with rivers and streams which are great sources of fish. In addition there are vast tracts of land with economic trees like mangoes, banana, locust beans trees, and baobab trees just to mention a few. Most of these resources are found on communal lands and are reaped or harvested by the Village head or chief.

Under the Egbura native law and custom, the village head in the past would harvest all that were on the communal land. He would call the members of the council of elders to share the produce among themselves. By this way, he was managing the property for the benefit of the members of his village or community. But now, this practise has stopped and died a natural death. But the village heads have continued to reap these sylvan produce for their own benefit only. No body seems to bother at all, about what happens to benefits which accrue from such management. Consequently, in the Middle Belt today, one hardly sees a village head or chief who accounts for his management of communal land. It is suggested, therefore, that an efficient management system of communal and family properties should be evolved in the form of Management Committee to be called "Management Committee of the Communal/Family Property" for each village and family. It shall be the responsibility of this Committee to render account of its management to

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22. Archibong V. Archibong /1947/ 18 N.L.R. 117; Odunsi V. Bolaji /1962/ L.L.R. 17.

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the Community or family, periodically.

The advantages which will accrue from this suggestion is needless to be emphasized. Firstly, it will bring to an end the menace of the Village or family heads who use Communal/Family property to the detriment of other members of the Community or Family.[23]

Secondly, it will minimize family feuds that normally threaten the stability and healthy relationship that exists among family members.

Thirdly, it will reduce to the bearest minimum the number of frauds, and litigations which often result into colossal waste of family money.

Although, this suggestion may be considered as a usurpation of the powers of the village and family heads who occupy traditionally cherished and covetous positions; it is submitted that the establishment of an independant body to shoulder the responsibility of the management of family property is the only way out from the current practice of mismanagement and abuse of that office by village/family heads.

The economic advantages which this suggestion will further yield are obvious and do not need any lengthy exposition. For, at this time of economic rescesion, when nearly all the state governments are finding it hard to pay the salaries of the Primary school teachers, let alone to execute some capital projects, the proper management of communal property could be a good source of revenue which could be used to re-building some dilapidated schools, repairing of some broken chairs or building of a town hall.

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23. Salvador V. Salvador [1959] L.L.R. 52.

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At this time when palm-oil (popularly known as red oil) has become a scarce and precious commodity in this country, the proper management of oil-palm trees in areas like Otukpo and other local government areas of Benue State, for instance, could fetch huge amount of money for the benefit of the peasant farmers.

3. CONCLUSION

From the foregoing discussions about title and management of property under native law and custom of the peoples of the Middle Belt of Nigeria, one can understand that, in the Middle Belt, the often quoted maxim that under Customary land law, land belongs to the Community, village or family and that the concept of individual ownership is foreign to native idea is still in full force. This maxim has been so well established that it has become the common law of the peoples of the Middle Belt. In otherwords, the general Customary rule is that land is owned in communal or family bases. Throughout the length and breadth of the Middle Belt of Nigeria, except in urban centres like Makurdi, Lafia, Otukpo, Gboko, Suleja, Keffi, just to mention a few, land is held by villagers or families as a corporate entity. In these urban centres, individual ownership of land is raring its head gradually. But in the main, the predominant holdings are of the nature of communal or family ownership.

I must reiterate that under native law and custom, individual farming is not the same with individual ownership of land. Views have been expressed in certain quarters, that the practise whereby members of the same family farm individually is the same with individual ownership of land.

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This, I submit is a misconception of what individual ownership of land means under native law and custom. The fact that an individual member of the family has volted out of the rest of the family members and has established his farm at the other part of the family land cannot be said to be individual ownership. In my view, this is an individual farming or labour on the communal or family property. The owner of the farm has absolute right to what he grows on the farm. But the title to the land or property still remains in the family or in the community. And therefore, under this circumstances it cannot be called individual owership of land. This is the practice that predominates in all parts of the Middle Belt.

In Chapter one of this dissertation, it was submitted that the problem of whether the maxim quicquid plantation Solo, Solo cedit applies under native law and custom or not is still a matter of conjecture. Looking from the arguements for and against the maxim, and the trend of the latest judicial decisons, perhaps, the better position is that the maxim applies. But this does not mean that it applies rigidly or inflexibly. Thus, under native law and custom, if a portion of communal land has been granted to a member or family, the grantee acquires a more-or-less absolute title in perpetuity. However, this is not the case with family property. Normally, the title to family property is vested in the family as a whole, in a corporate entity. Therefore an individual has no separate portion which he can point at as his. If he developes the portion given to him, he is entitled to make use of that development. But as soon as he dies, the title to the property reverts to

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the family as a whole. His children cannot claim absolute title to that property, although in most cases they will be allowed to make use of the property in the same way as their parent did, if circumstances permit. The absence of absolute right to that portion of the property and the development thereon, pre-supposes that the land and the development attached to it are the properties of the family.

Therefore, the division into what is naturally found on the land and what is artificially brought on the land does not atimes provide sufficient grounds to determine whether the maxim is part of the native law and custom or not. For instance, if a tree is naturally found on the family land, it means that, that tree like the land on which it is attached is a family property. The title to the tree is vested in the family because it is the family who owns the land to which it is attached. On the other hand, if the tree was planted by an individual member of the family in the portion of family property given to him by the family, has that member any right to uproot the tree when he is no more in possession of that portion? The answer is obviously negative. As soon as the tree has been planted, it assumed the character of family property. The interest of the planter is only usufructuary, which will last during his life-time. As soon as the planter dies, his children, and if he has none, all members of the family will inherit it. Under the Egbura native law and custom, even if the children of the planter are alive, the interest in the tree devolves to the whole members of the family. This position of the law is the same even if a building was erected on the family land.

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With regard to the management of communal land, in most villages, the chief is the manager. He allocates, collect tributes or rents, taxes, and oversees that land under his domain is intact - it does not pass to another village or community unjustifiably, He is also, his community's representative in all matters touching family property outside his community.

However, in most villages and communities the management of communal property leaves much to be desired. For instance, all over the Middle Belt, Communal lands are not properly managed and the benefits accrueing from such management accounted for. Apart from the fact that communal lands have served as residue of lands from which every body has access to fetch firewood, to fetch thatching-grasses, to fish and to hunt, little economic consideration has been given to it. In other words, the ample resources and raw materials that exist in some communal lands have not been properly managed and accounted for. There is no single district in the Middle Belt where sylvan products are collected, processed sold and the proceeds used for the benefit of the people. Therefore, as far as the management of communal property is concerned in the Middle Belt, it is unfortunate to say that everything is in shamble.

But the management of family property is more efficiently and properly done, although it is not without some problems. The general rule is that, a family property belongs to the whole members of the family. And that each member has the right to a portion of the family property; has the right to income arising from the management of family property and the right to have a say in the management of

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family property. It is found in the Middle Belt that these rights are not exercised equally by all members of the family. For instance, despite the progress made in the modern time to accord women with their rights and positions in the society, in some communites such as Alago, Agatu and Eggon, women cannot be heads of the family. Above all they cannot inherit land left by their parents. In most occasions, all matters relating to land are dealt with without consulting the female members of the family. The attitude of relegating women to the background in all matters touching family property should better be stopped. This is because, it is contrary to natural justice, equity and good conscience.

Similarly, in the management of family property, the slaves or the descendants of the slaves have little or no say in the management of the family property. This is because, they are considered not to be blood members of the family. Their interest atimes is treated with naivity. Nowadays, once it canbe traced that a person is a descendant of a slave, notwithstanding his level of assimilation into the family he will be disassociated from the management of family property. Although slavery and slave trade have been abolished long time go,[24] but in the Middle Belt today, the social stigma which it carried with it is yet to be forgotton or regarded as a thing of the past.

With respect to minors although they are not consulted in the management of family property, but their interest is always taken care of in all matters involving alienation of family property. In the Middle Belt within the Mijili,

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24. See Slavery Abolition Ordinance, 1916.

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Egbura, Agatu and Gwari Communities, if a portion left by a decea ed parent of a minor is not in anyway needed by any member of the family, the portion will continue to be fallow until the minor has become an adult in which case he will automatically take possession of the portion. Equally, in the management of the estate of the deceased parents, the interest of the minor is paramount.

Strangers are not members of the family. Therefore, in all matters concerning the management of family property, their consultation is not needed. But sometimes, advice could be sought from a stranger, in a matter affecting family property, particularly if he lives harmoniously with the blood members.

In the Middle Belt, in the past, transactions touching land were few or none at all. Today, although land transactions are few they are entered into from time to time. In urban centres like Makurdi, Otukpo, Gboko, Keffi, Lafia, Suleija and Lokoja, sale of land has almost come to be recognized as a natural phenomenon. But then, most of the transactions are still made under native law and custom. They are not made in writing in most occasions, or evidenced in writing as it is required by the English Law.[25] Loans and pledges are still very popular.

As far as the security of title is concerned, in the Middle Belt, recourse is normally had to the customary evidence in proving title to land when there is a dispute. That is to say proof of title to land is always done by oral evidence. This is because of the absence of documents which could be tendered as evidence of title. In short, in the Middle Belt, one hardly sees a customary right of

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25. See Statute of Frands, 1677.

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occupancy been registered in any registry. It is submitted that the idea of registration of title of property held under native law and custom is not known in the Middle Belt.

Customary land law being the law which evolved to serve the needs of the peasant farmer has its advantages and disadvantages. It is communalistic in nature. This feature has enabled it to provide social and individual securities. Communal land has always served as a residue of land which could be allocated to a member of the Community in time of need Therefore, it is rare to see a family or a member of the family or community without land completely in the Middle Belt.

Because the traditional landholding is communal in nature, it has always served as a social security for those who could not work on the field to earn a living because of their old age or ill-health. It also provides reliefs and mitigate rancour which might be caused because of natural disaster such as drought or infertility of soil. Whenever any of these calamities has befallen on any family member, the communalistic and socialistic pattern of the traditional land tenure enables the rest of the members to shoulder the responsibilities of the person affected by sharing with him the farm produce of the otherr members who have not been affected. In the Middle Belt today, it is this type of social security which the communal land tenure provides that made the lives of some old men tolerable and soothing.

However, customary land law has not been without some shortcomings in the context of economic and social conditions of the contemporary Middle Belt. It has been found that Communal ownership of land militates against alienation or

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easy disposition of land which is a pre-requisite for the proper economic use of land. This drawback is attributed to the customary land law which requires that a valid alienation can only be made when there is a concurrence of the family head and the principal members of the family. A condition which in the modern time cannot be easily met.

Furthermore, communal landholding lacks incentives - whether economic or moral incentives. A careful perusal of the system shows that, the absence of security of title has been the underlining factor for the absence of large scale land transactions. Since most tracts of land are held under native law and custome which requires no evidence in writing, most peasants in the Middle Belt are legally handicapped to mortgage their lands to secure loan of money from finance institutions and societies. The facility which cannot be dispensed with, inview of the present economic development which land has an important role to play.

Recently, communal ownership of land has been found to be killing the moral incentives of some family members, particularly where communality of land co-exists with communal labour or farming. In the Middle Belt it is traditional to see several members of a family farming together on the family land. Under this practice it has been discovered that, some members of the family especially the family heads, are in the habit of travelling from one place to another without concrete reasons. Therefore, they don't engage in active farming. This has caused some dedicated, hardworking family members to volt out of such group farming because the activities of the family heads, are morally depressing.

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Inview of the inadequacy of the customary land law to deal with the demands and challenges which the modern socio-economic developments have brought, it is submitted that the future of customary land law is bleak, despite its socialistic and communalistic advantages.

Finally, it is submitted that the problem with the title and management of land in the Middle Belt of Nigeria is that of the tenure system itself - i.e. communal holding. No other suggestion can be helpful in so far as the root cause remains unchanged. And since the system has become so firmly established, it is hoped that as the society becomes more complex and progressive, the need for the existence of the system will fade way. Consequently, it will be replaced with a better system capable of accomodating new challenges and developments.