BUSINESS LAW REVIEW

NIGERIAN JOURNAL OF BUSINESS AND CORPORATE LAW

VOL. 2 NO. 1 MARCH, 2011

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Published By Hybrid Consult
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Published by:
Hybrid Consult
11, Alhaji Masha Road,
Masha Roundabout (Beside Mr. Biggs)
P. O. Box 2214, Surulere, Lagos, Nigeria.
Tel: 01-8753803, 8719695, 08033342413,
08066192650, 08076084013, 07065319600
E-mail: hybridconsult@yahoo.com
info@hybridconsults.com
Website: www.hybridconsults.com

Abuja Office
Coscharis Plaza (2nd Floor),
Plot 1070, Faskari Crescent,
Area 3, Garki, Abuja
Tel: 09-2907664, 08034456682.

Printed By:
HMS 08034858665

SALE OF GOODS IN THE MIDST OF SIMILAR TRANSACTIONS: SEPARATING WHEAT FROM CHAFF*

1. INTRODUCTION

The initial problem in studying Sale of goods is that of identification. This problem arises as a result of its close similarity with other commercial transactions. The orgy of confusion that permeates through almost every aspect of Sale of goods sets in from that problem and leads to some issues that this article intends to address: The major issues of appellation for commercial transactions and content distinction.

2. WHAT APPELLATION OR LABEL FOR COMMERCIAL TRANSACTIONS?

Many textbook writers and scholars all over the world from United Kingdom, European Union, United States of America and Africa, particularly Nigeria, have written a plethora of books on the subject called Commercial Law. The title or heading of their books itself admits the existence of Commercial law.[1] And as if to support the argument that commercial law exists, many legal practitioners are claiming to be experts in Commercial Law, while Universities and law schools have the subject Commercial law or Commercial Transactions in their curriculum. The issue we intend to consider here is to examine the reality of the existence of commercial law. To do that effectively, we need to understand the meaning of Commercial law. The problem begins, from that inquest because there is no acceptable definition of

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* **Osuntogun, Abiodun Jacob**, LL.B (UNILAG), BL, LL.M (OAU Nigeria), LL.M (Pretoria, South Africa), CILS (American University, Washington DC, USA); Osuntogun Abiodun Jacob is a lecturer at the Faculty of Law, University of Ibadan, Ibadan, Nigeria. Presently, a Visiting Scholar to University of Wisconsin School of Law, Madison. Email: osunfolak@yahoo.com or aosuntogun@wisc.edu

1. See Okany M.C., Nigerian Commercial Law (Africana Fep Publishers L.td Nig 1992); Achike Okay, Commercial Law (Forth Dimension Publishers Ltd Nig 1985); Iwan Davies, Commercial Law (Blacks Stone Press Ltd Nig 1992); Michael Connolly, Commercial Law 2nd ed., (Cavendish Publishing Ltd, UK, 1998); Felicia Monye, Commercial Law (Chenglo Ltd, 2006); R. M. Goode, Commercial Law, (London: Penquin Books Ltd, 1982); Robert Bradgate, Commercial Law, 3rd ed. (Butterworths, London, 2000).

Commercial law. Professor Goode comments on this issue with respect to England when he wrote:

"The absence of anything resembling a commercial code makes this [issue] harder. If by commercial law we mean a relatively self-contained, integrated body of principles and rules peculiar to commercial transactions, then we are constrained to say that this is not to be found in England."[2]

If the absence of commercial code[3] may work to nullify the argument in favour of the existence of commercial law in England, the situation in the USA where there is a commercial code, the Uniform Commercial Code (UCC)[4], should be an easy ride in its support. On this issue, Professor Bruno Greene comments with respect to USA: "[i]f pressed for a definition of 'commercial law' as it appears in the system of the United States today, an American lawyer would be embarrassed for an answer, because the term does not denote to him a segment of his law, but merely a convenient denomination of transactions which he had been trained to label commercial."[5] Other scholars from the same country posit that 'although the term commercial law is not a term of art in American law, it has become synonymous in recent years with the legal rules contained in the UCC."[6]

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2. Goode, op. cit, 6.
3. See Hawkland, Uniform Commercial "Code" Methodology, 1962 U. 111. L.F. 291 (1962). See also. U.C.C. § 1-102(1), (2).A "code" is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code accepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body revealing its own plan and containing its own methodology It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies".
4. Note that UCC is not a complete closed system. See Edward A. Dauer Ellen A. Peters, 'Commercial Transactions: Cases, Text and Problems on Contracts Dealing with Personality, Realty and Services' vol. 13, Issue 1, No. 1, Boston College of Law Review noting that 'While the U.C.C. does not partake of this definition to the extent of being an entirely closed system, it does have its intrinsic methodology The use of case precedent in problems of Code interpretation differs from that in strictly common law controversies'.
5. Greene, Commercial Law in the United States, in L'UNITt DU DROIT DES OBLIGATIONS (THE UNITY OF THE LAW OF OBLIGATIONS) 159, 164 (M. Rotondi ed. 1974). See also Schlesinger, The Uniform Commercial Code in the Light of Comparative Law, I INTER-AM. L. REV. 11, 40 (1959). For the rest of the common law world, see Schmitthoff, Commercial Law in the 19th and 20th Centuries, in Then And Now 1799-1974: Commemorating 175 Years Of Law Bookselling And Publishing 33, 42 (1974); Ziegel, The American Influence on the Development of Canadian Commercial Law, 26 Case W. Res. L. Rev. 861,861(1976).
6. Jonathan A. Eddy & Peter Winship, Commercial Transactions: Text, Cases and Problems (Little Brown 1985) 997 pages. Take note that the drafters of the UCC themselves suggest that their object was to bring together all rules governing the commercial transaction. The General Comment to the official text of the Code states that "[t]his concept of the present Act is that 'commercial transactions' is a single subject of the law notwithstanding its many facets .... This Act purports to deal with all the phases which may arise in the handling of a commercial transaction, from start to finish."

Since scholars are skeptical on the definitions of commercial law, it is essential to seek recourse from the dictionary for clarity and precision. According to Black's law Dictionary, Commercial law is '[t]he substantive law dealing with the sale and distribution of goods, the financing of credit transactions on the security of the goods sold and negotiable instruments.'[7] A scholar adopts a functional approach when he defines commercial law as 'the law relating to commercial activity, especially transactions concerned with the supply of goods and services and the financing thereof.'[8] Another scholar defines it as the over all response of the law 'to the needs and practices of the mercantile community.'[9]

From the perusal of many definitions, certain subjects clearly form part of commercial law, for instance the law relating to sale of goods[10] which is the focus of this article. Other subjects are hire purchase transactions, agency, negotiable instruments, contracts, insurance etc.

Furthermore, a critical appraisal of different definitions implies that commercial law exists even if it is not governed by a distinct coherent uniform statutory provision. In Nigeria, like United Kingdom, the laws that regulate commercial transactions are scattered in different statutes and cannot be found in a single code. Such a jurisprudential system with uncoordinated regulatory provisions is prone to certain defects. The first is the problem of contents. There is no precision or certainty as to the contents of commercial law. A scholar explains this problem succinctly when he notes:

"Even the assertion that English lawyers might be able to describe the content of commercial law may be questioned. The content of academic courses and texts on commercial law varies widely, and a practicing lawyer might include within commercial law a number of matters which would appear in none of the courses and books. Thus, a commercial practitioner might deal with matters concerned with contracts; the supply of goods and services; finance, lending, and security; insurance; property; tax; competition law; and intellectual

7. Black's Law Dictionary, 9th ed. (2009).
8. Bradgate, op cit, 4.
9. Goode, op cit, 6.
10. Bradgate, op cit, 4.

property; partnerships; and companies."[11]

The situation is the same in Nigeria. The second problem is that of infiltration of equitable principles in to the jurisprudence of commercial law. Since there is no clear cut jurisprudence on commercial transactions, Judges are tempted to apply technical concepts of equity which are not meant for commercial disputes. Apart from general idiosyncrasies of individual judges, confusion emanating from the absence of a clear cut code for commercial law could be responsible. K.N. Llewellyn[12] explained the emergence of this problem in the USA before the enactment of the UCC where a separate law is made for the merchants when he wrote:

'It certainly tended long to cut Sales law loose from some rather useful technical concepts developed in equity : such concepts as 'legal property ' limited to security and divorced from risk of damage or destruction ; or "equitable title" in a person who had heavy interest though he had no "legal rights" ; or "equitable lien" for advances ; or power to transfer legal rights residing in a party whose own power and title were inter partes "dry" of juice'.

Furthermore, the difficulty and burden associated with looking for law in different statutory provisions will be solved if a commercial code is enacted for commercial transactions. This will give room for specialization and expertise even among courts and legal practitioners. The benefits that will spring up from the adoption of such a code can not be quantified particularly to developing countries.[13] More likely than not, judges will have uncontrolled discretion to pick and choose what they deem to be applicable principles of commercial law and the negative effects of that can be cured with a uniform statutory provisions.

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11. Noting that 'Company law is treated as a subject distinct from commercial law, despite the central role of companies in commercial activity and the separation extends to the courts, where there are separate Companies and Commercial Courts. This is a sharp contrast with the approach in many civilian jurisdictions where company law is regarded as part of the Commercial Code" Bradgate, op cit, 3.
12. K.N Llewellyn, 'The First Struggle to unhorse sales' (1939) L11(6) Harvard Law Review 874-904.
13. For example, litigants complain of delay in justice administration. If commercial courts are established and judges who are experts in commercial law are put to man the courts. This will result not only in speed but in efficiency. It may even reduce the number of litigants going for commercial arbitration.

A body of law for commercial transactions makes synthesis of commercial cases easier. Scholars and law practitioners could predict the outcome of commercial litigation. According to Justice Oliver Wendell Holmes, the most famous advocate of legal positivism in American history, the 'prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'[14]. In making this statement, Holmes was suggesting that the meaning of any written law is determined by the individual Judges interpreting them, and until a judge has weighed in on a legal issue, the litigants should be able to guess the way a judge will rule in a case. A coherent statutory provision will make that possible.[15]

In addition, it will be easy to develop common principles and legal doctrines that run through all commercial transactions. According to Lord Denning, there are two interests to be protected in law, those of property and commercial transactions.[16] The essence of regulatory law in commercial transactions is to protect those two interests. The last is the problem of content distinction. Similarly, K.N Llewellyn also identified this problem in the USA when he was advocating for a uniform law for commercial transactions. He remarked with a tone of finality that:

'[U]ntil merchant-to-merchant sales of wares are seen as the focus of a particular body of law [which they already largely are, in fact and in the decisions] we go on lacking clear, neat doctrine to distinguish from them , where needed ,sales by non- merchants , or to distinguish, where needed, sales to non-merchants [the ultimate consumer] from both.'

In spite of what might be positive attributes of a uniform body of law for commercial transactions, the experience of the USA has proved that

14. O.W. Holmes Jr., The Path of the Law 10 Harvard Law Review 457 [1897].
15. K.N. Llewellyn. op cit, at 877, where he notes: "Whereas when the facts run clearly and repetitively on a single pattern, their pressures become so predictable that one can observe which judge is sensitive to them, and which is not; one can then observe doctrine when it produces outlandish results attributable in reason to no other cause."
16. Bishopsate Motor Finance Corpn. Ltd v. Transport Breaks Ltd [1949] 1K.B 322 at 326-327, per Lord Denning when he said: "In the development of our law, two principles have striven for mastery. The first is for protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title."

there could be adverse effects.[17] Perhaps that can help us to appreciate the comment of Robert Bradgate that the absence of a clearly defined category of commercial law is ambivalent and not without its advantage in United Kingdom. Stressing its advantage, he said 'the strength of the common law has traditionally being its pragmatism: English law has been concerned with providing solutions to practical problems rather than with theoretical categorization.'[18]

Another issue is the use of the label "commercial transactions" or "commercial law". Why should some prefer one for another? This may be a matter of preference but for the UCC[19], the term "commercial transactions" is preferred to "Commercial law" because according to Professor Peter Winship, the use of the term "commercial transactions" instead of "commercial law" to describe the organizing principle has jurisprudential implications which relates to Karl Llewellyn's concept of 'situation sense' by which the rule for resolution for a particular dispute should emanate from the factual context.[20]

3. MEANING OF SALE OF GOODS.

Sale of goods can be defined as a contract where the seller agrees to relinquish the ownership in his goods to the buyer in return for price

17. Peter Winship, Contemporary Commercial Law Literature in the United States. 43 Ohio St. L.J. 643 1982, noting that "to focus on the Code is to focus on commercial law as private law, thereby ignoring public regulatory law except where it impinges on the private law rules. The predominance of the Code discourages other ways of organizing the study of commercial transactions, such as studying together different legal devices for raising business capital (the issuance of investment securities and loans secured by an Article 9 security interest) or contrasting rules governing real estate transactions with the Code rules for personal property. This predominance of the Code has also pushed aside the study of certain legal subjects, with the result that many recent law school graduates have only hazy notions of the basic principles governing such subjects as suretyship and personal property leases…" R. Pound, Jurisprudence 73-75 (1959), noting that [it is] unfortunate to set up a category of commercial law in a classification of common law. Such may be one effect of the Uniform Commercial Code... and a tendency in the law schools to set up a course on commercial law. In such a course there is likely to be consolidated what had been taught as distinct courses in one heterogeneous artificial course so as to make room in the crowded curricula for a variety of new subjects which are acquiring importance with the advent of the service state… We...ought not to be setting up a substantive division which will take everyday subjects of litigation out of the general setting of our law and put up a barrier setting off related subjects in separate categories of civil and commercial and creating possibilities of conflict where they overlap. The problem with such a heterogeneous course, he added, was that -[i]t cuts across many subjects in the law, with no common principal to hold the selected severed parts together.- Pound, op. cit, at 74 n.
18. Bradgate, op cit, 9.
19. Ibid.
20. See K. Llewellyn, The Common Law Tradition: Deciding Appeals 121-28 (1960).

paid or to be paid by the buyer. Section 1(1) of the Sale of Goods Act[21] which regulates the sale of goods defines it as 'a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.' The contract of sale of goods is between the seller[22] and the buyer.[23] However, the Act further explains that 'there may be a contract of sale between one part owner and another.'[24] It has been argued that the word 'owner' is not intended to have any flavour different from the word 'seller', just as 'the seller' is a person who sells or agrees to sell a particular title, as such, the owner is a person who owns a particular title, and as part owner owns that title concurrently with another.[25]

The essence of the contract is the transfer property in the goods to the buyer. The property here means ownership. Once property has been transferred, there is a sale whether or not the goods remain with the seller. But a mere transfer of possession is not termed as sale under the Sale of Goods Act. Another thing is that the consideration for the contract of sale of goods must be in money[26] and the subject matter of the transaction must be goods.[27]

The Act identifies two types of transactions termed sale[28] and agreement to sell.[29] Sale is an executed contract while agreement to sell is an executory contract. The main distinction is that property passes immediately in sale, whereas in agreement to sell, it is to be transferred at a later time. But that main distinction alters rights and duties of the

21. Sale of Goods Act, 1893.
22. Section 62(1), "A person who sells or agrees to sell goods."
23. Ibid; "A person who buys or agrees to buy goods."
24. Ibid.
25. See G. Battersby & A. D. Preston, The Concepts of "Property" "Title" and "Owner" used in the Sale of Goods Act 1893.
26. Section 1(1) of the Sales of Goods Act.
27. Ibid; See section 62[1] which defines goods as all chattels personal other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'. For further reading, see Osuntogun Abiodun, "Goods in Sale of Goods Act: An examination of the Subject Matter" (2010) 6(1) Nigerian Bar Journal 85-103.
28. Section 1(3) "Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale." See also Osuntogun, op. cit,
29. 'Where under a contract of sale, the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell." See Osuntogun, op cit.

parties.[30]

4. SALE OF GOODS AND OTHER SIMILAR COMMERCIAL TRANSACTIONS.

A contract of sale of goods differs from several other commercial transactions such as a contract of bailment, a gift, a contract of hire-purchase, a contract of agency, a contract of loan on the security of goods, a contract for the supply of services, a contract of barter or exchange, and a contract of licenses of intellectual property such as 'sales' of computer software. Though for efficiency in the administration of justice, the need for specialization and easy access for research, there could be a commercial code for all commercial transactions, yet the reality is that they are distinct from each other. In order to avoid confusion and miscarriage of justice, each transaction must be distinguished so as to arrive at the true identity of the transaction before any court of law can determine any dispute on any of them.[31]

The reasons for such distinctions are not far fetched. Even in the USA, where there is UCC, different rules and regulations apply. Similarly in Nigeria, different statutory provisions apply to commercial transactions depending on their categories, for example, a contract of sale of goods is governed largely in Nigeria by the 1893 English Sale of Goods Act while Hire Purchase is regulated by the Hire Purchase Act of 1965.[32] If distinction is not made between sale of goods and other transactions, other regulatory or statutory provisions can be applied to commercial disputes relating to sale of goods and that error is likely to occasion miscarriage of justice. Another reason for distinction is the ignorance of the parties. Ordinary business people are not learned in law and are prone to make mistakes in entering in to contracts.[33] They

30. A sale creates jus-in rem [right against the whole world while agreement to sell creates jus-in personam (right against an individual.) Note Section 20 of Sales of Goods Act to the effect that risk prima facie passes with property and on the effects of that on the rights and duties of the seller and buyer. See Osuntogun, op cit note 27.
31. The House of Lords in Young & Marten Ltd v McManus Childs Ltd [1969] 1 AC 454 expressed its reservation by condemning unnecessary distinctions between different classes of contract but Atiyah explains that the 'legislative structure of the law sometimes makes [distinction] an inescapable result'. See P.S. Atiyah, The Sale of Goods, 8th ed. (London: Pitman Publishing, 1990).
32. Hire Purchase Act of 1965 now amended as Hire-Purchase Act, Cap. H4, Laws of the Federation of Nigeria 2004. At present the current statute regulating hire-purchase transactions in Nigeria.
33. Even lawyers that are learned make mistakes too.

label their transactions in one form of commercial transaction or the other without critically assessing the true nature of their transactions.

On the contrary, the court has a duty to determine the correct nature of their transactions by considering the substance of the contracts and to do that the court must distinguish between one form of commercial transaction and the other. Therefore, in **Ibrahim Yakassai v. Incar Motors Nig. Ltd,**[34] the Supreme Court distinguishes between a contract of sale of goods and hire purchase to determine the legal dispute in the case. The court observes:

'The difference between an Outright Sale and a Hire Purchase Agreement is that in the former, the property in the vehicle passes to the purchaser as soon as the contract is entered into, whereas in Hire purchase agreement, the property in the vehicle still remains vested in the owner until payment is fully made. In other words, under a Hire Purchase Agreement, the property in the vehicle still remains vested in the owner until payment is fully made. In other words, under a Hire Purchase Agreement, it is always open to the owner of a vehicle to take possession of it on failure of the hirer to pay the installments. In an outright sale, the seller's remedy lies in an action to recover the balance of payment owed by the purchaser.'

4.1 SALE OF GOODS AND HIRE PURCHASE.

Hire Purchase is the 'bailment of goods in pursuance of an agreement under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee'.[35] In **Samuel Aro v Joe Allen & Co. Ltd,**[36] Okagbue JCA defined it as:

'.... a system whereby the owner of the goods lets them on hire for periodic payments by the hirer upon an agreement that when a certain number of payments have (sic) been completed, the absolute property in the goods will pass to the hirer, but so however, that the hirer may return the goods at any time without any obligation to pay further

34. [1975] 5 SC. 113. Also in Odufunade v. Antoine Rossek [1962] 1 All NLR 98 the Supreme Court decided that acquisition by the government of an interest in land under a compulsory purchase order was not a sale. In Helby v. Mathews [1985] A.C. 475, where Lord Herschel seems to be explaining the relevance of distinction when he said: "the parties cannot by calling it hiring or by mere juggling with words escape from the consequences of the contract into which they entered."
35. Section 20 of the Hire Purchase Act, 1965.
36. [1979] 2 FNR 292.

balance of rent accounting after return; until the condition have been fulfilled the property remain (sic) in the owner's possession.'[37]

Hire Purchase and Sale of Goods are closely similar. The similarity between the two transactions is actuated by the artificial nature of most hire-purchase agreements. This could be explained by the consideration of three points.[38] First, the real object of a contract of hire-purchase is 'almost invariably the ultimate sale of the goods to the hirer.'[39] Secondly, in the contract of Hire Purchase, the amount which the hirer is expected to pay is usually far in excess of that which he would have had to pay if he were really hiring the goods[40]. And thirdly, the legal purchase price for which the hirer has the option to buy the goods is frequently nominal only and, in fact, is sometimes not exacted in practice.[41] However, the court in **Joe Allen Co. Ltd v. Sani Adewale**[42] explained the yardstick to be adopted in distinguishing the two when it states: '...the test to be applied is whether or not the party receiving the goods has the legal right to return them at his own option and there upon to cease paying installments. If he has, the agreement is an agreement to hire, with possibly an option to the hirer to purchase. If he has not, the agreement is an agreement to sell.'

In hire purchase, the owner delivers goods to the hirer at the time of commencement of the agreement on the condition that the hirer must pay the agreed amount in periodic payments. Though, the hirer has possession of the goods, the ownership of the goods still remains with the owner. The hirer has a right to use the goods[43] but default in payment of any installment as at when due may result in adverse consequences

37. At 295.
38. Atiyah, op. cit.
39. Ibid.
40. Ibid.
41. Ibid.
42. 9 NLR 111 at 115.
43. See section 20(1) of the Hire Purchase Act which defines a contract of hire-purchase as 'bailment of goods."

to him.[44] The ownership of the good continues to be with the owner until the payment of last installment by the hirer though the hirer too has a right to terminate the agreement at any time.[45] However, if he decides not to terminate the agreement, he becomes the owner of the goods after he has paid all installments in terms of the agreement.

While hire purchase and sale of goods are both commercial in nature, distinction comes in the mode of regulatory provisions that govern them. Hire purchase transactions are governed in Nigeria by the Hire Purchase Act while the sale of goods Act governs sale of goods transactions. The structure of each transaction also contributes to their distinction: the sale of goods is essentially a simple transaction between the seller and the buyer with no formality required to enter into it. On the contrary, hire purchase transaction is complex and formal, it often involves three parties and there are statutory requirements to comply with.[46]

Furthermore, the major difference between the two is the effect of the transactions in both contracts which culminates into each having different legal obligations. The effect of transactions in sale of goods is to transfer the property in the goods to the buyer while in hire purchase, it is the possession of the goods by the hirer. The issue of transfer of the

44. Under the common law, due to the terms of the agreement between the owner and the hirer, if the hirer defaults even in paying the last installment, he may loose the right to use and to own the good again. In Atere v. Amao and Anor [1957] WRNLR 176, the hirer failed to pay the last installment of #5 after he had paid the sum of #995. The court held that the owner had a right to repossess the vehicle notwithstanding that the balance of the hire purchase price was #5. Coker, J in Animashawun v. CFAO explained the position under the common law when he stated: "At the time of the seizure the plaintiff was in areas with his rent and even if he paid up all the amounts due after the seizure and before the institution of proceedings against him, he will not be relieved of the consequences of his breach either at common law or in equity." Note that recovery of possession must be through an action in the court once the hirer has paid relevant proportion of the hire purchase price. See section 9(1) of the Hire Purchase Act.

45. The right to terminate is subject to the payment of minimum payment clause both under the common law and the statute.

46. Atiyah explains the tripartite nature of hire purchase very well when he observes "Many retailers have no wish to act as financiers themselves supplying credit to consumers. So a hire-purchase transaction often involves, first, a sale, under which the retailer sells the goods to a finance company, and then, secondly, a hire-purchase contract, under which the finance company lets the goods on hire-purchase terms to the 'buyer'. It follows that the 'buyer' has no contractual relations with the seller and this sometimes has important legal consequences, although the reality is that 'the identity or even existence of the finance company is a matter (to customers) of indifference; they look to the dealer, or his representative, as the person who fixes the payment terms and makes all the necessary arrangements." See Atiyah, op. cit, note 32.

property is not an essential but optional. Consequentially, legal obligations differ. In sale of goods, since property has passed, the seller has a right to price and could enforce this right even if the goods perish so soon as they are acquired by the buyer, but in hire purchase, the owner is not entitled to recovery of future installments if the hirer decides to terminate the contract and return the goods to the owner. Implicitly, therefore, the issue whether there is an option to return the goods is a distinguishing factor between the two as explained by Kingdom, CJ in **Joe Allen & Co Ltd. v. Sani Adewale & Anor**.[47]

4.2. SALE OF GOODS AND BAILMENT.

Though there are different categories of bailment,[48] bailment could be defined as the delivery of goods by one person (the bailor) to another (the bailee) on a condition which normally requires that the bailee must return the goods back to the bailor or to any other person in accordance with his directions. Unlike sale of goods, the property in the goods does not pass on delivery of the goods by the bailor to the bailee.[49] In

47. (Supra.) See also Kasali Raimi v. Ogundara & Anor.[1986] 3 NWLR 97.

48. See Coggs v Bernard (1703) 2 Ld Raym 909 Sir John Holt Chief Justice of the Kings Bench Court explained different categories of bailment when he said: "And there are six sorts of bailments. The first sort of bailment is, abare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which I mentioned in Southcote's case (1601) Cro Eliz 815. The second sort is, when goods or chattels that are useful, are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any rewards for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust". In that case, William Bernard undertook to carry several barrels of brandy belonging to John Coggs from Brooks Market, Holborn to Water Street, just south of the Strand (about half a mile). Bernard's undertaking was gratuitous; he was not offered compensation for his work. As the brandy was being unloaded at the Water Street cellar, a barrel was staved and 150 gallons were lost. Coggs brought an action on the case against Bernard, alleging he had undertaken to carry the barrels but had spilled them through his negligence. Court held that the defendant was negligent in carrying the casks and was therefore liable as a bailee. Holt made clear that Bernard's responsibility to Coggs was not formally contractual in nature, since he received no consideration. Instead, his responsibility rested on the trust that Coggs placed in him to use due care in transporting the casks, and by his tacit acceptance of that trust by taking the casks into his custody. Thus, because Bernard acted negligently when he was under a responsibility to use care, he was held to be in breach of a trust.

49. In some circumstances, the parties may have the intention that the property will pass in the future as in the case of hire purchase.

Chapman Bros v Verco Bros & Co Ltd[50] bags of wheat were delivered by some farmers to a company carrying on business as millers and wheat merchants. The wheat was delivered in unidentified bags which were identical to those in which other farmers delivered wheat to the company. According to the terms of the contract, the company is expected to buy and pay for the wheat on request by the farmer but if the farmers do not make such a request, then the company must return an equal quantity of wheat of the same type on a specified date; but there was no obligation to return the identical bags. Despite the fact that the contract referred to the company as 'storers', it was held by the Australian High Court that this transaction was necessarily one of sale as the property passed to the company on delivery.

The problem of distinction between bailment and sale of goods has been made difficult by the use of reservation of title clause[51] by the seller of goods which has the effect of eroding the distinguishing mark between the two [that of possession and ownership]. But clear understanding of how the retention of title clause works and the true nature of bailment will show the difference. Despite the reservation of title clause, a buyer of goods in such circumstance could still not be regarded as a mere bailee whereas; a mere bailee in a contract of bailment of goods could not be regarded as an owner.

4.3 SALE OF GOODS AND SECURITY AGREEMENT.

Security agreement or a loan on security is intended to enable someone who is already an owner of goods to borrow money on the security of those goods. The goods serve as collateral for the loan, if the borrower doesn't pay the debt, the lender has the right to take back the property and sell it to cover the debt.[52] This form of transaction could not be

50. (1933) 49 CLR 306. See also The South Australian Insurance Company v. Randell [1869-71] 3L.R P.C 101. In this case court held that the deposit of a quantity of corn by a farmer with a miller was a sale because the farmer could claim an equal quantity of corn of the same quality or the market price of the goods in lieu of his deposit. Court observes "Whenever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject-matter in its original or altered form, this is a transfer of property for value—it is a sale and not a bailment."

51. On reservation of title clause, see Osuntogun, A.J., "Transfer of Property in Commercial Transactions" (2009) 4(1&2) International Journal of law and Contemporary Studies 181-208.

52. Example of that agreement is a mortgage between the mortgagor and the mortgagee, others are pledge, charge etc.

regarded as sale because the use and the enjoyment of the goods are not contemplated by the parties. Consequentially, the Act prohibits the application of its provisions to such transactions.[53] Despite the specific statutory prohibition, the courts have not been finding it easy to distinguish between the two. However, in **Kingsley v Sterling Industrial Securities Ltd**[54] Winn, LJ explained the mechanism for distinction when he observed:

'In my definite view, the...dominant question...is whether in reality and upon a true analysis of the transactions and each of them, and having regard in particular to the intention of the parties, they constituted loans or sales...it is equally clear that each case must be determined according to the proper inference to be drawn from the facts and whatever the form the transaction may take the court will decide according to its real substance.'

The major problem with the application of that mechanism is the difficulty encountered by the courts on how to formulate the criterion by which the 'real intention' of the parties may be judged. Therefore, the modern tendency has been to uphold the genuineness of these transactions, though judicial disagreements have been frequent.[55] In **Jajira v. Northern Brewery Co Ltd**,[56] the problem of distinction was overcome by considering the genuineness of the transaction despite the fact that the terms of the agreement were drafted to conceal its true nature.[57]

4.4 SALE OF GOODS AND SUPPLY OF SERVICES.

In the past, supply of services was divided into two which are contracts for skill and labour, and contracts for labour and materials.[58] But the

53. Section 61[3] of the Act provides "The provisions of this Act relative to contracts of sale do not apply to any transactions in the form of a contract of sale which is intended to be operated by way of mortgage, pledge, charge, or other security."
54. [1967] 2 QB 747, 780.
55. See Fitzpatrick [1969] J Bus Law 211. See also Atiyah, op. cit, note 32.
56. [1972] NMLR290.
57. In that case, the defendant employer under a written agreement described as loan advanced credit to the plaintiff his employee to purchase a motor scooter for his use. The agreement is described as Hire purchase 'but giving the plaintiff ownership of the motor scooter until all installment' which is payable by six monthly installments has been paid. Court held that the agreement was a security agreement [a loan of money upon security for good] and not a credit sale or hire purchase.
58. See Atiyah, op. cit, note 32.

distinction is no longer relevant.[59] However, the distinction between sale of goods and supply of services is still relevant for a number of reasons.[60] Yet, it has been difficult for the court to distinguish between these two similar commercial transactions. In **Lee v. Griffin**,[61] where a dentist made two sets of false teeth upon the oral order of A; and A died before the teeth could be fitted, court held that no action would lie against A's executor, the contract being one for the sale of goods. Blackburn J said:

'If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy. An attorney employed to draw a deed is a familiar example of the latter proposition; and it would be an abuse of language to say that the paper or parchment of the deed were

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59. Ibid " in England until 1954 the law required that contracts for the sale of goods of the value of £10 or more should be evidenced in writing. No such requirement applied to contracts for the supply of services. This difference between the two kinds of contract disappeared with the repeal of the requirement of writing, but older authorities on the distinction which may still be cited today were often concerned with this requirement."

60. See Atiyah, op. cit, note 32. "….the time at which the property in the goods is to pass from the supplier to the buyer or client may differ in the two cases…if the contract is a pure sale, the whole consideration for the buyer's price is the transfer of the property in the goods to the buyer: hence it is inconsistent for the seller at one and the same time to claim that he need no longer transfer the goods to the buyer because of the buyer's default, and yet that he may retain the buyer's advance payment, which is simply the consideration for that transfer of the goods. On the other hand, where the contract is for the manufacture and supply of the goods, the manufacture of the goods is itself part of the consideration for the price; if the seller has devoted time and money to making the goods, any advance payment can be considered as a payment towards the manufacture as much as a payment towards the actual transfer of the goods. Hence, the mere fact that as a result of the buyer's default the goods will no longer be transferred to him at all does not mean that the consideration for the advance payment has wholly failed. However, despite this element of logicality, the result is far from satisfactory, and the law remains in a somewhat uncertain state". Hence different law may govern both.

61. 1861, 1 B. & S. 272, 23 R.C. 191. In Atkinson v. Bell, two frames ordered by the defendants had been ready for the last three weeks, before Sleddon was declared a bankrupt. The assignees afterwards required the defendants to take the frames, but they refused to do so. It was held that the action was not maintainable. Bayley J expressed the view that "If you employ another to make up his own materials in making a chattel, then he may appropriate the produce of that labor and [those] materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered". However that decision particularly the dictum of Bayley J was overruled in Grafton v. Armitage, 2 C. B. 336, in which an action by an inventor for services performed on his own materials was sustained. Coleman J declares: "the claim of a tailor or shoe maker is for the price of goods when delivered and not for the labour bestowed by him in the fabrication of them."

goods sold and delivered... Here if the teeth had been delivered and accepted, the contract for the sale of a chattel would have been complete. I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been none the less for the sale of a chattel.'

The court in that case expressed doubt on the soundness of the principle of law applied in **Clay v Yates**[62] where the court laid emphasis on the quantum of skill and labor[63] as the determinant factor and treated it as a unique case. In fact, Blackburn J reviewed the earlier cases of **Grafton v. Armitage**[64] and **Atkinson v. Bell**[65] and declared the test used was inappropriate:

'I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.'

Greer LJ modified the test applied in **Lee v. Griffin** supra in **Robinson v Graves**[66] and advocated the 'substance of the contract' test. Court held in the case that a contract for a painter to paint a portrait was one

62. [1856] 1 H & N 3. In this case, The plaintiff a printer, verbally agreed to print for the defendant, 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including the paper The treatise was printed, and after the proof sheet of the dedication was revised by the defendant and returned to the plaintiff'. The plaintiff discovered for the first time that it contained libelous matter and refused to complete the printing of it. Court held that this was not a contract of the sale of goods and that the dedication was libelous and that the plaintiff was justified in refusing to complete the printing of it.

63. Ibid. Pollock, C.B. comments: "My impression is that in the case of a work of art, whether it is gold, silver, marble or plaster, where the application of skill and Labor is of the highest description, and the material is of no importance as compared with the Labor, the price may be recovered as work, labor and materials. No doubt it is a chattel that was bargained for and, if delivered, might be recovered as goods sold and delivered, still i t may also be recovered as work, labor and materials Therefore it appears to me that this is properly a contract for work, labor and materials."

64. Ibid.

65. Ibid.

66. (1935] All ER 191.

for work and materials. Greer LJ[67] observed in that case that:
'If you find, as they did in Lee v. Griffin, that the substance of the contract was the production of something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if the substance of the contract, on the other hand, is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture.'

Therefore, in **Cammell Laird Co Ltd v. Manganese Bronze and Brass Co. Ltd**,[68] a contract for the construction of two ships' propellers was held by the House of Lords as a contract for the sale of goods. Similarly, a contract for the supply of a meal in a restaurant was held to be a contract of sale of goods[69]. In **Isaac v. Hardy**[70] Mathew J. held that a contract by an artist to paint a picture at an agreed price was a contract for the sale of a chattel.[71]

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67. Id. At 587-8. Slesser, L. J also explained his own difficulty too with the dictum of Blackburn J when he said: "It is that observation of that very learned judge which has given me considerable doubt and difficulty in this case, but I have come to the conclusion, looking at the authorities as a whole, and considering the matter as one of principle myself, that if Blackburn J. there meant to state that whenever there was an agreement whereby a chattel would ultimately have to be delivered there was of necessity a sale of the chattel, he is stating the matter too broadly... if that be the only test, so that the ultimate delivery of some material decides that the subject-matter is the sale of goods, I would find it difficult to understand how such cases as the delivery of written documents of parchment by a solicitor, which have always been agreed to be questions of work and labor and not sale of goods, would not fall within the category of sale of goods. But I think that the authorities are clear to the contrary, notwithstanding the weighty observations of Blackburn J."
68. [1934] All ER Rep 1, 151 LT 142, 50 TLR 350. But note that a contract for the manufacture of a ship may be a contract for sale of goods and a contract for services. Part of the contract under which the supplier is to make the ship is a contract for services while a contract under which the supplier agrees to sell the completed is a contract of sale of goods. See Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 1 WLR 1129.
69. Lockett v A & M Charles Ltd [1938] 4 All ER 170.
70. [1884] Cab. & Eb. 207.
71. The case was considered in Robinson v. Graves and the court distinguished it by saying "that in deciding as we have done we are not deciding anything which is necessarily contrary to the decision of Mathew J. in the shortly reported case of Isaacs v. Hardy, which dealt with a contract of a very different kind-namely, where a picture dealer, whose sole object was to acquire something which he might sell in his business, engaged an artist to paint and deliver to him a picture of a given subject at an agreed price. It must not be taken that we are in any way overruling that case or deciding whether it was right or wrong."

The 'substance of the contract' test has not resolved the complexity of distinction between the two. The test could hardly be resolved with many difficult and divergent cases on the burner. The truth is that, there can hardly be an adequate test that will resolve the emerging modern problems on the issue. In **Dodd v Wilson**,[72] the plaintiff engaged a veterinary surgeon to inoculate his cattle with a serum, which the surgeon did, using vaccine which he had himself bought from suppliers of vaccine. It was held that this was not a contract of sale but that, nevertheless, the surgeon impliedly warranted the vaccine to be fit for the purpose for which it was supplied. Therefore, he was liable, despite the fact that he was not himself guilty of any negligence[73].

Similarly, a contract to produce gramophone records was held to be a contract of sale of goods[74]. In an American case from the New York Court of Appeals, **Perlmutter v Beth David Hospital**,[75] the plaintiff suffered injury when he was given a blood transfusion in the defendants' hospital because the blood was contaminated with jaundice viruses which the plaintiff claimed that the blood had been 'sold' to him and that the defendants were, therefore, liable for 'defects' on the basis of implied warranties. But the majority of the court held that the transaction was one of services only and that the supply of the blood was merely incidental to those services.[76] In **Deta Nominees v Viscount Plastic Products Ltd**,[77] the Supreme Court of Victoria in Australia has described **Robinson v Graves** as a 'hard case' and expressly rejected its test as 'illogical and unsatisfactory', 'wrong in principle' and 'too erratic' to be useful.

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72. [1946] 2 All ER 691.
73. Note that if the contract is for sale, the defendants may be liable for implied duties [strict liability] but if it is for sale and services the defendants could only be liable for negligence if defendant exercises due care and skill he is absolved of the wrongs.
74. Friedrichshorf & Co. v. Fujah [1967] LL.R 115.
75. 123 NE 2d 792 (1955). Atiyah comments on this case that "an English court would almost certainly concur with this decision 'though according to him' not the all US states follow this approach, but in most states where warranty liability has been recognized at common law, the result has been reversed by statute." See Atiyah, op. cit.
76. Id. The court comments that the "Informed opinion is at hand that there is today neither a means of detecting the presence of the jaundice-producing agent in the donor's blood nor a practical method of treating the blood to be used for transfusion so that the danger may be eliminated."
77. (1979)[7]). The court preferred Lee v. Griffin noting that the court in Robinson was confused and could not decide accurately whether it departed from Lee v. Griffin or applied it.

The position is still uncertain particularly with the emerging problems relating to services in the area of technology and the appurtenant sale of goods.[78] The ideal approach is that no test should be discarded and none should be seen as sacrosanct. Each test should be evaluated to see which one is applicable to a particular case.

4.5 SALE OF GOODS AND EXHANGE OR TRADE BY BARTER.

In the global commercial world in which we find ourselves, it seems interesting that trade by barter which many believe is a vestige of under development, has been transformed to be the cornerstone of modern day enterprise. In all developing countries, many trade their goods for other goods or trade old one for new one or pay part in money to get new one. The emergence of modern day businessmen and industrialists and the manner in which they used trade by barter has complicated the distinction between trade by barter and the sale of goods. Through newspaper advertisements, websites and televisions, the modern day business men and industries offer their goods in form of trade by barter.[79] The result is the difficulty in understanding the difference between the two.

In the Irish case of **Flynn v. Mackin and Mahon**,[80] the second defendant agreed to supply the first defendant with a new car, in return for which the first defendant promised to pay #250 and to trade –in his own model car. While driving the car to the place of meeting agreed to by all of them, the second defendant was involved in an accident as the car collided with a car in which the plaintiff was a passenger. The latter sued the defendants in the High Court for negligence. The court held

78. The Author is of the opinion that this aspect is so verse that it should be treated separately in another paper.

79. For example 'Save Cash! Convert your business' goods and services into IMS trade dollars that work like cash to purchase needed items We've been growing the most successful barter trading network for 25 years. Yes, barter - just way bigger and way better than ever before. Check out how it can work for you" See IBM website http://www.imsbarter.com/?gclid=CLaro5uu2qUCFQTNKgodYzcnlw [assessed on the 7th of December 7, 2010]. "First barter site that verifies users to enhance the security of their trades, Verify before you register" Website of Barter-Questhttp://www.barterquest.com/?gclid=CIyI0rOw2qUCFULNKgodt1sykw [assessed on the 7th of December , 2010]. "Trade in your old TV and qualify for a £150 discount on a new Sony Bravia TV." Website of guardian.co.uk - http://www.guardian.co.uk/environment/2010/jun/07/sony-television-replace-world-cup[assessed on the 7th of December 2010].

80. [1974]I. R. 101.

that the second defendant had been negligent in the driving of the car. However, the judge withdrew from the jury the plaintiff's claim against the first defendant on the ground that property in the new car had not passed to him at the time of the accident. The plaintiff and the second defendant appealed to the Supreme Court. In disallowing the appeal, Walsh J. with whose judgment Budd J. and Fitzgerald C.J. concurred, held that the transaction between the defendants was one of exchange or barter, in which the absence of delivery rendered a transfer of ownership impossible. Both courts considered the 1893 Sale of Goods Act in reaching their decisions.

The pertinent question herein is: what is trade by barter? It is a commercial transaction by which people exchange their goods for other goods with an intention to transfer the property in those goods to each other or one another. The sale of goods is, however, different; property in goods is transferred for money consideration. That money consideration which is the main distinction between the two also fuels the confusion because in some circumstances goods are exchanged not only for goods but substituted by partial payment in money. In such circumstance, a glance at plethora of cases will make us to conclude that such transaction will be regarded as sale of goods. In **Sheldon v. Cox**[81], where A agreed to give a horse, warranted sound, in exchange for a horse of B, and a sum of money; and the horses were exchanged, but B refused to pay the money, pretending that A's horse was unsound, it was held that it was a contract of sale of goods and not exchange. In **Aldridge v. Johnson**,[82] an exchange of 52 bullocks for 100 quarters of barley and the payment of the difference in money was held to be a sale of goods. Similarly in **G. H. Dawson [Clapham] Ltd v. H.C. Dutfield**,[83] an old motor vehicle was exchanged for a new one with partial consideration paid in money. Court held it was a sale of goods.

Despite the criticism of the court's decision in **Flynn v. Mackin and Mahon**,[84] the ground upon which the decision was reached must be

81. [1824] 3 B & C. 420.
82. [1857] 7 E & B 885.
83. [1936] 2 All E.R. 232.
84. See E. M. Clare Canton, "Sale of Goods and Barter a Note" (1976) 39 MLR 589. "It is submitted that the conclusion of Walsh J. is in line with the more recent authorities. Moreover, his readiness to consider the possibility that the transaction might be a barter merits commendation. However, with respect, it is suggested that a broader, more common-sense approach might have been appropriate."

understood before taking a position of condemnation or even approval. In that case, the court considered the fact that there was no evidence of agreement to buy the car for an agreed price. The parties did not assign a value to either vehicle: they simply agreed to transfer the new car in consideration of a sum of money together with another car which was not valued.[85] Even in **Aldridge v. Johnson**,[86] the court observed that if the transaction had been that the bullocks plus a sum of money were to be transferred in return for the barley without valuation of the chattels, the contract would have been barter. Similarly, Hilbery J was moved to decide that transaction in **Dawson (Clapham) Ltd. v. Dutfield**[87] was a contract of sale of goods because according to him the vehicles had been valued and that prices were nearly if not exactly decided in conversation between the parties.

However, in **Bull v. Parker**[88] the transaction was an exchange of new riding equipment for old and partial consideration of £2. Despite the fact that the parties had not made any valuation, the court accepted that the price of such equipment was £4, and held that the plaintiff could recover that sum for the defendant's failure to perform his obligations. This decision suggests that if the value of the goods is apparent, a contract may be construed as a sale even if the parties have failed to assess the value of the goods in their transaction.[89]

Another issue raised by the court in Flynn v. Mackin supra is the difference in the time the property passes between sales of goods and barter.[90] In **Koppel v. Koppel,**[91] a man agreed to transfer the contents of his house to his former housekeeper in exchange for her promise to return to his home on a permanent basis, the Court of Appeal held that property in the goods had passed to the housekeeper solely by the contract itself. The court applied section 18 of the Sale of Goods Act,

85. See Flynn v. Mackin and Mahon (supra).
86. Ibid.
87. Ibid.
88. 13 (1842) 2 Dowling N.S. 345.
89. See Canton, op. cit, note 84.
90. Id. Noting that "Walsh J. went on to assume that ownership of the new car could only have been transferred when it was delivered to the first defendant. However, it seems that the question whether property in bartered goods passes by the contract itself or at the moment of delivery has not been answered satisfactorily."
91. [1966] 1 WLR 802.

1893 to the transaction. Harman L.J. insisted that the absence of formal delivery was not fatal to the case.[92]

In the midst of confusion, the best approach for the court is to decipher the intention of the parties and to apply it. According to Atiyah, the reason why the distinction was of practical importance in Flynn v. Mackin supra was that it was assumed that the property passes at different times in the two transactions. But if the contract is so close to the border between two classes of contract, it would seem absurd if such consequences were held to depend on the label attached to the contract, though sometimes this may be inevitable.[93]

4.6 SALE OF GOODS AND GIFT.

Since there is no money consideration or in almost all circumstances no consideration at all for the transfer of gift, it could not be regarded as a sale. In **Esso Petroleum Co. Ltd v Customs and Excise Commissioners**,[94] Esso produced 'World Cup Coins' which they offered as 'free gifts' to purchasers of their petrol. The issue was whether these coins were 'produced ... for sale' under the Purchase Tax Act, 1963 (UK) in which case Esso would be liable to pay some tax on them. The coins were of insignificant intrinsic value, but millions had been produced and the tax bill would be hundreds of thousands of pounds. The majority of the House of Lord decided that the contract was not a contract of sale of goods but a collateral contract.[95] This case

92. According to him, "there is no question of a gift here: it was money or money's worth." Note however that the fact that he did not define what he means by money and money's worth has been criticized. See Canton, op. cit, note 84 noting thus: "the assumed applicability of the 1893 Act precluding a conclusion that property in bartered goods can pass when the contract is made."
93. Atiyah, op cit, note32.
94. [1976] 1 All ER 117; 1 WLR. 1.
95. At the trial court, Pennycuick V-C held that the motorist had a straightforward contract for the coins as part of the undisputed contract for the purchase of petrol. According to him, the meaning of the word sale may be too wide in some circumstances. On appeal, his decision was set aside. The Court of Appeal held that that the motorist had no contract for the coins, the coins being a gift. On further appeal to the House of the Lord, the House held that there were two contracts involved in the transaction: one a straightforward contract for the purchase of the petrol, and the other a so-called "collateral contract" concerning the coins. The terms of the suggested "collateral contract" concerning the coins were to the effect that the garage promised to give the motorist a coin in return for the motorist entering into a contract to buy four gallons of petrol, not, in return for the motorist promising to pay money for the coins as such. Despite the fact that the collateral contract analysis treated the coins as the subject matter of a contract, the House concluded that under the definition of a "contract of sale goods" in the (then applicable) Sale of Goods Act 1893, the transaction was not a contract of sale since the consideration for the coins under the contract was not money.

has been criticized sharply by scholars that the transaction could have been treated as sale of goods.[96]

5.0 CONCLUSION

Since, different law applies to different forms of commercial transactions; the need to distinguish one [form of commercial transaction] from another is inevitable to decipher the true identity of the hidden nature of the transaction as well as the duties, obligations and rights of the parties. This paper has proved that no test is infallible; the courts must not prefer one test to another without a synthesis of the facts in conjunction with all the tests that have been developed. In addition, the idea of a common code for all commercial transactions is laudable but it is not a panacea to the confusion that might emerge in distinguishing one form of commercial transaction from another. Perhaps the partial antidote could be found in constant revision of commercial law.

96. See Igweike, K.I., Nigerian Commercial Law: Sales of Goods, 2nd ed. (Malthouse Ltd, Lagos); See Gus Merchandise Corporation Ltd v. Customs and Excise Commissioners [1981] 1 WLR 1309. See also Atiyah, P.S. "Conceptual Construction" [1976] 39 MLR 335-6.