



# **CONTRACT REGISTRATION AND PERFECTION.**

**The Legal Basis for Issuing and Using Warehouse  
Receipt/Warrant (Negotiable/Non-Negotiable) As  
Security for Trade Finance-Issues/Options Under the  
Nigerian System**

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**CONTRACT REGISTRATION AND PERFECTION: THE LEGAL BASIS  
FOR ISSUING AND USING WAREHOUSE RECEIPT/WARRANT  
(NEGOTABLE/NON-NEGOTIABLE) AS SECURITY FOR TRADE  
FINANCE-ISSUES/OPTIONS UNDER THE NIGERIAN SYSTEM\***

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**Summary**

We have carefully examined the law and practice relating to warehouse receipt/warrant as collateral security for financing commodity trade. In this connection we review some of the various devices evolved through the ingenuity of lawyers to see whether the legal basis of the warehouse receipt/warrant lies therein. It was discovered that some of the rules are applicable. It was also discovered that within the meaning of S.1(4) of the Factors Act 1889, warehouse receipt/warrant is accorded the status of document of title but was not recognized as a negotiable document of title by any legislation. This imposes limitation on the use of warehouse receipt/warrant as collateral security for financing commodity trade. We have suggested that legislation should be put in place to recognise warehouse receipt as negotiable document of title and this will aid rapid development of secondary market for financing agricultural produce with warehouse receipt/warrant playing a major role.

We discovered also that the issue of registration, perfection of security interest and priority are complex and confusing and sometime unclear we have therefore suggested legislation along the line of United State's Uniform Commercial Code to put sanity into the system. The present practice of using tripartite warehouse agreement with detailed clauses on the rights and duties of the parties, we find to be unsatisfactory and have suggested its replacement by security agreement and financing statement and the right and duties of the parties to be spelt out in legislation. There are many statutory provisions in various legislation which are relevant to operation of warehouse receipt/warrant

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but which need to be put together for easy access and enactment of some other additional legislation to enhance and sustain the integrity of the system.

For all of the above we have suggested a comprehensive codification of the law.

## **Introduction**

Credit creation for financing commodity trade became important strategy with the collapse of produce marketing boards<sup>1</sup> in the 80's as a result of the liberalization of government policy. The sudden change in policy without any alternative replacement in place denied the agricultural sector the much-needed financial assistance, which led to confusion and destabilisation in the sector. The result is that agricultural producers explored other possibilities of credit creation for the finance of their trade. The traditional credit facilities of mortgage of real properties,<sup>2</sup> chattel,<sup>3</sup> pledge,<sup>4</sup> and charges<sup>5</sup> were considered inherently cumbersome, inadequate and too complex for their operations. Consequently the idea of warehouse receipt/warrant as security for commodity trade became very attractive.

In Nigeria, warehouse receipt/warrant is used to raise credit from the Banks to finance commodity trade yet the practice lacks statutory backing. This underscores the urgent need for a legislative intervention to control and regulate the practice of warehouse receipts/warrants as security for loan and such matters as classification of warehouses, rights and obligations of parties, warehouse receipts/warrant, registration and perfection of security documents, insurance and realization of security in case of default among others. Since the main focus of government economic policy is liberalization, enabling financial environment should be created for the growth of the economy, the way this can be done in the agricultural sector is for the sector to have access to credit facilities and this can be done through warehouse receipts/warrants. It is pertinent to

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mention that agriculture, which used to be the main stay of Nigerian economy up to the early 70's now accounts for less than 10% of the national revenue. There is therefore the need to reverse the situation.

The paper carefully examines the various points highlighted above and offers suggestions for reform.

### **Types of Warehouses**

Warehouses can be classified into four categories;

- (1) **Independent warehouse:** This is a public independent warehouse where the owner acts only as custodian of the agricultural products stored in the warehouse and has no interest in the products.
- (2) **Field Warehouse:** Here the public warehouse company leases property for storage from the depositor/producer. The warehouse company must maintain a complete control of the property, properly demarcate the leased storage property and there must be a clear notice that the property is operated by the public warehouse. It must be clear that the depositor/producer is not connected with the operation of the warehouse.
- (3) **Subsidiary Warehouse:** This is a warehouse, which is wholly owned or controlled by a parent organisation, which owns the goods stored in the warehouse.
- (4) **An Owner-Operated Warehouse:** This is a warehouse operated by the owner as auxiliary to his principal business where he stores his products as well as those of the public.

It is relevant to state that Banks prefer warehouse receipt issued by independent and field warehouses. This view received support from learned editors when they said.<sup>5a</sup>

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“The early case law on field warehousing accepted the arrangement so long as certain basic requirements were met. *Umon Trust Co. v. Wilson* established that a good faith transfer of inventory to an independent warehouse conducted on the borrower’s premises was a sufficient change in possession to justify issuance of valid warehouse receipts and therefore was not in derogation of the rights of competing creditors. The warehouse receipts retained their efficacy even though the motive of the bailment was admittedly the acquisition of pledgeable documents not storage. The bailee’s economic independence was often said to be essential for the pledge to be valid . . . banks would probably not be willing to forego the advantage of an independent guardian of their interest.”

The operators of the warehouse issue warehouse receipt/warrant to depositors, which are used to finance commodity trade. This can be an effective means of financing commodity trade if there exist an effective legal framework for its operation. A system that allocates rights and liabilities and protects the parties, such a system exist in the USA,<sup>6</sup> Canada<sup>7</sup> and India.<sup>8</sup> Here in Nigeria, for commodity financing reliance is still placed on the common law and equitable principles and statutes scattered on the statute books. The ingenuity of lawyers has led to the creation of some security devices through which financing commodity trade are conducted. We shall now consider these securities devices as background to our topic.

## **1. The Pledge**

In *Halliday v. Holgate Willes J.* described<sup>8a</sup> ‘pledge’ as follows –

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“There are three kinds of security, the first a simple loan; the second a mortgage, passing the property out and out; the third, a security intermediate between a loan and a mortgage – viz, a pledge – whether by contract a deposit of goods is made security for a debt and the right to the property rests on the pledge so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt and until the debt is paid off the pledgee has the whole present interest”

This was the earliest form of security. The creditor took possession of the debtor's goods as security until the debtor paid the debt. The idea was that if the debtor was allowed to remain in possession after granting security over his goods; other creditors might be led to lend money on the belief that the debtor was still the owner of the goods. Common law then regarded possession by the creditor as essential for a valid security interest. It is interesting to note that mortgage of land was in the nature of pledge, the mortgagee taking possession of the land until payment. However, the practice developed in the 16<sup>th</sup> century of leaving the mortgagor of land in possession and this was also achieved for the mortgage of goods two centuries later.<sup>9</sup> Subsequently, there was further development which increased the scope of the pledge to include not only goods but document of title to goods and instruments, embodying a money obligation<sup>10</sup>. Common law developed to the extent that physical possession of the goods became unnecessary, constructive possession through the debtor or third party was sufficient.

The pledgee has limited interest in the asset; his possession is notice of his interest, which makes negotiation of that interest unnecessary. In the event of default the pledgee has the power to sell the goods but the pledgee must give reasonable notice to the pledgor,

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although what is reasonable will depend on the circumstances. Thus Sterling L.J. explained in *Diverges v. Sander man Clark & Co.*<sup>11</sup> as follows–

“According to these authorities<sup>12</sup> it would seem to me that when no time for payment has been originally fixed, then, before the power of sale can be exercised notice is to be given to the mortgagor and default must be made by him in payment after such notice. What this notice is to contain is nowhere defined, but it must, of course, be a notice that is in all respects reasonable regard being had to the circumstances of the case. A notice demanding payment of an excessive sum has been held to be bad: *Piggott v. Copley*”

### **Trust Receipt**

When goods are pledged, the pledgee/lender (usually a bank) may have to release the goods to the pledgor/borrower for purposes of sale or manufacture. Since possession is vital to the efficacy of a pledge, the protection of the interests of the parties became necessary. This was done through trust receipt whereby the borrower/pledgor acknowledges that the goods and the proceeds of sale are held on trust for the lender/pledgee. Thus in *Re David All ester Ltd*<sup>13</sup> such arrangement was made between a bank and its corporate customer. On the liquidation of the company, one of the issues for determination was whether the trust receipts were valid against the liquidator; it was argued that the trust receipt should have been registered as charges under the Companies Acts. Holding that the Bank’s right did not arise under the trust receipt but under the original pledge, the trust receipt being a mechanism under which the customer derive authority to release the goods on behalf of the pledgee bank; Asbury J. explained.<sup>14</sup>

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“In my judgment these letters of trust do not fall within the Bills of Sale definition at all. The pledge rights of the bank were complete on the deposit of the bills of lading and other documents of title. These letters of trust are merely records of trust authorities given by the bank and accepted by the company stating the terms on which the pledges were authorized to realize the goods on the pledge’s behalf. The bank’s pledge and its rights as pledgee do not arise under these documents at all but under the original pledge: see *Re Hardwick exp. Hubbard*.<sup>15</sup> The bank as pledgee had a right to realize the goods in question from time to time and it was more convenient to them as is common practice throughout the country, to allow the realization to be made by experts, in this case by the pledgors . . . These letters of trust really create no mortgage or charge on book debts in the true sense of the word at all. The bank had its charge before those letters came into existence. The object of these letters of trust was not to give the bank a charge at all but to enable the bank to realize the goods over which it had a charge in the way in which goods in similar cases have for years and years been realized in the city and elsewhere”.

Accordingly a valid pledge followed by a trust receipt require no registration as charges.

## **Lien**

A lien is the right to retain property belonging to another person until certain obligations have been performed. In some cases the lien is exercisable over all goods in the licensee’s possession, and such liens are

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termed general lien and are enjoyed by solicitors,<sup>16</sup> bankers<sup>17</sup> factors<sup>18</sup> and stockbrokers.<sup>19</sup> In most other cases lien is a particular lien only entitling the lienee to retain property in respect of which the obligation of payment arises.<sup>20</sup>

### **Charges**

A charge creates encumbrance on the property of the debtor, it does not involve transfer of property or possession. It gives the creditor right to realize the property and apply its proceeds to pay the debt it secures.<sup>21</sup> A charge can be created over any class of property whether real or personal, tangible or intangible, present or future. A fixed charge attaches on its creation and prevent the chargor from dealing with the property free of the charge, a floating charge on the other hand floats over a class of assets acquired by the chargor from time to time. The chargor is free to deal with such assets until the charge crystallizes, when all dealings are subject to the charge.

### **Bills of Sale**

In S.4 of the Bill of Sale Act 1878,<sup>22</sup> Bill of Sale is defined as including “. . . bills of sale, assignments, transfers declaration of trusts without transfer inventories of goods with receipt attached thereto or receipts for purchase moneys of goods and other assurances of personal chattels and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt and also any agreement whether intended or not to be allowed by the execution of any other instrument, by which a right in equity to any personal chattels orto any charge or security therein shall be conferred . . . “

As can be seen, there is no principle linking the various instances of bill of sale, they are just mere catalogue of interests. Similar view can be expressed of the numerous exceptions to the definition, which include a wide range of business instruments used in a fast moving commercial

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world. Among the excepted instruments are documents such as bills of lading and delivery orders and warehouse receipts and warrants.<sup>23</sup> The definition of “personal chattels” is not straightforward either.<sup>24</sup>

The Bills of Sale Act is very cumbersome archaic and difficult to operate. It makes elaborate provision for registration of certain categories of documents. While registration affords protection, non registration renders the transaction void. Third party creditor is also protected from being deceived by a secret and unrecorded transaction, between the parties to a bill of sale. The Bills of Sale Acts and Laws make it difficult to take security over the mobile assets of partnership and sole traders such as revolving assets like stock in trade.<sup>25</sup> Cases where the outright transferor retains possession are covered by the legislation, it thus excludes common law lien, pledge and transactions involving choses in action.<sup>26</sup> Since the legislation deals with documents and not the transaction itself parties may escape the effect of the legislation by making their arrangement informal. There are provisions in other legislation which fills these gaps. One of such legislation is the Property and Conveyancing Law of Ogun State, which require that any disposition of an equitable interest in property must be in writing signed by the person disposing or his agent.<sup>27</sup> Further the Bankruptcy Act.<sup>28</sup> protects creditors and bonafide purchaser<sup>29</sup> in the event of insolvency of the debtor.

### **Company Charges**

The Companies and Allied Matters Act makes provision for registration of charges. A registrable charge which is not registered within 90 days of its creation is void as against the liquidator and the creditor of the company. The list of registrable charges include a charge to secure issues of debentures, a charge on uncalled share capital of the company, a charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale, a

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charge on land, a charge on book debts of the company, a floating charge on the undertaking or property of the company, a charge on calls made but not paid.

Registration of charges enables creditors to assess the credit worthiness of a company before extending credit to such a company. Again, the ingenuity of lawyers to sidetrack some of these protective legislation by skilful documentary drafting was demonstrated in the case of *Welch Development Agency v. Export Finance Co. Ltd.*<sup>30</sup> which concerns financing of overseas trading in software produced by Welch manufacturer. There was a master agreement whereby the manufacturer sold its computer software to the financier. The manufacturer, acting for its undisclosed principal, the financier sold the computer software to overseas buyers. This was challenged by Welch Development Agency and the court declared the arrangement void on the ground that the transaction amounted in substance to a charge void for want of registration under the English Companies Act 1985.

On appeal, the decision was reversed by the Court of Appeal holding that the arrangement was a genuine agency agreement even though its main purpose was the provision of finance to the manufacturer. It is pertinent to note that the arrangement was structured to avoid all contact between the financier and the overseas buyers. The arrangement was limited to goods that complied with the sale contract and the statutory implied terms of merchantable quality and fitness for purpose. The manufacturer was also to pay the proceeds of sale into a special account of the manufacturer by the financier. This decision weakens the registration of charges provision in the English Companies Act. The question was asked whether if the arrangement had been made by an individual, he would have been required to register it under the bill of Sale Act. Although the question was not directly answered by the court, the financier made the point that the arrangement would not have been registrable since the arrangement

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involved future goods which do not come within the definition of “personal chattels” capable of complete transfer by delivery.

### **Priority Under the Existing Law**

Priority of competing interest in personal property is governed by the rule in *Dearle v. Hall*<sup>31</sup> which runs thus:

“Where the owner of an equitable interest in pure personality creates more than one incumbrance on it, the priority of the incumbrances does not depend on the dates of the creation of the respective incumbrances but on the dates in which the trustees received notice of the incumbrances, subject to the qualification that a later incumbrancer who has notice of an earlier incumbrance at the date of taking his security cannot obtain priority by being the first to give notice to the trustees.”

The fact of the case simply put is that Zachariah Brown was entitled to some fund under a will which he assigned to A, then to B and finally to C. In determining the priority of the assignees, the court held that the assignee who first gave notice of his assignment to the trustees of the will gained priority over all the other assignees.

Similarly in the case of statutory assignment, the law requires the assignee to give a written notice to the debtor/trustee to gain priority. Accordingly, if there are successive assignments of debt to several assignees, priority will depend on the order in which written notice is received by the debtor/trustee. We shall see later in this paper whether these rules are applicable or even adequate in resolving issues of priority among warehouse receipts/warrants holders.

### **Warehouse Receipts/Warrants**

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Warehouse receipts/warrants are instruments for trade financing. There are two types: negotiable and non negotiable. They are issued by the warehouse company to depositors of stored produce/commodity. Warehouse receipts/warrants are issued by the warehouse company and are evidence of the possession of the stored produce/commodities. This receipt/warrant is used to raise loan facilities from the bank. A tripartite warehousing agreement is prepared; parties to the agreement are the bank, the depositor and the warehouse company. The terms of this agreement, often detailed vary according to the nature of the transactions and parties to the agreement are governed by the terms of the agreement.

Using warehouse receipts/warrants as collateral for loan raises the issue of confidence and integrity of the system. The bank must be assured of recovering its loan at the end of the transaction. This means that the produce/commodity must be stored in safe warehouse, the receipts/warrants must not understate or overstate the quantity of the stored produce/commodity and should be available in case of enforcement. This calls for adequate rules and regulations to govern the operation. The present practice whereby the rights and the obligations of the parties derive largely from contractual undertaking is not adequate enough.

### **Warehouse Receipt as Document of Title**

S.1(4) of the Factors Act 1889 defines a document of title as

“A document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize either by endorsement or by delivery the possessor of the document to transfer or receive goods thereby represented.”

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Examples of document of titles are (1) Bill of Lading (2) Dock Warrant (3) Warehouse Keeper's Certificate and (4) Delivery Order.<sup>32</sup> And by S.62 (1) of the Sale of Goods Act 1893<sup>32a</sup>, document of title to goods has the same meaning as it has in the Factors Act. However, warehouse receipt/warrant is not recognized under the Nigerian Law as a negotiable document of title and so suffers crippling limitation. But in the United States of America, uniform commercial code gives recognition to the warehouse receipt/warrant as negotiable document of title. Since the warehouse receipt/warrant is an evidence of possession and control to the stored produce, banks accept it as such and extend credit facility accordingly. Thus once a lender/bank grants credit facility to a storer/borrower on the security of stored goods, the lender/bank has security interest in the stored goods.

### **Creation of security interest**

This involves complete transfer of ownership in the case of mortgage or delivery of possession in the case of pledge. Possession is essential to the creation of pledge. The pledgee must have possession, which must be lawful. A pledge can also be created by constructive delivery. Thus a pledge can be created by the pledgor depositing with the pledgee a document of title to the goods. But the only document recognized for this purpose at common law is the bill of lading though other documents have been recognized by custom or legislation<sup>33</sup> otherwise such a deposit will only create pledge of the document. One other significant point which is relevant to our discussion is where a third party bailee holds property for the pledgor, or pledge can be created by the pledgor ordering the bailee to hold the goods to the order of the pledgee and the bailee then attorns to the pledgee. Thus owners of goods store them in a warehouse, he can make a valid pledge of them by giving the pledgee a delivery order provided that the order is acknowledged by

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the bailee's attorning to the pledgee. This forms the legal basis of warehouse operation.

Again a valid pledge can be created over goods, which remain in the physical possession of the pledgor by the pledgor attorning to the pledgee so that he makes himself a bailee of the goods for the pledgee. In cases where lender/bank to which goods are pledged need to release them to the borrower in order that they can be sold or used in manufacturing, the procedure evolved is that of trust receipt whereby the borrower/pledgor acknowledges that the goods and the proceeds of sale are held in trust for the lender/pledgee. This procedure is applicable in Nigeria as well. Indeed, most of the tripartite agreement involving the release of goods to the borrower's use contain this procedure.

A security interest is a right given to one party in the asset of another party to secure payment or performance by that other party or a third party.<sup>34</sup>

### **Attachment of Security**

For a security interest to attach three conditions must be fulfilled namely that there is an agreement between debtor and creditor that the interest should attach, the debtor must have a present interest in the asset or power to give the asset as security and finally there must be some current obligation of debtor to creditor which the asset is designed to secure. Attachment occurs when the three conditions are fulfilled unless otherwise agreed. In the Nigerian context, the storer/borrower is the owner of the stored commodity while the lender/bank's interest in the stored commodity is to the extent of the credit facility granted to the storer/borrower. The security interest attaches when the security agreement is executed by the parties.

### **Perfection and Priority**

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Security interest must be perfected in order to make it effective against third parties. This involves performance of some acts, which puts third party on notice of the security interest. Such notice may be given in one of three ways; by taking actual or constructive possession, by registration, or filing and by notice to the debtor or fund holder where the asset is a debt or an interest in a fund. Any of these notices perfects the security interest against third party. While registration is purely statutory, the other two are common law development.<sup>35</sup> The rule in *Dearle v. Hall*<sup>36</sup> which has been discussed earlier in this paper governs priority of competing interests in pure personality,<sup>37</sup> where an assignee who gives notice of his assignment gains priority over an earlier assignee who does not give notice and subsequent assignee who gives notice. Similarly registration of some security agreements gives priority to the secured party.<sup>38</sup> The register will disclose the number of interests created in respect of each asset and this being public document will constitute notice to the whole world. This will resolve the issue of priority among competing interests in the debtor's asset. It is pertinent to state that a perfected security interest holder gains priority over trustee in bankruptcy if the security is perfected before the filing of the bankruptcy petition.<sup>39</sup> Similarly a perfected security interest gives priority to the secured party over a third party to whom the pledgor/borrower has sold the property.

As we have seen earlier in this paper, trust receipt or warehouse receipt is not registrable either under the Bill of Sales Acts/Laws or Companies and Allied Matters Act,<sup>40</sup> although security agreement may be registrable where the security is realty under the Land Instrument Registration Laws and Companies and Allied Matters Act and in some cases of mortgage of chattels under the Bill of Sale Act/Law. But only non possessory security interests are required to be registered.<sup>41</sup> This is to guard against the appearance of unencumbered ownership created by the debtors continued possession of assets over which he has granted security.

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It must be observed that the present position in regard to registration/filing as a method of perfection of security interest is totally unsatisfactory because of the multiplicity of registers and sometimes uncertain effect of registration and the lack of a rational policy underlying the sanctions for non-registration.

### **Legal Issues**

The various types of warehouses have been discussed earlier in this paper. It is apparent that banks prefer warehouse receipt/warrant issued by independent warehouse and field warehouse because of their independence, which ensures fair treatment of the parties, engenders confidence and enhances integrity of the system. But these warehouses can only issue non-negotiable warehouse receipt/warrant. This is because Nigerian law does not recognize warehouse receipt/warrant as a negotiable document of the title.

The depositor/borrower then pledges the receipt/warrant with bank/lender for credit facility. The three parties enter into a tripartite agreement. By virtue of the pledge of the receipt/warrant and the taking of the loan, the bank/lender becomes entitled to the stored produce. Of course, if the borrower liquidates the debt, the matter ends there. But in some instances, the depositor/borrower may default. It is here lies the problem of recouping his loan. What level of protection does a security interest give a lender and third parties? It is necessary to distinguish between two relationships that of lender to the borrower and that of transacting parties to the outside world. Here the concept of attachment and perfection, which has been explained earlier, is helpful. Where the security interest has attached the lender will be able to take full control of the secured property and sell it to satisfy the debt. However, attachment alone may not be sufficient to protect the lender against rights of third parties who in the mean time may have bought these secured property without knowledge of the security interest of the lender.

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The third party buyer therefore takes free of security interest as a bona fide purchaser of legal estate for valuable consideration without notice of the security interest. This underscores the importance of perfection of security interest. Of course, the buyer is still contractually bound to repay the loan and may also be liable for damages for breach of security agreement. The loan remains unsecured. Where the security interest is perfected, this constitutes notice to the whole world and a sale of the secured property will not affect the security interest even if the property has been sold and become unidentifiable the security interest will attach to the proceeds of the sale.

In regard to security interest, commingled goods as part of an undifferentiated bulk deserves special treatment. In some warehouses, grains from numerous depositors are commingled. In such a case, a depositor is only entitled to a certain amount of grain equivalent to the amount of his deposit rather than the actual grain deposited. The question may be asked whether the depositor can give effective security interest to a bank in such a situation. Under the sale of Goods Act 1893<sup>42</sup> a purchaser of specified quantity of a bulk of goods is not deemed to have acquired title to the goods until the portion purchased has been identified and appropriated into the contract of sale, since security interest can only attach to specified goods, it cannot attach to an undifferentiated right to a portion of a bulk. Similarly a mortgage of undifferentiated goods is not possible since mortgage involves transfer of title and a borrower cannot transfer title to an undifferentiated good.

The existing law does not recognize warehouse receipt/warrant as a transferable document of title. Yet the attractiveness of a mechanism for security credit is premised on whether the law recognizes it as a transferable document of title. In the United States of America<sup>43</sup> and India<sup>44</sup> warehouse receipts are recognized by law not only as transferable but also as negotiable document of title, which makes it possible for trade financing in the primary and secondary markets to be fully

developed. Here, a warehouse receipt/warrant is not only transferable but confers upon the transferee a direct interest in the stored goods free of any outstanding claims. On the other hand, the rights of the transferee of a non-negotiable receipt is not more than the right of the transferor which may be defeated by the sale of the stored goods to a bonafide purchaser of the legal estate for valuable consideration without notice of the transferee's right. In Nigeria, unlike U.S.A. and India there is no legislation recognizing warehouse receipt as a negotiable document of title, banks accept it for credit purposes. This explains why the tripartite agreement evidencing the loan contains elaborate clauses to protect the interest of the bank. Legislative intervention in this area becomes necessary making warehouse receipt not only transferable but also negotiable.<sup>45</sup>

### **Rights and Obligations of Parties**

It is the duty of the warehouse man to store the goods in the warehouse and keep them safe, insure and deliver them on demand to the bailor or to his order.<sup>46</sup>

The warehouse man must take reasonable care of the stored goods and he will be liable for negligence for loss or damage to the stored goods if he cannot explain loss or damage to the stored goods. But it is possible for the warehouse man to exercise due care yet the goods may still be lost, destroyed, or damaged. In an American case of *Procter & Gamble District Co. v. Lawrence Am. Field Warehouse Corporation*<sup>47</sup> where plaintiff sold vegetable oils to Allied Crude vegetable Oil refining Corporation pursuant to an arrangement whereby the plaintiff shipped oil to defendant's field warehouse for storage pending its resale by Allied a nonnegotiable warehouse receipt was issued by the defendant in the name of the plaintiff covering the oil. Allied went bankrupt and failed to pay for the oil. When the plaintiff claimed the oil from the defendant warehouse man most of it had disappeared and the defendant could not explain how the oil disappeared.

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It seems that some of the oil might have been stolen before it ever reached the defendants tank yet the court imposed liability. The warehouse man is liable for misdelivery or non delivery of the stored goods because these constitute breach of his basic obligation to deliver the goods to the person entitled under the warehouse receipt.

A breach of duty may result in civil or criminal liability. Suppose a warehouse company releases stored good to the storer without instruction from the lender/bank, the warehouse company is liable for breach of contract entitling the lender/bank to damages. If the warehouse company falsifies warehouse receipt/warrant the provisions of the Criminal Code will apply or if the stored goods has reduced in quantity through the negligence of the warehouse company, the warehouse company will be liable to pay damages for the tort of conversion.

A tripartite warehouse agreement may provide for exemption from liability but an exemption, which amounts to fundamental breach of the warehouse agreement, cannot be relied on. Thus where one of the servant or agent of the defendant deliberately disregards one of the obligations of the warehouse agreement by stealing the goods and preventing them from being delivered to their owner<sup>48</sup> committed a fundamental breach, which goes to the root of the contract. S.91 of the Ports Act,<sup>49</sup> exempts the Nigerian Ports Authority from liability for loss, misdelivery or detention or a damage to goods delivered to or in the custody of the authority except when such loss, misdelivery or detention or damage is caused by want of reasonable foresight and care on the part of the authority or any servant of the Authority. In the case of *Nigerian Ports Authority v. Ali Akan & Sons*,<sup>50</sup> Ports Authority sought to rely on this provision. But the plaintiff contended that the provision does not reverse the common law position, which place the onus of proof of the duty of care on the bailee. This contention was rejected by the Supreme Court, which held that the onus was

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shifted to the plaintiff to establish want of reasonable care and oversight on the part of the authority or its servants in order to deprive it the protection afforded by the section.

A practical illustration is a case, which happened recently<sup>51</sup>. Company A, a bank, company B a cocoa producing company and company C a warehouse company based in Lagos entered into a tripartite warehousing agreement with a clause limiting the liability of C. B had obtained a credit facility from A to finance the export of cocoa. By the terms of the tripartite agreement B was to deposit cocoa for export in C's warehouse and C was to issue warehouse receipt/warrant in favour of A to cover the cocoa stored in the warehouse. The cocoa was to be exported only after A had given its approval while the proceeds of sale was to be paid into a domiciliary account opened for that purpose which was controlled by A. C released cocoa to B without the approval of A. B sold the cocoa and diverted the proceeds leaving a huge amount of money outstanding on the credit facility. In an arbitration proceedings, C admitted its liability and paid damages to A.

In a developed system, a purchaser of a warehouse receipt who takes by due negotiation gets the basic rights of the bailor against the bailee, namely the right to have the bailee take reasonable care of the goods and the right to have him deliver on demand and gets title to the document and title to the goods, since the law recognizes transfer of the receipt as the mode of transferring title to both the warehouse receipt and the goods it covers. This of course, is in the case of negotiable warehouse receipt. It is to be noted that a good faith purchaser of such a receipt who takes by due negotiation cut off nearly all outstanding equities and claims of prior parties both to the receipt and the goods it covers.

A purchaser may be a purchaser of non-negotiable warehouse receipt. Here, the purchaser acquires against the transferor the right, which the transferor has to demand the goods from the bailee but the transferor may change his mind after the transfer and give delivery instruction to the bailee inconsistent with the transferee's right and if

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this is carried out by the bailee, the transferee will be left with no right against the bailee.

A pledgee/lender of warehouse receipt relies first on his borrower's reputation and promise to pay the loan and then on the goods covered by the receipt. In the case of a negotiable warehouse receipt, if the pledgee takes it by due negotiation and takes a valid enforceable and perfected security interest in the document, he acquires right superior to all possible third parties. In the case of non negotiable warehouse receipt a transferee takes the receipt subject to defect in title and defences to which a pledgee of negotiable documents is subject.

### **Tripartite warehouse agreement**

This is an agreement entered into by the lender/bank storer/borrower and the warehouse company. As it has been mentioned earlier in this paper, it contains elaborate clauses setting out the rights and obligation of the parties to the agreement, creating interest of the lender/bank in the stored goods.

Is tripartite warehouse agreement registrable? The main mechanisms for registration are Bills of Sale Act<sup>52</sup> Land Instrument Registration Law,<sup>53</sup> and companies charges.<sup>54</sup> It is not registrable under the Land Instrument Registration Law because the interest created is not derived from realty, but it may be registrable under the companies charges if a company has used its asset to raise credit facilities. It is also not registrable under the Bill of Sale Act/Law since the interest created by it is non possessory. In any case, the concept of perfection of security interest by registration is not clearly defined under the Nigerian law. This calls for legislative intervention to clarify and determine the scope of registration as a means of perfecting security interest.

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## **Recommendation**

It is clear from the above that warehouse receipt/warrant is not a negotiable document of title. This has imposed limitation on its use as collateral for commodity trade financing. It is recommended that there should be a legislation recognizing warehouse receipt as a negotiable document of title. Such legislation should allow easy transferability of warehouse receipt/warrant. This will not only create a sound base for primary and secondary market, it will enhance and sustain the integrity of the system.

The system of registration of security documents is archaic, cumbersome and very complex. In the fast economic world, a simple system of registration, which will be easily accessible, is needed. It is recommended that local Registries in major economic towns should be established for registration of security documents. Each local Registry will have a register for registering security documents. Simple registration form should be designed for this purpose. This is linked up with perfection of security document and priority. Once the security document is registered, it should gain priority not only over an earlier unregistered security document but also over subsequently registered security document and all other parties interested in the stored goods or produce covered by the warehouse receipt/warrant and in the case of liquidation by the storer/borrower or warehouse company or warehouse owner, a warehouse receipt/warrant holder should have priority over other creditors. The concept of attachment of security interest should also be adopted. We suggest that legislation should provide for automatic attachment of a negotiable warehouse receipt for a specified period of between 15 – 30 days after the security interest might have attached if one has possession of the warehouse receipt/warrant.

Because of the confusion and uncertainty of the tripartite warehouse agreement, it is recommended that this practice be

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discontinued and replaced by system adopted in the United States Uniform commercial Code of having security agreement and financing statement, registration of which will perfect the security interest.

It has been observed that the rights and obligations of the parties to the tripartite warehouse agreement are based on contractual undertakings and common law principles, it is submitted that this is not right; it is therefore recommended that the rights and obligations of the parties should be spelt out clearly in a legislation; particularly forgery of warehouse receipt/warrant, liability of the issuer of warehouse receipt/warrant for damages caused by non-receipt or misdirected stored produce/goods. There are existing legislation covering some of these areas scattered all over statute books, there is need to bring them together in a codified legislation being suggested.

With statutory recognition of warehouse receipt/warrant, already recommended, as a negotiable document of title, very transferable, a sound foundation is laid for operation of secondary market financing of Agricultural stocks. Once this is in place, stored agricultural commodity can be financed through secondary market using bankers and trade acceptances. Having regard to all the above recommendations, we suggest a codification of the law, which will embrace the above suggestions.

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## FOOTNOTES

1. Commodity Boards Decrees No. 29 of 1977 Cap 58 Laws of the Federation of Nigeria 1990 which established Commodity Boards abrogated State marketing Boards. The commodity Boards were dissolved in 1986 as a result of the structural Adjustment Programme.
  2. Conveyancing Act 1882; Property and Conveyancing Law, Cap 100 Laws of Ogun State 1978. Similar Laws exist in some states of Nigeria.
  3. Bill of Sale Act 1878 and 1882; Bills of Sale Law, Cap 11, Laws of Ogun State 1978. Similar Laws are contained in the Laws of some States of Nigeria.
  4. Ibid.
  5. Part VII Companies and Allied Matters Act Laws of the Federation of Nigeria 1990.
  - 5a. See Financing Inventory Through Field Warehousing, Yale Law Journal Vol. 69 p.663 at pp.671-672.
  6. United States Uniform Commercial Code.
  7. Canadian Warehouse receipt Act 1989.
  8. Warehouse Acts of various states in India.
  - 8a (1848) L.R. 3 Exch 399 at 302.
  9. See Goode, Commercial Law p. 7112.
  10. Ibid.
  11. [1902] 1 Ch. 579 at 593 (C.A.)
  12. Re Morrit Exp. Official Receiver (1886) 18 Q.B.D. 222 (C.A.); Re Hardwick (1886) 17 Q.B.D. 690 at 698 (C.A.)
  13. [1922] 2 Ch. 211.
  14. Ibid at p. 216.
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15. (1886) 17 Q.B.D 690 (CA)
  16. *Stevenson v. Blakelock* (1813) 1 M&S.
  17. *Brandao v. Bannetyt* (1846) 3 C.B. 519.
  18. *Barring v. Corie* (1818) 2 B of Ald 137.
  19. Re Londone Globe Finance Corporation [1902] 2 Ch. 416.
  20. Bridge, Commercial Law (2<sup>nd</sup> ed) p.430.
  21. See also S. 4(1) Bill of Sale Law Cap 11 Laws of Ogun State of Nigeria 1979. Similar provision exists in various laws of some states of Nigeria.
  22. S.4 1878 Act; S.3 Bills of Sale Law Cap 11 Laws of Ogun State. See also Re David Allester Ltd. [1922] 2 Ch. D 211; Re Hamilton Young & Co. [1905] 2 K.B. 772.
  23. S.4 1878 Act; S.3 Bills of Sale Law, Cap 11, Law of Ogun State.
  24. Bridge, Form, Substance and Innovation in Personal Security Law, (1992) Journal of Business Law P 4
  25. Ibid.
  26. Ibid.
  27. S.78 (1)(c) Property and Conveyancing Law Cap 100, Laws of Ogun State 1978. Similar provision exists in the laws of Oyo, Osun, Ondo and Ekiti States of Nigeria.
  28. No. 16 of 1979. The Bankruptcy Act, which was enacted in 1979, is yet to come into force. See also M.C. Okany, Nigerian Commercial Law pp. 725-731.
  29. Cap 59 Laws of the Federation of Nigeria 1990. S. 197; See also, Asomugha Company Law in Nigeria under the Companies And Allied Matters Act 1994 pp. 290-292.
  30. [1990] BCC 393.
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31. (1823) 3 RUSS 1; See J.O. Fabunmi, *Equity & Trusts in Nigeria*, pp.72-77.
  32. See Okany, *Nigerian Commercial Law*, p.445.
  - 32a. See S. 2 (1) Sale of Good Act, Cap 116, Law of Oyo State 1978, Section 2(1) Sale of Goods Law, Cap 117 Laws of Ogun State 1978. Similar Law exists in some States of Nigeria.
  33. See *Meyerstein v. Barber* (1866) L.R. 2C p. 38.
  34. Goode, *Legal Problems of Credit and Security* (2<sup>nd</sup> Ed. 1988) p.1
  35. See supra.
  36. (1823) 3 RUSS 1.
  37. See supra.
  38. See Bill of Sales Act 1878-1882, Bill of Sale Law Cap 11 Laws of Ogun State, Land Instrument Registration Law Cap 53 Laws of Ogun State, Property and Conveyancing Law Cap 100 Laws of Ogun State. Similar Laws exist in some of the states of Nigeria.
  39. See Bankruptcy Act Cap 30 Laws of the Federation of Nigeria 1990.
  40. Bridge, *Form, Substance and Innovation in Personal Security Law*, (1992) *Journal of Business Law* P 4.
  41. Those created by individuals by the Bill of Sales Act 1878 – 1882 and those created by Companies by the Companies and Allied Matters Act 1988.
  42. S.19 rule 5 Sale of Goods Law Cap 117, Laws of Ogun State 1978. S.19 rule 5 Sale of Goods Law Cap 116, Laws of OyoState 1978. Similar Laws exist in some of the states of Nigeria.
  43. See White and Summer, *Uniform Commercial Code* (2<sup>nd</sup> Ed.) p.783.
  44. See Warehouse Acts of various States in India.
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45. This is the case in Promissory Note or Bills of Exchange, see Bill of Exchange Act Cap 35 Laws of the Federation of Nigeria 1990.
46. *Dhabamdas & Co. Ltd. v. Intercotra Ltd*, [1970] NCLR 255.
47. 16 NY 2d 344, 213 N.E. 2nd 873.
48. *Koko v. NPA* [1973] [N.C.L.R. 342.
49. *Laws of Federation of Nigeria 1990*
50. [1965] 1 All N.L.R. 259.
51. The present Writer was one of the arbitrators in the case.
52. Bill of Sale Act 1878-1888, Bill of Sale Law, Cap 11 Laws of Ogun State 1978, similar Laws exist in the some States of Nigeria.
53. Land Instrument Registration Law Cap 53 Laws of Ogun State; Property and Conveyancing Law, Cap. 100 Laws of Ogun State 1978. Land Instrument Registration Law Cap 64 Laws of Lagos State; Land Instrument Registration Law Cap 72, Laws of Eastern Nigeria; Land Registration Law Cap 58, Laws of Northern Nigeria 1963.
54. Companies Charges, Part VII, Companies and Allied Matters Act 1988.