



UNIVERSITY OF UYO

**SECURED TRANSACTIONS LAW:
THE POWER OF COLLATERAL
IN NIGERIA**



BY

ENEFIOK ESSIEN

*LLB (Hons) (Calabar), BL (Hons) (Lagos), LLM (Lagos), PhD (Birmingham)
Professor of Property and Commercial Law*

**THE 24TH INAUGURAL LECTURE
DELIVERED IN THE UNIVERSITY OF UYO**

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ACKNOWLEDGMENTS

I thank the Almighty God, the Alpha and Omega, for my life and for my eventful and successful academic career. It is to Him too that I give the praise and glory for this unique opportunity and my ability to deliver this inaugural lecture.

I came into the world through Mr. Effiong Okon Essien and Madam Eyieubok James Essien, both late. I remember them with fondness, and I thank them for bringing me up properly. Still on the domestic side, I thank my dear vivacious wife, Rosalyn Essien – a loving, caring and very understanding lady who has marvelously combined her work as a career civil servant with her wifely and motherly duties: she attends well not only to me, but also to our five promising children. What a wife!

Let me also thank my brother and sisters, my uncles and aunties, my cousins and indeed all my relatives who have encouraged or assisted me in one way or another, at one time or the other, to reach this academic height. In particular, I recall that it was my late maternal uncle, Chief N. U. Akpan, OFR, of blessed memory, who gave me a note to the then Dean of Law, Professor U. O. Umozurike, which helped my transfer into the law programme. I am eternally thankful to him and to Professor Umozurike, because they have enabled me to stand out here today.

I owe a debt of gratitude to all my teachers and lecturers at the different levels of my formal education. My interest in Secured Transactions Law was kindled at the University of Lagos during my postgraduate studies. For this, I thank the late Professor J. A. Omotola, S.A.N., who

DEDICATION

To all lovers of knowledge.

taught me the course in the 1987/88 session and who, despite his tight schedule as Vice Chancellor of the University of Lagos, still found time to write a foreword to my book on *Law of Credit and Security in Nigeria* in the year 2000. I should not forget to thank Professor Fola Lassisi who as Vice Chancellor of our university, the University of Uyo, recommended me for award of the Commonwealth Study Fellowship, and Professor Akintola Aboderin who encouraged me to take up the fellowship offer. This award enabled me to read for the PhD.

During my PhD programme I was assigned to two professors: Professor R. R. Pennington (for company securities) and Professor G. R. Woodman (for real property securities). However, my research tilted more towards real property securities, thanks to Professor G. R. Woodman. He is a model supervisor: very knowledgeable, positively critical, absolutely thorough, but very accessible, very helpful and time-conscious. Despite his busy schedule, which often included traveling abroad, my work would hardly lie on his desk longer than a day or two. I have imbibed a lot of virtues from him and I thank him a lot as this lecture has benefited a lot from his ideas.

Last, but by no means the least, I thank our amiable, proactive and visionary Vice Chancellor, Professor Akaneren I. Essien, and the Management team, for this opportunity to present my inaugural lecture and for the peace and congenial academic environment that has facilitated academic work.

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PROFILE OF PROFESSOR ENEFIOK ESSIEN

The Vice Chancellor and Chairman of this inaugural lecture, members of the University Management, Distinguished Ladies and Gentlemen, I rise to read to you the profile of a very learned gentleman who is already well known within the university community and beyond. His name is Enefiok Effiong Essien. His parents, both late, were Mr Effiong Okon Essien and Madam Eyieubok James Essien. His village is Mbiabong Edem Edik in Ibiono Ibom Local Government Area, in Akwa Ibom State.

Professor Essien was born in 1960. He attended two schools for his primary education: Lagos Premier Day School, Surulere, Lagos, and Presbyterian Primary School, Mbiabong Edem Edik in Ibiono Ibom Local Government Area. For secondary education, he attended Ibiono Community High School, Edem Urua, where he passed with grade one distinction in 1978, and also won book prizes as the best graduating student in Bible Knowledge, English Language and Biology. For those who did their West African School Certificate (WASC) examinations in those halcyon and nostalgic days when results were graded, you would recall that a distinction was simply what it says, and did not go beyond aggregate twelve.

In 1979 the then young Essien took an entrance examination for admission into the Nigerian Institute of Journalism (NIJ), Lagos. He passed and was offered admission into the institute. However, he did not take up the offer, but instead opted for the School of Journalism and Television, Berkshire, England, from where he eventually obtained a Diploma in Journalism in 1979. Following this

qualification, and with a recommendation from Mr. Isong Akpabio who was then an editor with the Calabar-based Nigerian Chronicle, Essien was appointed as a reporter with The Gong Press, publishers of The Gong newspaper in Calabar, with effect from 1st October 1980. He assumed duties and worked for two weeks before he sought and obtained a divorce from journalism so that he could marry what has turned out to be a very jealous wife: law. By the way, law is often referred to metaphorically as a very jealous wife because it requires all your time.

The law programme of the University of Calabar started in October 1980. Professor Essien was one of the pioneer law students. He graduated effortlessly in 1984, with a 2nd Class honours, upper division. He also won a prize as the best graduating student in Jurisprudence and Legal Theory. He attended the Nigerian Law School and was, on successful completion, called to the Nigerian Bar in 1985, as Solicitor and Advocate of the Supreme Court of Nigeria. After the compulsory one-year national youth service in 1986, he got admission into the University of Lagos in 1987 for a Master of Laws degree programme which he completed and was awarded the Master of Laws degree (LLM) in 1988. After the LLM, he applied for and got admission into the University of Nigeria in 1988, for a Doctor of Philosophy of Law (PhD) programme in the area of International Law of the Sea. However, he later learnt that the supervisor to whom he was assigned had traveled to Vienna to take up an appointment. Professor Essien saw this as a wrong footing and therefore declined the offer of admission. This was because he had heard of students who spent years to get a change of

supervisor or a change of topic, and he warned himself not to be the next victim.

In September 1995 the inaugural lecturer won the much coveted Commonwealth Fellowship award to read for a PhD in law at a 'red brick' university in England – the University of Birmingham. He completed the programme with a written commendation. The English language used was 'with flying colours'. Apart from finishing in record time, he was not to dot any 'i' or cross any 't' after his *viva voce*. The Doctor of Philosophy of Law was formally conferred on him in 1998.

Now, to his working life. Immediately after his National Youth Service, Professor Essien started as an Assistant Lecturer with the then University of Cross River State in September 1986. He has traversed all academic ranks starting from Assistant Lecturer in 1986, Lecturer II in 1988, Lecturer I in 1990, Senior Lecturer in 1992. In September 1995 he was recommended (by a panel of four, three of whom were Professors, and two of whom were Professors of law) for assessment for Associate Professor. Unluckily, this was not followed up because in the same September 1995 he won the Commonwealth award and left to England for a PhD programme as stated earlier. On his return, he was appointed an Associate Professor with effect from October 1998, and in October 2001 he was elevated to a full chair as Professor of Property and Commercial Law.

Professor Essien has at various times been a Head of Department and Vice Dean in the Faculty of Law. He was Dean of the Faculty of Law for ten consecutive years – from 2000 to 2009 (both years inclusive). He is one of the remaining two pioneer academic staff of the Faculty of Law.

Our inaugural lecturer has authored over sixty publications comprising ten book chapters, twenty eight articles in refereed law journals, five books, and seventeen conference papers. He has published both locally and internationally.

He has held several positions both within and outside the University. In 1991 when federalism was first experimented at the grassroots level of government during General Babangida's military presidency, Professor Essien was appointed Attorney-General and Legal Adviser for Itu Local Government (which at that time included the now Ibiono Ibom Local Government). From 1997 to 1998 he was Company Secretary to Effects Ltd, London. In 2003 he was Chairman of Akwa Ibom State Panel of Inquiry on Assault and Kidnapping in Nsit Atai Local Government Area. From 2000 to 2009 he was member of the Council of Legal Education in Nigeria. From 2007 to date he is the Chairman, Corporate Affairs Commission's Editorial Board on Company Law Reports in Nigeria. In 1993 the Chief Justice of the Federation of Nigeria appointed Professor Essien as a Notary Public for Nigeria, an office he holds till today. May I also add that Professor Essien has been External Examiner for undergraduate and postgraduate law programmes in ten universities, some of which are still on. These are: University of Nigeria, University of Calabar, University of Jos, Rivers State University of Science and Technology, Abia State University, Ebonyi State University, Benue State University, Niger Delta University, Delta State University, and Ambrose Alli University.

Mr. Chairman Sir, Ladies and Gentlemen, that is not all for today's inaugural lecturer. Permit me to say further

that he has been lead presenter, presenter or discussant at many conferences, workshops, and roundtables. Let me mention just two or three. He was the Lead Presenter on Corporate Governance at a workshop organized by Corporate Affairs Commission at Lagos Sheraton. He was the Special Guest Lecturer at Global Securities Workshop organized by Faculty of Law, University of Lagos. He was Presenter at Corporate Governance Workshop organized by Akwa Ibom Investment and Property Company (AKIIPCO) in Uyo. He was Presenter at a workshop on Land Reforms Agenda of the Federal Government, organized by the Ministry of Lands and Town Planning in Uyo. Professor Essien was the 3rd Convocation Lecturer at Akwa Ibom State Polytechnic, Ikot Osurua, in 2006.

Professor Essien's accomplishments have not gone unnoticed. He has earned several awards, honours and listings. These include: *Who's Who in the World*, from 2000 to date; *Who's Who in Nigeria*, 2nd edition; *Who's Who in Ibiono Ibom*, 2008; *Leading Educators of the World*; *One Thousand Great Scholars of the 21st Century*; *The Contemporary Who's Who of Professionals*. He is also a Fellow of the Institute of Corporate Administrators (FCAI), and Fellow of the Institute of Industrial Administration (FIIA). He has Excellence Awards from The Presbyterian Church Nigeria, from Mboho Mkparawa Ibibio (a pan-Ibibio socio-cultural organization), from University of Calabar Law Students Association, from University of Uyo Law Students Association, etc, etc.

I should quickly add that for Professor Essien it is not all work and play. He belongs to various professional groups and social organizations. These include: International Bar

Association, Nigerian Bar Association, Nigerian Association of Law Teachers, Uyo Sports Club, and University of Uyo Senior Staff Club. He is also patron to many youth, social and religious bodies and organizations. For relaxation, he loves scrabble, reading and writing. He also watches football. He is very happily married to Rosalyn. Together they have five children, equitably(?) gendered: two boys and three girls. Professor Essien is a Christian.

Mr. Chairman and our respected Vice Chancellor, past inaugural lecturers, distinguished ladies and gentlemen, standing before you is an acclaimed university law lecturer, a convocation lecturer, and today he is the first inaugural lecturer from the Faculty of Law of this University. He is the 24th inaugural lecturer of this great university. I present to you Mr. Chairman, ladies and gentlemen, an unassuming gentleman, a legal pundit and an acclaimed intellectual. I present to you the man of the moment, our learned law professor, **Professor Enefiok Essien**.

SECURED TRANSACTIONS LAW: THE POWER OF COLLATERAL IN NIGERIA

1. PREAMBLE

There is a convincing unanimity among scholars worldwide, that an inaugural lecture affords (a newly appointed) professor an opportunity to tell the whole world what he¹ has contributed by way of research or advancement of knowledge,² and its relevance to society;³ it inaugurates the post of a (new) professorial appointment, enabling the post holder to present an overview of his research to a general audience, consisting of members of the University community and the general public.⁴ It is a “once and for all perfect academic obligation”⁵.

¹ By rule of interpretation “he” includes “she”: normally, words importing the masculine gender include females, so there is no need, to repeatedly say “he or she”. See: section 14 of the interpretation Act 1964, Cap 123 Vol. 8, Laws of the Federation of Nigeria, 2004

² See, e.g.: John Ademola Yakubu, *Within and Without: The Relevance and Potency of the Law Beyond Our Frontiers*, an Inaugural Lecture delivered at University of Ibadan, on 23rd November 2006, at page 1; Udo Etuk, *The Philosophy of Relevance and the Relevance of Philosophy*, 16th Inaugural Lecture of the University of Uyo, delivered on 25th January 2007, at page 2; Israel T. Eshiet, *Science Education in Contemporary African Society: Its Impact, Depth and Consequences*, an Inaugural Lecture of the University of Uyo, at page 1 (undated).

³ Ekong Udo Okon, *The Impossible Beer from Nigeria: A Case of Sorghum Versus Barley*, 22nd Inaugural Lecture of the University of Uyo, delivered on 13th November, 2008, at page 29.

⁴ Bristol University – See: Inaugural Lectures available at <http://www.bristol.ac.uk/cms/go/lecturers/inaugural/>, accessed on 19th April 2009.

⁵ Ekong Udo Okon, *op. cit.*, citing J. A. Okojie: *Once Upon a Forest: A Masterpiece of Creation*, an Inaugural Lecture of the University of Agriculture, Abeokuta, delivered in 1994.

Being an obligation, one may see it as a price which every professor has to pay for the chair that he occupies. In legal parlance, such a price is referred to as the “consideration” for the chair. In other words, an inaugural lecture is the consideration (or price) which the professor has to give (or pay) for his professorship. He must profess to the world at large. The problem, however, is that the “consideration” is *past*; it is neither *executed* nor *executory*, and therefore, goes to no issue, because a past consideration is no consideration.

It is normally not a term of or condition for the appointment to a chair that an inaugural lecture would be delivered. Therefore, nothing can be done where a professor fails, refuses or neglects to give his inaugural lecture till he retires from the University system. I submit that if one looks at an inaugural as a price or as an obligation, a professor who has not delivered his inaugural is indebted to the University. A sure way to ensure the discharge of this obligation is to exact some security, say in the form of an undertaking, from every newly appointed professor. Though such undertaking would not be a real security, it would suffice to ensure payment of the academic debt.

Mr. Vice Chancellor Sir, Ladies and Gentlemen, I stand before you today to pay a price for the full chair that I occupy and, indeed, have occupied since the year 2001. This is the first inaugural lecture from the faculty of law of this University, so the expectations would probably be high. But, Sir, if at the end of the day you were, for any reason, to adjudge the lecture as being an inadequate price for the chair I occupy, I will be entitled to remind you politely but firmly,

that in the law of contract consideration need not be adequate. I am required to do no more than give some value, and it will surely not be difficult for me to establish that even the fact of standing here for the next hour or so to address this august assembly constitutes some value in the eyes of the law.⁶

2. INTRODUCTION

As a professor of property and commercial law, much of my academic interest has been aroused and sustained mostly by real property and its use as security for credit or for borrowing, not only in Nigeria⁷ or in Africa

⁶ Also: A. A. Adeogun: *From Contract to Status in Quest for Security*, an Inaugural Lecture of the University of Lagos, delivered on 9th April, 1986, at page 1.

⁷ See, e.g. Enefiok Essien: “From mortgage to insurance in quest for security: A tale of two cities” (1999) UULJ, vol. 3 pp. 1 – 4; Enefiok Essien: “A New Dimension to the Consent Provisions in the Land Use Act”, (1997) vol. 1 UULJ, at pp. 1 – 8; Enefiok Essien: Lending on Land Mortgage or Pledge Security in Nigeria: A Minefield for Secured Lenders” *African Journal of International and Comparative Law*, London, (1998) Vol. 10 Part 3 at pp. 496 – 506 (a bi-lingual journal); Enefiok Essien: The ‘Trust’ under the Nigerian Land Use Act” Vol. 2 (1998) UULJ. Pp. 97 – 107; Enefiok Essien: “Securing Bank Security: Undue Influence and the *O’Brien* Legacy in Nigeria, Vol. 1 (2000) UJMS, pp. 32 – 39; Enefiok Essien: “Land Use Act and Security in Real Estate in Nigeria”, Chapter 13 (pp. 279 – 300) in I.O. Smith (ed): *The Land Use Act-Twenty Five Years After*, University of Lagos Press (2003); Enefiok Essien; “Land Policy and Security in Nigeria,” Chapter 3 (pp. 42 – 70) in I.O. Smath (ed) *Secured Credit in a Global Economy: Challenges and Prospects*, University of Lagos Press (2003); Enefiok Essien: “The Jurisdiction of State High Courts in Nigeria in Land Matters”, *Journal of African Law* (School of Oriental and African Studies, London) vol. 44 pp. 264 – 271 (2000); Enefiok Essien: The Secured Creditor: In word and in deed?”, (2000/2001) 3 & 4 UULJ pp. 69 – 81; Enefiok Essien, *Law of Credit and Security in Nigeria*, Uyo, Golden Educational Publishers, 2000.

generally,⁸ but also in Europe⁹. However, my interest in Public International Law, particularly in Law of the Sea¹⁰ has broadened by conception and perception of land, as will be seen shortly.

In Nigeria the law relating to secured lending is referred to as "Law of Securities". This is likely to immediately conjure the idea of debenture, stocks or bonds, shares, etc. But that is not exactly what is intended here, even though shares and stocks can be used as security. Indeed, the same nomenclature is adopted in Australia and some other common law jurisdictions. In England, some universities call it the Law of Credit and Security. This appears less confusing and more exact. In the United States of America it is generally called Secured Transactions Law, which, again, is less open to confusion. As you can see, I have adopted the latter nomenclature as part of my lecture title.

What then is Secured Transactions Law, and why is it important? To answer, let me start with the preface that market economies depend on the ability of organizations and individuals to access credit and encourage investment. One

⁸ See, e.g.: Enefiok Essien: "Pledge Security in Africa: Nigeria and Ghana", *National Black Law Journal* (University of Columbia, USA), Vol. 16 issue 1 (1999), pp. 24 – 36.

⁹ See, e.g.: Enefiok Essien: "Gazumping – now that it matters again" (1999) *Journal of Housing Law* (Sweet & Maxwell, England), vol. 1 issue 2, pp. 23 – 26; Enefiok Essien: "The Rise and Fall of Security by Deposit of Title Documents", *Journal of International Banking Law* (Sweet & Maxwell, London), Vol. 13 No. 2 (1998) pp. 80 – 83.

¹⁰ See, e.g.: E. E. Essien: "The Legal Solution to Maritime Pollution in Africa" (1994) *Cochin University Law Review* Vol. xviii (Cochin University Law School, India), pp. 289 – 295. Also available at: <http://s/s.cusat.ac.in/review.shtml>; Enefiok Essien: *Essays in International Law of the Sea, GEP, Nigeria*, (1994).

of the three basic systems which have developed in modern market economies for collecting debts is secured lending. To effectively enable access to credit by businesses and individuals, rules are needed to govern "lender-borrower/ creditor-debtor" transactions and relationships. It is for this reason that almost all developed private enterprise economies have laws or codes that provide the rules governing secured loans or transactions. These are the procedures and rules for borrowing and lending, systems for collecting debts and bankruptcy systems for terminating the collection of unpaid debts,¹¹ how risk is allocated among competing creditors, and how it is managed upon default of payment against the debtor. This is significant because in a private enterprise economy, the primary source of funding or credit is not the government but individuals, banks and other private lenders. Secured transactions have been considered as an obvious must with the increasing need for private capital, and a legal framework for secured transactions is a key requirement in creating a creditor-friendly climate. A creditor who knows that he has legally recognized rights of access to his debtor's assets in case of non-payment may assess the lending risk quite differently.

In this sense, a footnote may be added that, a creditor does not regard personal security of the debtor as sufficiently

¹¹ For Nigeria, rules for collecting secured debt on real property are governed mostly by common law and equity. See also, generally, the Bankruptcy Act 1979, Cap. B2 Vol. 1, Laws of the Federation of Nigeria 2004. The Act makes provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as employee).

securing the debt. Maybe I should explain this. Through the credit system, a debtor may obtain goods or services in exchange for the debtor's promise to pay for them later, or he may obtain money through borrowing in return for a promise to repay the loan in future. The "promise" constitutes a personal obligation undertaken by the debtor, and it binds him to repay the loan and provides the basis for suing him if he fails to repay.¹² At times the creditor may, aside from the personal promise of the debtor, require a further promise, or what is technically referred to as a guarantee, of a third party. A guarantee is a contract whereby a guarantor promises the creditor to be responsible, in addition to the principal debtor, for the due performance by the debtor of his existing or future obligations to the creditor if the principal debtor fails to perform those obligations¹³. Such guarantees merely super-add one personal obligation to another and the personal obligation of the guarantor in itself is merely enforceable by a court suit claiming the debt, just in the same manner as the obligation of the original debtor himself¹⁴. Besides, the efficacy of the guarantee depends on the completeness in the form of the document itself and on the original and continued solvency of the guarantor.

¹² Enefiok Essien: *Law of Credit and Security in Nigeria, op. cit.* at page 54.

¹³ G. Andrews and R. Millet: *Law of Guarantees*. London (Longman) 1992, at p.3. For the many definitions of guarantee, see: *Re Conley* [1938] 2All ER 127 at 130 – 131.

¹⁴ Enefiok Essien: "The Laws Regulating the Operation of Community Banks in Nigeria" (1996) UULJ 20.

Having settled the ambit of Secured Transactions Law, and having satisfied you (I suppose) about its importance in human empowerment and national economic development, I crave your indulgence to familiarize you with the peculiar meanings I attach to some key words and phrases which shall occur, and recur, in this lecture. I do this in realization that a word must become a friend or one will not understand it,¹⁵ and since no word has a meaning except that put on it by the speaker,¹⁶ it is necessary that we are *ad idem* on the meaning which I ascribe to the words/phrases.

2.1 Property

"Property" refers to something which may be owned.¹⁷ It is usual to classify it into two: real (or immovable) property or realty (which is land), and personal (or movable) property or personalty (which refers to chattels and includes money and things in action and other intangible property). Real property, real estate, immovable property, realty or land, are therefore all synonymous and used interchangeably. However, the term "real property" or "realty" in relation to rights in land has fallen into comparative disuse in Nigeria, and indeed in most common law jurisdictions, in preference for the increasingly common usage of "land". One must

¹⁵ Sir Edward Coke, *Case of Swans* (1592) 7 Rep. 15, 17, in David Shrager and Elizabeth Frost (eds). *The Quotable Lawyer*, New York, New England Publishing Associates Inc., 1986) p. 325 (para 140.6).

¹⁶ According to Dias, "the meaning of a word depends upon how it is used", so, "the idea that a word must necessarily possess some unique or "proper" meaning should be abandoned." See: R.W.M. Dias, *Jurisprudence*, 4th edn, London, Butterworths, at p.4

¹⁷ L.B. Curzon, *A Dictionary of Law*, 1st edn. Plymouth, Macdonald & Evans.

acknowledge, however, that the term “real property” still has tremendous historical importance and therefore should not be wished away. The legal basis for the use of the term subsists today: early English law gave the dispossessed landowner not a mere right of money compensation in respect of his loss, but a right instead to recover his land by “real action”, i.e., a right to require that the land be returned physically into his possession, and this avails even today.

Since there is now a preference for the use of the word “land”, what then is “land”? This question may be met with varying degrees of indignation. Everyone obviously has a firm idea of what land is: the soil, the earth’s surface, the ground. For the lawyer, however, land is not merely the earth’s surface, but all the land down to the centre of the earth and up to the heavens.¹⁸ This means that the person who owns the land owns everything extending to the very heavens and to the depths of the earth. This is often more eloquently than accurately expressed in the laconic Latin maxim *cujus est solum ejus est altum*. Whether accurate or not, this maxim has implicit in it the notion that at common law, land extends for beyond the immediate soil on which we stand and down (or up) to any limits capable of proprietary enjoyment. As shall be seen shortly, the maxim now has crucial statutory exceptions, particularly as relates to minerals, so much so that it is virtually worthless as a statement of contemporary law.

¹⁸ Benneth, J. in *Re Wilson Syndicate Conveyance, Wilson v. Shorrocks* (1938) 3 All ER 599 at 602

It however serves nowadays as an approximate statement of the *prima facie* extent of land at common law.¹⁹

Apart from the indefinite vertical extension of land, it also extends horizontally to include fixtures, i.e. all articles which, by their annexation to land, have lost their chattel nature and have become, in the eye of the law, part and parcel of land.²⁰ It is on this basis that land law has as a cornerstone that, whatever is planted on or attached to the land becomes part of the land: *quicquid plantatur solo solo cedit*.²¹ This means that the building in which we are now assembled is land, because without the land there can be no building since a house cannot stand in the air. As Lord Denning once said in *UAC v. MacFoy*, you cannot put something on nothing and expect it to stand. It is for this reason, that the landowner can claim a house erected illegally and despite warning on his land. Also, plants, economic trees and other permanent structures planted in or affixed to land, become part of the land.

¹⁹ That is why, in *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] QB 479 at 485C, Griffiths J. dismissed the maxim as merely “a colourful phrase... imprecise and mainly serviceable as dispensing with analysis.” In *Commissioner for Railways, et al v. Valuer-General* [1974] AC 328 at 351 G it was said to have “no place in the modern world”. Also: *Re The Queen in Right of Manitoba and Air Canada* (1978) 86 DLR (3d) 631 at 635, 637.

²⁰ *Per* Birkett, J. in *Hulme v. Brigham* [1943] IK.B. 152 at 154; *Mitchell v. Mosley* [1914] 1 Ch. 438 at 450. The rule originates in Roman Law. See: S.S. Ball: *The Jural Nature of Land* (1928 – 29) 23 *Illinois Law Review* 45 at 48.

²¹ H. S. Theobald: *The Law of Land*, 2nd edn. Rev. and enl. London, Saint Catherine Press, 1929 at p. 215; M. A. Kersley: *Broom’s Legal Maxims*, 10th edn. at p. 262; *Holland v. Hodgson* (1872) L.R. 7 C. P. 328; *Ezeani v. Njidike* (1965) NMLR 95, [1964] I ALL NLR 402; *Okoiko v. Esedalue* (1974) NMLR 337.

The vertical extension of land has contemporary significance in Nigeria, particularly for the oil producing states. The extension of "land" to the centre of the earth means that it also includes the natural prolongation of the land below the territorial waters, below the contiguous zone and the exclusive economic zone, in the form of continental shelf, extending 200 nautical miles (and sometimes more) into the sea.²² There is no part of the sea which does not have land below it, except probably the abysmal plain – which is really a *res nullius* (belongs to none) or, some would say, *res communis* (belongs to all). This brings to the fore the issue of property rights of the littoral states and the people's (individual) right to the extended land territory below the sea. This extended meaning of land is the *raison d'être* for the current clamour for resource control by littoral states in the Nigerian federation. I think the clamour is justified. Even if it is to be argued that the United Nations Convention on the Law of the Sea 1982 (UNCLOS III) only applies among nation states *inter se* and does not apply municipally to federating states, one should still fall back on the common law and statutory extension of land. Under our local statutes the only exclusions from the meaning of land are minerals.²³ However,

²² By Article 76 of the United Nations Convention on the Law of the Sea, "The continental shelf of a coastal state comprises the sea-bed and the sub-soil of the submarine areas that extend beyond its territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured..."

²³ Section 18(1) of the Interpretation Act 1964, Cap. 123 vol. 8 Laws of the Federation of Nigeria 2004. Also, the 1999 Constitution Cap. C 23 vol. 3 LFN 2004 and the Minerals & Mining Act, Cap. M12 Vol. 9 LFN 2004 exclude minerals from the definition of "land", and vest minerals in the Federal Government.

it would be recalled that in both the 1960 and 1963 constitutions of Nigeria, the continental shelf of any Region was recognised as part and parcel of the Region for the purpose of computing the 50 – 50 (or fifty per cent) sharing between the Regional and the Federal Government of the revenue from minerals extracted from the Region. The aforesaid independence and republican Constitutions were the *grund norms* of their time, and now that the current *grund norm*, (i.e. the 1999 Constitution) is to be reviewed, it is time to restore the provision that the continental shelf appertains to the respective federating states from which the land prolongates. Though placating, it is simply not enough to merely abrogate the on-shore/off-shore oil dichotomy as the federal government reluctantly did in 2004.²⁴

"Land" also includes other rights to land which are not the object of sensation, and which can neither be seen nor handled, but which are creatures of the mind and exist only in contemplation. Such rights, known as incorporeal hereditaments,²⁵ include intangible rights like easements, profits and rents.

I realise that land is central to development, and secure land rights underpin sustainable development by making it possible to undertake long-term investment. The more "liquid" land and real estates become and the greater their possible use as collateral for mortgaging or pledging, the more likely they are to contribute to economic growth, national development and poverty alleviation.

²⁴ See Extraordinary Federal Republic of Nigeria Official Gazette No. 17, Vol. 91 (Government Notice No. 039) of 16th February, 2004.

²⁵ Blackstone, *Commentaries on the Laws of England*, vol. ii at p. 17.

The centrality of land in human affairs²⁶ has made the land question a recurring one worldwide. In Nigeria, the law governing land is the Land Use Act 1978.²⁷ The Act permits the use of land as security for credit.

My focus is on credits which are secured by land, to the exclusion of securities not involving land, such as debentures, share certificates, bonds, stocks, negotiable instruments,²⁸ bills of lading, credit balances, insurance policies and book debts. I also do not discuss bank guarantees. Of course, a good bank guarantee can serve as a cash security. A failure to perform or loss may result in the beneficiary calling on the bond/guarantee and the issuing bank will be obliged to liquidate the guarantee/bond by cash payment. A bank guarantee is a contingent liability on the issuer: in practice, to set up a guarantee/bond, there would have been cash collateral offered by the customer or a bank facility debited to finance it. These are all *obiter*, as my interest is on landed security.

²⁶ Land provides the physical substratum for all social and economic interaction. Everyone, even the truly homeless, lives somewhere, and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. Land thus impinges upon a vast area of social orderings and expectations, exerting a fundamental influence on the lifestyles of even the ordinary people. Land is the most important factor of production in industry as well as agriculture, in the sense that business needs land for buildings, factories, stores, warehouses, etc. Professional practice needs land for offices, etc. For other countries, see: J. Davidson: "Without Land we Are Nothing: The Effect of Land Tenure Policies and Practices upon Rural Women in Kenya" (1987) Vol. 2 *Rural Africana*, pp. 1 – 7; C. P. Sheoran: "Socio-Legal Aspects of Land Reform in India" (1983) Vol. 9 *Indian Socio-legal Journal* 12 – 42.

²⁷ Cap. L 5 Vol 8 LFN 2004

²⁸ For a discussion on these, see C. M. Schmitthoff, *et al*, *Palmer's Company Law*, 1, 22nd edn., p. 426 para 42 – 03: Companies and Allied Matters Act, 1990, Cap. C20 Vol. 3 LFN 2004; R. M. Goode: *Commercial Law*, London, Penguin Books, 1995; W. J. Gough: *Company Charges* 2nd edn, London, Butterworths, 1996. See also Investment and Securities Act 1999, Cap. 124, vol 8 LFN 2004, Section 264 of which defines "securities" as intended therein. Security may even be given over intangible asset known as goodwill: *Re Wilby* (1930) 2A.B.C. 172.

2.2 Credit and Debt

Every instance of credit is an instance of debt, something owed. It may be a loan credit or a supply (or sale) credit. In loan credit, the credit is extended by payment of money to the debtor or to a third party at the debtor's request, upon terms (express or implied) that the debtor is to make repayment. In supply credit the debtor's obligation to pay the price of goods or services supplied/ rendered is deferred. Thus, a loan credit involves *repayment* of an advance, while supply credit involves deferment of *payment*.²⁹ In daily life, a single transaction may partake of a loan credit and a supply credit at different times. For instance, a hire purchase transaction is generally regarded as a supply (sale) credit in the sense that it involves a deferment of *payment*. However, when hire purchase is viewed in functional terms as a completed sale and an outstanding loan, the relationship of debtor and creditor arising out of a loan is substituted for the same relationship arising out of a sale, so that a hire purchase involves a *repayment* of a loan by installments. On this view, the security rights³⁰ of the creditor under a hire purchase agreement may be treated as a sale and mortgage back to a lender, rather than a retention of a property sold by an unpaid vendor.

Debt refers to where one owes a duty to do something, in this context, to pay money to another, or is unable to meet financial obligations usually arising out of agreement, as in "being in debt" or being indebted. "Debt" is also used as a noun to refer to the actual sum or thing that is owed.³¹

²⁹ R. M. Goode: *Consumer Credit Legislation*, Issue No. 43, London, Butherworths 1994 para 431.1

³⁰ Explained later, below.

³¹ See further: Geraldine Oku. "Legal Mechanisms for Effective Debt Recovery" *Juriscope* 21st (AlphaJuris Workshop Series) pp. 5 – 23.

The need for credit (or reason for debt) sometimes arises from lack of means to make immediate payment for goods and services. For this reason, the debtor in olden times was looked down upon the world over, and from the eighteenth and nineteenth centuries there were moral prohibitions with regard to the principles of credit, and dislike for credit was expressed in moralistic tones, particularly by the wealthy and middle class. A whole series of proverbs set the tone and reveal the attitudes: "Better to go to bed supperless than to rise in debt"; "He that borrows must pay again with shame and loss", "Neither a borrower nor a lender be, for loan oft loses both itself and friend, and borrowing dulls the edge of husbandry"³²; "Rags make paper, paper makes money, money makes banks, banks make loans, loans make beggars, beggars make rags"³³; "The man who is once involved in debt remains a debtor all his life, exchanging, like a horse that has once been bridled, one rider for another"³⁴; "thou canst not fly high with borrowed wings"³⁵; "He that buildeth his house with other men's money, is as one gathering stones for his sepulcher"³⁶. Even the Holy Bible also advises that "thou shalt lend unto many... but thou shalt not borrow"³⁷, probably because it is "more blessed to give than to receive"³⁸, or/and because just as "the rich ruleth over the poor...the borrower is servant to the lender."³⁹

³² William Shakespeare (1564 – 1616): *Hamlet*, Act 1, Scene 3, 1600 - 1601

³³ 18th century proverb.

³⁴ Plutarch, "On Borrowing", *Moralia*, 97.

³⁵ Thomas Fuller, *Gnomologia*, 1732.

³⁶ Ben Sira, Old Testament, *Ecclesiasticus*, 21:8, C. 190 BC.

³⁷ *The Holy Bible*, King James Version, Deuteronomy, 15:16

³⁸ *Ibid*, Acts, 20:35

³⁹ *Ibid* Proverbs, 22:7

It is not irrefutable that debt, or obtaining credit, is *per se* an index of poverty. As has been pointed out, it is indeed "one of the complexities of the subject that debt may be as much an indication of prosperity as of poverty"⁴⁰. In fact, with perhaps a few exceptions, it can be said that debtors who are able to provide security for their debt are anything but poor. The provision of security rebuts any inference of poverty. In Nigeria, the federal government has over the years tried to provide collateral-free credit to the underprivileged, who are therefore the truly poor.⁴¹

It is however significant that there has been a rapidly growing use of credit in Nigeria and this has caused a change of attitude towards its role and impact in the credit system generally. Individuals, all over the world, have changed their view about credit as a system for the poor. I recall sometime in an interview when Barbara Taylor Bradford, a world-renowned novelist and "one of the highest-earning British women" was asked: "Neither borrower nor lender be'. Is this a viable proposition?" Her answer may be regarded as a summation of the modern thinking: "You have to have a mortgage because it's tax-deductible, so it would be silly not to borrow..."⁴². In the western world therefore, credits are now very fashionable. Granting credit has become an important avenue of profit: it is one of the important

⁴⁰ M. L. Darling: *The Punjab Peasant in Prosperity and Debt*. 4th edn., New Delhi, 1977, at p. 50

⁴¹ E.g., through the Peoples Bank, established by Act No. 22 of the 1990, later the Community Bank, established by Decree No. 46 of 1992, and presently the Micro-Credit Banks.

⁴² "Work ethics pays off for woman of substance", *Financial Mail* (UK), Sunday, November 2, 1997, at pp. 36 – 37.

developments that have provided capitalist organisations with the means to maintain and increase their sales and profitability. Banks and finance houses attract loans from their customers by issuing them with Credit Cards and Cheque Guarantee Cards which the customers flaunt to show their credit-worthiness.⁴³

In Nigeria, vestiges of the inhibitions about borrowing still persist. Even as a nation, we still have reluctance about borrowing. For instance, writing on Nigeria's ambivalence to borrow from the Euro-Currency Market, the question was posed: "Has Nigeria, in a world of national economies developing on credit, self-consciously chosen the old-fashioned virtue of financial self-reliance?"⁴⁴ I think the problem with Nigeria obtaining loan is not so much with the loan as with whether it is put to the intended use. As the Finance Minister aptly put it,⁴⁵ there is "nothing wrong in obtaining the loan... it was the utilization of the loan that mattered". Recently the Managing Director of a petroleum company was granted a loan of N17.7 billion "without any strong collateral" for petroleum business but he reportedly diverted the bulk of the money into the purchase of choice properties.⁴⁶ The lingering aversion for credit and debt

⁴³ See further: P. E. Sayer., *Credit Cards and the Law: An Introduction*, London, Fourmat Publishing, 1988, pp. 1 – 4.

⁴⁴ P. A. Wellons: *Borrowing by Developing Countries on the Euro-Currency Market*. Finance: OECD, 1977 at p. 278. When States and Governments borrow, the security they provide takes the form of sovereign guaranties or government promises to pay back the money. See P. Adams: *Odious Debts*, London, Toronto: Earthscan, 1991 p. 89. See also: *Borrowing by Public Bodies Act*, Cap. B10, Vol.2, LFN 2004.

⁴⁵ "FG Secures \$780m loan from World Bank", *This Day* Newspaper, Tuesday, November 25, 2008 at p. 4.

⁴⁶ "EFCC uncovers N17.7b bank loan fraud", *The Nation*, Wednesday, February 4, 2009 (front page)

accounts for why we are not yet a cashless nation, and why we have a proliferation of supermarkets with names such as "Cash 'n' Carry".⁴⁷ On the whole, however, it is fair to say that some progress is being made towards embracing credit and debt in Nigeria, particularly with the introduction of erstwhile Community Banks and later Micro-Credit Banks which reach out to SME's and a lot more people than the orthodox banks.⁴⁸

The taking of land as security for credit is of great antiquity globally.⁴⁹ In Nigeria, it dates back to ancient history. The right granted to the creditor over such land has always been usufructuary or some other right short of ownership since, like in early England, there was a restraint on outright alienation. In traditional Nigeria, every effort is made to obtain credit by pledging land rather than by sale.⁵⁰ A similar restraint existed in England. Indeed, until the end of the nineteenth century in England, there was reluctance to sell land "even when that was the rational thing to do".⁵¹ Credit and debt have therefore always been secured not by sale but by creating encumbrance on the land.

⁴⁷ "Credit Economy: Is Nigeria ready for the revolution?", *Daily Sun*, Monday, January 14, 2008 (front page).

⁴⁸ Enefiok Enefiok: "Secured Credit and SMEs in Nigeria," presented at a 2-day Workshop on Entrepreneurial Development for Small and Medium-Scale Enterprises in the Niger Delta Region on 28-29 November, 2007, at Tent Manor Hotel, Uyo.

⁴⁹ See: E. F. Cousins and S. Ross: *The Law of Mortgages*, London, Sweet and Maxwell (1989) at page 8; Pollock and Maitland: *The History of English Law*, 2nd edn (1911) Vol. 2 at page 119; Holdsworth: *History of English Law*, Vol. 11, 3rd edn., London (1922) at page 25.

⁵⁰ D. Ford and R. Scott: *The Native Economies of Nigeria*, 1st edn, Faber & Faber Ltd., London, page 65

⁵¹ D. Sugarman and R. Warrington: "Land Law, Citizenship and the Invention of 'Englishness': The Strange World of Equity of Redemption", a paper presented on July 6, 1993 at the W.G. Hart Legal Workshop at the Institute of Advanced Legal Studies, London.

2.3 Collateral

As already stated above, the truth is that in practice, the creditor is often not satisfied with the debtor's personal promise to repay. He requires that some property be earmarked to satisfy his debt in the event of default. This leads to security being created. Security is an interest vested in the creditor in certain property owned by the debtor, whereby certain rights are made available to the creditor, over such property, in order to satisfy an obligation personally owed or recognised as being owed to the creditor by the debtor or some other person.⁵² However, in common parlance, "security" is used synonymously with "collateral" or, at times, "collateral security".⁵³ Contrary to this loose usage, "security" is, strictly speaking, not the property which is set aside, but the interest in the property.

It makes business sense for the creditor to insist on security from the debtor or from the debtor's guarantor/surety.⁵⁴ In the first place, a secured creditor has a specified property owned by the debtor if the latter should default on the loan. Thus, the security creates a proprietary right which is good against all the world, and because of the creditor's ability to assert the right against all third parties, it is often

⁵² E. I. Sykes and S. Walker: *The Law of Securities*, 5th edn., Australia, The Law Book Company, 1993, at p. 12.

⁵³ L. C. Mather: *Securities Acceptable to the Lending Banker*, 4th edn., revd., London, Waterlow London Ltd., 1979 at page 8.

⁵⁴ Though personal security is no security because it does not give rise to either a proprietary or possessory right in property, such right can however arise out of a personal security, such as where, in a suretyship or guarantee, property is furnished, thus creating an indirect (real) security under the personal security. A ready example is where a mortgage is given by a surety to secure the surety's guarantee of repayment by the debtor.

referred to as a right *in rem*, as opposed to a mere right *in personam*. Being a right *in rem*, it attaches and entitles the creditor to look to the *res* (i.e. the property) which is earmarked by the debtor/obligor as security. The creditor can sue or be joined in a suit to defend that interest where there is a threat to it. *Olufowobi v. Agge*⁵⁵ illustrates this point. The defendant had obtained a loan from National Bank Nigeria Ltd and mortgaged his immovable property to the bank as security for the loan. The defendant also owed the plaintiff some money but the debt was not secured. Upon the default in payment of the plaintiff's debt the plaintiff sued the defendant and got judgment. He thereafter applied for leave of court to attach the defendant's immovable property which was the bank's security. This involved the question of priority between the secured creditor, unsecured creditor and judgment debtor. However, the point of immediate interest here is that the bank's right *in rem* was recognised and the bank was joined in the case so as to defend its security interest in the property.

Creditors also insist on collateral so as to get priority over other possible competing creditors of the debtor as regards the property set aside: the creditor is able to recover the value of the loan by taking possession of the specified collateral instead of receiving only a portion of the borrower's property after it is divided among all creditors.⁵⁶ Security thus prevents the creditor's debt from being subordinated to unsecured debts of the same debtor and ensures that the creditor is paid his money in full, provided of course that his

⁵⁵ (1975) 5 U.I.L.R. (Pt.III) 338.

⁵⁶ http://topics/law.cornell.edu/wex/secured_transactions

security is sufficiently valuable.⁵⁷ This aspect of sufficiency of security is of especial importance where the debtor's total debts are more than his assets, such as where there are negative equities following a fall in the property market.

There is yet another reason for taking collateral. There is the view that if the debtor's property is set aside in the creditor's favour as collateral for the loan, overdraft or other financial accommodation or to secure the discharge of some other obligation, the debtor will be afraid that if he defaults in payment or in fulfilling his obligation, the property so earmarked will be seized and probably sold to recover the debt. This fear is expected to goad the debtor to pay the money or discharge the obligation. Writing about a similar experience in the United States of America, Mann put it this way:

The security gives two types of advantages to the lender: the lender's direct legal rights to force repayment by taking the collateral, and *the less direct advantages that operate before the lender tries to obtain payment forcibly*. The direct legal advantages increase the likelihood that the lender can forcibly collect on default. *The*

⁵⁷ R. C. Nolan: "Less Equal Than Others – Maxwell and Subordinated Unsecured Obligations," *Journal of Business Law*, September, 1995, at page 495.

*indirect advantages ... give the borrower a powerful incentive to repay voluntarily by enhancing the consequences of non-payment.*⁵⁸

The fear sometimes yields the expected result of making the debtor pay up. This is particularly so because in practice the property of the debtor which the creditor takes as security is normally of a much greater value than the amount of money lent to the debtor. The thought of losing such valuable property for a relative pittance compels the debtor to pay the debt so as to retain his property. This fear is however misconceived and based on ignorance of the law and particularly the ameliorating role of equity in such cases. For instance, the creditor has a duty to take reasonable care to ensure that the price at which the property is sold is the best price which can reasonably be obtained,⁵⁹ and to account for the surplus to the debtor or to other persons interested according to their priorities.⁶⁰

Apart from the business reasons for taking (landed) security, there are also statutory reasons. For instance, by Section 18(1)(b) of the Banks and Other Financial Institutions Act (No. 25) of 1991,⁶¹ no manager or any other officer of a bank shall grant any loan or credit facility to any person,

⁵⁸ R. J. Mann: "Explaining the Pattern of Secured Credit" (1997) Vol. 110 *Harvard Law Review*, page 625 at pp. 638 – 639 (Emphasis mine).

⁵⁹ *Reliance Permanent Building Soc. v. Harwood-Stamper* [1944] Ch. 362.

⁶⁰ E. F. Cousins: *The Law of Mortgages*. London, Sweet & Maxwell, 1989, pp. 237 – 239; E. L. G. Tyler: *Fisher and Lightwood's Law of Mortgage*, 19th edn., London, Butterworths, 1988, pp. 396 – 399.

⁶¹ Cap. B 3, Vol. 2 LFN 2004.

unless it is authorized in accordance with the rules and regulations of the bank; and where adequate security is required by such rules and regulations such security shall, prior to the grant, be obtained by the bank. Closely related to this is Section 19(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act (No. 18) of 1994⁶² which makes it an offence for any director, manager, officer or employee of a bank to grant or approve a loan:

- (i) without adequate security or collateral, contrary to the accepted practice or the bank's regulation
- (ii) with no security or collateral where such security or collateral is normally required in accordance with the bank's regulations, or
- (iii) with defective security or collateral.

3. TYPES OF LANDED SECURITIES

The most common types of consensual landed securities available to the creditor are, the mortgage, the legal charge (or "charge by way of legal mortgage"), and the pledge. These will now be discussed *seriatim*, not necessarily in this order. Even as concerns landed security interests, I do not deal with non-consensual security interests (that is, equitable charges arising by operation of law, statutory charges and liens) nor with floating charges.⁶³ This lecture proposes to assess the state of Nigerian law today regarding these three forms of consensual real security to determine whether to

⁶² Cap. F 2 Vol. 6 LFN 2004.

⁶³ Floating charges are created by companies over all types of property and not only, or even primarily, interests in land.

maintain or leave the *status quo*, and if the latter, what remedial measures are necessary to ensure that they are not real securities only in name. In view of the average time that an inaugural lecture should take⁶⁴ so as to sustain interest, I will probably have to do some abridgement.

3.1 Mortgage

I have always tried not to recall the rather daunting but nevertheless oft-quoted statement of Lord Macnaghten that "no one, I am sure, by the light of nature, ever understood an English mortgage of real estate."⁶⁵ To make it easily understandable and leave the technicalities for a while, one would say simply that a mortgage is a transfer of an interest in property as collateral for a loan. Mortgage of land is the one most commonly encountered in practice. This is particularly so because, unlike shares, land has tended to appreciate in value over recent decades, and so the mortgagee is hardly ever the loser. The lender is known as the "mortgagee", he is the person who provides the money and takes the interest in the property as security for the money which he has lent. In most cases, today, the mortgagee is a professional in the sense that he is in the business of lending money on mortgage. The borrower is known as the "mortgagor"; he is the person who transfers an interest in property as security for the loan. The document by which the rights of the mortgagee in respect of the mortgaged

⁶⁴ At the Bristol University Website, it is stated that inaugural lecture normally "lasts for about an hour" see: Bristol University-Inaugural Lectures, available at <http://www.bristol.ac.uk/cms/go/lectures/inaugural>

⁶⁵ *Samuel v. Jarrah Tinoer and Wood Paving Corporation* [1904] A.C. 323 at 326 (HL)

property are created is itself known as a "mortgage". When the loan is paid off, and the rights of the mortgagee are disencumbered or lifted from the property, the mortgagor is said to "redeem" his property. The old common law principle is that English law follows an Englishman, as his personal law, wherever he goes.⁶⁶ Thus, with the successful scramble for and eventual partition of Nigeria unto themselves, they brought the common law of England into Nigeria. Mortgage is a product of common law (and equity) which came to apply in Nigeria by virtue of reception provisions.⁶⁷ The interplay of common law and equity is most visible in the mortgage security, and it is to that that I must now turn.

At common law, the mortgage was initially like a pledge⁶⁸ because it depended on the creditor/mortgagee taking possession, so that he applied the rents and profits to the repayment of the principal as well as to the satisfaction of his claim (i.e. *vivum vadium*), or so that he took all the rents and profits by way of interest while the whole principal remained due (*mortuum vadium*).⁶⁹ The mortgage was usually for a fixed term. If at the end of the term the debt was not repaid the land became the property of the creditor.⁷⁰ During the subsistence of the mortgage, the mortgagor was treated

⁶⁶ *Campbell v. Hall* (1774) Cowp. 204; *Blankard v. Galdy* (1693) Salkeld 411.

⁶⁷ See now the reception provisions in the High Court Laws of the various States of the Federation, which are just a reproduction of the High Court Laws of the respective regions from which the states were created.

⁶⁸ Discussed below.

⁶⁹ The latter, though regarded as usurious and sinful in the Christian belief, was nevertheless quite common. See: C. H. M. Waldock: *The Law of Mortgages*, 2nd edn., London, Steven & Sons Ltd and Sweet & Maxwell Ltd., 1950, at p. 19.

⁷⁰ Waldock, *ibid.* Also: R. L. Ramsbotham: *Coote's Treatise on the Law of Mortgages*, 9th edn., vol. (1927), pp. 1 - 4.

as having no proprietary interest in the property, but merely a personal right to have the property returned on repayment on the due date, and even the personal right was extinguished for ever if he defaulted in timely repayment. A mortgage therefore looked more like an absolute conveyance than a security because, apart from the creditor taking actual and immediate possession, the chance of the debtor not being able to get back (or redeem) the land was very high, and while the mortgage lasted the mortgagor had no proprietary right to the land.

Equity then stepped in to modify common law, both with regard to the mortgagor's right to redeem the property and the mortgagee's right to take possession, and both steps led to the recognition of the mortgagor as having an equitable proprietary interest (rather than a personal right to have the property returned) the existence of which restricted the exercise of ownership-type rights by the mortgagee.

To achieve the modification, the court developed the equitable doctrine which produced the effect that, even when a special date was named for repayment, and when by the contract and at law the mortgagor forfeited his property to the mortgagee if the date passed without payment, equity allowed the defaulting mortgagor to redeem by afterwards discharging his obligations. This was so even when the parties had stressed that the time for repayment was of the essence of the transaction. Equity thus "completely altered the conditions on which a creditor held his security."⁷¹ Equity regarded the mortgagor as retaining a significant proprietary interest in the land from the date of creation of the mortgage.

⁷¹ Waldock, *op. cit.*, at p. 21.

This was the “equity of redemption”,⁷² which encompassed the mortgagor’s equitable right to redeem after the contractual redemption date. So jealous was equity in guarding the equity of redemption that the mortgagor himself was unable, on any terms whatever, to surrender his right of redemption to the mortgagee by any clause in the mortgage contract.⁷³ That is why it has been said that “equity has made the most conspicuous element in security the right of redemption”, a right which itself developed into a mortgageable and transferable interest in land.⁷⁴ Equity thus made the right to redeem a larger one than was usually given to the mortgagor by contract. It may be argued that the intervention of equity to this extent is, by modern standards, an interference with the parties’ freedom of contract. The answer would be that equity did this in order to protect the supposedly weak, innocent and gullible debtors/mortgagors, recognizing that they, as “necessitous men are not, truly speaking, free men, but, to answer to a present

⁷² As Lord Bramwell noted in *Salt v. Marques of Northampton* [1892] A.C. 1 at 18 – 19: “One knows, in a general if not in a critical way, what is an equity of redemption. It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender ... on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities are to be the absolute property of the creditor”.

⁷³ The Court regarded the right to redeem as a special term in the security contract which could therefore not be altered or contracted out of. Thus, talking about equity of redemption, Eldon, L. C. said in *Seton v. Slade* (1803) Vol. 32 E. R. 108 at 111: “I take it to be so in the case of a mortgage, that you shall not by special terms alter what this court says are special terms of that contract.

⁷⁴ See: *Western Region Traders Syndicate v. Fashugbe* [1960] WNLR51; *Mustapha Alli v. Allen* (1966) NCLR 14, [1966] All NLR 98.

exigency will submit to any terms that the crafty may impose upon them.”⁷⁵ It appears, however, that modern-day business transactions have witnessed the graduation of borrowers from the supposedly weak and gullible status to witty, knowledgeable, evasive and sometimes fraudulent mortgagors who outwit lenders and collect money without paying back.⁷⁶

As the second major modification, mortgagees started to get discouraged from taking possession of the land late in the sixteenth century when the interference of equity was already being felt. In equity, a mortgagee who took possession was required to derive no personal profit therefrom because the mortgagor, while he still retained the right to redeem, was recognized as the real owner of the property so that all the profits must be credited to his account.⁷⁷ The requirement of equity was so strict that the mortgagee had not only to account to the mortgagor for profits actually made, but also for those which he ought reasonably to have made.⁷⁸ By thus jealously scrutinizing the mortgagee’s account, equity discouraged him from taking possession, except when necessary for his protection, e.g., as a prelude to the exercise of his power of sale.

⁷⁵ Per Lord Henley, in *Vernon v. Bethel* (1761) 2 Eden 110 at 113, Vol. 28 E. R. 838 at 839.

⁷⁶ See also: Felix O. Adeoye: “The Anglo-American Law of Mortgages: A Quagmire for Creditors” (1993) *Journal of Business Law*, pp. 544 – 570 at 544 – 545.

⁷⁷ *Heath v. Pugh* (1881) 6 Q.B.D. 345, affirmed (1882) 7AC 235. The basis for the mortgagee’s duty to account when he is in possession is that, by taking possession of the mortgaged property he is “regarded as exercising a special right over someone else’s property in which he or she has merely a limited interest”: E. I. Sykes and S. Walker: *Law of Securities*, 2nd edn., at p. 1026.

⁷⁸ *White v. City of London Brewery Company* (1889) 42 Ch. D. 237.

Real Property Act 1845 and Conveyancing Act 1881. Local statutes which apply include the Registration of Titles Act 1958⁸³ (for Lagos), Property and Conveyancing Law 1959 (for the then Western Nigeria).⁸⁴ The Contract Laws of the various states now substantially reproduce provisions of the Statute of Frauds.⁸⁵ By far, the local statute having the greatest impact on the creation of mortgage security in Nigeria today is the Land Use Act 1978.⁸⁶ The obstacles which the Act has placed in the way of mortgages make land mortgage look like a mirage, particularly when the time comes for realization. This informs why land reforms, specifically the amendment of the Land Use Act is conspicuous on the Seven-Point Agenda of the present federal government.⁸⁷

3.1.3 Mortgage Creation and the Land Use Act

With the inception of the Land Use Act, the greatest interest held in land, and which can be mortgaged, is a right

of occupancy, a right which is in the nature of a lease.⁸⁸ However, the pre-Act mortgaging laws are still preserved by the saving clause, Section 48 of the Act, which provides:

All existing laws relating to...interest in land or the transfer of title to any interest in land shall have effect subject to such modifications (whether by addition, alteration or omission) as will bring those laws into conformity with this Act or its general intendment.

Thus, all the received statutes affecting the creation of mortgages still apply *mutatis mutandis*. The modification in the creation of mortgages occasioned by the Land Use Act leave the following methods of creating a legal mortgage in Nigeria today: In States which comprised the Northern and Southern Nigeria which apply the Conveyancing Act 1881, the principal way of creating a legal mortgage is by a *conveyance of the legal title* subject to a proviso for redemption. Under the Conveyancing Act 1881, a second mortgage may be created over the same property. In such case, the second

⁸³ Cap. 181 Laws of the Federation of Nigeria and Lagos. The statute has not been applied outside Lagos: *Olofintuyi v. Barclays Bank* (1965) NMLR 142 at 144. See now the Registration of Titles Law Cap. 121, Laws of Lagos State 1973, which is simply a reproduction of the 1958 Act.

⁸⁴ Which has now been replicated in the States that comprised the former Western Nigeria.

⁸⁵ See, e.g., the Contracts Law of Akwa Ibom State, Cap. 34 Vol. 1 Laws of Akwa Ibom State 2000, Law Reform (contracts) Law of Lagos State, Cap. 114.

⁸⁶ The Act was originally promulgated as a Decree by the military regime (i.e., Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over the government by civilians re-designated Act, *vide* Section I of Adaptation of Laws (Re-designation of Decrees, etc) Order No. 13 of 1980. See now Cap. L. 5 vol. 8. Laws of the Federation of Nigeria 2004.

⁸⁷ Madu Omuorah, "Yar' Adua begins review of the Land Use Act", *The Guardian*, Monday, February 23, 2009 at p. 10

⁸⁸ *Majiyagbe v. Attorney General* (1957) NRNLR 158; *Abioye v. Yakubu*, (1991) 5NWLR (Pt. 190), at 223. In *Director of Lands and Mines v. Sohan* (1952) Tang. L. R. 631, Abernathy J. of the Tangayinka Court held that "the only substantial difference" between a lease and a right of occupancy was in name. See also the East African case of *Henvicksdorff v. Dodd* (1960) E.A.R. 327 at 335.

mortgage is a mortgage of the equity of redemption since the first mortgage is legal. In States which comprised the former Western and Mid-Western Nigeria which apply the Property and Conveyancing Law 1959, mortgages are created by a *charge by way of legal mortgage* or *demise for a term of years absolute* subject to a cesser on redemption. In the case of leaseholds such as a right of occupancy, a legal mortgage may be created thus:

- (i) The mortgagor conveys a *sub-lease* or *sub-demise* of his interest to the mortgagee for a period slightly less than his own term. A mortgage by sub-demise is normally preferred to an assignment, so that the mortgagee will not be liable by privity of estate, on any onerous covenants in the mortgagor's certificate of occupancy (i.e., the original lease) in so far as such covenants touch and concern the land.⁸⁹
- (ii) The mortgagor *assigns* the whole of his unexpired term to the mortgagee. This is less satisfactory as the mortgagee is liable to all covenants that touch and concern the land.

States of the former Southern and Northern Nigeria still apply the Conveyancing Act of 1881, thus assignment and sub-demise are used. States of the former Western Nigeria (and mid-west) adopt the charge by way of legal mortgage

⁸⁹ *Spencer's Case* (1583) 5 Co. Rep. 16, Vol. 77 E.R.72. In England the Landlord and Tenant (Covenants) Acts, 1995, now replaces the old law of *Spencer's Case*. The Act regulates the enforceability of leasehold covenants between original parties and successors in title to the lease and provides for statutory release of the original tenant from leasehold covenants after they have assigned the lease (section 5).

under the Property and Conveyancing Law 1959. A common feature, and a significant change, in the method of creation of mortgages in all parts of Nigeria is that since the inception of the Land Use Act, a mortgage must obtain the written consent of the State Governor in the case of land situated in the urban area, or the approval of the Local Government in the case of land situated in a non-urban area.

3.1. 4 Approval/Consent to Mortgage

Every mortgage is subject to sections 21 and 22 of the Land Use Act, 1978. These read:

21. It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever-

(a) without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable Sheriffs and Civil Process Law; or

(b) in other cases without the approval of the appropriate Local Government.

22. It shall not be lawful for the holder of a statutory right of

occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession or otherwise howsoever without the consent of the Governor first had and obtained.

Section 21(b) thus requires the approval of the Local Government, while Section 22 requires the consent of the Governor for, *inter alia*, a mortgage⁹⁰ of a right of occupancy whether expressly granted under Section 5(1)(a) or deemed to have been so granted under Section 34(1) – (4) of the Act, and failure to obtain consent renders the mortgage void. By virtue of the inclusive definition of a mortgage in Section 50(1), the requirement of consent also applies to equitable mortgages and to a “second and subsequent mortgage”.

Apart from the consent itself, the timing of the consent has also bedeviled the mortgage. Section 22 says that the consent must be “first had and obtained”. This would have invalidated all mortgages if courts had not drawn from the fountain of equity to salvage the situation, by a liberal interpretation of the statutory provision. The courts have held repeatedly that despite the “first had and obtained” clause,

⁹⁰ Governor’s consent is not necessary for upstamping a mortgage because the upstamping relates to the same transaction as in the original mortgage. Also, no “transfer” is made by the upstamping: There is no alienation by a fresh mortgage to warrant a fresh consent. See: *Moses Ola & Sons Ltd. V. Bank of the North & Anor* (1992) 3 NWLR (Pt. 229) 377.

a subsequently obtained consent would do.⁹¹ The stance of the courts is commendable. It is our submission that since government’s aim in inserting the consent provision in the Act was to control the transfer of land rights, it should suffice that the Governor’s consent is sought and obtained; the stage at which that is done should be of no moment. To insist otherwise would be to create bottlenecks to capital accumulation and economic development through private sector initiative by use of mortgage. A businessman who needs money for investment will hardly succeed if he has to wait till the governor’s consent is given to a mortgage by which he wants to raise the money.⁹² In any case, if the aim of the consent provision is to control the transfer of land rights, it should not apply to mortgage because by a mortgage, land rights are only encumbered, not transferred.

A few more heady aspects still remain regarding the consent requirement. One is the attitude of the mortgagor to

⁹¹ See: *Awojugbagbe Light Industries Ltd v. Chinukwe & Anor* (1993) INWLR (Pt. 270) 485; *Iragunima & Anor v. Uchendu & Anor* (1996) 2 NWLR (Pt. 428) 30; *Adetuyi v. Agbojo & Anor* (1997) NWLR (Pt. 484) 705; *Denning v. Edwards* [1961] A. C. 245; *Solanke v. Abed & Anor* [1962] All NLR (Pt. 1) 230.

⁹² The delay in the grant of Governor’s consent has been judicially noticed and therefore needs no further proof. In *Savannah Bank (Nig.) Ltd. v. Ajilo* (1989) INWLR (Pt. 97) 305, the Supreme Court noted that the delay in the grant of the Governor’s consent has “a suffocating effect on the commercial life of the land and house-owning class of the society who use their properties to raise loans and advances from banks”. In *Awojugbagbe Light Industries Ltd. v. Chinukwe & Anor* (1993) 1 NWLR (Pt. 270) 485, the mortgage deed was executed and submitted in 1979 but the Governor’s consent was not granted until 1985.

seek to annul the mortgage on the basis of lack of Governor's consent, after he (the mortgagor) had reaped the benefit of the mortgage. By section 22, the holder of a right of occupancy, i.e. the mortgagor, has the duty to obtain the Governor's consent to the mortgage, and where no such consent is obtained the mortgage is void under Section 26. In *Adedeji v. National Bank of Nigeria Ltd & Anor*,⁹³ the appellant had by deed of legal mortgage dated 7/3/80 mortgaged his property for a loan from the first respondent. The second respondent was an auctioneer who threatened to sell the property under the terms of the mortgage. The appellant argued that the deed of legal mortgage was null and void because the Governor's consent was not obtained. Rejecting this contention, the Court of Appeal held that the duty of obtaining consent was on the appellant and so he could not be allowed to rely on his failure to declare the mortgage void. The court stressed that "apart from the principle of law involved... it is morally despicable for a person who has benefited from an agreement to turn round and say that the agreement is null and void".⁹⁴ Equity will not in such case permit a complaint by the mortgagor based on his own default to arise.⁹⁵ In fact, even when a flawed consent was given, it would be unconscionable of the mortgagor to turn around and contend that the consent was flawed, after he had received valuable consideration in the form of a loan from the mortgagee.⁹⁶

⁹³ (1989) 1NWLR (Pt 96) 212.

⁹⁴ *Ibid.*, at pp. 226 – 227. Also: *Attorney General of the Federation v. Sode* (1990) 1 NWLR (Pt. 128) 500; *Adetuyi v. Agbojo & Anor* (1997) INWLR (Pt. 484) 705 at 717; *Solanke v. Abed & Anor* [1962] All NLR (Pt.1) 230, held no. 4.

⁹⁵ *Oilfield Supply Centre Ltd v. Johnson* [1987] All NLR 440.

⁹⁶ *Ugochukwu v. Co-operative and Commerce Bank (Nig.) Ltd.* (1996) 6 NWLR (Pt. 456) 524.

Furthermore, courts have shown a readiness to order the mortgagor, on a motion by the mortgagee, to apply to the Governor for consent where it appears that the mortgagor is seeking to discharge himself from the mortgage by deliberately refusing to obtain the consent.⁹⁷ In this way, the court has helped to instill short-term confidence in the mortgage institution and thus enhance the use of land as collateral.

3.1.5 Grant of Governor's Consent

A mortgage collateral faces another obstacle that a grant of the Governor's consent to its creation is not automatic upon an application. The provisions of the Act requiring the Governor's consent to an alienation (including a mortgage) are framed in terms which state that the holder of a statutory right of occupancy may, "subject to the prior consent of the Governor... mortgage..."⁹⁸ or that it shall not be lawful to mortgage, etc, "...without the consent of the Governor first had and obtained",⁹⁹ or otherwise to alienate the right "except with the prior consent in writing of the Governor".¹⁰⁰ The provisions thus impose a duty on the "holder" of a statutory right of occupancy to ensure that he obtains the Governor's consent to mortgage but do not appear to impose any duty on the Governor to give consent. The Governor is left to his own discretion whether to give consent in each case.

⁹⁷ *Abubakar v. Baba* (1971) NNLR 62; *Mamiso v. Pate* (1971) NNLR 58; *Motunde v. Kanu* (1974) 10 C.C.H.C.J. 1509.

⁹⁸ Section 15(b) of the Land Use Act.

⁹⁹ Section 22. *ibid.*

¹⁰⁰ section 34(7) *ibid.*

There is indeed a dangerous leeway in that the Act does not lay down any conditions which, when fulfilled by the holder/applicant, entitle him to be given consent.¹⁰¹

Consequently, the Governor may not be compelled by an order of mandamus to give his consent.¹⁰² It has been argued that the Governor's discretion to give consent is coupled with a duty and therefore he should give his consent as a matter of course once an application is made to him.¹⁰³ My view, however, is that the duty is only for the Governor to exercise the discretion either way; it is not for him to automatically give consent to each and every application. If the Governor's consent were to be given as a matter of course then the consent would as well be assumed in every case and there would be no further need for application. If the consent clause is to be retained at all, the better approach appears to be that the Governor's consent should not be given as a matter of course, but he should be more inclined to give than to refuse it. Consent may only be refused where, for example, fraud is detected. In any case, the Governor should give his reasons for refusal,¹⁰⁴ because the giving of reasons

¹⁰¹ In *Iwuji v. Federal Commissioner of Establishments* (1985) INWLR (Pt. 3) 497, the Supreme Court held, at page 520, that where the exercise of a discretionary power is based upon satisfaction or fulfillment of condition precedent by the beneficiary of such power, the exercise of the power may be refused only where the condition has not been met or satisfied. In the case of the Land Use Act, however, no conditions are prescribed. Applicants only fill and submit prescribed forms designed presumably under Section 46 (3) (d) of the Act.

¹⁰² Since mandamus does not lie to compel the exercise of discretionary power.

¹⁰³ Sholanke, O.O.: "Is the grant of the Governor's Consent under the Land Use Act automatic?" [1990] J.A.L. vol. 34 No. 1, p. 42.

¹⁰⁴ In *R. v. Minister of Lands and Survey* (1963) NNLR 58, the Minister did not give any reasons for refusing consent.

will help to prevent abuse of discretion. Where the Governor or whoever he delegates gives reasons for refusal of consent, it appears that the court may examine such reasons if they are challenged by the rightsholder/applicant.¹⁰⁵

Also, the Governor may not refuse outright to give his consent to a mortgage, but may simply fail to act, i.e. to exercise his discretion by giving or refusing consent. It appears that in such case the court can order him to act in one way or the other. In other words, while the Governor may refuse to exercise his discretion in favour of the mortgagor/applicant, he has a duty to exercise that discretion in one way or the other. As emphasized by the Supreme Court in *Shitta Bey v. F.P.S.C.*¹⁰⁶

Now there is no doubt that where power is vested in a body to do certain things, there is *prima facie* a discretion on the part of that body to do so. Where, however, as here, there is power to act ministerially (as opposed to judicially) then although, *ex facie*, there is a discretion to act in one way or the other, in such a case there is a duty to exercise the discretion.¹⁰⁷

¹⁰⁵ *Zango v. Governor of Kano State & Anor* (1986) 2NWLR (Pt. 22) 409; *Padfield v. Minister of Agriculture* [1968] AC 997. Also: *Congreve v. Home Office* [1976] Q. B. 629; *Secretary of State for Education and Science v. Tameside M.B.C* [1977] A.C. 1014

¹⁰⁶ (1981) 1 SC 40

¹⁰⁷ *Ibid.*, per Idigbe JSC at pp. 61-63. Also: *R. v. Bishop of Sarum* [1916] 1 KB 466.

No matter the short-term remedial measures that have been devised by equity and by the courts, the issue of Governor's consent as enshrined in the Land Use Act has posed the greatest threat to the power of mortgage collateral in Nigeria. Maybe I should reserve further comments on consent for my recommendations, after I have considered our "indigenous mortgage", i.e., the pledge of land.

3.2 Pledge¹⁰⁸

The pledge of land is unarguably the oldest secured credit device in Nigeria, and indeed in the world.¹⁰⁹ A land pledge is:

A kind of indigenous mortgage by which the owner-occupier of land, in order to secure the advance of money or money's worth, gives possession and use of the land to the pledge creditor until the debt is fully paid or discharged.¹¹⁰

A pledge of land is thus, normally, a security transaction,¹¹¹ and is distinguishable from a lease of farm land and from land borrowing.¹¹² The person who takes the land on pledge (i.e. the creditor) is the pledgee, while the person giving the pledge (i.e. the debtor) is the pledgor. In a pledge, physical possession and use of the land are given over to the pledgee.¹¹³ Indeed, the essence of a pledge is the conferment on the pledgee of the possession and physical use of the pledgor's interest in the land until the debt is repaid. Until possession is given, there is no pledge but only a contract to pledge which passes merely contractual rights.¹¹⁴ This is a major weak point in the pledge of land generally, particularly from the view point of the debtor/pledgor, since it deprives him of the use of the land and the revenue he would have

¹¹¹ *Okoro v. Nwachukwu* (2007) 4 NWLR (Pt. 1024) 285, held 1. See also: R. O. Adeboye: "Redemption of pledge property through rural credit," in *Proceedings of the 1972 Annual Conference of the Nigerian Economic Society*, pp. 181 – 189 at 185 where he asserts that "pledging accompanies borrowing of money." The same is the position in Ghana. See: N. A. Ollennu and G. R. Woodman: *Ollennu's Principles of Customary Land Law in Ghana*, 2nd edn., Birmingham, CAL Press, 1985 at pp. 103 *et seq.* c.f.: C. O. Olawoye: "The Question of Accountability in Customary Law Pledge" (1978) J.A.L. 125 at 129, that "customary pledge in its original conception is not a security transaction." This cannot be correct.

¹¹² For land borrowing, see: M. Manoukian: *Tribes of the Northern Territories of the Gold Coast*, London, International African Institute, 1951 at p. 67.

¹¹³ Outside customary pledge of land, the word pledge is used to mean both possessory and nonpossessory interest in property to secure the performance of an obligation. Civil law lawyers generally seem more comfortable with the term pledge, even when speaking of nonpossessory pledges. See: Randall D Guyann: *Modernising Securities Ownership, Transfer and Pledging Laws*, Capital Markets Forum, Section on Business Law, International Bar Association, 1996 at p. 13.

¹¹⁴ *Per* Michelin J. in *Adjei v. Dabanka*, *op. cit.* at p. 66.

¹⁰⁸ For the controversy whether to retain the name, "pledge", see: K. Bentsi-Enchill: "Do African Systems of Land Tenure Require a Special Terminology?" (1965) J.A.L. pp. 114 – 139; N. A. Ollennu and G. R. Woodman: *Ollennu's Principles of Customary Land Law in Ghana*, 2nd edn. (1985) at p. 103; A. K. P. Kludze: *GHANA 1: Ewe Law of Property*, London, Sweet & Maxwell, 1973, at pp. 449 – 450. I believe that the name should be retained at least for the reason of its long usage and familiarity in legal, academic and commercial circles. Besides, no havoc has been caused by its usage. Sometimes the act of pledging is referred to (more frequently in Scotland than in other parts of the United Kingdom) as "impignoration", from the term of Roman law, *pignus*, which is closely related to the English common law pledge.

¹⁰⁹ J. H. Wigmore: "The Pledge-Idea: A Study in Comparative Legal Ideas" *Harvard Law Review*, vol. x (1896 – 1897) pp. 321 – 350.

¹¹⁰ *per* Michelin, J. in *Adjei v. Dabanka* (1930) I WAC 63 at 66 – 67.

derived therefrom which would have been used to repay the debt. It also distinguishes a pledge of land in Nigeria from a pledge of chattel in Anglo-Nigerian law where a symbolic, constructive or token delivery of possession would suffice.¹¹⁵

The pledgee's entry into possession of the pledged property is not without reasons. The first is so that the pledgee can put the land to his own use and enjoy the profits thereof. Secondly, the physical or factual possession assures him that the collateral is not insecure, as in the case where there is an adverse claim to possession. The third reason is to ensure that the pledgor does not subsequently re-pledge the land or otherwise alienate it to a third party without the pledgee's knowledge. A fourth reason is so that by the pledgee using and profiting from the land, the pledgor may be impelled to make effort to redeem it. Despite this, however, where the debtor/pledgor has no (immediate) need for the land, especially where the land is not developed, he would still not bother to redeem, with the result that the pledgee holds the land *ad infinitum*.

There appear to be three distinguishable types of pledge of land today. The first is the traditional pledge, so called because it is the oldest type of pledge. It is perpetual in nature. It remains a pledge so long as it is not redeemed and remains redeemable no matter how long it lasts. Here, the maxim is, "once a pledge always a pledge."¹¹⁶ As an Ibo proverb has it, "A thing which is pledged is never lost" (*ihe*

¹¹⁵ *Dublin City Distiller Ltd v. Doherty* [1914] A.C. 823 at 843; *Ogunbona v. Sunmonu*, vol. xix NLR 25.

¹¹⁶ *Olekanma v. Njoku* (1975) 5 UILR (Pt. 11) 332 at 337; *Ikeanyi v. Adighogu* (1957) 2 ERNLR 38 at 39.

ibe efui-efu).¹¹⁷ The right is inheritable, transferable and transmissible. The pledgee enjoys the fruits of the land unconditionally until redemption. In this kind of pledge sometimes the pledgor/debtor has no intention of redeeming the land.¹¹⁸ The second type is the term pledge. Here the pledge lasts for a fixed, agreed term after which it effluxes, subject, of course, to the pledgor's right to redeem at any time even before the term effluxes, but with reasonable prior notice to the pledgee.¹¹⁹ The term may be a number of calendar years, a number of farming seasons or flood seasons. The third type of pledge is the self-liquidating or self-redeeming pledge, which has a striking resemblance of the early English live pledge or *vivum vadium* which preceded the mortgage. Here the pledgee is to apply the fruits of the land or the rent therefrom to reduce and eventually liquidate the indebtedness, so that the pledgor/debtor regains his property without himself repaying the loan. The land repays the loan by itself, hence the name, self-redeeming. This third category is a modern pledge, because of the equity in its repayment and its increasing usage nowadays.

¹¹⁷ C. K. Meek: *Law and Authority in a Nigerian Tribe*, London, OUP, 1947, at p. 103; *Dung v. Chollom* (1992) 1 NWLR (Pt. 220) 738; *Nwagwu v. Okonkwo* (1987) 3 NWLR (Pt. 60) 314.

¹¹⁸ P. Hill: *The Migrant Cocoa Farmers in Southern Ghana*, London, Cambridge University Press, 1963, at p. 187.

¹¹⁹ D. Ford: *The Yoruba-Speaking Peoples of South-Western Nigeria*, London, International African Institute, 1962 rept., p. 69; D. Ford and G. I. Jones: *The Igbo and Ibibio-Speaking Peoples of South Eastern Nigeria*, London, International African Institute, 1950, at p. 22.

3.2.1 Creation of Pledge

There is no statute specifically regulating the mode of creating a pledge of land in Nigeria. This, perhaps, must be so, because once there is a statute regulating its creation the pledge would lose its simplicity and character and might indeed cease to be a pledge.¹²⁰

Though a pledge does not require any particular form for its creation, it must however take place in the presence of witnesses who share the "thank offering" (e.g., sheep, goat, drinks, etc) given by the pledge. The requirement of witnesses derives from the fact that customary law generally¹²¹ knows no writing and so since there is no written document to prove the pledge, witnesses are required¹²² so that they can testify to the pledge as having taken place. The value of witnesses is therefore chiefly evidentiary, though it also ensures that the pledge transaction is not kept secret, but rather, is given the widest publicity in case there is any person who would object to its creation.

Witnesses are of two kinds, partial and impartial. Impartial witnesses merely testify to the fact that the transaction did take place. Partial witnesses are those who are themselves interested in the subject matter of the transaction and are therefore subsidiary parties to the transaction; their interest

¹²⁰ A ready example is that of Ghana where the Mortgages Decree 1972, as amended, does away with the need for possession, makes compulsory the use of writing and, in sum, converts pledges to mortgages; even the title of the Decree ("Mortgages Decree") shows that pledges are no more.

¹²¹ Muslim law (regarded as part of customary law) which is applied in most states of Northern Nigeria is written.

¹²² The requirement of witnesses applies to both pledge and customary sale of land: *Taiwo v. Ogunsanya* (1967) NMLR 371.

is bound by their presence at and participation without protest in the transaction, and by their acceptance of part of the "thank offering", which signify their consent to the transaction.¹²³ There is no precise number of witnesses in the states of the southern part of Nigeria as well as in the non-moslem parts of the north, and the witnesses may all be males or females, though at least one senior male witness is desirable since land transaction generally is traditionally seen as a male affair. In the Moslem states of Northern Nigeria, the witnesses are as prescribed by the Koran: two male witnesses or one male and two female because, under Moslem law, two women are equal to one man.¹²⁴ Also, a pledge transaction is normally embodied in a document as required in the Koran.¹²⁵

A further requirement is that the pledgee should be shown round the boundaries of the land in the presence of witnesses. This is normally followed by possession of the land being handed over to him.¹²⁶ Apart from the presence of witnesses and the showing of the boundaries of the land (which takes the place of survey plan), the necessary customary consents must be obtained in the case of family or communal land.

¹²³ See further, A. Allot: *Essays in African Law*, London, Butterworths, 1960, at pp. 243 – 244.

¹²⁴ See the Koran verse of the Almudaya, cited in O. Ohonbamu: "Current Trends in Nigerian Law of Mortgage" (1964) vol. 1 NLJ 1

¹²⁵ *Ibid.*

¹²⁶ *Ajadi v. Olarenwaju* (1960) 1 All NLR 382 at 387; *Ajikobo v. Akomolafa* (1995) 7 NWLR (Pt. 405) 461. The surrender of possession is, however, more of an incident of pledge than a requirement for its creation.

3.2.2 Land Use Act and the Pledge

The Land Use Act appears to contemplate an inclusion of pledge of land in the requirement of Governor's consent. This is so because Section 22(a) of the Act talks about "transfer of possession", which is precisely all that a pledge does. This means that if the collateral is a land pledge, Governor's consent must be obtained to the transaction, otherwise the pledge is null and void. The law in this regard has become a dead letter, as no application has ever been made for Governor's consent to a pledge, and yet land pledges are granted everyday, particularly in local areas where the pledge of land serves as "a safety valve against the evil of outright sale".¹²⁷ Significantly, it appears that with the requirement of gubernatorial consent to a pledge, the pledge now has to be in writing with effect from 1978 when the Land Use Act came into force. This is because in order to obtain the consent or approval as the case may be, the pledge agreement has to be in writing so that the consenting or approving authority may read and endorse the approval or consent thereon. Again, this is another area where theory takes a departure from practice. This is a further reason why gubernatorial consent should be jettisoned because it does not accord with reality.

Probably the greatest hurdle to pledge of land appears in section 36(5) of the Land Use Act which provides:

No land to which this section applies
(i.e., land in non-urban area which is
used for purposes of agriculture and

¹²⁷ R. W. James: *Modern Land Law of Nigeria*, Ife, University of Ife Press, 1982, at p. 226

which is the subject of deemed customary grant) which was immediately before the commencement of the Act held or occupied by any person shall be sub-divided or laid out in plots and *no such land shall be transferred to any person* by the person in whom the land was vested as aforesaid.¹²⁸

This section constitutes an absolute prohibition of pledge (or "transfer") of agricultural land in the local or non-urban areas. There is nothing to suggest that the statutory bar on transfer refers to transfer of proprietary interest only and does not include transfer of possessory interest (i.e. pledges) as well. All transfers are therefore barred by the provision.¹²⁹ Justifying the absolute bar, the Supreme Court reasoned that it is in consonance with the policy of government of the federation to ensure the availability of agricultural land for adequate supply of food to feed the nation.¹³⁰ This is borne out by the provision of sub-section (6) of section 6 of the Land Use Act which stipulates that "where land in respect of which a customary right of occupancy is revoked under this Act was used for agricultural purposes by the holder, the Local Government shall allocate to such holder alternative land for use for the same purpose".¹³¹ The current national

¹²⁸ Emphasis mine.

¹²⁹ c.f.: I. O. Smith: *Nigerian Law of Secured Credit*, Lagos, Ecowatch Publications Ltd., 2001, at p. 112.

¹³⁰ *Abioye v. Yakubu* (1991) 5 NWLR (Pt.190) 130 at 224.

¹³¹ *Ibid.*

food scarcity belies the assumption that the holders are in fact using such non-urban lands for cultivation. In any case, there is nothing to suppose that if the absolute bar is removed, such non-urban land might not be pledged to someone who would put the land to better agricultural use, or to suppose that such land might not be pledged to raise money for the purchase of farm tools and equipments.¹³²

3.3 Charge

A charge is a security whereby the debtor's property is appropriated by the creditor so that on default by the debtor, the creditor is entitled to pursue certain remedies against it and not merely against the debtor, for the discharge of his debt or obligation.¹³³ Unlike a pledge, a charge does not pass possession; and unlike a mortgage, it does not pass any ownership-type right. It is merely the shadow, so to speak, cast by the debt upon the property of the debtor.¹³⁴ Though it passes neither possession nor title in the property to the creditor, the creditor has certain rights and interests of a proprietary character. The interest is proprietary because in the event of the debtor disposing of the property, the interest is not extinguished but subsists over the *res* notwithstanding changes in ownership;¹³⁵ and in the event

¹³² See further, Enefiok Essien: "Secured Credit and SMEs in Nigeria", a paper presented at a 2-day workshop on Entrepreneurial Development for Small and Medium-Scale Enterprises in the Niger Delta Region on 28 – 29 November, 2007, at Tent Manor Hotel, Uyo.

¹³³ *Swiss Bank Corporation v. Lloyds Bank Ltd & Ors.* [1982] AC 584 at 594 – 5.

¹³⁴ Salmon, *Jurisprudence* 11th edn. p. 469; 12th edn., p. 430.

¹³⁵ However, in the case of an equitable charge, it may be defeated by a *bona fide* purchaser for value without notice.

of bankruptcy of the debtor the creditor has a right not merely to lodge proof of debt but also to exercise remedies against the property itself and to withdraw it to that extent from the net cast by the trustee in bankruptcy.

A charge must be in writing but no other formality or particular form of words is necessary: the only requirement is that the parties demonstrate an intention to "liable or specially appropriated to the discharge of a debt or some other obligation"¹³⁶

In states which comprise the former Western Nigeria, the Property and Conveyancing Law (PCL) 1959 applies to land charges. This law, framed on the Law of Property Act 1925 of England, creates a "charge by way of legal mortgage"¹³⁷ which is indeed equivalent to a legal mortgage rather than a charge. Under the PCL, a legal chargee obtains a legal interest¹³⁸ and he is also given "the same protection, powers and remedies" as a legal mortgagee.¹³⁹ The substantial differences between a legal charge (or charge by way of legal mortgage) and a legal mortgage are that (a) there is no conveyance, but a mere statement that the borrower, as beneficial owner, charges the lands by way of legal mortgage with the payment of the principal, interest and any other moneys secured by the charge, and (b) there is no proviso for redemption. The words "as beneficial owner" introduce into the legal charge precisely the same covenants by the borrower as in the corresponding mortgage by demise.¹⁴⁰

¹³⁶ E. L. G. Tyler: *Fisher and Lightwood's Law of Mortgage*. London, Butterworths, 1988, at p. 15.

¹³⁷ See Sections 108 and 109.

¹³⁸ Section 3(2)(b) of PCL.

¹³⁹ Section 110(1), *ibid.*

¹⁴⁰ Waldock, C.H.M.: *The Law of Mortgage*, 2nd edn. (1950) at pp. 40 – 41.

As may have become obvious from the foregoing, the charge by way of legal mortgage (or legal charge) created under the PCL assimilates a legal mortgage, so that both terms are interchangeable for all practical purposes. Even the PCL contemplates this, for it defines a mortgage to include "any mortgage, charge... on property for securing money or money's worth."¹⁴¹ Similarly, the Companies And Allied Matters Act¹⁴² also defines a charge to include a mortgage.¹⁴³ Judicial utterances also support this laxity.¹⁴⁴ What this then means is that a charge by way of legal mortgage, giving the chargee "the same protection, powers and remedies" as a legal mortgage, also requires the Governor's consent for its creation under the Land Use Act. This is because though the legal charge does not transfer any proprietary or possessory interest in the land,¹⁴⁵ its ultimate result is the same as a legal mortgage and it is included even in the statutory definition of a mortgage. In matters of secured lending it is indeed the ultimate result which is of sole importance. The whole process of creation, perfection and protection of security are all aimed at ensuring its continued potency for effective realization in the event of failure by the secured borrower/debtor.

¹⁴¹ Section 2(1) PCL, 1959

¹⁴² Cap. C.20, Vol. 3 LFN 2004.

¹⁴³ Section 197(11) of the Act.

¹⁴⁴ See: C. H. M. Waldock: *The Law of Mortgages, op. cit.*, at p. 13. Also: Fry, L. J. in *Re Richardson* (1885) 30 Ch.D 396 at 403.

¹⁴⁵ c.f.: *Okuneye v. First Bank of Nigeria Ltd* (1996) 6 NWLR (Pt. 457) 749.

4. REALIZATION OF THE COLLATERAL

One should agree right away with Maitland that though a creditor is a secured creditor, "he is not the less a creditor because he is a secured creditor";¹⁴⁶ meaning that he can sue on the debtor's personal covenant to repay, just like any (unsecured) creditor would. However, where landed collateral was given, a suit by the creditor on the debtor's personal covenant for repayment is regarded as an action for the recovery of money charged on land within Section 8 of the Real Property Limitation Act 1874¹⁴⁷ and therefore has to be begun within twelve years from when the debt was payable¹⁴⁸ otherwise the equity of redemption may become extinguished.¹⁴⁹

Collateral may be realized, in the case of a legal mortgage, by foreclosure of the equity of redemption so that the mortgagee becomes himself the owner, or by taking possession (as a prelude to sale), by sale of the property or by appointment of a receiver to manage the property. The remedies are cumulative in the sense that, generally, the

¹⁴⁶ F. W. Maitland: *Equity*. London, Cambridge University Press, 1969 rept. at p. 182.

¹⁴⁷ The Act is an English statute of general application in Nigeria. In Nigeria, the earliest statute on abatement of actions by lapse of time is the English Statute of Limitation 1623. States now have their respective Limitation Laws. See, e.g.: Limitation Law of Akwa Ibom State, Cap. 78 Vol. 4 Laws of Akwa Ibom State 2000; Limitation Law of Lagos State, Cap. 70, Vol. 4 Laws of Lagos State 1973; Limitation Law of Oyo State, cap. 64 Vol. 3 Laws of Oyo State 1978; Cap. 61, vol. 3 Laws of Ondo State 1978; Cap. 61 vol. 3 Laws of Ogun State 1978.

¹⁴⁸ *Sutton v. Sutton* (1882) 22 Ch. D 511; *Kong v. U.T.C. Ltd* (1934) 2 WACA 188; *Laniyonu v. Brighton Wilson & Anor* (1940) 15 NLR 103.

¹⁴⁹ *Federal Administrator General & ors v. Cardoso & ors* (1973) 1 All NLR 816.

creditor can pursue all of them concurrently. For our present purpose, I may only examine realization by sale.¹⁵⁰

5. REALIZATION BY SALE

The power to sell the collateral upon default may be expressly conferred in the security instrument.¹⁵¹ Thus, on failure of redemption the power enables the secured creditor to sell the property. The power of sale may also be given by the court. In such case, the secured creditor seeks an order of court to sell the property, and such order for judicial sale destroys the equity of redemption. Alternatively, the secured creditor may first ask for and obtain an order for foreclosure only, and thus extinguish the equity of redemption so that upon sale, he could transfer an unencumbered title to the purchaser. This is, however, a cumbersome process, and the desire to avoid it led to the practice of expressly conferring the power of sale. A third source of a power of sale is the statute. Statutory provisions start from the Trustees and Mortgagees Act 1860,¹⁵² which was later repealed by the Conveyancing Act 1881.¹⁵³ By Section 19(1) of the latter Act, a statutory power of sale is implied in every mortgage made by deed, both legal and equitable. Thus, though an equitable mortgage by deposit accompanied by a memorandum does

¹⁵⁰ For detail discussion of the various modes of realization of security, see: Enefiok Essien, *Law of Credit and Security in Nigeria, op. cit.*, chapter 7.

¹⁵¹ Such express conferment of the power of sale was initially rare because it was feared that it would be a clog on the equity of redemption. The practice became common in the early years of the nineteenth century.

¹⁵² Otherwise known as Lord Cranworth's Act, Section 15.

¹⁵³ The Lord Cranworth's Act still remained in force in England for mortgages created between 1860 – 1882. see: *Re Solomon and Meagher's Contract* (1889) 40 Ch. D 508 at 511.

not confer a statutory power of sale, such power is conferred if the memorandum is under seal, i.e. by deed.

The statutory power of sale also attaches to a charge by way of legal mortgage under the PCL. It attaches as well to the charge created under the Registration of Titles Act (Lagos), since the Act gives the registered owner of a charge the same power of sale as if the land has been conveyed or assigned by deed by way of mortgage.¹⁵⁴ Thus, any holder of a mortgage or charge has a statutory power of sale so long as the mortgage is by deed, or, in the case of Lagos, expressed to be made by deed. However, in every case, the statutory power of sale applies only if and in so far as a contrary intention is not expressed in the mortgage deed.¹⁵⁵ This means that the parties may altogether delete the statutory provision or vary it.

The realization of the collateral by sale may be inhibited by the requirement of requisite consent, among other factors.¹⁵⁶ The point was made earlier that under the Land Use Act, the Governor's consent is necessary for creation of a mortgage and a legal charge. In fact even an equitable mortgage by deposit of title deeds to the land has been held to require Governor's consent under the Land Use Act.¹⁵⁷ One should clarify right away that there is no provision

¹⁵⁴ Section 22(a) and (b) of Registration of Titles Act.

¹⁵⁵ Section 123(4) PCL 1959; Section 19(3) CA 1881; Section 101(4) Law of Property Act 1925 (England); Section 79(1) Registration of Titles Act (Lagos).

¹⁵⁶ Such other factors include, that the power of sale must have "arisen" and "become exercisable", the mortgage money must have "become due", and the "proper notice" must have been given requiring payment, or there has been a breach of some provision of the mortgage. See generally Enefiok Essien: *Law of Credit and Security in Nigeria, op cit*, pp. 237 *et seq.*

¹⁵⁷ *Jacobson Engineering Co. Ltd. v. United Bank for Africa Ltd* (1993) 3NWLR (Pt. 283) 586.

in the Land Use Act requiring Governor's consent before the exercise of the mortgagee's power of sale. However, if Governor's consent was not obtained to the creation of the mortgage (which consent automatically includes consent to the mortgagee to exercise his powers as mortgagee) the mortgagee would need to obtain the Governor's consent before he can sell. This is so in spite of the court order for sale. Indeed, it is doubtful if the court would make an order for sale if it is realized that the Governor's consent was not obtained for the creation of the mortgage. In *Jacobson Engineering Co. Ltd. & Anor. v. United Bank for Africa Ltd*,¹⁵⁸ an equitable mortgage was created by deposit of title documents of a landed property as security for an overdraft facility. The trial court granted the mortgagee an order to exercise his right of sale, but this was reversed at the Court of Appeal for the reason that the Governor's consent was not obtained to the mortgage. This was affirmed at the Supreme Court.

I submit that it is necessary that the requirement for consent as a prerequisite for the enforcement of the mortgagee's power of sale be abolished in every case because it constitutes an unnecessary hurdle in the way of realization of the collateral by sale. Besides, the process of obtaining the consent may, apart from delaying the sale (which may mean the property being sold at a lower price if a slump in the property market sets in in the interim) increase the cost of enforcement, which ultimately is borne by the mortgagor, since it is added to the mortgage debt. Also, the mortgage will be better protected against market forces if the requirement for consent to the sale is removed. Further, doubt

as to whether consent will be easily forthcoming, or forthcoming at all, could lead to reluctance to accept landed interest as collateral.

There is yet a further pre-enforcement consent under the Judgment Enforcement Rules made pursuant to Section 94 of the Sheriffs and Civil Process Act.¹⁵⁹ By Order 5 rule 5 of the Rules, a mortgagee who has obtained a judicial order¹⁶⁰ for sale still cannot exercise the right of sale if the landed property is "in the custody or under the control of any public officer, in his official capacity", unless and until he obtains the consent of the Attorney-General. By this provision, if, for example, an individual's property is occupied (rented) by a Government functionary so that it is in the custody or under the control of "public officers" – meaning, government officials – a mortgagee will need the consent of the Attorney-General (himself a Government Official!) to be able to exercise his power of sale. This is so irrespective of whether the occupation or "control" by the public officers commenced after or before the creation of the mortgage.¹⁶¹ It cannot be expected that the Attorney-General will give consent against himself. A way out is for mortgagees to guard against accepting property already on lease to any government functionary. Also in the mortgage document the mortgagees should insert a clause requiring their consent to any lease by

¹⁵⁹ Cap. S.6, vol. 14 Laws of the Federation of Nigeria 2004. The Law has adaptations in the various states in Nigeria.

¹⁶⁰ Necessary, for instance, where the mortgage was not by deed, so that the mortgagee has no power of extra-judicial sale.

¹⁶¹ Generally, a lease granted after the mortgage has been created does not bind the mortgagee, but here, where the Attorney-General with-holds his consent to the sale, it has the effect of forcing the lease on the hapless mortgagee.

¹⁵⁸ *Ibid.*

the mortgagor – just so as to have a say in whom the mortgagor grants a lease. No doubt the requirement of the Attorney-General’s consent here is an aberration and inimical to the power of collateral. It is analogous to where the Attorney-General of the Federation (AGF) reportedly issued a circular to all government departments that where any garnishee is obtained against government department the beneficiary of the garnishee order should first obtain the consent of the AGF before the government department will attend to it. This gives the impression that the AGF is trying to review judicial action, which is simply not possible. What is normal is judicial review of administrative action, not administrative review of judicial action.¹⁶²

As to a pledge, the point has already been made that generally, it is perpetually redeemable. The consequence of this rule is that the avenues open to mortgagees and chargees to realize their security do not avail the pledgee. Thus, the pledgee cannot insist on repayment of the loan.¹⁶³ The pledgee has no right of sale “even after the agreed redemption time is up; the land remains redeemable for all time”.¹⁶⁴ This is because in selling, the pledgee would pass title, which he has not; all he has is a passive right of possession, though he can sub-pledge.¹⁶⁵ It appears, however,

¹⁶² See “Court Martial is Illegal and Unjust” in *The Guardian* (Nigerian), Tuesday, March 31, 2009 at page 82, column I.

¹⁶³ C. K. Meek: *Land Tenure and Land Administration in Nigeria and Cameroons*. London, 1957 at p. 204.

¹⁶⁴ S. N. C. Obi: *The Ibo Law of Property*. London, Butterworths, 1963 at p. 120. See also: *Iwuchukwu v. Anyanwu* (1993) NWLR (Pt. 311) 307 at 319; *Okoro v. Nwachukwu* (2007) 4 NWLR (Pt. 1024) 285.

¹⁶⁵ He cannot sell because he has no title which he can pass, *nemo dat quod non habet*; but he can sub-pledge because in doing so he only passes possession, which he has.

that the pledgee may sell the property if the right of sale is expressly stipulated in the pledge agreement.¹⁶⁶ It is hereby submitted that in such case, the power of sale derives not from customary law but from contract, and it is doubtful whether in such case the transaction can still be called a pledge, being that perpetual redeemability is of the essence in a pledge.

The pledge, particularly perpetual pledge, therefore has the main defect that, like the old Welsh mortgage,¹⁶⁷ it is impossible to realize the security, with the only exception, perhaps – if this can be seen as a realization, that the pledgee may sub-pledge the property and so recover his money. The perpetual redeemability of a pledge greatly diminishes its collateral potential.

6. CONCLUSION

The point has been made that land is wealth, particularly where the land is a potent collateral. The early socio-economic and national importance of a powerful landed collateral may be illustrated by using Lagos¹⁶⁸ as a microcosm and Taiwo Olowo as “the archetypical

¹⁶⁶ B. O. Nwabueze.: *Nigerian Land Law*. Enugu, Nwamife, 1972 at p. 277, relying on the Ghanaian case of *Norh v. Gbedemah* (1926 – 29) F.C. 395 and on *Ollenu’s Customary Land Law in Ghana*, *op. cit.*

¹⁶⁷ In the old Welsh mortgage, the mortgagee could neither compel redemption nor enforce foreclosure. See: *Coote on Mortgages*, 9th edn., vol. 1 at p. 35; vol. 2 at p. 1026. In short, in a Welsh mortgage, realisation of the security is impossible. See *Waldock, op. cit.*, at p. 250.

¹⁶⁸ Lagos grew from a colonial headquarter (under the British rule) to the status of a Federal Capital Territory and later (with some parts excised from neighbouring States) became Lagos State and the capital of Nigeria. It is today the commercial centre of Nigeria.

Lagosian.¹⁶⁹ In the colonial period when there was shortage of capital, the greatest force that fuelled and shaped the transformation of Lagos economy and society was the growth of trade on a system of credit secured initially by pledge of land, and later by mortgage of land;¹⁷⁰ “the more land persons could offer as security, the more credit they could get and the bigger their trading opportunities could grow.”¹⁷¹ By the pledge, and later mortgage of land, Taiwo Olowo had access to capital which he invested and accumulated wealth, power and prestige. Indeed, so highly was he esteemed that at some point he was regarded as creditworthy even when his landed holdings were not formally pledged or mortgaged as security for the loans.¹⁷²

In Olowo’s time land was individually-owned. Today land is “vested” in the Governor. In Olowo’s time there was no Land Use Act which required Governor’s consent to every mortgage, legal charge, and land pledge. Today the Governor’s consent is required under the controversial Land Use Act, otherwise the mortgage, legal charge or pledge is void. No doubt equity has so far played a huge interventionist role in mitigating the hardship which would have otherwise beset the creation and realization of landed

¹⁶⁹ K. Mann: “The Rise of Taiwo Olowo: Law, Accumulation, and Mobility in Early Colonial Lagos”, in K. Mann and R. Roberts (eds.), *Law in Colonial Africa*. London, Heinman Educational Books Inc, 1991, pp. 85 – 107.

¹⁷⁰ *Ibid*, at p. 87.

¹⁷¹ In one major land transaction, J.P.L. Davies mortgaged fourteen parcels of landed property to Child Mills and Co. in return for £60,000 annual credit. See a copy of the mortgage deed dated March 18, 1872 at page 141, vol. 15 at the Land Registry, Lagos.

¹⁷² Mann, *op. cit.*, at p. 94.

collaterals. In Nigeria today the biggest obstacle confronting mortgages, and landed collaterals in general, remains the requirement of Governor’s consent under the Land Use Act. The judiciary has done its bit by adopting a humane, equitable and liberal statutory interpretation to save the collateral as the need arises. However, as the judiciary can neither make nor amend laws, it behoves the legislature to take a deliberate legislative action in this regard.

Recently the Federal Executive sent a Bill to the National Assembly aimed at “alter[ing] the provisions of the Constitution of the Federal Republic of Nigeria, 1999, by amending the Land Use Act Cap. L 5 LFN 2004...” A few comments may be made on the Bill. The Bill seeks to amend Sections 5, 7, 15, 21, 22, 23 and 28 of the Land Use Act. Essentially, it seeks to expunge the imposition of penal rent where there is a mortgage, legal charge, or pledge (i.e. transfer of possession) without the Governor’s consent,¹⁷³ or revocation of a holder’s right of occupancy (and thereby taking away the collateral) where there is mortgage or pledge without Governor’s consent.¹⁷⁴ It does away with the need for consent for encumbering customary and statutory rights of occupancy.¹⁷⁵ The Bill appears to agree with the view that unlike an assignment, mortgages, pledges and legal charges are merely encumbrances on land rather than alienation. Thus, the Bill seeks to restrict the requirement for Governor’s consent to cases of assignment only.

¹⁷³ Section 5(1)(f)

¹⁷⁴ Section 28

¹⁷⁵ Sections 15(b), 21, 22.

The executive proposals are absolutely commendable and the passage of the Bill into law would sing the *nunc dimittis* of consent requirement to collaterals creation and realization.¹⁷⁶ The Bill however gets off on the wrong foot in both its heading and in its recital. The heading says it is "A Bill for an Act to alter the provisions of the Constitution... by amending the Land Use Act..." This is obviously wrong and misleading because what is sought is not an alteration of the constitution in any respect, but simply an amendment or alteration of the Land Use Act. The error is traceable to the popular misconception that the Land Use Act is part and parcel of the Constitution. The recital in the proposal says: "WHEREAS the Land Use Act by the provisions of Section 315(5) of the Constitution is part of the Constitution." Nothing can be further from the truth than this. The reference to the Land Use Act in Section 315(5) of the 1999 Constitution does not make the Land Use Act "part" of the Constitution, such that one can say that by amending the Act one is thereby amending the constitution. Section 315(5) of the Constitution merely says that the Land Use Act "shall continue to apply and have full effect... to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of Section 9(2) of this Constitution." Courts have held in a

¹⁷⁶ The executive proposal, if passed into law, will only address the question of Governor's consent and will still leave untouched the myriad problems inherent in the Act. One would have expected that all the problems raised in the Land Use Act would be sorted out once and for all in the government-sponsored bill.. See generally, Enefiok Essien: "Land Reforms Agenda of the Federal Government: The Legal Perspective and Property Rights," a paper presented at the First Akwa Ibom State Summit on Land Reforms, organized by Ministry of Lands and Town Planning on 29th August 2008 at Ikom Hall, Uyo, Nigeria.

plethora of cases that the entrenchment of the Act in the constitution only makes the Act an extra-ordinary statute and does not make it part and parcel of the Constitution.¹⁷⁷ Accordingly, where any provision of the Act is inconsistent with a provision of the Constitution, the Act is void *pro tanto*.¹⁷⁸ This would not be so if the Act were "part" of the Constitution. The only thing achieved by the constitutional entrenchment of the Act is that it makes the amendment of the Act very rigid, just like amending the constitution. The Act cannot be amended except in the same strict and rigorous method of amending the Constitution: it cannot be amended through the normal legislative process. The normal legislative process for amending an Act requires that the proposal for amendment should be supported by a majority of members of the National Assembly.¹⁷⁹ The special procedure under Section 9(2) requires that a proposal for the alteration of the Land Use Act should be supported by not less than two-thirds majority of all the members of the National Assembly and approved by a resolution of the Houses of Assembly of not less than two-thirds of all the States. This rigorous

¹⁷⁷ *Nkwocha v. Governor of Anambra State & 2 ors.* (1984) 1 SCNLR 634, (1984) 6SC 362. See also cases cited in the next footnote.

¹⁷⁸ See: *Osungwu & ors v. Onyeikigbo* (2005) 16 NWLR (Pt. 950) 80 at 94 lines E-F; *Babalola v. Obaoku-Ote* (2005) 8 NWLR (Pt. 927) 386 at 404 lines F-G; *Odetayo v. Bamidele* (2007) 17 NWLR (Pt. 1062) 77, held no. 1; *Lemboye v. Ogunsiji* (1990) 6 NWLR (Pt. 155) 210. Also, Section 47(2) of the Act which purports to oust the jurisdiction of courts conflicts directly with Section 272 of the Constitution which guarantees unlimited access to court, and has therefore been judicially declared to be repugnant to Section 272 of the Constitution and void *pro tanto*. See: *Ebiteh v. Obiki* (1992) 5 NWLR (Pt. 243) 599 at 615 - 7; *Kadana v. Governor of Kaduna State & Anor* (1986) 4 NWLR (Pt. 35) 361.

¹⁷⁹ Section 56 of the 1999 Constitution.

procedure has made it most difficult to amend the provisions of the Act. In fact even the executive bill may have a very rough ride in the National and State Assemblies. This is because the executive proposal only singles out Governor's consent in order to facilitate the creation and realization of collaterals, leaving untouched the numerous other problems thrown up by the Act. The first realistic step to amending the Act should be its removal from the constitution, so that amendments would be easy. A removal of the Act from the constitution would amount to an amendment of the constitution, but an amendment of the Act itself does not amount to an amendment of the constitution.

The last comment on the executive proposal is on the ambivalence of its short title. The Bill ends with "This Act may be cited as the Land Use Act (Amendment) Act 2009 or the Constitution (First Amendment) Act 2009." It is hereby submitted that the first title is proper, while the alternative is a clear misnomer.

7. RECOMMENDATIONS

Mr. Vice Chancellor and Chairman Sir, distinguished ladies and gentlemen, please permit me to make the following recommendations to remedy the defects in our secured transactions law particularly as regards landed collaterals.

1. For mortgages, the requirement of gubernatorial consent should be expunged from the Land Use Act. This is both as regards the creation of the mortgage and at the point of realization of the security. Enforcement should not be bogged down by technicalities but rather, enforcement procedures should enable prompt realization at the market value of the

asset(s) given as security. It is a known fact that a remedy is only as good as the procedures and practice for exercising it allow it to be. For the same reason, the Attorney General's consent required under the Sheriff and Civil Process Rules in case of judicial sale of the property should be abolished. The collateralization of credit exposure should be encouraged and not inhibited by excessively expensive or impossible realization procedures.

2. The creation of legal mortgage by conveyance (or transfer) of title and reconveyance of same upon redemption should be abandoned in favour of the charge by way of legal mortgage which currently applies only to states of the former Western Nigeria. There does not appear to be any compelling policy reason why states of the former Northern and Southern Nigeria should still stick to a pre-1900 practice under the Conveyancing Act 1881 when England had long abandoned it and Western Nigeria has discarded it. The proliferation of modes of creation of landed security is historically explicable, but it is doubtful if it still serves any useful purpose.

3. Nigeria is one country. She has only one Constitution at a time applying to the whole country. The Land Use Act also governs land use nationally. There should also be one statute regulating mortgage creation and realization throughout the country. An example may be drawn from the American practice where the Uniform Commercial Code ("UCC")¹⁸⁰ has modernized and harmonized the different U.S. State laws on secured transactions.

¹⁸⁰ In America, Article 9 of the Uniform Commercial Code covers most types of security agreements for personal property that are both consensual and commercial.

4. The point about modernity needs some emphasis. Modernity has to do with reform. As noted by the Law Commission on Land Mortgages in England, "the English law of land mortgages is notoriously difficult".¹⁸¹ The same may be said of Nigerian Law of land mortgage, which is not only based on English common law, but on old English common law. It has never been subjected to systematic statutory reform, and over several decades of gradual evolution it has acquired a multi-layered structure that is historically fascinating but inappropriately and sometimes unnecessarily complicated. I hereby recommend a reform that will not only modernize but also simplify and standardize mortgages.

5. Perpetual pledge should be abolished. Here, possession is passed to the pledgee and yet the pledgee cannot sell it to realize his money. The essence of security lies in the ability of the creditor to turn the collateral into money when he needs it and when the money has become due. In a market economy scenario, depriving the creditor of the use of his security is self-defeating. As agreed by the Court of Appeal "a firm decision on this point (of perpetual redeemability of pledge) by the highest tribunal of this country is overdue"¹⁸² on this point. I recommend that not just a judicial but a legislative action or review is necessary.¹⁸³

6. There should be a possibility of granting a pledge without factually transferring physical possession to the pledgee.

¹⁸¹ The Law Commission Working Paper No. 99: Land Mortgages, London, H.M.S.O (1986), p. 1.

¹⁸² *Iwuchukwu v. Anyanwu & Anor* (1993) 8 NWLR (Pt. 311) 307 at 319.

¹⁸³ In Ghana, such legislation is already in place: under the Mortgages Decree, redemption is barred after twelve years.

A pledge is a purely security transaction and so the pledgee should have no immediate interest in the land used as collateral until there is default by the debtor. What a pledgee seeks is only the securing of an obligation. A transfer to him of the possession or right of possession of the land means giving him more than he really requires for security purposes and at the same time depriving the pledgor a free, unhindered, productive use of the property. One must agree with Weisman¹⁸⁴ that it is characteristic only of the less developed form of security to go beyond what is needed for the securing of an obligation, and that the more primitive a security device is, the more it incorporates elements which are not actually required for security purposes.

7. The absolute prohibition of "transfer" (i.e. mortgages, legal charges and pledges) under section 36(5) of the Land Use Act is unjustified, for the reasons we had stated earlier. This statutory provision should be amended, by deletion.

8. On a final note, I notice that in practice, what the creditor has given willingly to the debtor (i.e., the loan) he often needs a fight to retrieve it. In order to make the fight less long-drawn, I strongly recommend the establishment of a Debt Recovery Court, or, more generally, a Commercial Court.¹⁸⁵ This will not only improve the speed of trial of recovery cases

¹⁸⁴ J. Weisman: "Floating Charges: Recent Developments under Israeli Law," *Current Legal Problems*, (1988) vol. 41 pp. 197 – 211.

¹⁸⁵ Presently, there is a Revenue Court, or, more fully, a Federal Revenue Court. It is now called The Federal High Court. The court does not, however, fulfill the role of a Commercial Court as its jurisdiction is only in respect of matters connected with or pertaining to the revenue of the Federal Government. See section 251 of the 1999 Constitution.

but also the quality or accuracy of the judgments¹⁸⁶ as the court would be presided over by judges with known background experience and knowledge in commercial law and practice. The need for speed and accuracy in a legal system generally, and in commercial cases in particular, was brought out by Lord Justice Scrutton when he said.¹⁸⁷

Now I take it that a good legal system should have four – at least four – attributes. Its Judges should be incorrigible and impartial: that is one. The law they administer should be *accurate* and founded on recognized principles: that is two. Justice or judgements should be given *quickly*: that is three. And justice should be accessible to citizens cheaply: and that is four...

In Nigeria, secured debt recovery cases notoriously suffer inordinate delays, which at one time led to the formation of *ad hoc* special task forces or military tribunals to quickly

recover debts, particularly those owed to local, state and federal government or to “government agencies.” This was obviously due to the slow speed and dissatisfaction with the proceeding of some regular courts in some cases.¹⁸⁸ For instance, it would certainly breed discontent where a secured debt is treated as unsecured by the court. In *Union Bank of Nigeria Ltd. v. Ozigi*,¹⁸⁹ the trial High Court granted the defendant’s plea to repay the loan by instalments, despite the fact that the loan was secured on the defendants’ land. The Court of Appeal reversed the decision of the High Court, and held that “having held that the respondent still owes the appellant... [the trial court] ought not to deprive the bank of the immediate recovery of that sum without good reasons.”¹⁹⁰ Instead of ordering instalmental payment, the Court of Appeal ordered the respondent to pay the entire balance of his debt within four months.¹⁹¹ It thus gave him time to pay. This is equitable and therefore a preferred approach, especially as the time given is not unreasonably long, and is comparable to the English practice where, under section 36(1) of the Administration of Justice Act 1971,¹⁹² the court can postpone the date for delivery of possession, for such period as the court thinks reasonable, if it is likely that within the period the mortgagor may be able to pay any sums due under the mortgage. A similar provision is contained in

¹⁸⁶ At the moment our court system in Nigeria is generally not divided into specialist divisions (not judicial divisions). This is unlike in England where the Court of Appeal is divided into Civil and Criminal Divisions, while the High Court is divided into the Chancery and Queen’s Bench and the Family Divisions, and the Chancery and Queen’s Bench Divisions have further specialist subsidiaries.

¹⁸⁷ Scrutton, L.J.: “The Work of the Commercial Courts”, *The Cambridge Law Journal*, vol 1 (1921 – 23) pp. 6 – 20 at p. 7. Emphasis mine.

¹⁸⁸ A view shared by both lawyers and non-lawyers. See, e.g. C.U. Uche: “The Nigerian Failed Banks Decree: A Critique” (1996) *Journal of International Banking Law*, vol. 11, pp. 436 – 441 at 438.

¹⁸⁹ (1991) 2 NWLR (Pt. 176) 677.

¹⁹⁰ *Ibid*, at p. 696.

¹⁹¹ *Ibid*, at p. 697

¹⁹² As amended by the Administration of Justice Act 1973.

the Consumer Credit Act 1974 (U.K.),¹⁹³ under which the court can make a “time order” for payment. In England the commercial court is a specialized subsidiary of the Queen’s Bench Division of the High Court, and its establishment is attributable partly to the dissatisfaction with the handling of a commercial case¹⁹⁴ by a judge¹⁹⁵ who was not versed with commercial law matters. Ghana too has established Commercial Courts.¹⁹⁶

Mr Chairman Sir, distinguished ladies and gentlemen, I can assure you that the recommendations, if effected, will ensure that real securities are not so only in name. The recommendations will, if implemented, greatly strengthen the power of collateral in Nigeria.

I thank you all, for your patience and for your audience. Thank you and God bless.

¹⁹³ Section 129.

¹⁹⁴ S. H. Bailey and M. J. Gunn: *Smith and Bailey on the Modern English Legal System*, 3rd edn., London, Sweet and Maxwell, 1996 at p. 89. First, a Commercial List was established but this transformed into a Commercial Court in 1970 (by the Administration of Justice Act 1970, Section 3(1)).

¹⁹⁵ J. C. Lawrence, J., described by Lord Justice F.D. Mackinnon in “The Origin of the Commercial Court” (1944) 60 LQR 324 as “a stupid man, a very ill-equipped lawyer and a bad judge.” See also: V. V. Veeder, Q. C.: “Mr. Justice Lawrence: ‘True Begetter’ of the English Commercial Court (1994) 110 L.Q.R. 292.

¹⁹⁶ K. Addeah: “The State of Ghana Banking Law after Restructuring,” a paper presented at the Ghana Bar Association’s Continuing Legal Education Seminar on Banking Law, held at the British Council Hall, Accra on April 23, 1996. The paper is now published in *The Ghanaian Banker*, 3rd Quarter, July – September 1996, vol. v, pp. 11 – 31 at p. 30.