



THE AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW

LA SOCIETE AFRICAINE DE DROIT INTERNATIONAL ET COMPARE

Aberdeen House, 22 Highbury Grove, London N5 2DQ

Tel: 0171-704-0610 Fax: 0171-704-0973 E.mail: 100632.3305 @compuserve.com

Offprint – Tiré à part

Reproduced From

The African Journal of International and Comparative Law

Tiré de

La Revue Africaine de Droit International et Comparé

RADIC Volume 10 Pt. 3 (1998)

RADIC Tome 10 No. 3 (1998)

LENDING ON LAND MORTGAGE ON PLEDGE SECURITY IN NIGERIA: A MINEFIELD FOR SECURED LENDERS

ENEFIOK ESSIEN*

I. INTRODUCTION

The Government in Nigeria expects a meaningful private sector participation in the national development.¹ This is, probably, a legitimate government expectation in all capitalist economies. The private sector in turn requires capital for investment so as to bring about development. This results in borrowing. However, the lenders² of capital are normally not satisfied with just the borrower's promise to repay; they require some security, real security,³ for the capital lent. This is true particularly of the institutional lenders like Banks, Finance and Mortgage houses,

* Enefiok Essien Esq., LLB (Hons), LL.M, Barrister and Solicitor (Nigeria), Notary Public.

- 1 There is no commonly agreed definition of "development" and the definitions that abound only reflect the intuitive value-sets of their authors: Seidman, R. B., *The State, Law And Development* Croom Helm, London (1978), at p.55; and at times the word is used interchangeably with "modernisation": Scers, D., *The Meaning of Development* (1969) vol.11, International Development Review, at p.2; which is why, for Western observers, "development" means "to be like us": Nettl, J. P., "Strategies in the Study of Political Development", in Leys, C. (ed.), *Politics and Change*, p.13; Higgins, B., *Economic Development: Principles, Problems and Policies*, Norton New York (1959). As used here, the term "development" embraces both individual and national betterment and cuts across the mental, physical, educational, health, social and commercial sectors. Development thus includes better education, enlightened creative populace, better road networks, constant electricity supply, better and constant water supply, better health care, better clothing, better food and houses, ownership of automobiles, radios, television and telephone sets and, generally, a happier people. It is indeed a multi-faceted concept.
- 2 The term "lender", "financier", "secured lender", "creditor", "secured creditor", "mortgagee" and "pledgee" are used herein interchangeably as the circumstances dictate, to refer to the person (natural or legal) who lends money to another. Accordingly, "borrower", "debtor", "mortgagor" and "pledgor" are used interchangeably as the context warrants, to indicate the person to whom money or "capital" is lent.
- 3 "Real Security" here is used in contrast to "Personal Security". In real security, some property of the debtor is earmarked so that the creditor may appropriate it in the event of the debtor's default in repayment. On the other hand, in a personal security no such property is earmarked: the creditor relies only on the personal promise of the debtor to repay or/and on the promise of the debtor's guarantor(s) to repay - which is still a personal security, just that one personal promise is added on another. For the creditor, the fundamental effect of the distinction between real and personal security is that in the event of a default in repayment, the creditor who had real security proceeds against the *res*, i.e., the property which has been earmarked, to recover his money, whereas the creditor who had merely a personal security proceeds against the person of the debtor (or/and his guarantor(s)) to recover on the debtor's promise to repay. One gives the creditor a right *in rem* while the other gives him a right *in personam*. See generally: Sykes, E. I. and Walker, S.: *The Law of Securities* (5th edn., 1993) The Law Book Company, at pp.12-13; *Bristol Airport PLC v. Powdrill* [1990] 2 All ER 493 at 502.

10 RADIC (1998)

which normally advance loans of appreciable amounts, or what is generally referred to as investment loans, to borrowers. The two most common landed securities for credit in Nigeria are the mortgage and the pledge.

This paper argues that the pledge and mortgage laws as they stand in Nigeria presently do not afford enough protection to the secured creditor, and that that is why potential borrowers do not obtain the capital they need for investment and development. The paper argues further that for the secured creditor to be afforded sufficient protection, it does not suffice that the pledge or mortgage security provided *fully covers* the loan in the event of default, but that the pledge or mortgage must also be *easily realisable*. For one, a security is of little value if an attempt at its ultimate realisation is like the proverbial futile struggle by the camel to go through the eye of a needle. For another, lack of creditor confidence in the ability to cover the potential losses of the debtor default with the collateral securing the loan will likely produce one of two unpleasant results: either a dearth of available loan funds will arise as creditors refuse to risk their capital, or lenders will begrudgingly provide loans only at exorbitant rates of interests, which will stifle all but the boldest of potential debtors. In either case, the development of the national economy will be greatly slowed or halted.

The problem of *full coverage* of the loan hardly arises in Nigeria because, in practice, the creditor normally extracts security which is even of higher value or financial worth than the loan sum.⁴ The problem is with *easy realisation* of the security. Our attention here is, principally, on the realisation of the two most common consensual forms of security in land (or real property)⁵ in Nigeria, namely, the pledge and the mortgage.

II. THE PLEDGE SECURITY

The pledge of land is a consensual customary law transaction by which possession of the land is transferred and delivered by one party called the pledgor, to the

4 This is to leave room for a possible slump in the capital market at the time of realisation of the security which may cause the property (which is the subject of the security) to be sold at a lower price than originally valued.

5 Accordingly, security interests in personal property are not discussed. However, the law in the case of security in personal property is the same as in other common law countries, subject, of course, to local statutes. On this, see generally: Gilmore, G., *Security Interests in Personal Property* (1965); Gough, W.J., *Company Charges*, 2nd edn., Butterworths, London (1996); Goode, R.M., *The Legal Problems of Credit and Security*, 2nd ed., Sweet and Maxwell, London (1988); Sykes, E.I. and Walker, S., *The Law of Securities*, 5th ed., The Law Book Company, Australia (1993). "Land" or "Real Property" is used here broadly to include land, right or interest in land and right or interest in the things attached permanently to land, e.g., houses erected thereon, i.e., the "fixtures"; for it is the law that *quicquid plantatur solo solo cedit*: whatever is affixed to the soil belongs thereon: *Holland v. Hodgson* (1872) L.R. 7. C.P. 328; *Wiltshire v. Cottrell* (1853) 1 E. and B. 647, vol.118 ER 589; *D'Eyncourt v. Gregory* (1866) Law Rep. 3 Eq 382; *Ezeani v. Njidiye* (1965) NMLR95, [1964]1 All NLR402. Apart from under the general law (which is the common law) "land" also includes the fixtures on it under customary law: *Okoiko v. Esedalue* (1974) NMLR 337 at 340, per Elias C.J.N. Cf.: Ezejiolor, G., *Okoiko v. Esedalue: Have The Last Words Been Said?* 9 NLJ 168, 172-4.

other party called the pledgee, as security for the repayment of a debt.⁶ It is most appropriate for small-scale security transactions between individuals and small groups⁷ and it is practised in all African countries.⁸ Its practice is excluded by definition in the United States of America,⁹ and in England it is presently only “theoretically possible”.¹⁰ So far as a pledge of land involves the delivery of possession, it is thus like the pledge of chattel or personalty under the general law, except that in the case of land, the delivery of possession is required to be actual, never constructive¹¹ – which, indeed, is good for the creditor/pledgee because, unlike a mortgagee in possession,¹² he is entitled to reap the fruits of the pledge property (e.g., by collecting the rent therefrom) as his interest on the loan without accounting for it.¹³

The pledge would ordinarily have been a very attractive security device due to the simplicity in its creation. It does not require writing, though in practice the parties frequently reduce the agreement into writing, probably for evidential

- 6 A pledge could be as a security for the performance of some obligation other than the repayment of a debt. Our concern here, however, is with the repayment of a (monetary) debt.
- 7 See the sub-title, *Secured Transactions: Customary Law* in Woodman, G.R., *Fundamental Principles: Customary Law*, a Paper presented on 28 February 1994 to World Bank staff, under the general theme, Fundamentals of Land Law.
- 8 In Ghana, Michelin, J. described it as “a kind of indigenous mortgage”: *Adjei v. Dabanka* (1930) 1 WACA 63 at 66-67. The relevant modifications to the pledge laws in Ghana are mentioned below.
- 9 Here, a pledge is defined as “a contract for delivery of *personalty* to be retained by the pledgee as security for the performance of some obligation due from the pledgor, legal title remaining in the pledgor and possession only passing to the pledgee, who has a special property in the thing pledged until the obligation secured is satisfied”: *US.- Nelson v. Commissioner of Internal Revenue*, C.C.A. 8, 101 F.2d 568 (emphasis mine); *Corpus Juris Secundum*, vol.72.
- 10 Goode, R.M., *The Legal Problems of Credit and Security*, *op.cit.*, at p.11. However, though hardly met with in practice today, the pledge of land existed in England in the early days (in the forms of *vivam vadium* or live pledge and *mortuum vadium* or dead pledge: vol. 21 ER 1067) and it is the earliest form of secured credit device not only in Nigeria and in England but in the world. See: Holdsworth, W. S., *A History of English Law*, vols. 2 and 3 (1923) 3rd edn., Methuen and Co. Ltd., London, pp.25, 128; Waldock, C.H.M., *The Law of Mortgages*, 2nd edn., Stevens and Sons Ltd. and Sweet and Maxwell Ltd. (1950) at p.19; Plucknett, T.F.T., *A Concise History of English Law*, 5th edn., Butterworths, London (1956) at pp.603, 605; Pollock, F. and Maitland, F. W., *The History of English Law*, vol. 2, 2nd edn., Cambridge University Press, London (1911) at pp.118-119; Barton, J. L., *The Common Law Mortgage* (1967) 83 LQR 229 at 229; Hazeltine: *The Gage of Land*, vol. 3, *Essays in Anglo-American Legal History*, p.636; Wigmore, J. H. *The Pledge-Idea: A Study in Comparative Legal Ideas*, Harvard Law, Review, vol.x (1896-1897) pp.321-350. Wigmore traces the origin, derivation, development and the various meanings of the word “pledge” in today’s usage.
- 11 In Ghana, the Mortgages (Amendment) Decree 1979 has dispensed with the requirement of transfer of possession of the land to the pledgee; thus, the pledgor retains possession until default.
- 12 A “mortgagee in possession” is a rare occurrence. Though at law a legal mortgagee is entitled to possession even “before the ink is dry on the mortgage” (*Four-Maids Ltd. v. Dudley Marshall (Properties) Ltd.* [1957] Ch. 317 at 320, *per Harman, J.*), in practice, however, he does not take possession (except upon default, in which case it is a prelude to exercising his right of sale) because of the strict duties to account imposed by equity on the mortgagee in possession.
- 13 An exception is in the case of self-liquidating pledge, i.e., where the creditor/pledgee is expected to repay himself, with the result that once the proceeds which he has made from the property are up to the loan sum and agreed interest, the loan becomes automatically liquidated and possession of the land reverts to the pledgor without more.

purposes only. This is unlike the situation in Ghana where a pledge of land now requires the same rigorous formalities as a mortgage.¹⁴ It is, however, not clear if, in Nigeria, the Land Use Act 1978¹⁵ which requires the Governor's consent to any "transfer of possession of land"¹⁶ affects the pledge. If it does, it means that the pledge may now have to be in writing so that the document may be sent to the Governor for his consent to be endorsed thereon. The practice, however, is that the pledge of land is still, generally, oral and even when reduced to writing using formal Agreement Papers purchased from the stationery stores, the Governor's consent is never sought nor obtained. I have personally seen a few such written pledges.¹⁷ It may well be that the Governor's consent is not required for land pledges. Alternatively, it may be that the Governor's consent is required, so that it is in ignorance of the law, hardly an excuse, not to obtain the consent. One thing is clear, however; which is that an uncertainty exists for the creditor who accepts a pledge of land as security for his loan. Indeed, the creditor runs the risk of losing the entire loan security if it turns out that the Governor's consent was required but not obtained. This is by analogy with the settled judicial attitude in the case of mortgage of land without the Governor's consent:¹⁸ such mortgage is no mortgage in law, with the result that the lender's credit is unsecured.¹⁹

As a security for credit, a pledge of land in Nigeria has a major drawback for the creditor. The pledgee cannot realise his security by sale of the pledged property or at all; he cannot turn his security into money even when there is default in repayment and he needs the money. This is unlike a pledge of chattel in Anglo-Nigerian law, and indeed, in American law, where the primary purpose or basis of a pledge is to put it in the power of the pledgee to reimburse himself for the money advanced when it becomes due and unpaid.²⁰ It is noteworthy that this is also the primary purpose of pledge even in communist China.²¹

The rule that a pledgee of land cannot sell the pledged property is probably an

- 14 Pledges are to "be made in accordance with the Mortgages Decree, 1972". See ss. 1, 2 of the Mortgages (Amendment) Decree, 1979. Also: Kludze, A.K.P., *The Modern Ghanaian Law of Mortgages* (1974) 11 UGLJ at pp.5-7; Dankwa, E.V.O., *The End of Pledge in Ghana* (1989) JAL, 185.
- 15 Originally Decree No. 6 of 1978, but later re-designated "Act" by s. 1 of the Adaptation of Laws (Re-designation of Decrees etc.) Order No. 13 of 1980.
- 16 Ss. 21, 22, 28(1)(a), 28(3)(d), 34(7) and 36(5) of the Land Use Act.
- 17 In one case some rooms in a building were pledged for a certain amount of money. The creditor/pledgee was to use the rooms (by letting and collecting the rents therefrom, living therein or making any other reasonable use thereof) for an agreed period, after which he handed over possession of the rooms to the debtor/pledgor.
- 18 *Savannah Bank (Nig.) Ltd. and Anor v. Ajilo* [1989] All NLR 26, (1989) 1 NWLR (Pt.97) 35, affirming Court of Appeal decision in (1987) 2 NWLR (Pt.57) 421.
- 19 *Ibid.*
- 20 U.S. – *In re Carter*, D.C. Va., 56 F. Supp. 385.
- 21 See: Mary Riley: "Borrowing with Security in China" [1995] 10 JIBL pp.428-436 at 429: "A debtor is allowed under China's General Principles of Civil Law ... to pledge certain assets as security for the discharge of a debt. If the debtor fails to discharge its debt according to the contract terms, the creditor has the 'right to receive priority payment according to the provisions of the law, by converting the security to its value or by selling the secured assets'".

offshoot of the customary law rule, “once a pledge, always a pledge”²² – an obvious adaptation of the equitable rule, “once a mortgage, always a mortgage”.²³ However, while in common law mortgage the phrase means that once a transaction is seen to be a mortgage, equity will not allow any fetters or clogs on redemption, under the customary law pledge the phrase acquires two different meanings. Firstly, it means that once the transaction is seen to be a pledge, it may be redeemed at any time even soon after its creation and before the time fixed for redemption (where such time was fixed). Secondly, it means that the pledge may be redeemed at any time in the future no matter how long the pledge property has remained in the possession of the creditor/pledgee.²⁴ It is thus probably to safeguard the debtor/pledgor’s illimitable right of redemption²⁵ that the creditor/pledgee is deprived of any power of sale, the reasoning being that the existence of such power would be inconsistent with the debtor/pledgor’s perpetual right to redeem.

On logic, however, it is not clear why customary law should deprive the pledgee of the right of sale. All that the pledgee has is a passive right to withhold possession of the pledged property until repayment or redemption, whichever is earlier. A sale by the pledgee will only transfer this passive right to possession to the purchaser, and nothing more, so that the pledgor’s title or ownership remains unaffected. This is analogous to a sale by an equitable mortgagee which is said to convey not a legal title but only such interest as the equitable mortgagee himself had, i.e., an equitable interest.²⁶

The law of pledge of land in Nigeria does not encourage the potential creditors to lend their money to those who need it for investment and development. The law does not appear to balance the interest of the creditor to recover his money (and the agreed interest) with the interest of the debtor to retain the land. The law presently is in favour of the debtor/pledgor only; and in so far as the creditor/pledgee cannot effectively enforce the security interest and dispose of the collateral, the entire effort to secure the debt is for naught. The pledge does not therefore assist the pledgee in enforcing payment.²⁷

22 *Olekanma v. Njoku* (1975) 5 UILR (Pt.111) 332 at 337; *Ikeanhi v. Adighogu* (1957) 2 ERNLR 38 at 39; *Leragun v. Funlayo* (1955-56) WRNLR 167.

23 *Seton v. Slade* (1802) 7 Ves. 265 at 273, vol. 32 ER 108 at 111, vol. 34 ER 984 at 985, *per* Eldon, L.C.

24 *Dung v. Chollom* (1992) 1 NWLR (Pt.220) 738; *Nwagu and Anor. V. Okonkwo and Ors.* (1987) 3 NWLR (Pt.60) 314; *Iwachakwu v. Anyanwu and Anor.* (1993) 8 NWLR (Pt. 311) 307.

25 It may be necessary to mention that quite differently from the situation in a common law mortgage, the terms “equity of redemption” and “equitable right to redeem” have no application in a customary law pledge; there is only a “right to redeem” which is alternatively referred to as a “right of redemption”.

26 Waldock, C.H.M., *The Law of Mortgages*, 2nd edn. Stevens and Sons and Sweet and Maxwell, London (1950) at p.55; *Re Hodson and Howes Contract* (1887) 35 Ch. D. 668 at 671, *per* North J. “... he can convey all he has; but he cannot convey the legal estate”. *Cf.* Lord Denning, MR in *Re White Rose Cottage* [1965] Ch. 940 at 951, approving Wilberforce J’s opinion in the same case, at [1964] 1 Ch. 483; McLoughlin, P., *The Equitable Mortgagee’s Power to Give Legal Title: Nemo Dat Quod Non Habet?* [1983] (Pt.1) City of London Law Review, pp.43-47.

27 See further: Sheridan, L. A., *Rights in Security*, Collins, London, 1974, at p.5.

It is suggested that the pledge law in Nigeria should be revolutionised. A pledge should continue to be redeemable but the redemption should be subject to fixed periods of limitation just like in the case of a mortgage. There is need for legislation to invest the pledgee with the power of sale. That the long-standing customary law rules of perpetual redeemability and non-sale are reversible by legislation is neither in doubt nor without precedent. In young capitalist Russia, for instance, the pledge was until recently a possessory security (i.e., possession was *necessarily* given to the creditor/pledgee, just like in Nigeria presently) but the new Civil Code²⁸ changed it to non-possessory security, by providing that “the collateral shall remain with the debtor unless otherwise provided by law or by agreement”.²⁹ The law thus shifts the preference to pledge as a non-possessory security. And in Ghana, legislation has now set a period of limitation for redemption of a pledge.³⁰ This has affected, for Ghana, the continued correctness of the maxim earlier stated, “once a pledge always a pledge”. It is submitted that if the rule of perpetual redeemability is abandoned it will be beneficial to both the secured lender and the borrower: the lender will rest in the knowledge that in the event of default, he is equipped with the power of sale (though he cannot foreclose before selling³¹) or, if the property is very commercially attractive, he may choose to wait for the period of limitation to expire and then the property becomes his. With this confidence, the borrower will also gain because the lender will be easily disposed to advancing him the capital he needs. In the long run, the national economy will also be the better. Until legislation is put in place effecting these changes, the lender/pledgee in Nigeria may discover, probably at the late stage a of default in repayment, that far from being a secured lender, he has no security.

28 *Grazhdanskii Kodeks Rossiskoi Federatsii* (GKRF), quoted in Kilborn, J. J., *Securing Russia's Future: A Plea For Reform in Russian Secured Transactions Laws*, vol. 95, No. 1 Michigan Law Review (1996) p.255 at 256.

29 *Ibid.*, art. 338(1).

30 The Limitation Decree 1972 (NRCD 54), s. 12(3) prescribes a twelve-year period for claims by a mortgagor to redeem land. This probably covers the redemption of pledges since the Mortgages Decree in Ghana is expressly stated to be applicable also to “actions in respect of matters regulated by customary law: s. 30(3). See also: Kludze, A. K. P., *Modern Principles of Equity*, Foris Publications, USA (1978) at pp.464-466. In fairness to the pledgee, there is no reason why there should be no period of limitation for redemption, so that after that period the pledgee may sell. It may be recalled that it was this same necessity for fairness in the area of mortgages that led equity to intervene in England by developing the doctrine of foreclosure, a process which effectively terminates the mortgagor's “equity of redemption”.

31 A pledgee has only a “special property” (*Donald v. Suckling* (1866) L.R. I Q.B. 585), or limited legal interest, in the collateral. In the case of pledge of land, this “special property” is the passive, possessory right only; title to the pledged property remains in the pledgor. Thus, though we have argued that the pledgee should be able to transfer this possessory right to the purchaser, he cannot foreclose: the pledgee has no title which he may enlarge by foreclosure. See: *Carter v. Wake* (1877) 4 Ch. D 605; *Fraser v. Byas* (1895) 11 TLR 481; Waldock, *op.cit.*, at pp.7-8; Gough, W. J.: *Company Charges*, 2nd. edn., Butterworths (1996) at p.21. In any case, even in the case of mortgages foreclosure is now generally recognised as potentially inequitable in so far as it permanently vests the debtor's property (which was intended only as security) in the creditor: The Law Commission Working Paper No. 99, *Land Mortgages*, paragraph 3.52.

III. THE MORTGAGE SECURITY

A financier that accepts a land mortgage in Nigeria is into a legal labyrinth with regard to the creation of the mortgage security and into a minefield with regard to its ultimate realisation. As to its creation, it may be mentioned that there is in Nigeria no uniform legislation governing the creation of mortgages; this is unlike the position in Ghana where the Mortgages Decree uniformly applies. In Nigeria, the form for mortgage creation is governed by different laws depending on which part of the federation the landed property is situated in. However, two things may be said generally. Firstly, that the highest mortgageable (or pledgeable) landed interest in land in Nigeria is the Right of Occupancy which is created under the Land Use Act, 1978. Secondly, that under the same Act, the Governor's consent is a *sine qua non* to the creation of the mortgage.³² Outside these two, the other requirements for the creation of a mortgage and the form that the mortgage should take are in different laws and in some cases vary from one State to the other.

For States in the former Northern and Southern Nigeria, the applicable laws are the Conveyancing Act 1881,³³ the Statute of Frauds 1677 (regarding the need for writing), the common law and equity and the Real Property Act 1845 (regarding sealing). While sealing is a requirement in these States, it is not so in Lagos State, where a mortgage is created by a "Legal Charge in the prescribed manner"³⁴ under the Registration of Titles Act³⁵ and does not require to be sealed; it suffices that it is expressed to be by deed.³⁶ At the moment, it is not clear if the Registration of Titles Act is still operational in Lagos State since it deals with "titles" to land which, as from the inception of the Land Use Act in March 1978, has ceased to exist; individuals now have a right of occupancy only, not title. However, the Registration of Titles Act has neither been repealed nor amended,³⁷ and until that is done it continues to apply, subject to such modifications as will bring it into conformity with the Land Use Act.³⁸ Where no provision is made in the Registration of Titles Act for any matter in Lagos State, the Conveyancing Act 1881 also applies.³⁹

States of the former Western Nigeria apply the Property and Conveyancing Law 1959 which was modelled on the Law of Property Act 1925 of England. For these States, a mortgage is by a charge by way of legal mortgage. It may be

32 Ss, 21, 22, 26 and 36(5) of the Land Use Act which require consent.

33 An English statute of general application.

34 The "prescribed manner" is the Form of a Charge provided as Form 5 in the First Schedule to the Registration of Titles Act. See the next footnote.

35 Cap. 121, vol. X1, Laws of Lagos State, 1973.

36 S. 80(1).

37 See, however, the Registration of Titles (Amendment) Edict (No. 2) of 1986 of Lagos State. This only amended the Second Schedule to the Act, i.e., the fees chargeable upon registration of charges.

38 S. 48 of the Land Use Act 1978. It is with the same proviso that the Land Tenure Law continues to apply in the States of the former Northern Nigeria. See s. 4 of the Land Use Act.

39 S. 80(2) of the Registration of Titles Act; *Seaview Investments Ltd. v. Munis and 2ors.* (1991) 6 NWLR(Pt. 195) 67.

argued that if a mortgage of land which is situated in any of the States of the former Northern and Southern Nigeria is purportedly made by a charge by way of legal mortgage, or by legal charge, such mortgage is void since it attempts to create what is a legally unrecognised security in those States. This issue has not come up yet in our courts but it is all too real and can prove a worry to the mortgagee. For instance, I have come upon a secured credit contract headed "Legal Charge" and commenced with "This Legal Charge ..." but all through the body of the document "mortgage", rather than "legal charge", was continually referred to.⁴⁰ The document was executed in and related to landed property situated in a State in the Southern part of Nigeria. This shows that the multiplicity of and the variation in the forms of creating a mortgage in the country constitute a maze to some legal practitioners. This situation does not benefit the secured creditor who requires a simple, certain and legally binding security for his credit.

Assuming the mortgage has met the requirements for its creation, the major worry for the mortgagee is with the realisation of the mortgage security. There may be many reasons underlying his worry, such as that the mortgage is not realisable if it is declared void because the Governor's consent was not obtained to its creation, or if it is voidable for want of the consent of the principal members of the family, in the case of family landed property.⁴¹ However, the most vexing reason for the mortgagee's worry may be that the borrower/mortgagor's right of occupancy to the land (or landed property) has been revoked by the Governor⁴² – an act which has nothing whatsoever to do with, and is not attributable to any default by, the mortgagee.

Granted that the mortgagor is in equity the beneficial owner of the mortgaged property until his interest is extinguished by the mortgagee's realisation of the security, it is equally true that in Anglo-Nigerian law the mortgagee is also, from the moment of the creation of the security, entitled to preserve the mortgaged property – if a legal mortgagee, by reason of his legal interest; if an equitable mortgagee, by reason of the fact that every mortgagee has a general right in equity, as against the mortgagor, to hold the security undiminished in value.⁴³ He may, for instance, be granted an injunction to restrain a subsequent encumbrancer

40 The document was attached as Exhibit A to an affidavit in Suit No. HU/85/96: *Okedo Enterprises (Nig) Ltd. and Anor. v. Co-operative Development Bank PLC*, filed on 13/3/96 at High Court No.6, Uyo, Nigeria. The case is still pending in court but we reckon that the document may be referred to because, apart from that it had been registered, having been filed in court it has become a public document. Also, the point being made here has not been raised in the case; it is therefore a non-issue and raising it here cannot be regarded as *sub-judice*.

41 The pre-Land Use Act customary law rules, such as the requirement of consent of the principal members of the family to the alienation or encumbrance of family landed property, still subsist. The Land Use Act has not abolished them (*Okpalugo v. Adeshoye and Anor* (1996) 10 NWLR (P. 476) 77 at p.100; *Abioye v. Yakabu* (1991) 5 NWLR (Pt. 190) 130 at 225) but has merely added another form of consent requirement, i.e., the Governor's.

42 Under the Land Use Act, the Governor has the right to revoke a right of occupancy where the land is to be used for public purpose (s. 28(2)(B) and s. 28(3) of the Act), or is needed for the extraction of building materials or for overriding public interest (s. 28(3)(A) and (c)).

43 *McMahon v. North Kent Iron Works Co.* [1891] 2 Ch. 148 at 150, that the mortgagee has a right to the protection of his security if it is in jeopardy.

from dealing with the mortgaged property in a prejudicial manner.⁴⁴ From the fact of the mortgagee's right to preserve the mortgaged property and the fact that the mortgage security entitles him to look to the mortgagor's right in the land for the repayment of his debt, it ought to follow that should the mortgagor's interests in the land change, the mortgagee's security would automatically attach to the mortgagor's interest in the changed form. This, however, does not appear to be so in Nigeria.

Under the Land Use Act, upon the revocation of a right of occupancy, it is "the holder and the occupier [who] shall be entitled to compensation for the value at the date of the revocation of their unexhausted improvements"⁴⁵ on the land. The Act expressly excludes a mortgagee from the definition of a "holder" for the purpose of entitlement to compensation following a revocation.⁴⁶ The Act defines "occupier" as the person occupying the land.⁴⁷ "Occupier" thus refers to the person in possession and use of the land. This accords with common law where, as stated in *Ironmongers Co. v. Naylor*,⁴⁸ "the owner of a vacant land or houses is not the occupier, for the "occupant" or "occupier" are always in law taken for an actual possessor, one that useth, enjoyeth or manureth the land; he is said to have the land in his occupation".⁴⁹ The mortgagor is thus also not an occupier and therefore not entitled to compensation under the Land Use Act in the event of revocation for, as stated earlier, though in law he has a right to possession, he normally does not exercise the right in practice. This has the effect that, though the mortgagee has the right to (and in fact does) preserve the improvements on the land, which are the security for his debt, yet on the revocation of the mortgagor's entitlements, i.e., his right of occupancy, the mortgagee has no right to the compensation money into which the improvements may be said to have transmuted.⁵⁰

There is as yet no reported judicial pronouncement on this point in Nigeria, but there is certainly a danger lurking there in the Act for the mortgagee. It is not improbable that the point may have arisen in a case which never went on appeal from the High Court, and as High Court decisions are generally unreported,⁵¹ the point has escaped notice. However, now is the time when the definition of a "holder" should be amended to include the mortgagee. There is no reason why the mortgagee should not be assured that even when there is a revocation of the

44 *Legg v. Mathieson* (1860) 2 Giff 71, vol. 66 ER 31.

45 S. 29(1) and (2) of the Act.

46 S. 50(1) of the Act.

47 *Ibid.*

48 Poll. 216, vol. 86 ER 562.

49 Vol. 86 ER 562 at 566.

50 Sadly, this was the view taken in interpreting a similar provision in the Tanzanian Land Ordinance, Cap. 133, in *Manyara Estates Ltd. and Ors. v. National Development Credit Agency* (1970) E.A. 177 at 185, *per* Sir Charles Newbold, P. It is hoped that the Nigerian Courts will not find any persuasion in this case. As argued below, the mortgagee should be entitled to the compensation money *qua* mortgagee even if not *qua* "holder".

51 Probably because they are not binding on the superior courts, not even on the Judges who pronounced them; they are only of persuasive force. However, they are binding on inferior courts.

mortgagor's right over the secured property, his security interest remains alive in the form to which the property has been changed. Support for this view may be drawn from other jurisdictions.

In the English case of *Ranken v. East and West India Docks Co.*⁵² where, upon the land being taken over (under an Act of Parliament) by the defendant Railway Company, the court ordered that compensation should be paid to the mortgagee to whom the land was security. The same decision was reached in *Rex v. Middlesex (Clerk of Peace)*,⁵³ where land subject to mortgage was taken compulsorily by the Railway Company under an Act of Parliament. Rowlatt, J. said:⁵⁴

... it certainly is a startling proposition that the mortgagees who have precisely the same land in their hands as security should be in a worse position than their mortgagor, and should be unable to demand all the compensation which their mortgagor could have demanded in respect of the mortgaged property ...⁵⁵

The same view was expressed, more pointedly, in the Australian case of *Syme v. The Commonwealth and Anor*,⁵⁶ where a mortgaged land was taken over by the Government of Australia under the National Security Act 1939-1940. Latham, C.J. emphasised:⁵⁷

When compensation is paid for a deprivation of interest which diminishes the mortgagee's security, the compensation is regarded as representing the security *pro tanto* and it must be paid to the mortgagee or preserved to meet his claims under the mortgage... [because] in such case, as Kekewich J. said in *Law Guarantee and Trust Society Ltd. V. Mitcham and Cheam Brewery Co. Ltd.* (1906) 2 Ch. 98 at 103: "The property ... is not what it was. Something has been taken out of it".

In the light of the foregoing therefore, and to protect the interest of the mortgagee, the Land Use Act should be amended to provide for payment of compensation to "the person interested in order of priority". That way, the mortgagee will have a prior right to the compensation money and thereby be enabled to realise his security.

IV. CONCLUSION

A few points may be stressed by way of conclusion. The first is that there is need for uniformity in secured transactions law in the country. There is no reason why,

52 12 Beav. 298, vol. 55 ER 1075.

53 (1914) 3 K.B. 259.

54 *Ibid.*, at p.264.

55 See also, *Pile v. Pile, ex parte Lambton* (1876) 3 Ch. D. 36 at 39, *per* Hall, V. C.: "The mortgage of the lease of a property ... must carry along with it everything which would be awarded in respect of the property".

56 [1942] 66 C.L.R. 413.

57 *Ibid.*, at p.421.

for instance, a mortgage should be created in different ways and assigned different names in different parts of the country. This is important because, unlike the case in the United States of America where attorneys belong to and practise in particular States, all legal practitioners in Nigeria are entitled to practise in all parts of the country and their practice will be simpler, better and faster if there is uniformity in the law, thus making the law less complex. At the end the creditors too will benefit from the uniformity and simplicity of the law because they will no longer have to bear the financial burden of solicitors' mistakes. This calls for a review of the entire law on secured credit transactions. Indeed, such a review should be a continual rather than a one-off exercise. A cue may be taken from the United States of America where the Congress has continually revised and updated the laws relating to (secured) debt recovery "in an effort to best serve the interest of debtors, creditors, and the economy as a whole".⁵⁸

Similarly, the law relating to the pledge of land needs to be updated in the areas highlighted above so as to accord with modern commercial realities and in order to strike the correct balance between the interests of the secured creditor and the borrower. If the pledge of land is to retain its classification as a security, it is high time the law made it a realisable security. For now, it is not a security properly so called.

The final point to make is that the secured creditor (such as the mortgagee) should be left in no doubt that, whatever the circumstance, even in the event of a revocation by the Governor or by Government, his security will not vanish. This may be achieved by amending the Land Use Act in the manner we have recommended above. Until all the modifications we have suggested are carried out, a lender who accepts land mortgage or a pledge of land (or landed property) as security for his loan will continue to tread on a legal minefield.

58 See the Explanation to Title 11 of the United States Code – containing the laws of a general and permanent nature relating to Bankruptcy.