LEGAL ENCUMBRANCES: AN APPRAISAL OF BANK SECURITIES IN NIGERIA.

BY

ADAMU KYUKA USMAN

A THESIS SUBMITTED TO THE FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTERS OF LAW DEGREE (LL.M)

APRIL, 1998

DECLARATION

I hereby declare that this thesis was written by me. It was not copied from any research work neither is it being submitted concurrently for any other degree.

I also declare that both published and unpublished materials directly used in this Thesis are appropriately acknowledged. Any errors in this work are entirely my own.

....

ADAMU KYUKA USMAN DATE. 8/9/98

CERTIFICATION

The Thesis entitled "LEGAL ENCUMBRANCES: AN APPRAISAL OF BANK SECURITIES IN NIGERIA by ADAMU KYUKA USMAN meets the regulations governing the award of the Degree of Masters of Laws (LL.M) of Ahmadu Bello University, Zaria Nigeria and is approved for its contribution to knowledge and literary presentation.

..... 09:09:98
Chairman, Supervisory Committee — Date
Dr. J.G. Irokalibe

..... 09/09/98
Member, Supervisory Committee — Date
Mr. K.A. Monkaree

..... 09:09:98
Head of Department — Date
Department of Commercial Law
A.B.U. Zaria
Dr.J.G. Irokalibe

..... 7/4/99
Dean of Post Graduate School — Date
Ahmadu Bello University, Zaria
Professor J.A.Olayemi

ACKNOWLEDGEMENT

With heart-warming gratitude to God who determines the destiny of men, I wish to acknowledge the useful contribution of the following personalities in making this research work a reality.

First and foremost is Dr. Goldface Irokalibe the substantive internal supervisor of my work. His relationship with me in the course of this work was that of a senior brother and his younger brother. Where I made mistakes he humanely corrected me, and when I lapsed into inertia he urged me on. Perhaps nothing demonstrated to me his brotherly care than his indulgence that I can submit my manuscripts to him for correction not only in handwritten form but also on plain sheets. But for his understanding and care this work would definitely not have been completed at the time it was completed.

Secondly, I appreciate in no small measure the kind assistance of Mr. Y.A.T. Yagba and Mr. Ben Kanyip formerly lecturers of the Law Faculty A.B.U. Zaria but now Senior research fellows with the Institute of Advance Legal Studies Lagos. During my visit to the Institute in the course of this research they not only accommodated me but also ensured that I had free and full access to the rich library of the institute. Indeed but for Mr. Ben Kanyip I would have submitted this work totally oblivious of the 1997 Insurance Decree.

Thirdly, I also owe gratitude to my colleagues in the Law Faculty in the persons of Professor Chukkol, Mr. D.C. John, Mal. A.M.A. Raheem and my fiancee Miss. Maria Dankat who often found time

to inquire after my work. Their inquiries often created feelings of guilt in me that I had not been doing my best in the prosecution of the research.

Lastly, but by no means the least, my gratitude goes to Mal. Ibrahim Bature my uncle and Alh. Husaini Aliyu Matazu my client whose moral and financial support augmented my meager salary as an Assistant Lecturer in the Law Faculty Ahmadu Bello University Zaria to see me through the research work which warranted my having to travel to the Institute of Advance Legal Studies Lagos among other places in search of relevant materials.

ABSTRACT

Legal encumbrances and bank securities are two sides of the same coin. The existence of one necessitates the existence of the other. The encumbrance is the burden suffered by the property offered to the banker by the borrowing customer to secure an advance while the security is the benefit of the banker taking the security.

However, even though legal encumbrances and bank securities are two sides of the same coin, invariably it is the legal encumbrance that gives birth to the bank security in the sense that a burden must first be imposed on the property of the borrowing customer for a benefit to be enjoyed by the banker taking the security. Indeed it may not be entirely incorrect to say that legal encumbrances constitute "the container" that habours bank securities. It is in this sense that the topic of this research: Legal Encumbrances: An appraisal of Bank securities in Nigeria is investigated in this work.

Due to the resultant nature of bank securities from legal encumbrances or legal encumbrances from bank securities, a discussion of the banker's benefit or what come to the same thing, the security of a banker in the form of the property given to him as security by the customer implies a discussion of the burden or what comes to the same thing, the legal encumbrance that is imposed on such property against the customer who can not while the sum secured remained unpaid deals with it as he likes. Indeed the framing of the topic of this research itself suggest this inductive

deductive treatment. In so doing bank securities is inducted while legal encumbrances is deducted.

Legal encumbrances and bank securities are issues of prevailing legal and commercial relevance not only in Nigeria but the world over. This is so because modern commercial life and activities appear to thrive on credit. In a world irredeemably hooked on credit like a Junkie to hard drugs, a world where demands for monetary credit by men and institutions of commerce is on the rise, the law as a social engineer must step up means by which men and institutions with huge financial resources can without fear of default in repayment lend their money to men and institutions of commerce without financial resources.

The Law providing for legal encumbrances and bank securities supply this means. By the provision of this law banks which are financial institutions can grant advance facilities to their borrowing customers and demand that such advance facilities be secured by the borrowing customer's property which may or may not be handed over to the banker for possession pending the redemption of the property on repayment by the customer of the principal sum advanced and any interests thereon. The security of the banker in such an arrangement lies in the fact that if the customer default in payment as at when due, the banker may, depending on the type of security created in his favour, sell off the customer's property given to him as security to amortise the debt owing to him from the customer. This of course will not be the situation where the advance to the customer is unsecured. Where the advance is unsecured if there is default of repayment by the customer, the

banker has no other means of recouping his money on loan to the defaulting customer than sue the customer on his personal obligation to repay the advance. If he so sued the customer and judgment is entered in his favour but the customer has neither money nor property to be attached and sold by the court to repay the banker the judgment entered in favour of the banker avails him nothing. The consequence of lack of security being so unpleasant to the banker, not many bankers will be willing to lend money to loan seeking customers if such loan are not to be secured by some property of the customer. This is more so in today's modern world of business when business is carried on on the supposition of fraud rather than on the supposition of trust on which it was carried on in ancient times.

It is against this background that the function of legal encumbrances and bank securities as lubricants of modern business credit machinery can be appreciated.

It is, however, sad that existing Nigerian Literature on this All important Legal lubricant of modern commercial locomotion is rather scanty and devoid of analytical depth. It is this lack, among other motivating factors that prompted the undertaking of this research to bring to the door-steps of the Nigerian Banker the "good tiding" of the Nigerian Legal System providing for legal

DEDICATION

This work is dedicated to my loving mother and all conscionable men that will not only forbear from killing a fly but from eating one killed.

TABLE OF CONTENTS

TITLE PAGE..... i

DECLARATION..... ii

CERTIFICATION..... iii

ACKNOWLEDGEMENT..... iv

ABSTRACT..... v

DEDICATION..... ix

TABLE OF CONTENTS..... x

TABLE OF STATUTES..... xiv

TABLE OF CASES..... xv

CHAPTER ONE: INTRODUCTION PAGE

1.1 HISTORICAL BACKGROUND..... 1

1.2 RESEARCH OBJECTIVES..... 3

1.3 SCOPE OF RESEARCH..... 4

1.4 RESEARCH METHODOLOGY..... 5

1.5 LITERATURE REVIEW..... 6

1.6 ORGANIZATIONAL LAYOUT..... 10

CHAPTER TWO: MORTGAGES AND THE PROPERTIES OVER WHICH THEY ARE CREATED

2.1 MORTGAGES..... 13

2.1.1 DEFINITION OF MORTGAGES..... 13

2.2 TYPES OF MORTGAGES..... 14

2.2.1 LEGAL MORTGAGES..... 14

2.2.2 EQUITABLE MORTGAGES..... 15

2.2.2.1 EQUITABLE MORTGAGE UNDER SEAL..... 24

2.3 SECOND MORTGAGES..... 26

2.3.1 MEANING OF SECOND MORTGAGES..... 25

2.3.2 INADEQUACY OF A SECOND MORTGAGE AS SECURITY. 26

2.4 SUB MORTGAGES..... 31

2.2.1 MEANING OF SUB MORTGAGES..... 31

2.5 PRIORITY OF MORTGAGES..... 35

2.6 CREATION OF MORTGAGES..... 41

2.6.1 TYPES OF PROPERTY OVER WHICH MORTGAGES MAY BE CREATED..... 41

2.6.2 MORTGAGES OF LAND AND SHIPS..... 41

2.6.3 MORTGAGES OF STOCKS AND SHARES..... 51

2.6.4 MORTGAGES OF LIFE INSURANCE POLICIES..... 52

CHAPTER THREE: SECURING AND ENFORCING THE BANKER'S MORTGAGE

3.1 INTRODUCTION..... 64

3.2 SECURING THE BANKER'S MORTGAGE..... 65

3.2.1 MEANING..... 65

3.2.2 INVESTIGATION OF TITLE..... 65

3.3 OVERRIDING INTERESTS..... 68

3.3.1 THE OVERRIDING INTEREST OF OCCUPIERS..... 68

3.3.2 UNPAID VENDOR'S LIEN..... 69

3.3.3 ESTATE CONTRACTS..... 69

3.3.4 THE DESERTED WIFE'S RIGHT..... 71

3.3.5 INTERESTS OF OWNERS OF UNDIVIDED SHARES IN LAND WHO ARE IN OCCUPATION..... 74

3.3.6 INTERESTS OF SPOUSES IN THE PROPERTY, AND ASSETS WHICH REPRESENT THE MATRIMONIAL HOME.. 82

3.3.7 THE DOCTRINE OF LIS PENDENS..... 85

3.4.8	QUESTIONS OF IMPORTANCE IN DETERMINING THE EXISTENCE OF OVERRIDING INTERESTS.....	89
3.4	TRUST PROPERTY.....	93
3.4.1	MORTGAGES OF TRUST PROPERTY.....	93
3.5	CONSENT REQUIREMENT.....	94
3.5.1	MEETING THE CONSENT REQUIREMENT.....	94
3.6	REGISTRATION OF MORTGAGES.....	104
3.6.1	REGISTERING THE BANKER'S MORTGAGE.....	104
3.6.2	INSURING THE MORTGAGED PROPERTY.....	107
3.6.3	CONSOLIDATION OF MORTGAGES.....	108
3.6.4	TACKING THE MORTGAGE.....	111
3.7	LIMITATION OF ACTION.....	116
3.7.1	THE LIMITATION LAW.....	116
3.8	THE MORTGAGOR'S EQUITY OF REDEMPTION.....	127
3.9	ENFORCEMENT OF MORTGAGES.....	131
3.9.1	ENFORCEMENT MEASURES.....	131
3.9.2	SALE OF THE MORTGAGED PROPERTY.....	131
3.9.3	APOINTMENT OF A RECEIVER OVER THE MORTGAGED PROPERTY.....	139
3.9.4	FORECLOSURE.....	143
3.9.5	TAKING POSSESSION OF THE MORTGAGED PROPERTY...	146

CHAPTER FOUR: CHARGES AS ENCUMBRANCE ON BANK SECURITIES

4.1	INTRODUCTION.....	161
4.2	CLASSIFICATION OF CHARGES.....	162
4.2.1	LEGAL CHARGES.....	162
4.2.2	EQUITABLE CHARGES.....	167
4.2.3	FIXED AND FLOATING CHARGES.....	169

4.3	EQUITABLE CHARGE AND EQUITABLE MORTGAGE.....	173
4.3.1	DISTINCTION BETWEEN EQUITABLE CHARGE AND EQUITABLE MORTGAGE.....	173
4.4	CREATION OF CHARGES.....	176
4.4.1	TYPES OF PROPERTY OVER WHICH CHARGES ARE CREATED	176
4.4.1.2	FIXED AND FLOATING CHARGES OVER ASSETS OF THE COMPANY.....	180
4.5	SECURING THE BANKER'S CHARGE.....	182
4.6	ENFORCEMENT OF CHARGES.....	189

CHAPTER FIVE: THE BANKER'S LIEN

5.1	DEFINITION OF LIEN.....	199
5.2	SPECIAL FEATURES OF LIEN.....	200
5.3	TYPES OF BANKER'S LIEN.....	201
5.4	PROPERTY S UBJECT TO THE BANKER'S LIEN.....	204
5.5	DUTIES AND POWERS OF THE BANKER UNDER LIEN....	215

CHAPTER SIX: CONCLUSION

6.1	SUMMARY.....	219
6.2	RECOMMENDATIONS.....	224
6.2.1	IRRELEVANCE OF MORTGAGEE'S MOTIVE IN SELLING MORTGAGED PROPERTY.....	224
6.2.2	THE LAW IN AWOJUGBAGBE LIGHT INDUSTRIES LTD VS. B.N. CHINUKWE.....	226
6.2.3	RECONCILING SECTION 197 OF THE COMPANIES AND ALLIED MATTERS ACT TO SECTION 68 OF THE SAME ACT.	228
6.3	CONCLUDING REMARK.....	229

TABLE OF STATUTES

1. The Agricultural Credit Gurarantee Scheme Fund Act (Cap 13) Laws Of The Federation Of Nigeria 1990.
2. The Carriage Of Goods By Sea Act (Cap 57) Laws of the Federation of Nigeria 1990.
3. The Companies And Allied Matters Act (Cap 59) Laws Of the Federation Of Nigeria 1990.
4. The Conveyancing Act 1881.
5. The Evidence Act (Cap 112) Laws Of The Federation Of Nigeria 1990.
6. The Insurance Decree No 2 of 1997.
7. Tha Kaduna State Law of Property edict No 2 1990.
8. The Kaduna State Limitation Edict No 12 1990.
9. The Lagos State Limitation Law (Cap 70) Laws of Lagos State 1973.
10. The Land Use Act 1978 (Cap 203) Laws Of The Federation Of Nigeria 1990.
11. The Limitation Act (Cap 189) Laws Of The Federation of Nigeria 1990.
12. The Merchant Shipping Act (Cap 224) Laws Of The Federation Of Nigeria 1990.
13. Oyo State Limitation Law.
14. Property And Conveyencing law Of Western Nigeria 1959.
15. 1925 Property Law in England.
16. The Recovery of Premises law (Cap 115) Laws Of Northern Nigeria 1963 As Amended.
17. The Stamp Duties Act 1939 (Cap 411) Laws of The Federation Of Nigeria 1990.

TABLE OF CASES

	Title	Page
1.	Abbey National Bank Vs. Cann (1990) 1 ALL E.R. 1085	89,92
2.	Abhulimhen Vs. Hamme (1992) 8 N.W.L.R. (pt 258) p 211	85
3.	Adalman Tanker Vs. Mercantile bank & Ors (1986) F.H.C.R.L.R. 416	149,150
4.	Adeniran Vs. Alao (1932) WACA 43	42
5.	Adejumo Vs. Olawaiye (1996) N.W.L.R. (pt 425) p. 436	124
6.	Adelaja Vs. Fanoiki (1990) 6 N.B.L.R. 48	224
7.	Adjei Vs. Dabanka (1930) WACA 63	45
8.	Agbaje Vs. Adelekan (1993) 8 N.W.L.R. (pt 316) p. 166	192
9.	Agbloe Vs. Sapper 12 W.A.C.A. 187	97
10.	Ajewole Vs. Adetimo (1994) 3 N.W.L.R. (PT 335) P. 739	190
11.	Ajuwon Vs. Akanmi (1993) N.W.L.R. (pt 316) p. 182	87,95
12.	Akinola Vs. Iaseun & Ors (1973) A.L.R. 78	123
13.	Alh. Ferdinand Ibekwe Vs. Mrs Lucy Maduka (1995) 4 N.W.L.R. (pt 392) p. 716	96,103
14.	Amankra Vs. Zankley (1963) 3 N.S.C.C. 243	105
15.	Awojugbagbe Light Industries Ltd. Vs. B.N. Chinukwe (1993) 1 N.W.L.R. (pt 270) p. 485	10,12,100,102,103,145,148,225,226
16.	Bank of Cyprus London Ltd. & Ors Vs. Gill (1979) 2 Lloyds Rep. 508	133,134
17.	Barclays bank (D.C.O.) Ltd. Vs. B.A. Olofintuyi & Anor (1961) 4 ALL N.L.R. 299	19
18.	Barclays Bank Ltd. Vs. Bird (1954) Ch. 271	145
19.	Bendal Vs. Whiter (1952) 21 ALL E.R. 130	72
20.	Beresford Vs. Royal Insurance Co. Ltd. (1938) ALL E.R. 602	54
21.	Birmingham Citizens permanent Building Society Vs. Caunt (1962) Ch. 883	164
22.	Black Vs. Williams (1857) 1 Ch. 408	49,106
23.	Brandao Vs. Barnett (1846) 12 Cl.& Fin 787	202,203
24.	Bridges Vs. Hess (1957) Ch. 475	68

25. British And French Bank Ltd. Vs. S.O. Akande (Trading As Akande Bros & Co.) (1961) 4 ALL N.L.R. 340.....19,99,100

26. Bull Vs. Bull (1978) 1 ALL E.R. 104.....76,79,80

27. City of London Building Society Vs. Flegg of (1987) 2 ALL E.R. 435.....74,76,79,80,81

28. Cole Vs. Folami (1956) 1 N.S.C.C. 59.....36,39

29. Cooperative Bank of Eastern Nigeria Vs. Eke (1979) 6.L.R. 491.....208,211

30. Cradock Vs. Scottish Provident Institution (1893) 69 L.T. 380.....166

31. Cuckmere Brick Co. Vs. Mutual Finance (1971) 2 ALL E.R. 633.....133

32. Delalu Vs. Akappo And African Continental bank Ltd. (1967) A.L.R. 277.....208,209,211

33. Denning Vs. Edwardes (1961) A.C. 245.....99

34. Devayness Vs. Noble Clayton's Case (1816) 1 Mer. 572.....112

35. Ejikeme Vs. Okonkwo & Anor. (1994) 8 N.W.L.R. (pt 362) p. 266.....128

36. Ekaetah Vs. Nigerian Housing Development Society Ltd. & Anor (1973) I N.S.C.C. 373.....27,132,224

37. Ekpendu & Ors Vs. Erika & Ors (1959) I N.S.C.C. 64.....97

38. Exparte Haigh (1905) 11 Ves. Jr. 403.....17

39. Fasakin Vs. Fasakin (1994) 4 N.W.L.R. (pt 340) P. 587.....185,190

40. Frank Vs. Le Roy 49 Cal. 314.....126

41. Gillet Vs. Eaton 6 Wis. 30.....147

42. George Baker Vs. Eynon (1974) ALL E.R. 900.....140,141

43. G.O.C. Vs. Fakayode (1994) 2 N.W.L.R. (pt 329) P. 744.....126

44. Grafita Vs. Allen (1888) 37 Ch. D. 48.....120

45. Harold Vs. Plenty (1703) 1 Bro. C.C. 269.....16

46. Hodgson Vs. Marks (1971) 2 ALL E.R. 684.....70,91

47. Ibrahim Alabi Vs. Standard Bank (Nig.) Ltd. (1976) A.L.R. 404.....198,203,204,205,206,208,212

48. Illingworth Vs. Houldsworth (1904) A.C. 355.....169

49. Innih Vs. Perado A & C Ltd (1990) 5 N.W.L.R. (pt 152) p.604..... 95

50. Jegede Vs. Ayinogun & Ors. (1959) 1 N.S.C.C. 226.....96

51. Joseph Vs. Lyon (1884) 15 Q.B. 280.....177,182

52. Kasunmu Vs. Scott & Ors (1967) 5 N.S.C.C. 227.....135,136

53. Kaycee (Nig.) Ltd. Vs. Prompt Shipping Corporation (1986) 1 N.W.L.R. (pt. 15) P. 180.186

54. Kuahen Vs. Avose (1989) Reports of Certain Judgements of the Supreme Court by Elias quoted in Oluyade P.A Nigerian Law Of Conveyancing 1st ed. (Ibadan, IUP 1978) p. 48.....1

55. London And Cheshire Insurance Co. Ltd. Vs. Laplagrene Property Co. Ltd. (1971) 1 ALL E.R. 435.....68,69,90,192

56. London Assurance Vs. Hansel (1879) 11 Ch. D. 363.....54

57. Lloyds bank Vs. Bank of America national TRust And Savings Association (1938) 2 K.B. 137. 177

58. Lloyds Bank PLC. Vs. Rosset & Anor. (1990) 1 ALL E.R. 1111.....82,85,92

59. Metcalfe Vs. Archbishop of New York (1836)1 MY & Cr 587.....167

60. Montaque Vs. Earl of Sandwich (1886) 32 Ch. D. 525.....172

61. Nash Vs. Bade (1880) 25 S.J. 95.....27,29,223

62. Nasr Vs. Berini Beirut Riyad (Nig.) Ltd. (1967) A.L.R. 414.....17,21

63. National Provincial Bank Ltd Vs. Hastings Car Hart Ltd. (1905) A.C. 1175.....72,73,79

64. Nigerian Housing Development Society Ltd. Vs. Mumuni (1977) A.L.R. 241.....144,148

65. Nigerian Loan And Mortgage Co. Ltd. Vs. Ajetunmobi (1944) 17 N.L.R. 137.....134

66. Nwarike Vs. Commissioner of Police (1986) 3 N.W.L.R. (pt. 14) P.361. 147

67. Ocean Accident Co. Ltd. Vs. Ilford Gas Co. (1905) 1 K.B. 493.....95

68. Oguchi Vs. Federal Mortgage bank (Nig.) Ltd. (1990) 6 N.W.L.R. (pt 156) P. 465.....137

69. Ogundiani Vs. Araba & Anor. (1978) N.S.C.C. 334.....20,21,22,25,86,87,172,173

70. Okoye Vs. Dumex (1959) 20 N.L.R. 123.....70

71. Orjiako Vs. Orjiako (Unreported) Suit No JD/27/55.....99

72. Omo - Bare Vs. New Nigerian bank Ltd. (1978) A.L.R. 180.....162,173

73. Onashile Vs. Idowu & Ors. (1961) 2 N.S.C.C. 171.....105

74. Osagie Vs. Oyeyinka (1987) 3 N.W.L.R. (pt 59) P. 184.....88

75. Oyiola Vs. Ferri (1992) 3 N.W.L.R. (pt 298) P. 407.....117

76. Pilcher Vs. Rawlins (1872) 7 Ch. APP. 259.....23

77. Platt Vs. Handel (1884) 27 Ch. D. 246.....28

78. R.C.C. (Nig.) Ltd. Vs. Buratto (1993) 8 N.W.L.R. (pt 312) P. 508.....115

79. Re Barley Corn Enterprises (1970) 2 ALL E.R. 155.....194

80. Re Bowes, Earl of Strathmore Vs. Vane (1886) 33 Ch. D. 586.....213

81. Re Heathstar Properties Ltd. (1966) 1 ALL E.R. 620.....19

82. Re Lloyd (1903) 1 Ch. 385.....173

83. Re London And Globe Finance Corporation (1902) 2 Ch. 416.....212

84. Re Harrison, Jones & Taylor (1914) 1 Ch. 50.....170

85. Rose Vs. Page (1829) 2 Sim. 471.....29

86. Russel Vs. Russel (1783) 1 Bro C.C. 269.....16,17

87. Sanders Bross Vs. Maclean & Co. (1883) 11 Q.B.D. 327.....178

88. Saldko Vs. Alao (1994) 8 N.W.L.R. (pt. 360) P. 47.....179,190

89. Samuel Vs. Jarrah Timber Corporation (1904) A.C. 323.....128,130

90. Savannah Bank of Nigeria Vs. Ajilo (1989) 1 N.W.L.R. (pt. 97) P. 305.....95,96,103

91. Sharp Vs. Rickards (1909) 1 Ch. 109.....110

92. Singh Vs. Kubhuya (1963) 3 ALL E.R. 499.....99

93. Solanke Vs. Abed (1962) 1 ALL N.L.R. 230.....99,103

94. Spencer Vs. Clarke (1878) 9 Ch. 137.....57

95. Sweet Vs. Denlam (1954) 32 W.L.R. 680.....72

96. Swiss Bank Corporation Vs. Lloyds Bank (1980) A.C. 5804.....166,167

97. Tauton Vs. Sheriff of Warwickshire (1895) 2 Ch. 313.....170

98. Taylor Vs. Stibber (1970) 30 E.R. 713.....89

99. Thomson Vs. Bretty (1920) 1 Ch. 508.....138

100. Tse Kwong Lam Vs. Wong Chit Sen (1983) 2 Llyods Rep. 438.....135

101 U.B.A. Vs. Europharm (Nig.) Ltd. (1990) 6 N.W.L.R. (pt 155) P. 239.....123

102. Ugo Vs. Obiekwe (1989) 1 N.W.L.R. (pt 69) P. 566.....198

103. Vernon Vs. Bethel (1961) Zedam 113.....129

104. Victory Merchant Bank Vs. Pelfaco Ltd. (1993) 9 N.W.L.R. (pt. 317) P. 340.....137

105. Western Bank Ltd. Vs. Schindler (1976) 2 ALL. E.R. 390.....99

106. White Vs. City of london Brewery Co. (1889) 42 Ch. D. 237.....142,149

107. White Vs,. Conroy (1921) S.R. (N.S.W.) 257.....166

108. White Vs. Pledge (1896) A.C. 187.....108,110

109. Williams & Glynn's Bank Vs. Bolland (1980) ALL E.R. 408.....74,77,78,79,80,81,90,91,92

CHAPTER ONE

INTRODUCTION

1.1 HISTORICAL BACKGROUND

Legal encumbrances especially pledges or pawns are as old as mankind. Under Yoruba customary law not only were palm trees, cocoa trees, kolanut trees and land itself pawned, but even human beings were pawned as security for advances.[1] The Yoruba adage of kii pe pe ki iwofa o di eru onile meaning, no matter how long the pawn, a pawned person can never become the slave of the pawnee[2] attests to this.

However bank securities which are incidents of legal encumbrances are of comparatively recent origin. In England the advent of legal encumbrances and bank securities can be traced to the 13th Century when a group of Italian Goldsmiths migrated from an Italian province known as Lombardy to settle in the part of London now known as Lombard street. By a gradual process these Italian settlers before the end of the 16th Century had evolved a system of transactions which today forms the very foundation of modern banking.[3]

At first the Italian Goldsmiths only carried out the traditional services of their craft. As time went on, however, their business grew and they found it necessary to acquire vaults for the safe storage of all gold and precious stones they received from their customers. It was at this juncture that their services increased to include among others receiving gold deposits from customers for safe custody against receipts; and lending part of their gold stock-first from their own and later from deposits of

their customers. From lending of gold, Goldsmiths moved to the lending of money.

Since creation of legal encumbrances is an old practice of mankind it is to be expected that Goldsmiths would demand securities for their advances thereby leading to the creation of legal encumbrances on property offered by customers as security for advances made or to be made to them by the Goldsmiths.

As Goldsmiths continued to render more and far reaching banking services, groups of Goldsmiths began to pool their resources together and set up business as merchants and private bankers. This increased the incidents of legal encumbrances and the volume of security transactions. In 1694 the bank of England was established to render more comprehensive bank services and to control the private and Merchant Banks. This again witnessed a flourish of legal encumbrances and bank securities transactions.[1]

Here in Nigeria, perhaps for lack of a literary culture, the history of organised and institutional security lending and the creation of legal encumbrances must of necessity start with the establishment of the Bank of British West Africa, later renamed Standard Bank and now First Bank, in 1894; two hundred years after the establishment of the Bank of England. This was followed up by the establishment of Barclays Bank and other first generation commercial banks in England. This led to organised money lending and the creation of legal encumbrances and bank securities by bankers to secure credit advances made or to be made to borrowing customers.

Since the days of Joint Stock Banks in England, money lending has been a prominent and profitable function of banks. Bankers

borrow in order to lend again. As lender the banker must have a lively regard to the chances of obtaining repayment and from the earliest times he has seldom been contented to rely upon the mere obligation and the often flimsy promise of the customer to repay, but has demanded tangible securities to which he could have recourse in the event of a failure by the customer to fulfil his obligation. Unless buttressed by such security the business of lending money is very speculative, and can only be carried on by charging interest so high that it could hardly serve the ordinary requirements of commerce and industry.

Even though the making of advances and acceptance of securities for advances are prominent with banks, it is not governed by the law of banking like the banker's customers relationship and other topics in the law of banking are. Rather the law governing the giving and taking of securities by banks may be found within the general body of law which could be either the law of contract, land law or the law on mortgages. Save for the banker's lien the law has no special attitude towards the banker and his securities. He stands on the same footing as the financier or private lender. This has been the situation in by-gone years and it is still the situation today. It is this legal situation among other shortcomings such as lack of a standard and comprehensive work on Nigerian law on the topic of this work that motivated the undertaking of this research.

1.2 RESEARCH OBJECTIVES

This work is motivated by the following objectives. First, the work seeks to consider the adequacy or otherwise of the law regulating legal encumbrances and bank securities in Nigeria.

Where inadequacies are found, a comparative study would be made between the law in Nigeria and the law in foreign jurisdictions especially foreign jurisdictions within the common-wealth with a view to making recommendations for the reform of Nigerian Law.

Secondly, the work will seek to impress upon the banker the best security he should insist upon in the light of existing law regulating bank securities in Nigeria and in the light of convenience. This law is not fixed but depends on the type of property offered to the banker by the customer as security. Thus while a legal charge may be a good form of security where land is offered to the banker as security, it may not be such a good security where shares or some other property is offered as security.

Towards the end of ascertaining the best security for the banker in respect of a given credit transaction with a borrowing customer, certain forms of security that are largely unknown to the Nigerian banker and therefore not patronised by him but which are better forms of security in many respects when compared with the traditional and stereotype forms of security known and patronised by the Nigerian banker shall be considered in this work.

Finally the work will further seek to bring out to the benefit of the Nigerian banker the steps or measures he should take to secure a security created in his favour by a borrowing customer from the encroaching rights of third parties and even from the fraud and malafide of the customer creating the security.

1.3 SCOPE OF RESEARCH

The scope of this work is limited by its objectives. This necessarily means that such matters as do not go to achieve these

objectives either directly or indirectly will not receive special consideration in this work.

Within the limited parameters stated above this work will principally dwell on the various forms of encumbrances on tangible bank securities, and the types of property for which each is suitable. The availability of enforcement powers and the efficacy of such enforcement powers to the banker shall be considered against the given security.

In the end an appraisal of the present state of the law on legal encumbrances and bank securities would be made and recommendations for reforms preferred.

1.4 RESEARCH METHODOLOGY

Four different types of legal research methodologies will be employed in this work. These include, the generalised approach, descriptive word approach, known topic approach, and words and phrases approach.

The generalised approach is employed by the use of secondary materials such as text books, legal encyclopedias, dictionaries, monographs, legislative history or periodicals to gain initial knowledge of the subject of research. The descriptive word approach is used to burrow into primary sources such as statutes and law reports for primary research materials. The known topic approach is used by a researcher who is confident that he knows what area of law the problem involves. While the words and phrases approach is employed if the research problems involved definition of legal terminologies and phrases.

By the descriptive word approach, primary sources of research material such as statutes and law reports would be dug into for

primary materials for the work. Using this method both statutory and case law in Nigeria on the subject of the research will be updated.

Using the generalised approach, secondary sources of research materials such as text books, legal encyclopedias, law dictionaries, legislative history and periodicals such as law journals and monographs will be seriously studied not only for the purpose of complimenting the primary sources but also for purposes of appraising the critical literature on the topic of the research supplied by academic writers. This method will also be used to further update the primary sources.

The words and phrases approach will be employed to define legal terminologies and phrases whose precise meaning and import may be vague and suggestively indeterminable.

While using any of the approaches mentioned above the known topic approach will be simultaneously put to use.

1.5 LITERATURE REVIEW

Existing Nigerian literature on the subject of this research is invariably characterised by either of two related shortcomings, that is, by either lack of analytical depth or lack of comprehensive coverage. Where analytical depth is attained it is almost invariably certain that comprehensive coverage would be lacking, and where comprehensive coverage or something near to it is achieved it would be certain that analytical depth has been sacrificed.

The reason for this unsatisfactory state of affairs is that no standard work on bank securities in Nigeria has been written by any

of Nigeria's academic writers in the law of banking comparative with the work of Milnes Holden[5] or even the work of the authors of Paget's law of banking.[6] Earlier works on the topic of this research are often treated in a chapter or a number of short chapters that hardly scratch the surface of the subject.

For instance Igweike's Law of Banking and Negotiable Instruments allotted only thirteen pages to the whole topic of this research in its chapter six dealing with bank financing. Given the space allotted to the subject which Milnes Holden an English author has made the subject matter of a whole text book of 443 pages, it is to be expected that Igweike's work will not consider with some depth most issues falling under the subject.

The book merely lumped together various issues of bank securities such as legal and equitable mortgages, types of property subject to bank securities such as land, stocks and shares, life insurance policies, goods and documents of title to goods without giving any of them a serious and systematic consideration. The only assistance the book affords this work is in the area of the merits and demerits of land as a subject of bank security, and the advantages of equitable mortgages of stocks and shares. Beyond these Igweike's work pales out to little or no significance from the stand point of this work.

Similarly, Adeniji[7] even though he dedicated three chapters of his work to bank securities, the subject of this research, provided very little material relevant to the research. For instance a sizeable chunk of chapter eight which is the first chapter dealing with bank securities is dedicated to land issues such as leases, land in urban and rural areas, statutory and customary right of

occupancy distinguished and other matters that have no direct or immediate relevance to the topic of this research as circumscribed by its objectives.

Chapter nine of Adeniji's work which deal with perfection of bank securities, merely glanced off the surface of such issues as investigation of title to land, obtaining the necessary consent, registration, legal mortgages, equitable mortgages and mortgages of stocks and shares; issues which are all relevant to the topic of research. Then it went on to treat such matters as guarantees and bills of sale which have no immediate or direct input to the research.

Neither does chapter ten of Adeniji's book dealing with enforcement of bank securities advance the cause of this work as it proceeds to treat enforcement of bank securities as enforcement of unsecured debts. Thus issues like the debtor's obligation to repay his loan or overdraft facility, consequences of default in repayment, imprisonment for civil debt, levy of execution on the debtor's property and assets, bankruptcy, winding up of a debtor company are given prime of place at the expense of such important bank security enforcement issues like sale of the property given to the banker by the customer borrower as security, or appointment of a receiver over such property, or taking possession of such property or foreclosing the customer's right to redeem it if it was mortgaged to the banker. Indeed the book's consistent reference to the customer borrower as debtor instead of mortgagor or chargor which are security terms shows how oblivious the book is of the important issues involved in enforcing a bank security.

However, Adeniji's work proved useful to this research effort in respect of ship mortgages in that it supplies materials on the procedure of registering a mortgaged ship, the priority that is accorded a registered mortgagee of a ship over an unregistered mortgagee of the same ship and the rights of a mortgagee of a ship. It is only in this respect that Adeniji's book is significant to this work.

Adekanye,[8] in his own work dedicated four short chapters to the topic of this research. Of those chapters only chapter fifteen dealing with Agricultural Charges significantly assisted this research in that it provided a good background literature on the topic of Agricultural Charges which falls squarely within the scope of this work. It furnishes useful materials on the current law governing Agricultural Charges in Nigeria thereby making it possible for statutory law on the issue to be updated.

Other works by Nigerian scholars besides the ones mentioned here affected this work far less than the ones mentioned and therefore deserve no mentioned in this literature review.

With regard to other sundry literature, an article by Boladeoku[9] on the rights of an occupier as overriding interests is of immense contribution to this work on the issue of securing the banker's mortgage. It provided useful primary and secondary materials on such issues as vendor's lien, estate contracts and the deserted wife's right among other issues.

Similarly Umezulike[10] made a thought provoking analysis on the imperativeness of Governor's consent to the validity of a mortgage transaction which is an aspect of this work, in his article: The heady question of execution of a mortgage deed before consent:

Awojugbagbe Light Industries Ltd Vs. B. N. Chinukwe[11] evaluated. The write-up proved very useful to this work on the issue of obtaining Governor's consent before mortgaging land.

But as pointed out earlier even though writings such as those of Boladeoku and Umezulike which are published articles proved useful to this research in terms of analytical depth, they proved less useful in terms of comprehensive coverage of the myriad issues falling under the topic of research. Again articles of relevance to the research are not contained in one volume but scattered in different law journals; some are not even published in any journal. The thrust of this research is to provide a comprehensive coverage of all matters falling within its ambit and to unite in one volume a serious analysis of the law in bank securities. Herein lies the modest contribution of this research effort.

1.6 ORGANIZATIONAL LAYOUT

This work embarks on a systematic study and analysis of encumbrances affecting bank securities in Nigeria raising fundamental security issues that must engage the attention of the banker if he must get the best out of the security created in his favour by the customer debtor. The systematic approach to this research informed the organizational layout of the work.

Chapter one is the introductory chapter dealing with such issues like Historical Background of the Research, Research Objectives, Scope of Research, Research Methodology and Literature Review.

The focus of chapter two is Mortgages And the Property Over Which They Are Created. It dwells on such issues as, Types Of Mortgages, Legal Mortgages, Equitable Mortgages, Second Mortgages,

Sub-mortgages, Priority Of Mortgages, Types Of Property Over Which Mortgages May Be Created, Mortgages Of Land And Ships, Mortgages Of Stocks And Shares, and Mortgages Of Life Insurance Policies.

Securing And Enforcing The Banker's Mortgage is discussed in chapter three. The chapter tackles matters like, Investigation of Title, The Overriding Interests Of Occupiers, Trust Property, Meeting The Consent Requirement, The Doctrine Of Lis Pendens, Registering The Banker's Mortgage, Consolidation Of Mortgages, Tacking The Mortgage, The Limitation Law, The Mortgagor's Equity Of Redemption, Enforcement Of Mortgages, Sale Of The Mortgaged Property, Appointment Of A Receiver Over The Mortgaged Property, Foreclosure, and Taking Possession Of The Mortgaged Property.

Chapter four deals with Charges As Encumbrance On Bank Securities. It covers issues like, Types Of Charges, Legal Charges, Equitable Charges, Fixed And Floating Charges, Distinction Between Equitable Charges And Equitable Mortgages, Types Of Property Over Which Charges Are Created, Agricultural Charges, Fixed And Floating Charges Over Assets Of A Company, Securing The Banker's Charge, And Enforcement Of Charges.

The focus of chapter five is, The Banker's Lien. It dwells on such matters as, The Definition Of Lien, Special Features Of A Lien, Types Of Banker's Lien, Property Subject To The Banker's Lien, and Duties And Power Of The Banker Under Lien.

Chapter six is the concluding chapter. It contains, a Summary of the entire work, Recommendations and a Concluding remark.

NOTES AND REFERENCES

1. Kuahen Vs. Avose (1889) reports of certain judgements of the supreme court by Elias quoted in Oluyede P.A. Nigerian law of Conveyancing (Ibadan, IUP 1978) 1st ed. p. 48.

2. Oluyede P. A. Nigerian Law of Conveyancing 1st ed (Ibadan, IUP 1978) p. 48.

3. Ituwe C. E. Elements of Practical Banking 1st ed (Ibadan, IUP 1982) p. 3-4.

4. Ibid.

5. Holdens Milnes J. The law and practice of Banking Vol.2: Securities for Bankers' Advances (Pitman, PUb. 1989).

6. Megrah Maurice: Paget's Law of Banking (Butterworth, BUP 1972).

7. Adeniji A. O. Law and Practice of Banking in Nigeria (Ife, IUP 1981).

8. Adekanye F. Practice of Banking Vol.1 (Ife, IUP 1979).

9. Bolodeoku O. Rights Of Occupiers As Overriding Interests: Justice Journal (June 1991 Issue) p. 101-104.

10. Umezulike I.A. The Heady Question of Execution of Mortgage deed before consent: Awojugbagbe Light Industries Ltd Vs. B.N. Chinukwe (Justice Journal May-June 1993 issue) p. 69 at 71.

11. (1993) INWLR (pt 270) p. 485.

12. Justice Journal (May-June 1993 issue).

CHAPTER TWO

MORTGAGES AND THE PROPERTIES OVER WHICH THEY ARE CREATED

2.1 MORTGAGES

2.1.1 Definition of Mortgages

The term mortgage is composed of two French words, `mort' meaning death or dead and `gage' meaning pledge. These two words `mort' and `gage' forming the compound word mortgage are apparently unsuited and of contrary chemistry. In their irreconcilable state it is difficult to see how they come to mean a banker's security unless, of course, it is conceded that the word `gage' had `colonised' and assimilated the word `mort.'

Be that as it may the concern of this work is with the word mortgage as a banker's security which has been defines as:

> .....a security created by contract for the payment of a debt already due or to become due, or of a present future advance effected by means of an actual or executory conveyance of real or personal property with the payment of the money secured redeemable at law only according to a strict legal condition of conveyance but redeemable in equity independently of such condition and enforceable in default of payment by foreclosure or sale in lieu thereof.[1]

The above definition apart from seeing a mortgage as a mode of creating a security establishes the essential characteristics of a mortgage which are that it is redeemable at the instance of the mortgagor and can be foreclosed by the mortgagee in appropriate circumstances.

Mortgages constitute the major form of encumbrance acceptable to banks especially over landed property and ships. The reason for this is not far fetched. Mortgages more than any other form of security impose the heaviest legal encumbrance on the borrower's property offered as security to the banker and this afford the banker the best security. It is in recognition of this importance of mortgages as bank security that the discussion on mortgages has been splitted into two chapters for a more detailed examination of this bank security. The present chapter dwells on the various types of mortgages and the properties over which they are created while the next chapter considers securing and enforcing the banker's mortgage.

2.2 TYPES OF MORTGAGES

2.2.1 Legal Mortgages

A legal mortgage was the mortgage that was recognised at common law as enforceable by the mortgagee by sale of the property mortgaged or by foreclosing the mortgagor's right to redeem or by exercising any other legal right of a mortgagee to discharge the mortgagor's financial obligation towards the mortgagee when it falls due.

A legal mortgage vests a legal estate in the mortgagee banker in whose favour it is executed by the mortgagor customer. This legal estate vested in the mortgagee banker approximates ownership of the property mortgaged to him. In fact what might be called, for lack of a better expression, "ownership nisi" of the mortgaged property is vested in the mortgagee banker for the duration of the mortgage in that the legal estate in the property mortgaged is conveyed to the banker and all the mortgagor customer has with him

is the right to redeem the mortgaged property before or at the fixed time for such redemption. Thus if the mortgagor customer fails to redeem at the appropriate time the mortgagee banker's ownership nisi becomes absolute ownership and the mortgagor customer from that point ceases to have any interest or claim on the property. Accordingly a legal mortgage is the best security a banker can get for his advances from the point of available remedies.

The legal mortgage was recognised at common law as enforceable because it has met all the requirements of a valid mortgage such as being in writing and under seal. Any document purporting to be a mortgage but which did not conform to this form stipulated by common law was invalid and unenforceable. It was this invalid and unenforceable mortgage agreement that equity later validated and made enforceable in equity as equitable mortgages.

A legal mortgage properly executed is a mortgage that can be enforced by the mortgagee banker without reference to either the mortgagor customer or the court. While commenting on this enticing aspect of a legal mortgage, the authors of Paget's law of banking observed as follows: "the significance of a legal mortgage lies in the power it gives the mortgagee banker to exercise his remedies without the assistance of the mortgagor or of the court."[2]

2.2.2 Equitable Mortgages

An equitable mortgage is the mortgage that did not meet the requirements of a legal mortgage such as being evidenced in writing and made under seal. Because such mortgage was considered defective in form it was not enforceable at law.

But since equity looks more to the intention of the parties regarding transactions purporting to be mortgages rather than the form such transactions had been reduced into, such mortgage as did not meet the requirements of law was recognised and enforced in equity provided it is not superseded by a prior legal mortgage[3] or a subsequent legal mortgage created in favour of a mortgagee without notice of the earlier equitable mortgage.

Thus where there is intention to give a security the mere deposit of title deeds or other property with the banker gives the banker a valid equitable mortgage which so long as he holds the title deeds can not be overridden. The case of Harold Vs. Plenty[4] vividly illustrates this point. In this case the plaintiff granted a loan of #150 to the defendant against the security of a share certificate. On default by the defendant to redeem the mortgage the mortgagee sought to foreclose the mortgagor's right of redemption. The question that required the court's adjudication was whether the deposit of the share certificate amounted to an equitable mortgage entitling the mortgagee to foreclose. It was held that the deposit of the share certificate was a good equitable mortgage that entitles the mortgagee to foreclose the mortgagor's right of redemption.

It is submitted that even though the mortgagee in the above mentioned case was an individual and not a banker, the situation would not have been different were the mortgagee a banker.

The creation of an equitable mortgage by the simple deposit of the customer's title deeds or any other property with the banker has been recongised since Russel Vs. Russel.[5] In that case the mortgagor deposited his title deeds with the mortgagee as security

for a loan advanced. It was held that the deposit of the title deeds by the mortgagor was not only evidence of an agreement to mortgage the property but also a sufficient act of part performance which makes the agreement enforceable.

Even though the decision in Russel Vs. Russel[6] was lamented by Lord Eldon in Exparte Haigh[7] which presented similar facts with Russel Vs. Russel[8],as "an unfortunate limitation on the statute of frauds which requires mortgages to be in writing, the rule became established and confirmed in Spencer Vs. Clarke[9] where a farmer seeking a loan of #100 from a money lender deposited title deeds of his cottage with the money lender without uttering a single word. It was held on the authority of Russel Vs. Russel[10] that an equitable mortgage has been created by the farmer in favour of the money lender.

In the Nigerian case of Nasr Vs. Berini Beirut Riyad (Nig) Bank Ltd[11] it was also held that the mere deposit of title deeds with a bank as security for advances constitutes a valid equitable mortgage enforceable in equity. The facts of that case were that the plaintiff who was at all material times a director and deputy chairman of the defendant bank, was the lessee of two plots of land, the title deeds of which he deposited with the defendant as security for advances made to his nephew. The plaintiff in his capacity as director authorised the defendant's manager to finance the building of flats on his plots of land without the approval of the board of directors. As a result of an agreement with a building contractor the plaintiff arranged to have the flats built and all payment for such building to be charged to the account of his nephew, who was at all material times resident outside the

country. This account was, it seems, opened and operated by the plaintiff and the title deeds to the property was deposited with the defendant as security for payments into the account to cover the building costs. At a later date the plaintiff demanded the return of the title deeds and when the defendant refused, he instituted the present proceedings to recover them.

The defendant counter claimed for the amount of the advances to the account opened by the plaintiff plus interest until the date of judgment. The plaintiff contended that what the defendant claimed to be advances made on the security of the title deeds were in fact payments made in pursuance of a tacit arrangement approved by the board of directors and there was no question of interest on the payments, and that the title deeds were merely deposited with the defendant for safe custody in accordance with his practice. He further contended that even if a mortgage was created by the deposit of the title deeds it was imperfect in that it was created by a fictitious document and the title deeds themselves were still in the plaintiff's possession when the building was not in existence, and that in any event, if a mortgage was effectively created, the whole transaction was invalid since the consent of the lessors of the property was not obtained.

It was held, rejecting the plaintiff's contention, that an equitable mortgage was effectively created by the mere deposit of the title deeds and the equitable mortgage so created is not invalidated by lack of the lessors' consent.

The essential element in an equitable mortgage by deposit of title deeds or any other documents of title unsupported by any written evidence such as that provided by the ordinary memorandum

of deposit, is the intention to give a security. Without such intention no such mortgage is created. Accordingly the deposit of deeds with a banker for safe custody does not create such a mortgage.

A deposit of documents as discussed above, however, is not the only way of creating an equitable mortgage in favour of the banker. In Re Heathstar Properties Ltd[12] it was held that a mere undertaking by the solicitors of a farmer customer to hold the deeds of the customer on behalf of the banker created an equitable mortgage over the title deeds in favour of the banker.

Another way in which an equitable mortgage may be created is by the deposit of documents of title with the banker with a written memorandum setting out the terms and conditions upon which the deposit is made. This was examined and upheld in the Nigerian cases of Barclays Bank (D.C.O.) Ltd Vs. B.A. Olofintuyi & Anor,[13] and British and French bank Ltd Vs. S.O. Akande (Trading as Akande Bros. & Co).[14] In each of the cases the defendant deposited his title deeds with the plaintiff banker to secure overdraft facilities. The deposits were accompanied by memorandums of deposit. On failure by the defendants to repay the mortgage debts the plaintiffs sued the defendants on their personal obligation to repay the loans. On obtaining judgment against the defendants, the plaintiffs brought actions for an order of foreclosure. The defendants denied that any security was given to secure the overdraft facilities, but it was held that the deposit of the title deeds and the memorandum of deposit in favour of the banker created an equitable mortgage in favour of the banker which he can enforce by an order of foreclosure.

The various modes of creating an equitable mortgage were articulated in the celebrated supreme court case of Ogundiani Vs. Araba and Barclays Bank (Nig) Ltd[15] the brief facts of which are as follows. The appellant bought from one Ashiru property which was the subject matter of dispute between Ashiru and the second respondent - Barclays Bank (Nig) Ltd. The second respondent had made some overdraft facilities available to Ashiru on the security of the property in dispute. There was a formal memorandum of deposit in which Ashiru covenanted to execute a legal mortgage of the property in favour of the second respondent bank in the event of his failure to discharge the overdraft when called upon to do so. He failed and the bank called upon him to execute the legal mortgage but Ashiru refused. The second respondent then sued him for specific performance of the contract, that is, execution of a legal mortgage in favour of the respondent bank.

It was held by the Supreme Court that the second respondent bank was entitled to an order of specific performance of the mortgage agreement between it and Ashiru. The Supreme Court also held, inter alia, that the deposit of Ashiru's title deeds with the second respondent bank accompanied by a memorandum of deposit created a valid equitable mortgage between Ashiru and the second respondent bank which the second respondent bank can enforce in terms of the mortgage agreement. The Supreme Court then went on to identify three different modes of creating equitable mortgages namely: by mere deposit of title deeds unaccompanied by a written memorandum of deposit but with a clear intention that the deeds should be taken or retained as security for the loan, next, by a deposit of title deeds accompanied by a written memorandum of

deposit setting out the purpose and intent of the deposit and thirdly, by a mere equitable charge of the mortgagor's property.

It is worth noting that a substantial difference exist between the first two types of equitable mortgages and the last type of equitable mortgage identified in the case of Ogundiani Vs. Araba and another.[16] This difference is that while some form of equitable estate in the property mortgaged is conveyed to the equitable mortgagee banker on the creation of any of the first two types of equitable mortgages, no such estate is conveyed to the mortgagee banker of the last type of equitable mortgage. All that the quitable mortgagee of the last type of equitable mortgage gets is a bare right to be paid out of the property mortgaged.[17] This being the case no demarcating line can be drawn between such an equitable mortgage and a charge.[18]

Of the different modes of creating equitable mortgages, the equitable mortgage that is created by the deposit of some property of the mortgagor accompanied by a memorandum of deposit containing a promise by the mortgagor customer to execute a legal mortgage in favour of the mortgagee banker on default by the mortgagor customer to repay the mortgage sum is, save for the equitable mortgage under seal discussed under 2.2.2.1 of this work, the best mode of creating an equitable mortgage - at least from the banker's position. This is because with such an equitable mortgage the banker will be able to show if necessary that a certain property deposited with him was deposited as security and not for some other purpose such as safe custody which can extinguish the bankers's security if proved. The case of Nasr Vs. Berini Beirut - Riyad (Nig) Bank Ltd[19] shows the possibility that a customer can assert

that the property he deposited with a banker was deposited for safe custody and not as security if there is no memorandum of deposit setting out the terms and conditions of deposit. But he can not so assert if the deposit is accompanied by a written memorandum of deposit.

Again the banker whose equitable mortgage is accompanied by a written memorandum of deposit containing a promise by the mortgagor customer to execute a legal mortgage if call upon by the banker to do so on default by the mortgagor to repay the mortgage sum as at when due, can get a legal mortgage executed in his favour by merely suing the mortgagor for specific performance of the mortgage agreement where the customer proves uncooperative.[20]

However, save for the equitable mortgage under seal, whatever may be the mode of creating an equitable mortgage, it suffers from the weakness that for the mortgagee banker to enforce it he must either obtain the cooperation of the customer mortgagor or have recourse to court. Accordingly, even though an equitable mortgagee banker may enjoy certain rights such as right of sale, foreclosure and appointment of a receiver enjoyed by a legal mortgagee, the equitable mortgagee banker unlike the legal mortgagee requires the cooperation of the customer or the assistance of the court to enforce these rights. Thus it can be said that a banker as an equitable mortgagee does not enjoy the "enticing aspect" of a legal mortgage enjoyed by the legal mortgagee, save of course his equitable mortgage is under seal.

Again an equitable mortgage unlike a legal mortgage confers no estate on the mortgagee that approximates ownership of the property mortgaged by the customer mortgagor. An equitable mortgage vests

no legal title in the banker as mortgagee and it is defeasible by a subsequent legal mortgage executed in favour of a mortgagee without notice of the prior equitable mortgage.[21]

However, serious as the shortcomings of an equitable mortgage may be, an equitable mortgage is not without some merits. In fact with some property, such as stocks and shares discussed later in this work, equitable mortgages are more meritorious than legal mortgages as a form of security over such property. Some of the advantages of equitable mortgages include the following:

First, an equitable mortgage if it is under hand and not under seal, attracts a lower rate of stamp duties.[22]

Secondly, an equitable mortgage does not in the case of registered deeds form part of the title.[23]

Thirdly, there are the merits of simplicity and brevity which are embodiments of an equitable mortgage as contrasted with the long and complicated form of legal mortgages.[24]

Fourthly, in respect of stocks and shares, an equitable mortgage is the most appropriate form of security to be executed in favour of the banker rather than a legal mortgage - at least from the stand point of the customer borrower and commercial expediency. For a legal mortgage of stocks and shares will require the customer to surrender the stocks and shares to the banker, execute the necessary instruments of transfer of the stocks and shares to the banker, and execute a formal mortgage deed with the bank as mortgagee. When the mortgage is discharged this process is repeated to reconvey the stocks and shares back to the customer.[25]

This process, maintains Professor K. I. Igweike[26] cost time and money and, is a heavy clog on commercial activities compared with

the more expedient process of an equitable mortgage which merely requires the customer to deposit his share or stock certificate with the bank and execute a memorandum of deposit which states the purpose of the deposit and that he has undertaken to execute the formal transfer of the security in favour of the bank or its nominee.

The above advantages of an equitable mortgage do not, however, obliterate the grave shortcomings of equitable mortgages earlier enumerated. An attempt by mortgagees to overcome some of these short comings of equitable mortgages led to the evolution of what is called an equitable mortgage under seal.

2.2.2.1 Equitable Mortgage Under Seal

In order to avoid most of the disadvantages of equitable mortgages and enjoy the advantages of legal mortgages without inflicting upon the customer the stigma of having it upon his title in future, banks sometimes make use of a special type of equitable mortgage called equitable mortgage under seal which virtually gives the banker the same powers as does a legal mortgage.

This kind of mortgage may be more easily understood by examining the position of the legal mortgagee as compared to that of an equitable mortgagee whose mortgage is executed under hand. The equitable mortgagee under hand has no power of sale and no power to appoint a receiver because he has no legal estate or interest in the property. Not having a legal estate himself he has none to convey to a purchaser on the basis of the doctrine of Nemo dat quod non habet which means that a man can only give that which he has.

The main object of the equitable mortgage under seal is to enable him to do so and, the desired result is achieved in practice by inserting either or both the clauses mentioned below in an equitable mortgage instrument.

The first clause embodies an irrevocable power of attorney whereby the mortgagor customer irrevocably appoint an official of the bank to sell the property mortgaged as his agent or to execute a legal mortgage thereof as his agent in favour of the banker.

The second clause contains a declaration of trust wherein the mortgagor customer acknowledges that he holds the property in trust for the bank and at the same time empowers the bank to remove him from the trust and appoint some other person as trustee who may then execute a legal mortgage in favour of the banker or sell the property on behalf of the banker and convey the title to the purchaser.[27]

The use of either of these clauses or both of them in the equitable mortgage agreement will spare the banker the risk of having to rely on the cooperation of the customer in order to have a legal mortgage executed in his favour or to realise the security, a cooperation which in most cases is altogether uncertain.[28] Neither does the equitable mortgagee banker whose mortgage is under seal need the assistance of the court which also can be quite expensive and dilatory.

Again the banker by making use of the equitable mortgage under seal is spared the sometime embarrassing consideration of having to inflict the dreadful stigma of a legal mortgage on the title deeds of the customer were he to take a legal mortgage of the deeds.

With all these advantages of an equitable mortgage under seal it is to be expected that in future it will receive greater patronage by the Nigerian banker than the legal mortgage which presently enjoys prime of place.

2.3 SECOND MORTGAGES

2.3.1 Meaning of Second Mortgages

A second mortgage simply defined is a mortgage created by the mortgagor in favour of a second mortgagee over property which is already the subject matter of an earlier mortgage in favour of a first mortgagee. The second mortgage could be either legal or equitable depending on which mortgage was earlier created and the mortgage being now demanded by the second mortgagee.

2.3.2 Inadequacy of a Second Mortgage as Security

A second mortgagee banker whatever his rights may be, finds satisfaction only after the first mortgagee has been satisfied. It is this "second class" status of a second mortgage that makes it an inadequate security for a banker to accept for his advances. This inadequacy of a second mortgage will be shown by an examination of the rights of the second mortgagee banker and the limitations upon them.

First, although a second mortgagee banker may have the right to take possession of the mortgaged property he can only do so if the first mortgagee has not done so. So also a second mortgagee may have the right to sell the mortgaged property he can only do so if the first mortgagee has not exercised that right. In deed a wrongful exercise of the power of sale by a first mortgagee can wreck incalculable damage to the interest of the second mortgagee

banker in that where the first mortgagee sells the property when the power of sale is not exercisable, the second and subsequent mortgagees can only sue the first mortgagee for damages but can not impeach the title of the purchaser.[29]

A second mortgagee banker's peril respecting a sale of the mortgaged property by the first mortgagee is particularly disturbing when regard is had to the fact that a mortgagee is not a trustee of the power of sale.[30] The power of sale is exercised for his own benefit and as such he is neither bound to get the best price nor to take into consideration the interest of the mortgagor or that of the second mortgagee banker. All that a mortgagee is required to do in the exercise of his right of sale is to take reasonable care to obtain the proper market value of the property.[31]

So where in the exercise of his power of sale a first mortgagee acting in good faith sells at an undervalue enough only to satisfy his mortgage the second mortgagee banker would be left with nothing and no claim against the first mortgagee.

Also the motive of the first mortgagee in selling the mortgaged property has been held in Nash Vs. Eads[32] to be immaterial. So if his motive be to spite the second mortgagee banker it matters not! So the first mortgagee can while acting within the law turn the security of the second and subsequent mortgagees to an illusion.

It is humbly submitted that this is not a satisfactory state of affairs. The law ought to take interest in the state of mind of the first mortgagee in selling the mortgaged property, i.e., his motive of selling the mortgaged property. There should be no difference in this respect between the law of banking and criminal

law or the law of tort in which motive is considered relevant for the purposes of determining culpability or liability. For an evil or spiteful motive in a first mortgagee can lead to a sale of the mortgaged property at an undervalue with the sole aim of hurting the legitimate interest of the second mortgagee banker in the property mortgaged.

It is, however, worth noting that a first mortgagee is bound to hand over to the second mortgagee banker the surplus of a sale by him where he has notice of the second mortgage. Therefore if instead of turning over such surplus to the second mortgagee banker the first mortgagee turns it over to the mortgagor he would be liable for same to the second mortgagee banker.[33]

The precarious situation of a second mortgagee banker discussed above arises where the power of sale is exercised by the first mortgagee. But the second mortgagee banker is not necessarily in a happier situation were he to exercise the power of sale himself.

First, a second mortgagee banker desirous of exercising the power of sale must either get the cooperation of the first mortgagee to sell the mortgaged property free of the first mortgage or dispense with his cooperation and sell the mortgaged property subject to the first mortgagee's interest.

Either option has its disadvantages to the second mortgagee banker. If he chooses the first option, that is getting the cooperation of the first mortgagee, the first mortgagee may refuse to cooperate especially if his debt is being properly serviced by the mortgagor. But even if the first mortgagee cooperates with the second mortgagee banker to sell the mortgaged property, the second

mortgagee banker will still suffer the disadvantage of having first to satisfy the cost of selling the property, the interest of the first mortgagee before satisfying his own security, if there is still a surplus to do so. This means that if no surplus remains to satisfy the second mortgagee banker interest he would have suffered himself to sell the mortgaged property to satisfy everybody but himself. This is hardly a pleasant situation.

If on the other hand the second mortgagee banker decides to exercise the second option of dispensing with the cooperation of the first mortgagee he will find few buyers as no purchaser will like to buy a property subject to the interest of the first mortgagee.

The second mortgagee banker's right of foreclosure is neither also pleasant. For instance a foreclosure order absolute obtained by the first mortgagee forecloses subsequent mortgages including the second mortgage. But if it is the second mortgagee banker that exercises the right of foreclosure he can only foreclose third and subsequent mortgages but leave untouched the right and interest of the first mortgagee.[34] If the second mortgagee banker desires to acquire or extinguish the interest of the first mortgagee he must redeem up, that is to say, pay off the first mortgagee.[35]

On the right of the second mortgagee banker to appoint a receiver over the mortgaged property, a second mortgagee banker can only exercise this right if he is in a position to exercise his power of sale.[36] Again the second mortgagee can not exercise this right if the first mortgagee has already appointed a receiver.

Perhaps the only right which a second mortgagee banker, and indeed all mortgagees, can exercise without reference to any other

mortgagee or encumbrancer is the right to sue the mortgagor for the mortgage debt. This is because this right does not affect the mortgaged property but the mortgagor himself.

Apart from the already enumerated disadvantages of a second mortgage there is also the possibility that the right of the mortgagor to create subsequent mortgages may be restricted in the first mortgage deed. If there is such a restriction and the mortgagor mortgages to the second mortgagee banker, the second mortgagee banker will take nothing.

All these go to show that a second mortgage is truly a perilous security which a banker should be wary of accepting as security for his advances. If, however, a banker is minded to accept a second mortgage as security the following precautionary measures will be very useful.

First, the banker should make a search at the registry of the security about to be accepted to confirm that there is only a first mortgage on the property and also to find out the extent and value of the first mortgage.

Secondly, the banker should make proper valuation of the mortgaged property in order to ensure that his security will be covered whenever steps are taken to realise the property.

Thirdly, the banker should also take a negative pledge from the mortgagor against further mortgages without his own consent.

Finally, the banker should take a critical look at the first mortgage deed to find out whether there are restrictions on the right of the mortgagor to further encumber the property. There is always a negative pledge from the mortgagor not to make further mortgages without the consent of the first mortgagee. Where there

is such a negative pledge the second mortgagee banker should approach the first mortgagee to get his consent to his own mortgage.

2.4 SUB MORTGAGES

2.4.1 Meaning of Sub-Mortgages

A sub mortgage may be defined as a mortgage of a mortgage, or more accurately as a mortgage of a mortgage debt. This definition may be illustrated thus:

X has borrowed from Y the sum of ₦200,000.00 and as security for the loan, has mortgaged house A to Y who has an account with City Bank. Y the mortgagee later finds that he needs a loan of ₦50,000.00 to attend to some pressing business of his but he is not willing to call in his loan. So he decides to raise the money by mortgaging his mortgage to City Bank by creating a sub-mortgage. In this transaction Y is a sub-mortgagor, City Bank a sub mortgagee and the mortgage executed by X in favour of Y the head mortgage.

From this illustration it can be seen that a sub mortgage is the direct opposite of a second mortgage. For while a second mortgage is created by the mortgagor in favour of another mortgagee, a sub-mortgage is created by the mortgagee in favour of another mortgagee.

However, the difference between a second mortgage and a sub-mortgage is not so much a difference of quality as a difference of who creates which. For both types of mortgages do not provide a good security to the banker. A sub-mortgage like a second mortgage is ridden with many shortcomings which include the following.

First, the sub-mortgagor may borrow more money from the sub-mortgagee banker than he lent to the head mortgagor under the head

mortgage so that even when the head mortgagor pays him his money in redemption of his mortgage the sub-mortgagor may not be in a position to redeem his mortgage with the sub-mortgagee banker. Even where this is not the situation the head mortgagor may redeem his mortgage and yet the sub-mortgagor may still fail to redeem his own mortgage with the sub-mortgagee banker. If this happens the sub-mortgagee banker may lose his security unless he has given notice of his mortgage to the head mortgagor and the latter had given the money in redemption of his mortgage to the sub-mortgagee banker instead of the sub-mortgagor.

Secondly, the property mortgaged may not provide adequate value to cover the sum secured under the sub-mortgage. However, the sub-mortgagee banker need not come to undue worry on account of this disadvantage which is a disadvantage possible for all mortgages whether first, second or sub-mortgages. As such it can be anticipated by the banker and well taken care of in advance as shall be seen hereafter.

Thirdly, there is the possibility that other sub-mortgages in favour of other sub-mortgagees have already been created by the sub-mortgagor on the same property before creating the banker's sub-mortgage so that the banker's sub-mortgage may, for lack of a better expression be called "a second or third sub-mortgage." If this be the situation the banker's sub-mortgage will be postponed to the earlier sub-mortgages in the event of a competition between them.

Lastly, like with second mortgages, there may be a covenant against creation of sub-mortgages by the sub-mortgagor in the head

mortgage. If such a covenant exist in the head mortgage it will operate to nullify the banker's sub-mortgage.

From all these shortcomings a sub-mortgage like a second mortgage poses a lot of risks to the banker and banks should be wary of accepting it as security for their advances. But where despite all these warning signals a bank is still persuaded to advance money to a customer on the security of a sub-mortgage the bank will do well if it avert its mind to the following precautionary measures.

First, on the danger of the sub-mortgagor borrowing from the sub-mortgagee banker more money than he had lent the head mortgagor, the banker as sub-mortgagee should be able to find out how much is secured under the head mortgage. This should not be difficult where the head mortgage is a legal mortgage or an equitable mortgage accompanied by a memorandum of deposit. In either of these two types of mortgages the sum secured under the head mortgage would certainly become known to the sub-mortgagee banker who should normally require to see the instrument evidencing the head mortgage before consenting to the sub-mortgage.

The problem is when the head mortgage is an equitable mortgage by a mere deposit of the property mortgaged or of documents of title to it unaccompanied by a written memorandum. Here the sub-mortgagee banker may have to contact the head mortgagor if he knows him and have access to him. This reference to the head mortgagor will help the banker sub-mortgagee in two ways. First, he will know the exact sum secured under the head mortgage and, secondly, he will give notice of his sub-mortgage to the head mortgagor so that on redemption of the head mortgage by the head mortgagor, the

head mortgagor should pay to him instead of to the sub-mortgagor. In fact if he gives such notice to the head mortgagor and the head mortgagor despite the notice pays to the sub-mortgagor the head mortgagor will be liable to him in damages.

Secondly, as to the danger of the mortgaged property being of less value than the sum secured under the sub-mortgage it has been pointed out that the sub-mortgagee banker need not come to serious grief over this disadvantage as he can well before hand see the problem and solve it before going into the sub mortgage agreement. This the sub mortgagee banker can do by directing a property valuer to value the security and report back to the banker. The banker should then be able to act as dictated by the valuer's report by either accepting or rejecting the sub-mortgage proposal.

Thirdly, as to the possibility of earlier sub-mortgages created by the sub-mortgagor existing to postpone the banker's sub-mortgage, the banker should make the necessary searches or inquiries to discover these sub-mortgages, if they exist and, decide for himself whether or not to accept the sub-mortgagor's sub-mortgage proposal. In this regard he will be a prudent banker that will not accept a sub-mortgagor's proposal who had earlier created other sub-mortgages in favour of other sub-mortgagees no matter how attractive the value of the property under the head mortgage is. For the banker may be so far on the line of sub-mortgagees that whatever proceeds are realised on a sale of the mortgaged property, the banker may not be reached before the proceeds get exhausted.

Lastly, on the possibility of there being a negative covenant in the head mortgage against the creation of sub-mortgages by the

sub-mortgagor, such a covenant should not be difficult to discover and met appropriately by the sub-mortgagee banker. For such a covenant should normally be in a written form and contained in the head mortgage creating instrument. Having found it the sub-mortgagee banker if he is still persuaded to take the sub-mortgage can approach the sub-mortgagor for consent to his sub-mortgage.

The consideration of sub-mortgages brings to a close the examination of types of mortgages. Even though while treating the various types of mortgages reference might have been made to priority of mortgages, it is here the issue will be closely examined in some details. The need for detailed examination of the law on this issue is to help the banker who is the focus of this work appreciate how the different types of mortgages coexist in harmony without coming to irreconcilable or irresovable conflict. A knowledge of the law on priority of mortgages should help the banker in knowing which mortgage is best for him.

2.5 PRIORITY OF MORTGAGES

Priority of mortgages arises where more than one mortgage is created on one property of the mortgagor in favour of more than one mortgagees. The question will then arise, as between the two or more mortgagees which of them will be entitled to enforce his mortgage in priority to the others?

A legal mortgage on all occasions has priority over an equitable mortgage except where an equitable mortgage is created before the legal mortgage and the legal mortgagee had notice of the equitable mortgage at the time his legal mortgage is being created. In a situation such as this the legal mortgage will lose its priority on the ground that it will be inequitable to allow the

subsequent legal mortgage to defeat the prior equitable mortgage which the legal mortgagee had notice of but yet deliberately accepts the legal mortgage probably with the intention of defeating the equitable mortgage.

The priority of a legal mortgage was upheld in the supreme court case of Cole Vs. Folami.[37] The brief facts of this case were that the appellant as mortgagee sued the mortgagor in the Ibadan High Court of Justice seeking among other reliefs a judicial sale of a landed property lying and situate at Ibadan which property had been mortgaged to him by the mortgagor by way of an equitable mortgage under hand. The respondent on becoming aware of the said suit then brought an application to be joined as co-defendant and counter claimant on the ground that the mortgagor had also executed a legal mortgage in his favour over the same property. He was so joined. At the trial it was established that the equitable mortgage executed in favour of the appellant was first in order of creation but that at the time the respondent's legal mortgage was created by the mortgagor the respondent had no notice of the prior equitable mortgage created in favour of the appellant. The court then held that since the respondent is untainted by notice of the prior equitable mortgage of the appellant, his legal mortgage must prevail over the appellant's equitable mortgage and, consequently that the appellant is not entitled to an order for judicial sale of the mortgaged property. On appeal to the court of appeal and the supreme court of Nigeria by the appellant the decision of the trial High Court was confirmed and upheld as representing the position of the law in Nigeria on the point.

As between two or more legal mortgages it is the legal mortgage that is first in time of creation that will prevail over the one that is later in time of creation.

An equitable mortgage whether under hand or under seal has priority only over an equitable mortgage of a later creation and over a legal mortgage of a later creation if the mortgagee of the later legal mortgage has notice of the earlier equitable mortgage. A mortgagee of a later legal mortgage will normally be affected by notice of an earlier equitable mortgage only where the documents of title to the property over which the security is created is deposited with the earlier equitable mortgagee.

The priority of a legal mortgage over an equitable mortgage is codified into law by the equitable maxim of **"where the equities are equal the law prevails."** So also the priority of an earlier legal mortgage over a later legal mortgage and an earlier equitable mortgage over a later equitable mortgage codified by the equitable maxim of **"where the equities are equal the first in time prevails."**

Between a first and second mortgage, their priority will depend on the rules discussed above, so that a first legal mortgage will have priority over all subsequent mortgages be they legal or equitable, affected or unaffected by notice of the prior legal mortgage. But a second legal mortgage can only defeat a first equitable mortgage which the mortgagee of the second legal mortgage had no notice of and subsequent legal and equitable mortgages.

A second equitable mortgage can only defeat subsequent equitable mortgages and, subsequent legal mortgages created with notice of the second equitable mortgage.

Priority of mortgages applies to sub mortgages only to a limited extent. This is because priority of mortgages is concerned with priority between two or more mortgagees with a common claim against a common mortgagor and a sub-mortgage usually has one mortgagee claiming against one mortgagor. The only instance when priority of mortgages will arise in a sub-mortgage is where the sub-mortgagor creates more than one sub mortgages in favour of different sub-mortgagees. Should that happened priority of mortgages will then arise between or among the various sub mortgagees as to who is entitled to enforce his sub-mortgage in priority to the others. In such a situation the rules earlier discussed will apply so that a first legal sub-mortgagee will be entitled to enforce his sub-mortgage in priority to all subsequent sub-mortgages be they legal or equitable. So also a second legal sub-mortgagee will be entitled to enforce his sub-mortgage against all sub-mortgages save a first legal sub-mortgage and a first equitable sub-mortgage which the second legal sub-mortgagee has notice of. In the same vent a second equitable sub-mortgage can only prevail over subsequent equitable sub-mortgages and subsequent legal sub-mortgages whose mortgagees have notice of the secon equitable sub-mortgage.

Priority of mortgages should be a very important consideration in the mind of a banker about to advance money to a customer on the security of a mortgage especially where he has notice that the property over which his mortgage is to be created is under an earlier encumbrance in favour of another mortgagee. Where there is an earlier mortgage in favour of another mortgagee the banker should normally refuse to advance the money on the security

offered. But if he is minded to accept such security, prudence requires that he should take the following steps to protect himself.

First, the banker should find out the value of the property under the earlier mortgage which property is now being offered to him as security.

Secondly, he should find out the sum secured under the first mortgage.

Thirdly, he should try subtracting the sum secured under the first mortgage from the value of the property to determine whether or not enough value still remains out of the whole value of the mortgaged property to accommodate him. In determining whether or not enough value still remains the banker must have regard to the fluctuation in prices of certain securities such as stocks and shares.

Finally, if after taking the above steps, the banker is persuaded to accept a second mortgage he should insist on a legal mortgage to ensure his priority over subsequent mortgages that might be created over the same property by the mortgagor. But it is worth noting that the banker can only insist on a legal mortgage where the earlier mortgage was an equitable mortgage. If it was a legal mortgage then the banker can not insist on another legal mortgage since the mortgagor having parted with his legal estate by vesting it in the first mortgagee has none to pass to the banker second mortgagee. All he has left with him and which he can convey to the second mortgagee banker is an equitable interest.[38]

It should be noted, however, that for a mortgagee banker to take the above steps to protect himself he must be affected by

notice of the earlier mortgage and; for him to have actual notice of the earlier mortgage he must conduct a search for such earlier mortgage. It follows therefore that a mortgagee banker should conduct a search to determine whether or not a particular property offered to him by a customer as security is under an earlier encumbrance in favour of another mortgagee before accepting the mortgage sought to be created in his favour.

In respect of landed property offered as security such search should be conducted in the land registry where such land situate because all encumbrances on land are required to be registered in the land registry and the mere registration of such encumbrances in the land registry is deemed to affect subsequent mortgagees with constructive notice of the earlier encumbrance whether or not such subsequent mortgagees conducted a search to avail them with actual notice of the encumbrance.[39] In fact S.193 of The Property And Conveyancing Law Of Western Nigeria 1959 which applies in those states making up the former Western and Midwestern regions of Nigeria provides that registration is actual notice to all persons for all purposes connected with land where the registration is of an instrument creating an estate contract, an equitable easement, a general equitable charge or a restrictive covenant.

If after conducting the search the banker decides to accept the mortgage sought to be created in his favour by the borrowing customer he should cause the mortgage created in his favour to be registered in the proper registry as soon as possible. Failure to have it so registered in the case of land will make him lose priority over a subsequent legal mortgage executed in favour of another mortgagee who has no notice of the earlier equitable

mortgage created in favour of the banker, that is if the first mortgage is equitable. Where it is legal registration may not matter much. In the case of ships failure to register the banker's mortgage is more fatal as such failure will result in an equitable mortgage being created in favour of the banker not withstanding that the mortgage was intended to be legal.[40]

2.6 CREATION OF MORTGAGES

2.6.1 Types Of Property Over Which Mortgages May Be Created

Any property can be mortgaged to the banker provided it has adequate value to secure the sum advanced or to be advanced and it is the property of the mortgagor. Thus stocks and shares can be mortgaged just as land or ships can be mortgaged, and insurance life policies can be mortgaged just as credit balances, units of a unit trust or any other property of value can be mortgaged.

However, in Nigeria some properties out of those listed above are more liable to be mortgaged to a banker mortgagee than the others. These properties more likely to be mortgaged are land, ships, stock and shares and to some extent insurance life policies. These different types of property and the types of mortgages most often created over them would be briefly examined here in turn.

2.6.2 Mortgages Of Land And Ships

Strictly speaking land can not be offered as security to a banker by an individual customer. The reason for this is that in theory all land belong to the state[41] and individuals can only own interests in land or what come to the same thing, a right to possession of land for certain period, either immediately or at some future date. Therefore before a banker accepts a legal

mortgage or any other type of mortgage or security over land from an individual, he must know what type of interest is being offered to him as security and what is its worth.

The Land Use Act[42] recognised four types of interests in land in Nigeria capable of individual ownership. These are statutory right of occupancy, customary right of occupancy, deemed right of occupancy, and leasehold. Such rights or interest in land such as fee simple and freehold existing in Nigeria before the enactment of The Land Use Act had thus been abolished by the provision of the above rights and interests by the Land Use Act.

The statutory right of occupancy is granted by the Governor of a state over land in Urban Areas for a period of 99 years. Though on the authority of the court of Appeal decision in Adeniran Vs. Alao[43] it would appear that the Governor's power to grant a statutory right of occupancy is not restricted to land in urban areas but also extends to land in rural areas within his state. In this case the Court of Appeal reasoned that since S.1 of the Land Use Act vests ownership of all land in a state in the Governor of that state then there is nothing stopping the Governor from granting a statutory right of occupancy over lands in rural areas within his state.

With respect, it is submitted that the above reasoning of the Court of Appeal in the above mentioned case is faulty in the sense that the mere vesting of ownership of all land in a state in the Governor of that state by S.1 of the Land Use Act does not confer on the Governor an unrestricted right of dealing with the said land. For the same Land Use Act which vests ownership of all land in the Governor also demarcates the area over which he is to grant

statutory right of occupancy by providing in S.5 that the Governor shall grant statutory right of occupancy over land in urban area. If it was intended by the legislature that the Governor shall also have the right to grant statutory or even customary right of occupancy over land in rural areas the law would have expressly said so. What is more since S.5 of the Land Use Act comes after S.1 of the same Act it is to be taken that it supersedes S.1 of the Act. In any case if the Court of Appeal was fully persuaded that S.1 of the Land Use Act is a blank cheque or what comes to the same thing, confers blanket powers on the Governor to deal as he wishes with all land within his state it should have equally held that the Governor can not only grant statutory rights of occupancy over land in rural areas but can also grant customary rights of occupancy over lands in rural and urban areas within his state. Since it didn't so hold, it has recongised limitations to the powers of the Governor in dealing with land within his state. These limitations must include his lack of power to grant statutory rights of occupancy over lands in rural areas which the Court of Appeal said he has.

The customary right of occupancy is granted by the Local Government Authority over land in rural areas for an unspecified period of time. The leasehold can be granted by either authority i.e. the Governor of a state or the Local Government Authority over land in urban and rural areas. Individuals can only grant subleases short of the period between them and the head lease granting authority. Nobody grants the deemed right of occupancy. In fact it is a right of occupancy over land in respect of which no right of occupancy has been granted.[11]

These various interests in land are, save for the deemed right of occupancy evidenced in documents known as documents of title to the interest concerned. The statutory right of occupancy for instance is evidenced by a statutory certificate of occupancy issued by the Governor of the state to the person entitled. So also the customary right of occupancy evidenced by a customary certificate of occupancy issued by the appropriate Local Government Authority to the person entitled. The leasehold is evidenced by a lease agreement between the individual and the lease granting authority.

The deemed right of occupancy is not evidenced by any document of title being a right not granted by some body or some authority. This presents a serious practical problem of mortgaging the said interest since no document of title to it can be handed over to the banker and the right in its intangible state is incapable of being handed over. Happily this interest unlike the other types of interests in land exist mostly over land in rural areas which are rarely mortgaged to banks.

Whenever any interest in land covered by documents of title is mortgaged to the banker it is the documents of title that are handed over to the banker since the land and the interest therein are incapable of physical custody. Depending on the type of mortgage created, the handing over of the documents of title by the customer mortgagor to the banker mortgagee symbolises the conveyance of some interest in the land from the customer mortgagor to the banker mortgagee.

In the case of a legal mortgage, the handing over of the documents of title to the mortgagee banker is a conveyance or

assignment of the whole or part of the estate or interests of the mortgagor customer in the land of which he is the legal owner and of which he has the power to transfer. The essence of a legal mortgage of land is the vesting of a legal estate in the mortgagee banker together with an immediate right of possession.

But a legal mortgage of land must follow the requirement of the law such as being in writing and under deed. The case of Adjei Vs. Dabanka[45] underscores the risk a banker mortgagee runs if a purported legal mortgage to him is not under deed. In that case the plaintiff granted a legal mortgage over his leasehold property for a loan of #250 at an interest of #100 repayable in a year time. Under the agreement the mortgagor was to be in possession of the building, use, control and collect rents. But if he default in payment at the stipulated time, then he shall lose the possession and use of the property to the mortgagee from that date forever. He defaulted and the mortgagee sold the land. The court held that the mortgagee had no power to sell because the mortgage was not a legal mortgage being not under deed. Neither was it a pledge the mortgagor being in possession. But that it was an equitable mortgage under hand under which the mortgagee has to obtain a court order to sell.

Also the conveyance of a legal mortgage of land must where the land in issue is situated in kaduna State be as provided in the Kaduna State Law of Property Edict [46] which provides that the legal estate in the property be conveyed to the mortgagee after the execution of the mortgage deed. In respect of land in other states such as the states making up the former western region of Nigeria i.e Ondo, Ogun, Osun, Oyo and Ekiti states S.181 of the Property

And Conveyancing Law which is in pari material with the provision of the Kaduna State Property Law Edict is the applicable law.

Today land is probably the most common form of property over which mortgages are created. And since it has earlier been pointed out in this chapter that mortgages are the predominant security accepted by bankers for their advances, it follows that land over which mortgages are created is the most predominant property accepted by banks as security for their advances.

Historically, however, land was not the most acceptable security to bankers. In fact there was a time when there existed a strong prejudice among bankers against lending on land as security, a prejudice that led J. W. Gilbert to remark, "the rule of a banker is never to make any advances directly or indirectly upon deeds or any other dead security."[47] This prejudice has however been overcome and bankers now look upon land as a security which will tend to increase in value with time.

By virtue of its permanency and other advantages hereinafter considered, land has become a leading bank security. In Nigeria certain factors are responsible for the prominence given to land as bank security compared to other types of property. These factors include the following:

Firstly, land is easily ascertainable and accessible to most Nigerians despite some difficulties imposed by the land use Act such as vesting all lands in the territory of a state in the Governor of that state and the requirement of the Governor's consent before alienating land by individuals.[48]

Secondly, the economic value of land under normal circumstances tends to increase with time.

Thirdly, there is a psychological attachment to land by Nigerians which always make borrowers to do anything possible to avoid the realization of their landed property given as security to the bank.

Fourthly, there is availability of buyers of land in the event of the bank wanting to realise the security. On this score land may, in the Nigerian context, prove a better bank security than all other types of property especially stocks, shares and insurance policies which are to some extent unheard of in most rural villages in Nigeria.

However, land as a type of property over which mortgages are created is not a basket full of advantages without disadvantages; for some disadvantages do afflict land as a bank security. In fact some of the advantages of land as a bank security enumerated above are by their nature capable of turning into disadvantages.

For instance, the permanency of land which is supposed to be an advantage may well be a disadvantage regard being had to the fact that it is this permanence that makes it possible for all sorts of interests to be created on land over time which may not be easily noticeable to the banker.

Another disadvantage of land as security is the expenses involved in taking this type of security. The customer will have to pay the fee of the bank solicitors for examining and reporting upon title. In some cases he would have to pay for professional valuation of the property. On the issue of valuing a landed property it is often difficult to make an accurate valuation of a landed property even with a professional valuer thereby compounding this disadvantage.

There is also the possibility that in a mortgage of land the bank may fail to get a good title under the mortgage. This will arise, for instance, where there is a technical irregularity in connection with previous dealings with the land which prevented the customer himself from obtaining a good title. However, this risk is very slight because any such defect should normally be revealed if the title is examined by the bank's solicitors.

Again there is the tendency for borrowing against land to be long termed. However, it has been observed that this is not an objection particular to borrowing against land as loans against other types of property can also be long-termed unless proper control is exercised.

Finally, the requirement of consent of certain persons[49] before alienating land by way of mortgage also detract from the popularity of land as bank security by turning it into a territory with booby traps which the banker should be wary of treading.

Mortgages of ships enjoy two unique qualities distinct from mortgages of other types of property particularly land.

The first is that a legal mortgage of a ship or shares in a ship is effected by the registration of the mortgage with the port of registry[50] and not by the mode of creating the mortgage such as is the case of a mortgage of land. Thus a ship mortgage which could in the case of land mortgages be termed an equitable mortgage by reason of its form not complying with the requirements of a legal mortgage such as being in writing and under deed will, if registered with the port of registry be a legal mortgage despite its defective form. On the other hand a legal mortgage of a ship or shares in a ship which is not registered is a mere equitable

mortgage until it is registered notwithstanding that it is not lacking in form.[51]

Secondly, a registered mortgage of a ship enjoys priority over prior unregistered mortgages whether or not the registered mortgagee has notice of the prior unregistered mortgages.[52] All these make registration of ship mortgages imperative to the mortgagee banker who is intent on having a good and indefeasible security for his advances.

Ships that are most usually mortgaged to a banker are trawlers and pleasure boats; though sometimes a customer may borrow money from the banker to finance the construction of a ship over which a mortgage will be executed in favour of the lending banker. The latter type of lending is what is referred to as a self-liquidating lending. The provisions of the Merchant Shipping Act do not apply to a self-liquidating mortgage of a ship.

S.323(1) of the Merchant Shipping Act provides for the mortgage of a ship by stipulating that a ship registered in Nigeria or a share therein may be made a security for a loan. The section also provides for the mortgage of a share in a ship. What this means is that a person who may not be the sole owner of an entire ship but a mere owner of a share of the ship can mortgage that share that is his in the ship to a banker.

It will appear by the provision of S.327(1) and (2) of the Merchant Shipping Act that although a mortgage of a ship or a share in a ship may not initially be made to a banker by the ship owner or share owner the banker can nevertheless enjoy the benefits of the mortgage if it is transferred to him by the original mortgagee as security for an advance. If the mortgage is so transferred to

the banker by the original mortgagee, the Registrar of the port of registry shall on the production by the banker of the instrument of transfer enter in the register book the name of the banker as mortgagee of the ship or share of the ship, and the original mortgagee from that date ceased to be mortgagee.

It is equally heartwarming that once a banker as mortgagee of a ship or a share in a ship has been so registered at the port of registry, his interest as such mortgagee remains unaffected by the death or bankruptcy of the mortgagor after registration of the banker's interest. In addition the interest of the banker as a registered mortgagee shall be preferred over claims of other creditors of the bankrupt or of any trustee or assignee in their benefit.[53]

But like all mortgages, a mortgage of a ship or a share in a ship, whether legal or equitable, to the banker by a mortgagor owner does not vest ownership of the ship or the share in the ship in the mortgagee banker nor does the mortgagor owner thereof ceased to be such owner.[54]

A banker who advances money on the mortgage of a ship should obtain possession of the marine insurance covering the ship so that he will avail himself of the insurance money should any risk within the insurance cover happened to the ship.

Finally it is worth noting by the banker before accepting the mortgage of a ship that ships are probably more difficult to realise than any other type of property in times of economic depression. In such a time a banker may try in vain to find market for a ship mortgaged to him by a customer.

2.0.3 Mortgages Of Stocks And Shares

Most of the stocks and shares offered to a banker by customers as mortgage security are quoted stocks and shares, that is, stocks and shares dealt in on the Stock Exchange as distinguished from unquoted stocks and shares not so dealt in on the Stock Exchange. A mortgage of stocks and shares has the following advantages:

Firstly, in the case of quoted stocks and shares their value can easily be ascertained by reference to the Stock Exchange.

Secondly, in normal times stocks and shares enjoy stability of value.

Thirdly, unlike land, there are few formalities to be observed when taking a mortgage of stocks and shares. For instance, no investigation of title as is done when land is mortgaged. This in itself saves expenses.

Fourthly, stocks and shares can easily be realised in the Stock Exchange market on default to repay the overdraft or loan by the customer when due.

Some of the disadvantages of stocks and shares as bank securities include the following:

Firstly, the value of stocks and shares change quickly. This makes it imperative for a banker accepting a mortgage of stocks and shares to allow a margin for the fluctuation of prices.

Secondly, there is the possibility of theft of stocks and shares by the bank's employees because stocks and shares are easily realised in the Stock Exchange than for example title deeds or life policies in the conventional market.

Thirdly, there are additional drawbacks to partly paid shares where a legal mortgage is executed on them in favour of the banker.

Calls may be made on those shares and the banker as a legal mortgagee will have to meet those calls or face possible forfeiture of such shares.[55] Also the market in partly paid shares is sometimes narrower than for fully paid up shares with the result that they may be liable to sharp fluctuation in prices and may be more difficult to realise.

Lastly, shares which are not quoted on the Stock Exchange are subject to the special disadvantages of difficulty of valuing and realising them.

It is worth noting that as a bank can accept mortgages of stocks and shares of other companies it can also accept mortgages of its stock and shares. This is because mortgages of a bank's stocks and shares falls under one of the exceptions to the capital mainterance doctrine which prohibits a company from acquiring its own shares as that will result in a deliberate reduction of capital.[56]

2.6.4 Mortgages Of Life Insurance Policies

Even though insurance life policies are regarded by bankers in advanced countries of the world as the most satisfactory property over which mortgages can be created, in Nigeria mortgages of insurance life policies are rare. The reason is the drought of life policies coupled with a palpable unawareness of the suitability of insurance life policies as mortgageable property among bankers and customers so used to mortgaging land.

The advantages of a mortgage of insurance life policies to the mortgagee banker include the following:

Firstly, the value of the security can easily be ascertained. After the first two or three annual premiums, the policy generally

acquires what is called a surrender value, that is, a sum of money which will be paid by the insurance company upon the abandonment of the policy. This increases with the payment of each additional premium.

Secondly, a life insurance policy can easily be realised. If, as usual, the banker takes a legal mortgage of the policy he is in a position to surrender it and obtain payment of the surrender value from the insurance company should the customer fail to pay his overdraft when called upon to do so.

Thirdly, a life policy is stable in value. Its surrender value continually increases provided the premiums are paid. There is therefore no necessity, as there is when valuing stocks and shares, to allow a margin for depreciation of prices.

Again S.63 of the 1997 Insurance Decree entitles an assignee of a life insurance policy to sue the insurer in his own name without joining the assignor as a party to the proceedings. A mortgagee, particularly a legal mortgagee banker being an assignee can thus sue the insurer to recover money covered by a life policy-insurance mortgaged to him. However S.64(1) of the same Insurance Decree provides that an assignee can only sue the insurer if he has given a written notice of the assignment to the insurer containing the date and purport of the assignment. It is the date on which the notice of the assignee is received by the insurer that regulates the priority of all claims under the assignment.[57]

As for the disadvantages of insurance life policies J. W. Gilbert while expressing the opinion that deeds were not a satisfactory property for a banker's mortgage, was equally emphatic about life policies. In respect of life policies he said:

> A banker should never make an advance upon life policies. They may become void should the party commit suicide, or die by the hand of justice or in a duel; or if he goes without permission to certain foreign countries. The payment may be disputed upon the ground that some deception or some concealment was practiced when the policy was obtained. And in all cases they are dependent upon the continued payment of the premium.[58]

To a very large extent the above pessimistic view of an insurance life policy as a banker's security holds good. But it overstates the point to the extent that it seeks to state without qualification that an insurance life policy as a good bank security depends on the continued payment of premiums. For as has been maintained earlier a life insurance policy usually acquires' a surrender value after the first two or three annual premiums are paid by the insured. This means that once the life policy has acquired the surrender value the banker mortgagee would be entitled to the surrendered value once he gives notice of the assignment of the life policy to the insurer in accordance with S.64(1) of the Insurance Decree 1997. Of course the surrender value may not be enough to satisfy the secured sum; but that is a matter touching on the adequacy of the security as opposed to its validity.

The first disadvantage of an insurance life policy as a bank's mortgage security is the risk that it may be vitiated either by the assured committing suicide[59] or not disclosing material facts and circumstances affecting the risk,[60] or a breach of a material term of the insurance policy by the assured, or the assured has no insurable interest in the life insured. The last drawback is

probably the most serious shortcoming of a mortgage of a life policy in that it either renders the policy null and void or makes it voidable at the instance of the insurer. This means that the banker as a mortgagee of the policy will not be able to maintain any claim against the insurer on the basis of the policy mortgaged to him.

Secondly, there is the risk that the customer may not be able to pay future premiums. However this is not a very serious disadvantage where the insurance policy has acquired a surrender value. If it has acquired a surrender value the banker will be entitled to the surrender value which may be good enough to satisfy the secured sum. This makes it imperative that the banker should not lend to the full amount of the surrender value.

After the banker has weighed in his mind the merits and demerits of accepting a mortgage of insurance policy in general he should then move on to examine the particular policy that is offered to him by the customer before accepting the mortgage of the policy.

Firstly, the banker should examine the type of life policy[61] being offered and satisfy himself that it is the best type of life policy that is being offered for mortgage.

Secondly, the name of the insurance company which issued the insurance policy should also be considered to determine whether it is of sound financial standing. If its financial standing is doubtful to the banker he should be reluctant to accept a mortgage of its policy.

Thirdly, the number of years during which the policy has been in force and the amount of the annual premium already paid should

be considered next. This will determine the amount of the surrender value.

Fourthly, the banker should consider whether the policy is still in force and effect, whether the last premium has been paid and whether the insurance company has received notice of other assignments.

Fifthly, any special condition attached to the policy should be examined. Occasionally a special suicide clause is inserted, particularly if the assured had suffered from any nervous disorder. Thus the policy may contain a clause that, if the life assured dies by his own hands whether sane or insane at any time during the currency of the policy the amount of the company's liability is to be limited to the premiums actually paid. Policies containing conditions such as this are not necessarily unsatisfactory for bank mortgages, for although the sum payable upon death may be reduced, the surrender value is usually unaffected.

Sixthly, the banker should ensure that the last premium receipt is with the policy and that the policy is properly stamped. This is to prevent a fraudulent customer from taking an insurance policy that is not issued by any insurance company.

Seventh, although some insurance companies do not insist upon the age of the insured being admitted before the policy is issued but they will insist upon proof of age when the sum assured is claimed under the policy. The banker should therefore insist upon the assured proving his age and if necessary obtain an endorsement to that effect from the insurance company.

It is after a consideration of the above issues that the bank will be in a good position to take an informed position on whether

or not it should take a mortgage of the policy offered. If it decides to accept the mortgage offered, it should decide which type of mortgage it should accept. Usually, a legal mortgage is the best type of mortgage to take over a life insurance policy.

As soon as the customer has executed a legal mortgage of a life policy in favour of the banker, the banker as mortgagee should give notice of the mortgage to the insurance company that issued the policy for the following cogent reasons.

First, the giving of notice by the bank to the insurance company enables the bank to sue the insurance company in its own name without joining the customer as a party to the proceedings.[62]

Secondly, notice to the insurance company by the bank binds the insurance company so that if it pays to another claimant it will be held liable to the bank.[63]

Thirdly, it enables the bank acquire priority over earlier assignees who have not given notice[64] provided that the bank had not received actual or constructive notice of the earlier assignments at the time of taking his own security. Non production of the policy by the customer to the banker may amount to constructive notice of an earlier assignment. Therefore the bank should always insist upon the production of the policy as failure to do so may wreck unpleasant consequences on the banker mortgagee. The case of Spencer Vs. Clarke[65] stands as a strong warning to the banker who is ready to accept any flimsy excuse by the customer for the non production of the insurance policy on demand.

In that case a mortgagee accepted without further inquiry the mortgagor's statement that he left the insurance policy at home by mistake, whereas he had in fact executed a prior equitable mortgage

in favour of a lender who did not give notice to the insurance company. The later mortgagee gave notice to the company, but it was held that he had constructive notice of the earlier mortgage and could not acquire priority over it.

Fourthly, notice preserves the bank's priority as against subsequent mortgagees without notice of the bank's mortgage.

It is the usual practice of bankers to request the insurance company to acknowledge receipts of the notice by signing a duplicate notice sent to the insurance company. S.66 of the 1997 Insurance Decree has codified this practice.

Also when notice is given to the insurance company of the bank's interest as mortgagee, the company should be asked to state whether it has received notice of any prior encumbrance or whether it has any charge on the policy itself. Again at the time when the notice of the bank's interest is given to the insurance company it is prudent to ask the company to quote the present surrender value of the policy in order that this may be entered into the bank's records. Thereafter it will be good practice for the bank to keep finding from the insurance company at reasonable intervals the present surrender value of the policy and to reflect this in its records.

The discussion on insurance life policies as property over which mortgages can be created brings to an end the discussion on the types of property over which mortgages are created. It should however be noted that even though emphasis seem to have been laid on land, ships, stocks and shares, and insurance life policies as types of property over which mortgages are created, such emphasis does not by any means exclude the creation of bank mortgages on

other valuable property not considered. The use of the above types of property is merely illustrative and not exhaustive.

The reason why these types of property have been chosen for illustration rather than other types of property is simply because of the relative popularity of these types of property among Nigerian mortgagee bankers and their customers mortgagors. Other types of property which enjoy less popularity are reserved for other forms of bank securities under which they find better favour. These are treated in chapter four and five of this work.

NOTES AND REFERENCES

1. Cortes on Mortgages 6th ed. Vol.1 page 6 quoted in Holden Milnes J. The law and practice of Banking Vol.2 securities for bankers' Advances 7th ed. (Pitman, pup. 1986)p.207.

2. Megrah Maurice: Paget's Law of Banking 8th ed. (Butterworth, Bup. 1972)p.26.

3. Harold Vs. Plenty (1783) 1 Bro. C.C. 269.

4. Ibid

5. (1783) 1 Bro C.C. 269.

6. Ibid

7. (1805) 11 Ves. Jr. 403.

8. (1783) 1 bro. C.C. 269.

9. (1878) 9 Ch. 1377.

10. (1783) 1 Bro. C.C. 269.

11. (1967) A.L.R. 414.

12. (1966) 1 ALL E.R. 628.

13. (1961) 4 ALL N.L.R. 299.

14. (1961) 4 ALL N.L.R. 340.

15. (1978) N.S.C.C. 334.

16 Ibid.

17. Ogundiani Vs. Araba and Anor (1978) N.S.C.C. 334.

18. Ibid.

19. (1967) A.L.R. 414.

20. Ogundiani Vs. Araba and Anor (1978) N.S.C.C. 334.

21. Pilcher Vs. Rawlins (1872) 7 ch. App. 259.

22. S.80(3) of the stamp duties Act 1939 (Cap 411) Laws of The Federation of Nigeria 1990.

23. Oluyede. P.A. Nigerian Law of Conveyancing (Ibadan. IUP. 1982) 267.

24. Sheldon and Fidler's Practice and Law of Banking 11th ed. (Macdonald, MEP, 1982) p.265.

25. Igweike K.I. Law of Banking and Negotiable Instruments (Africana Fep AFUP, 1991)p.99-100.

26. Ibid.

27. Holden Milnes J. The Law and practice of Banking Vol.2: Securities for Bankers' Advances (Pitman, PUP 1966)p.26.

28. Ogundiani Vs. Araba and Anor (1978) N.S.C.C. 334.

29. Nash Vs. Eads (1880) 25 S.J. 95.

30. Ekaetah Vs. Nigerian Housing Development Society (1973) 6. S.C. 183.

31. Ibid.

32. (1880) 25 S.J. 95.

33. Platt Vs. Mandel (1884) 27 Ch.D 246.

34. Rose Vs. Page (1829) 2 S.M. 471.

35. Nash Vs. Eads (1880) 25 S.J. 95.

36. Ibid.

37. (1956) 1 N.S.C.C. 59.

38. Cole Vs. Folami (1956) 1 N.S.C.C. 59.

39. S.119 of the Kaduna State Law Of Property Edict No. 20 1990 and S.193 of the Property And Conveyancing Law (Cap.100) Laws Of Western Nigerian 1959.

40. S.525(1) of the Merchant Shipping Act (Cap 224) Laws Of The Federation Of Nigeria 1990.

41. S.1 of the Land Use Act 1978 (Cap 203) Laws Of The Federation Of Nigeria 1990.

42. SS.5,6 and 34 of the Land Use Act 1978 (Cap 203) Laws Of The Federation Of Nigeria 1990.

43. (1932) WACA 43.

44. S.34 of the Land Use Act 1978 (CAP 203) Laws Of The Federation Of Nigeria 1990.

45. (1930) WACA 63.

46. S.108(1) of the Kaduna State Law of Property Edict No. 20 1990.

47. Gilbert J.W. The Logic of Banking (1889) page 194 quoted in Holden Milnes J. The Law and Practice of Banking Vol.2: Securities for Bankers Advances 7th ed. (Pitman, pup, 1986) p. 21.

48. Igweike K.I. Law of Banking and Negotiable Instruments (Africana Fep, AfUP, 1991) p.96-97.

49. S.27 of the Land Use Act 1978 (Cap 203) Laws Of The Federation Of Nigeria 1990.

50. S.325(1) of the Merchant Shipping Act (Cap 224) Laws Of The Federation Of Nigeria 1990.

51 Ibid

52. Black Vs. Williams (1857) 1Ch. 408.

53. S.325(2) of the Merchant Shipping Act (Cap 224) Laws Of The Federation Of Nigeria 1990.

54. S.326(1) Of The Merchant Shipping Act (CAP224) Laws Of The Federation Of Nigeria 1990.

55. Holden Milnes J. The Law and Practice of Banking Vol.2: Securities for Bankers' Advances 7th ed. (Pitman, pup, 1986) p.156.

56. S.160 of the Companies and Allied Matters Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

57. S.64(2) of the Insurance Decree No.2 1997.

58. Gilbert J.W. The Logic of Banking (1859) p.195 quoted in Holden Milnes J. The Law and Practice of Banking vol.2: Securities for Bankers' Advances 7th ed. (Pitman, PUP, 1986) p.128-129.

59. Beresford Vs. Royal Insurance Co. Ltd. (1938) ALL E.R. 602.

60. London Assurance Vs. Mansel (1879) 11 Ch.D. 363.

61. S.59(1) of the Insurance Decree No. 2 1997.

62. S. 60(1) of the Insurance Decree No. 2 1997.

63. Holden Milnes J. The Law and Practice of Banking Vol.2: securities for Bankers' Advances 7th ed. (Pitman, pup, 1986) p.127-128.

64. S.64(1) of the Insurance Decree No. 2 1997.

65. (1878) 9 Ch.D. 137.

CHAPTER THREE

SECURING AND ENFORCING THE BANKER'S MORTGAGE

3.1 INTRODUCTION

Securing the banker's mortgage simply refers to the steps or measures a banker as mortgagee should take to ensure that his mortgage is not defeated by either lack of title to the mortgaged property or by legal provisions or overridden by a third party's interest. It covers such matters as, Investigation Of The Mortgagor's Title To The Mortgaged Property, The Overriding Interest Of Occupiers, Joint Tenants And Co-tenants, Trust Property, Meeting The Consent Requirement, The Doctrine Of Lis Pendens, Registering The Banker's Mortgage, Taking Possession Of The Mortgaged Property, Consolidation Of Mortgages, Tacking The Mortgage, The Limitation Law, And The Mortgagor's Equity Of Redemption.

Enforcing the banker's mortgage means the steps a banker as mortgagee should take to realise his mortgage security or to consolidate it. It covers matters like, Sale Of The Mortgaged Property, Foreclosure, Appointment Of A Receiver, and Taking Possession Of The Mortgaged Property.

Securing the banker's mortgage and enforcing the banker's mortgage overlap in certain areas. For instance, taking possession of the mortgaged property can be a means of securing the banker's mortgage as it can be a means of enforcing it.

3.2 SECURING THE BANKER'S MORTGAGE

3.2.1 Meaning

As noted above securing the banker's mortgage is a means of protecting the banker's interest as mortgagee against adverse claims of third parties on the mortgaged property or against adverse legal provisions touching on the right or interest of the banker as mortgagee. Investigation of the mortgagor's title to the mortgaged property comes first in this respect.

3.2.2 Investigation Of Title

Whenever any property is offered to a banker as a mortgage security for a credit facility sought, the immediate, compelling, natural and urgent question that must engage the mind of the banker is, does the customer have title to the property sought to be offered as security? If the answer to this question is in the negative, then there is no need for the banker taking any further step pursuant to the proposed mortgage save that of rejecting the mortgage proposal, because the mortgagor lacking in title to the property sought to be mortgaged has no title to pass to the banker mortgagee by virtue of the latin maxim of Nemo dat quod non habet, meaning, a man can only give that which he has.

If on the other hand the answer to the question is in the affirmative, in the case of land offered as security, the banker must ask the further question of: what is the extent of the mortgagor's title to the property sought to be mortgaged?

To answer any of these questions where land is the property offered as security the bank must necessarily investigate the customer's root of title to the land to ascertain whether it is good. In this respect as soon as the title deeds have been made

available to the banker by the customer he should arrange for them to be examined by the bank's solicitors who should be requested to prepare a report on title.

The intending borrower should be able to produce the original documents of title for examination. If this can not be done a convincing explanation for the absence of the documents must be insisted upon by the banker.

Normally upon opening the deeds the banker would find what is called an abstract of title. This important document is a summary or epitome of all the documents such as wills and conveyances which have dealt with the title. It also recites events such as births, deaths and marriages which affect the title. The abstract of title must start with a good root of title which may be defined as, "a document which deals with the whole legal and equitable interests in the land, describes the land adequately and contains nothing to show any doubt on the title."[1]

A conveyance by way of sale is, in practice, the most usual root of title. A legal mortgage is equally satisfactory, since it must be assumed that the mortgagee was satisfied at the time of creating the legal mortgage that his mortgagor had a good title. An equitable mortgage is not a good root of title. Also a general devise in a will is not a good root of title; but a specific devise is a good root of title provided it is backed up by the written assent of the personal representatives of the deceased devisor.

If the banker is able to establish a good root of title in favour of the customer in respect of the land offered as security he should then turn to the second question requiring to know the

extent of the customer's title to the land. To answer this question the banker would have to make searches in the land registry. The object of searching is to discover the rights, if any, of third parties which are enforceable against the land. The general principle is that a purchaser or a mortgagee is deemed to have notice of third parties rights which are capable of registration and are in fact registered,[1] whereas he acquires his interest in land free from third parties rights which are capable of registration but are not in fact registered.

The most important search to make is the search that of the register in the land charges department of the land registry. The search in this registry should reveal any interest, if any, that are on the land which have not been discharged by payment by the customer and which therefore are of interest to the banker. If the bank discovers that the land is under an encumbrance in favour of another person he should require that such encumbrance should be discharged before he makes his advance. If he failed to do so and make the advance he would be deemed to have notice of the prior advance and in the event of a competition between his interest and that created before his own, his own will be postponed on the basis of the maxim, where the equities are equal the first in time prevails.

Apart from searching the land registry, however, the banker should pay a visit to the land in issue with the aim of discovering if certain overriding interests exist upon the land which may not be revealed by a search in the land registry because they are not registered. The most important of these overriding interests is

the interest of occupiers of the land offered as security to the banker. This interest is considered later in this chapter.

In respect of other properties sought to be mortgaged to the banker, the two questions asked bearing on the title of the mortgagor can easily be answered in the sense that neither root of title nor encumbrances on such properties are difficult to discover. For instance the root of title to stocks or share can easily be ascertained by the banker by reference to the stock or share certificate and by reference to the company or public body which issued the shares or stocks relevant registers.

3.3 OVERRIDING INTERESTS

3.3.1 The Overriding Interest Of Occupiers

Under the registration of title law system operating in Lagos state and the states making up the former western and mid weste / states of Nigeria all a mortgagee has to do is to consult the register and from any encumbrance not entered in it, he takes free. Where he takes for value, he is not to be affected by any notice, express or implied of any unregistered estate in favour of a third party.[1]

However a mortgagee takes subject to all overriding interests of occupiers which are not regarded as encumbrances and therefore are not required to be registered.[1] Neither are they shown in the title deeds or mentioned in the abstract of title to the land. In short overriding interests exist without the formality of any written document. This deficiency of registration does not however, detract from their overriding quality when land is mortgaged to a banker subject to them.

Some of the overriding interests that may exist on land include, Unpaid Vendor's Lien, Estate Contracts, The Deserted Wife's Right, Interest Of Owners Of Undivided Shares In Land Who Are In Occupation, and Interest Of Spouses In The Property And Assets Which Represent The Matrimonial Home. These different overriding interests will be examined here in turn.

3.3.2 Unpaid Vendor's Lien

When an owner of land sells and conveys it to a purchaser that had not paid him the complete purchase sum, the seller as vendor has an equitable lien arising by operation of law on the land for the unpaid balance, and this is enforceable against the purchaser whether or not the vendor is in occupation of the land. Neither does it matter if the conveyance to the purchaser contains a receipt for all the consideration money, so long as the total purchase sum remains unpaid.[5]

If in the interim between the sale and conveyance of the land to the purchaser and the completion of payment of the purchase sum by the purchaser, the purchaser mortgages the land to a banker, the banker's mortgage will be subject to the vendor's overriding interest of unpaid vendor's lien[6] whether or not he had notice of the lien at the time his mortgage was created.

3.3.3 Estate Contracts

Estate contracts may be simply defined as contracts to convey or create a legal estate. It therefore includes every contract of sale or lease of a legal estate, options to renew or purchase the reversion contained in a lease.

Under the common law, if an agreement to enter into an estate contract is made between a vendor of land and a purchaser, and the

vendor in the interim between agreeing to sell the land and the actual sale and conveyance of the land to the purchaser, mortgages the land to a mortgagee the mortgagee will take subject to the overriding interest of the purchaser whether or not such estate contract between the vendor and purchaser is registered.[7]

But section 2 of the Property And Conveyancing Law 1959 applicable in the states making up the former western region of Nigeria, makes registration of estate contracts mandatory. Failing this, such estate contracts will be void against the purchaser. In the states making up the former eastern region of Nigeria even though there is no legislation stipulating registration of estate contracts as in the western region, case law in this states supports registration of estate contracts.[8] In Lagos state and the states making up the former Northern region of Nigeria, registration of estate contracts is not required. However, section 191(1)(a) of the Kaduna State Law Of Property Edict 1990 will appear to require registration of estate contracts. It does not however, like section 2 of the Property And Conveyancing Law 1959 applicable in states that constitute the former western region of Nigeria, make an estate contract void for want of registration.

In those states where registration of estate contracts is mandatory such as the states in the former western region of Nigeria failure to register an estate contract as required by the operative law will make such estate contract not only void against the purchaser but will also defeat any overriding interest the purchaser may claim against a mortgagee of the land agreed to be sold to him. This is simply because of the fact that the estate contract being void against the purchaser no interest or right

under it can exist in his favour which he can assert against an adverse party. Also the contract being void **ab initio** it will appear that even physical occupation of the property by the purchaser pursuant to the estate contract cannot avail him an overriding interest against a subsequent mortgagee. Registration and not occupation is the only thing that creates an overriding interest in these states in respect of estate contracts. Without registration no overriding interest exist. In fact without registration no estate contract exist.

But once registered an estate contract comes to life and with it an overriding interest in favour of the purchaser against all subsequent mortgagees who are deemed to be affected by actual or constructive notice of the estate contract whether or not they search the land registration office and whether or not the purchaser is in physical occupation of the land in issue.[9]

But in places such as the northern states of Nigeria and Lagos state where registration of estate contracts is not mandatory an estate contract will subsist as an overriding interest even if it is not registered and so the banker will take subject to it where it exist.

3.3.4 <u>The Deserted Wife's Right</u>

The deserted wife's right to live in the property which constitutes the matrimonial home has always been a personal right enforceable against the husband as opposed to a real right enforceable against the property. In other words the right can be an answer in a proceeding by the husband to eject the wife out of the property during the subsistence of the marriage but not an answer against a third party seeking possession of the property by

virtue of a mortgage to him by the husband, being not a right against the property. The personal right of the deserted wife against her husband to live in the property constituting the matrimonial home exist irrespective of whether or not the wife has a proprietary interest in the property.

According to Omotayo Bolodeokun[10] dangerous sentiments have flown into the veins of the judges who persistently have maintained that a husband has a duty to maintain his wife and keep her in the matrimonial home whether or not she has any proprietary interest in such matrimonial home. As such the deserted wife's right to continue to occupy the matrimonial home in which she has no proprietary interest has been upgraded to an interest in property enforceable against a mortgagee with notice of the wife's right after desertion.[11] This notice like in the case of other overriding interests is often effected by the mere occupation of the property by the deserted wife whether or not the mortgagee has visited the property to avail himself of actual notice of such occupation.

However, in National Provincial Bank Ltd Vs. Hastings Can Mart Ltd[12] the House of Lords in England in a well considered judgment reversed the judicial trend of treating the deserted wife's right in the property constituting the matrimonial home as a right in property capable as an overriding interest of defeating the interest of a purchaser or mortgagee of the matrimonial home. The House of Lords unanimously held that the right has not, and should not be seen to have lost its true nature of being a personal right which can only be enforceable against the husband. According to their Lordships "it should not enter the field of real property law so as to clog the title of an owner."[13]

By this decision of the House of Lords a mortgagee banker who has not made any inquiry as to the right of a deserted wife merely in occupation by virtue of the deserted wife's right to be in occupation of the matrimonial home but without any proprietary interest against the property take free of the interest of the deserted wife her right being not an overriding interest.

The lack of consideration, imprecise and vague nature of the deserted wife's right against a mortgagee or purchaser of the matrimonial home must have informed the House of Lords decision in National Provincial Bank Ltd Vs. Hastings Can Mart Ltd.[14] On this consideration Lord Upjohn in the same case has this to say:

> The answer, "I am a deserted wife" if given to an inquiry as to the nature of interest an occupant has only gives notice of a right so imprecise, so incapable of definition, so incapable of measurement in legal phraseology or terms of money that if he is to be safe the mortgagee will refuse to do business.

It is submitted with respect that the decision of the House Lords in National Provincial Bank Ltd Vs. Hastings Can Mart Ltd[15] on the deserted wife's right against the property constituting the matrimonial home is commendable and should be of persuasive effect on Nigerian courts on the point. Even so he will be a prudent banker who will not advance money on the mortgage of a matrimonial home known to him to be in the occupation of the wife, given the penchant of our judges to regard the deserted wife's right as an overriding interest earlier lamented.

3.3.5 Interests Of Owners Of Undivided Shares In Land Who Are In Occupation

Land may be held by tenants in common all or some of whom may be in occupation of the land. It may also be held beneficially for tenants in common by means of a resulting trust.

Conceivably examples of land held in common are when two people contribute to the purchase of a property, for example, husband and wife[16] contributing in whatever proportion to the acquisition of a house or under an arrangement, two or more people may agree to contribute to the purchase of a property.[17] Land held in this way may however be registered in the name of one or more of the tenants entitled to the undivided share in the land with or without the consent of all the beneficial owners.

The question that may be asked here is, does a mortgagee banker of the legal estate in the property held in common executed in his favour by the person in whose name the land is registered and who has the power to so mortgage it on behalf of his co-owners, entitled to take the property free of the interest of the co-owners or he must take subject to the interest of the other co-owners if it turns out that the co-owner in whose name the property is registered and who mortgaged it to the banker did so without the consent and authority of the other co-owners? Put another way, does the interest of the non consenting co-owners to the mortgage to the banker mortgagee constitute an overriding interest subject to which the banker must take? If the answer to this question is in the affirmative, does the overriding interest of the non consenting co-owners depend on their physical occupation of the land or exist irrespective of such physical occupation?

Under the common law the answer to the first question will be in the affirmative, that is, the non consenting co-owners interest in the mortgaged property qualify as an overriding interest subject to which the banker as mortgagee must take whether or not he had notice of the non consenting owners' interest. As for the second question the answer under common law is that co-owners must be in physical occupation of the mortgaged property for their interests to override that of the mortgagee banker. If they are not in occupation their interest loses its overriding quality and is defeasible by the interest of a mortgagee banker without notice of the co-owners interest.

The reason why co-owners in occupation interest qualified as an overriding interest under the common law was that interest of a tenant in common unless taking effect under a trust, was a legal estate and devolved as such. Each co-owner because of the unity of possession among co-owners was entitled to every part of the land as his co-owners and also entitled concurrently to occupy same with them. If they could not agree the land had to be partitioned or order of sale sought in court. If the property is to be mortgaged all co-owners must consent to the mortgage as the legal estate does not vest in a particular person but in all the co-owners. Where therefore only one or some of them purport to mortgage it to a mortgagee without the knowledge and consent of the other co-owners, the mortgagee irrespective of the type of mortgage purported to be executed in his favour by the co-owner or co-owners mortgagors will take only an equitable interest subject to the overriding legal interest of the non-consenting co-owners.

However section 124(1) of the Kaduna State Law Of Property Edict 1990 which is in pari material with section 34(1) of the English Law Of Property Act 1925 provides that:

> where after the commencement of this edict land is expressed to be transferred to any persons in undivided shares and those persons are of full age the transfer shall------operate as if the land had been expressed to be transferred to the grantee, or if there are more than four grantees, to the first four named in the transfer as joint tenants upon the statutory trusts hereinafter mentioned and so as to give effect to rights of the persons who would have been entitled to the shares had the transfer operated to create those shares.

By this provision and the provision of section 61(1) of the same edict, undivided shares in land can only take effect in equity behind a trust for sale in which a legal owner is to hold the land as trustee thereof. Upon the exercise of the power of sale or mortgage by the trustee or trustees, the interests of the tenants in common become overreached and sounds only in the proceeds of sale or mortgage.

Therefore under the present law, there is no such thing as an overriding interest in favour of non-consenting owners in common once a trust for sale arises in favour of some of the owners in common who can as trustees for the others sell or mortgage the property to a third party. The only condition for the validity of such a sale or mortgage appears to be that the sale or mortgage sum must be paid by the purchaser or mortgagee to no less than two co-owners. Once this condition is met the sale or mortgage becomes

unimpeachable and in the case of a mortgage, the mortgagee banker takes free of the interest of the other co-owners whether or not they consented to the mortgage.

In the English case of City of London Building Society Vs. Flegg[18] Lord Oliver succinctly present the law on the point in the following graphic terms:

> Having established the trust for sale as the conveyancing machinery through which effect is given to the interest of owners in undivided shares, those interests are by virtue of the equitable doctrine of conversion, transferred to the proceeds of sale and the net rents and profits pending sale....

Accordingly, a tenant in common may be in occupation, but upon the mortgage of the property by the trustees of the property his interest in the property is converted to interest in personalty. The fact of his occupation before and after mortgage adds nothing to his right which ceases to attach itself to the property after mortgage but on the proceeds of the mortgage.

If the above represents the position of the law after the enactment of the 1925 property law in England and the promulgation of the Kaduna State Law Of Property Edict, the decision of the House of Lords in Williams and Glynn's Bank Vs. Boland[19] can not be a correct statement of the law. In that case a couple had contributed to the purchase of a house which was registered in the name of the husband only. The latter mortgaged the property to Glynn's Bank without the knowledge of the wife. Upon default in paying the principal with interest, the bank sought possession of the property under the mortgage which was under the occupation of

the wife. The bank at the time of the mortgage never inquired as to the nature of her interest in occupation. As it turned out she claimed she has a beneficial interest in the property and being in occupation she asserted her interest as an overriding interest. The bank however argued that to give the wife's interest existing under or behind a trust for sale a protection of an overriding interest would contradict the principle according to which such equitable interest can be overreached by an exercise of the trust for sale.

It was however surprising that in the present position of the law on the point and its powerful submission by the bank the House of Lords per Lord Wilberforce with whom other lords of the House of Lords concurred held that the wife's interest constitute an overriding interest subject to which the bank as mortgagee takes. In so holding the House of Lords relied heavily on Lord Denning's decision in the earlier case of Bull Vs. Bull.[20] With respect reliance on this decision was misleading on the following grounds.

First, Bull Vs. Bull[21] was a case concerning action between co-owners as opposed to action between co-owners and third parties, the exact position in Williams and Glynn's Bank Vs. Bolland.[22]

Secondly, Bull Vs. Bull[23] was a case between co-owners which arose before sale while Williams and Glynn's Bank Vs. Bolland[24] was a case between a third party - the mortgagee and an occupying co-owner which arose after the property had been mortgaged.

Although the decision in Bolland's case[25] can be justified on the simple fact that payment of money was made to a sole trustee contrary to the statutory provision which requires payment to more than one trustee, this important consideration did not appear to

have influenced the minds of their lordships in deciding Bolland's case as they did. At any rate if the deciding consideration were that payment was made to only one trustee instead of two trustees as required by law[26] the resulting effect would not have converted the wife's undivided share in the property to an overriding interest subject to which the bank takes but would have merely made the mortgage to the bank invalid for failing to comply with the statutory provision respecting payment of the mortgaged sum.

On the whole, beside the fact that the House of Lords in deciding the case of Williams and Glynn's Bank Vs. Bolland[27] relied heavily on the unavailing case of Bull Vs. Bull[28] with complete disregard to the better, if also unavailing, consideration that payment of the mortgage sum was paid by the bank to only one trustee instead of two as required by law, it may not be too superstitious to suspect, in view of earlier consideration of the deserted wife's right, that the House of Lords might have unwittingly came under the pervasive influence of the ghost of the deserted wife's right in deciding the case of Williams and Glynn's Bank Vs. Bolland[29] -a ghost the House of Lords attempted burying in 1965 in the case of National Provincial Bank Ltd Vs. Hastings Car Mart Ltd.[30]

With all these criticisms of the House of Lords decision in Williams and Glynn's Bank Vs. Bolland[31] it is to be expected that the House of Lords in a later case with similar facts as those in Bolland's case[32] will avail itself of the opportunity to state the correct and current law on the issue of whether or not interests of owners in undivided shares otherwise known in the old law as tenants in common, constitute overriding interest subject to which

a banker as mortgagee must take whether or not he had notice of such interest. This opportunity presented itself in 1987 in the case of City of London Building Society Vs. Flegg.[33]

But the House of Lords bungled that opportunity in a smart move obviously informed by a consuming desire not to over rule itself. Lord Templeman who read the lead judgment in the case of City of London Building Society Vs. Flegg[34] summarises the reason why Bolland's case should be decided the way it was decided and held:

> If the wife's interest had been overreached by the mortgagee advancing capitals money to two trustees there would have been nothing to justify the wife remaining in occupation as against the mortgagee.

The above statement of Lord Templeman appears to beg the question and to strengthen the suspicion that the most potent consideration that influenced the chequered decision in Bolland's case[35] was not even lord Denning's decision in Bull Vs. Bull[36] but the deserted wife's right to remain in possession of the property constituting the matrimonial home. For in Bolland's case[37] the issue was not that the wife's continuous occupation must be justified but whether she is justified to continue occupying the property?

The brief facts of City of London Building Society Vs. Flegg[38] were that land was held by co-owners as beneficial owners thereof. The land was registered in the names of two persons as proprietors. The two persons in whose name the property was registered mortgaged the property to a Building society which paid the money to the two registered proprietors. As it turned out the

two registered proprietors as trustees mortgaged the property without the knowledge of the other co-owners, who were in occupation. When possession of the property was sought by the mortgagee, the occupying co-owners relying on Bolland's Case[39] asserted their rights as overriding interest subject to which the mortgagee must take, this interest not having been investigated.

The House of Lords rightly held that they had no such interest to amount to overriding interest, their interest being only in personalty not realty. The House of Lords however was not bold enough to point out the limitations in Lord Wilberforce judgment in Bolland's case[40] but rather made a face saving justification for why lord Wilberforce gave a judgement which on the facts was somehow right but with assailable reasoning. That face saving justification is the dictum of Lord Templeman earlier quoted.

In Flegg's case[41] Lord Oliver gave an apt description of the interest of occupying co-owners after sale or mortgage and the money has been paid to the trustees as the law requires. His lordship said, "once the beneficiary's rights have been shifted from the land to the capital money in the hand of the trustees, there is no longer an interest in land to which the occupation can be referred or which it can protect."[42]

This dictum by the law lord summarises the present law on the right of co-owners in undivided shares in land both in England under the 1925 law of property Act and in Kaduna state under the Kaduna State law of property edict 1990. An occupying co-owner in undivided shares in land has no interest in the land that he can look up to, where the trustees or the registered proprietors have sold or mortgaged the land and the capital money have been paid to

the trustees. The interest before sale having been overreached, can not be an overriding interest any more. Being in occupation adds nothing.

3.3.6 Interest Of Spouses In The Property, And Assets Which Represent The Matrimonial Home

Spouses living together in matrimony may have jointly contributed towards the acquisition of the matrimonial home. If this is the case, the implication is beyond argument. They both have interest in the undivided share to the extent of their contributions. It however happens many a times that the property and assets representing the matrimonial home are not acquired by joint efforts. One of the spouses usually the husband may have solely acquired it and the other that is the wife, may have contributed only in kind by making the property ready for the occupation of the two. What will be the rights of the spouses in this situation against the property? Can any of them assert an overriding interest against a third party such as a banker - mortgagee? The case of Lloyds Bank Plc Vs. Rosset & Anor[43] answers these questions and also throw more illuminating light on the general rights of spouses regarding the property which represent the matrimonial home.

In this case Mr. Rosset, a beneficiary of a trust fund, acquired a property with the fund. The trustees were not to release the fund unless the property was acquired solely in his name, which he did. The property was registered in his name. He also on his own provided the money for a substantial renovation of the property. This he did by an overdraft facility given to him by the bank following which he charged the property in favour of

Lloyds Bank. Mrs. Rosset made no financial contributions to the acquisition of the property nor to its renovation. She knew nothing about the overdraft and the charge. She however spent her time with the renovators, making valuable suggestions, effecting paintings and decorations. She was, as it were, a skilled decorator and painter. The amount owing on Mr. Rosset's overdraft continued to rise and consequently the bank demanded the payment on the amount outstanding. Mr. Rosset was unable to repay the amount with the result that the Bank started proceedings for possession and sale of the property. The wife asserted a claim that being beneficially entitled to the property, and because of her occupation of the property at the material time she has an overriding interest subject to which the Bank must take. She based her claim on an alleged express agreement between her and her husband in conversation that the property was to be jointly owned and that in reliance on this agreement she had made a significant contribution in kind to the acquisition of the property by the work she had personally done which was sufficient to give rise to a constructive trust in her favour.

The House of Lords on appeal to it first tried to determine whether or not she had such beneficial interest in the property by which her claim of being in actual possession would be meaningful. After a careful consideration of this important ingredient of the wife's claim to overriding interest in the property the House of Lords rejected the wife's claim to beneficial interest in the property and held per Lord Bridge thus:

> In this circumstance, it would seem the most natural thing in the world for any wife----to spend all the time

she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property.

Having found that Mrs. Rosset's contributions fell far short of conferring on her a beneficial interest in the property, the House of Lords held that her claim of overriding interest failed. The House of Lords went on to consider the circumstances in which a sole legal proprietor of a dwelling house can properly be held to have become a constructive trustee of a share in the beneficial interest in the house of the partner with whom he or she had cohabited in the house as their shared home.

The first of such circumstances as Lord Bridge stated is: whether, independent of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there was at anytime prior to the acquisition, or exceptionally, at some later time, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. If this exist, it will be necessary for the partner asserting a claim to beneficial interest against the partner entitled to a legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement, arrangement or understanding in order to give rise to constructive trust or proprietary estoppel.

The second circumstance as his lordship stated, is where there is a direct contribution to the purchase price by the partner who

is not the legal owner whether initially or by payment of mortgage instalments. This will readily justify the inference necessary to the creation of a constructive trust in favour of the partner claiming beneficial interest.

Going by the above formulations, any claim of overriding interest by a co-partner in matrimony, will only be tenable in the above circumstances. Outside them no overriding interest can enure to the benefit of either of the spouses. This is the law in England.

In Nigeria the courts are yet to pronounce on the point. But since Nigerian case law invariably follows English case law it is to be expected that should the point arise in Nigeria, the courts are likely to decide in terms of Lloyds Bank Plc. Vs. Rosset and Anor[44]

3.3.7 The Doctrine Of Lis Pendens

The term Lis Pendens has been defined simply as meaning "pending suit."[45] This definition of the term found judicial support in the case of Abhulimhen Vs. Namme[46] where Adio J.C.A. (as he then was) assigned to it the simple definition contained above.

However this definition of the term neither captures the "prohibitive fangs" nor the legal purpose and consequences of the term which may therefore have to find expression through an explanatory discourse.

The central purpose of the doctrine of Lis Pendens is to prevent the sale or other disposition of property which is the subject matter of litigation between parties during the pendency of the case in court. By the use of the doctrine once parties have resorted to the court for the resolution of a dispute between them

concerning a given subject matter they have to await the determination of the dispute by the court before taking any further action in relation to the sale, mortgage or other disposition of the property as the law does not permit self-help for the resolution of the dispute while the suit is still subjudiced. This is to avoid foisting upon the court a situation of complete helplessness when the case is finally determined as there would be no subject matter on which the court's decision will anchor.

If in violation of the doctrine of Lis Pendens a party to a court proceedings decides to dispose off the subject matter in dispute to a banker by way of mortgage the mortgage will be null and void and the banker will take nothing.

The Supreme Court case of Ogundiani Vs. Araba [47] lucidly demonstrates the efficacy and dire consequences of Lis Pendens against a person who is foolhardy or unfortunate enough to accept the disposition to him of property affected by the doctrine.

In that case one Alhaji Ashiru mortgaged his two properties at 30 Ishoku Street Ijebu-Ode and 46 Akpata Street, Shomolu, Lagos state to Barclays Bank of Nigeria Ltd (now Union Bank Plc.) by way of equitable mortgage with a covenant in the memorandum of deposit of the title deeds that when called upon, he would execute a legal mortgage. He defaulted and the bank went to court for an order of specific performance and to compel him to amortise the debt. The matter eventually got to the appellate court and while the suit was pending there Alhaji Ashiru sold the property at Shomolu to Chief Ogundiani. The bank at last got what it wanted from the court and consequently sold the property at an auction sale to Chief Araba the 1st respondent.

In the legal tussle that ensued over the ownership of the property between Chief Ogundiani and Chief Araba, the Supreme Court held, inter alia, that the doctrine of Lis Pendens prevents the effective transfer of rights in any property which is the subject matter of an action pending in court and so the sale of the land which was the subject matter in dispute between the parties by Ashiru to Ogundiani during the pendency of the case was null and void and of no effect whatsoever.

It is worth noting that even though the disposition in the case of Ogundiani Vs. Araba[48] was a sale and not a mortgage it is submitted that the result wouldn't have been different were it a mortgage to a banker.

A proper question to ask here is on what type of property does the doctrine of Lis Pendens apply or does it apply on all types of property?

The law does not appear to be settled on this point. While in the case of Ogundiani Vs. Araba [49] the court held that the doctrine applies on all types of property, in the case of Ajuwon Vs. Akanni[50] it held that it applies only on real property. In the uncertain state of the law it will be safer for a banker mortgagee to presume that the doctrine applies on all types of property.

Where the doctrine of Lis Pendens applies it is immaterial whether judgment is finally entered in favour of the party who dispose it off during the pendency of the suit in so far as he dealt with it without the consent and authority of the court. Accordingly the disposition will be set aside and declare illegal.[51]

Likewise it is irrelevant whether the banker as mortgagee has notice, actual or constructive of the pending suit or not. This is

because mortgagees during the pendency of a suit are bound by the decision in the suit without being made parties. This point was succinctly made by Oputa J.S.C. (as he then was) in the case of Osagie Vs. Oyeyinka[52] where he held:

> simply put the doctrine of Lis Pendens operates to prevent the effective transfer of any property in dispute during the pendency of that dispute. It is quite irrelevant whether the purchaser has notice-actual or constructive.

The provision that the operation of the doctrine of Lis Pendens is not affected by the doctrine of notice invest it with enormous potentials of being the waterloo of many an unwary banker. The only way to curb the menace of the doctrine to the mortgagee banker is for the banker to always conduct a search in the register of pending action in the land registry where land is to be mortgaged to him. In every land registry there is a register in which pending actions in court affecting land are registered. After the completion of the case the action so registered in the register is struck out.

In respect of mortgage of other properties other than land which have no register in which actions affecting them are registered the banker will have to make informal inquiries as to whether there is a pending action or actions involving such property.

Where a banker is affected by notice of Lis Pendens it will sound rhetorical and academic to advise that the banker should not accept the mortgage of a property subject to Lis Pendens regard

being had to the ruthless operation of the doctrine earlier highlighted.

3.3.8 Questions Of Importance In Determining The Existence Of Overriding Interests

In all the cases in which the courts had considered whether a particular interest amounted to overriding interest, certain questions of importance arose in determining the existence or non existence of overriding interest in favour of those claiming its existence. These questions include the following:

First, is it a requirement of the law that a person who claims an interest as overriding interest must be in actual occupation of the property? The straight answer is, yes. The clause "actual occupation was interpreted in Taylor Vs. Stibber[53] to mean physical presence as opposed to legal possession which may not require physical occupation of the property by the party claiming overriding interest. Again in Abbey National Vs. Cann[54] it was held that the physical occupation should involve some degree of permanence and continuity which would rule out mere fleeting presence. Accordingly their lordships in Cann's case held that a prospective tenant who is allowed as a matter of indulgence to go into the property in order to plant decorations or measure for furnishings would not be said to be occupying it, even though he might be there for hours at a time.

Occupation of the property in the determination of interest as overriding interest is a means by which mortgagees are to be constructively fixed with notice of any interest existing on the property which the occupier may have.

The second question in determining whether or not an overriding interest exist in favour of a party claiming its existence flows from the first question. It is that assuming the claimant to an overriding interest was in occupation of the property at the time of creating the mortgage, does he lose his overriding interest if his occupation ceases at any point in time? Put another way, must the occupier continuously be in occupation to be entitled to an overriding interest?

This question arose in London & Cheshire Insurance Co. Ltd Vs. Laplagrene Property Co. Ltd and Anor.[33] It was argued in this case by a mortgagee that because the unpaid vendor who was in occupation when the mortgage was created, and who was never questioned about his rights, ceased to be in occupation at a time after the creation of the mortgage, he could not assert his interest as an overriding interest. Lord Brightman felt this argument was absurd and held that he could not see how an overriding interest subject to which a disposition was made could be extinguished merely because the owner of the right ceases to be in occupation after the disposition. His lordship pointed out the absurdity into which this argument might result in the following words:

> If actual occupation, which is necessary to clothe a right with the status of an overriding interest is not confined to actual occupation at the time when the interest or estate thereby effected is transferred or created but continuous occupation is required thereafter for the continued existence of the right as an overriding interest it must follow that inquiry by a transferee or grantee of the right at the time of disposition must not

be confined to the time of the disposition but must continue during the subsistence of that occupation.[56]

One can not but agree with the unassailable reasoning of Brightman J. Occupier may cease to be in occupation. This is not material if he was in occupation at the completion or creation of the disposition but nobody enquired from him what his interest were.

A third interesting question that has arisen over the years is whether if the mortgagor is in occupation of the property, it relieves the mortgagee banker the duty of enquiring into the rights of other persons who are also in occupation of the property together with the mortgagor. This question arose in Williams and Glynn's Bank Vs. Boland[57] and in the case of Hodgson Vs. Marks.[58]

In Boland's case[59] it was argued that the banker mortgagee will be required to enquire into the nature of the rights of the other occupier or occupiers beside the mortgagor if such occupation is inconsistent with that of the mortgagor. For example, where a man unrelated to the mortgagor in any way occupies the property together with the mortgagor. But that where the occupation of the other person or persons is not inconsistent with that of the mortgagor, such as the occupation of the property by the mortgagor's wife, the banker mortgagee will be relieved of the duty of enquiry into the nature of the other person's occupation.

In rejecting the above argument Lord Wilberforce, delivering the lead judgment of the House of Lords said:

A wife may, and everyone knows this, have rights of her own; particularly, many wives have a share in a matrimonial home. How can it be said that the presence

> of a wife in the House as an occupier, is consistent or inconsistent with the husband's right until one knows what rights she has. If she has rights, why, just because she is wife (or in the converse case, just because an occupier is a husband), should these rights be denied protection under the law?[60]

There can be no doubt that the law in England on the need for the banker to enquire into the nature of the rights of all persons in occupation beside the mortgagor not withstanding that the occupation of some of these persons may, like in the case of his wife, be consistent with the mortgagor's occupation as stated by Lord Wilberforce in the above case is the law in Kaduna state under the Kaduna State Law Of Property Edict as it is the law in England. For S.25 of the Edict provides that a husband and his wife shall for all purposes of acquisition of any interest in property under a disposition made or coming into operation after the commencement of the Edict, be treated as separate persons. Being therefore separate persons the occupation of a property by one can not thereby extinguish any adverse claim his co-occupant may have against the property.

Finally, a fourth question that arose recently in the House of Lords in the two cases of Abbey national Vs. Cann,[61] and Lloyds Bank Vs. Rosset,[62] is the relevant date for determining whether the claimant to a right is in actual occupation. Although this question arose in the earlier case of London & Cheshire Insurance Co. Ltd. Vs. Laplagrene Property Co. Ltd.[63] it was in Abbey National Vs. Cann[64] that it received serious attention. In both Abbey National's Case and Rosset's case the House of Lords held that the

relevant date is the date of the completion of the transaction not the date when it is registered.

On the whole even though it will appear that the incidence of overriding interests as a potent adverse proprietary interest that can defeat or at least prejudiced the interest of the mortgagee banker has been reduced by recent judicial decisions still, to use the words of Omotayo Bolodeoku,[65] a banker mortgagee will find it difficult passing by their ghosts undeterred without paying due homage to their existence. This homage becomes very necessary in the case of the deserted wife's ghost which has been roaming the law in this area like the Biblical devil looking for whom to devour.

3.4 TRUST PROPERTY

3.4.1 Mortgages Of Trust Property

A trustee under common law and equity has no implied powers to borrow money in pursuance of the trust and no power to mortgage the Trust Property.[66] Accordingly unless the trust instrument gave the Trustee power to borrow and mortgage the Trust Property, any mortgage by the trustee in favour of the banker who has notice of the Trust would not be binding on the beneficiaries who would take free of the mortgage. There is however no problem if the mortgage is effected by the beneficiaries. In that event the banker will take free of the Trust whether or not he has notice of the Trust.

Section 61(1) of the Kaduna State Law Of Property Edict 1990 has however attenuated the rigid provision of the common law which prevents Trustees from mortgaging the Trust property by providing that where Trustees are authorised either by the Trust instrument or by the general law to pay or apply capital money subject to the

Trust for any purpose or in any manner, they have the power to raise the money required by mortgage of all or any part of the Trust property. No mortgagee banker paying or advancing money on mortgage purported to be made under any Trust or Powers vested in Trustees, is concerned to see that such money is in fact wanted or as to its application. So that where a banker acquires A legal estate by virtue of a mortgage to him by the Trustees he will prevail over the beneficiaries rights.

This then means that before a banker can accept the mortgage of Trust property from the Trustees of the Trust he should examine the Trust instrument for powers to mortgage. If such power does not exist and the general law does not permit the mortgage of the Trust property by the Trustees, the banker should refuse to accept the Trust property as security. If he is however desirous to accept the mortgage of the Trust property despite the lack of authority to mortgage by the Trustees, he should either seek the consent of the beneficiaries under the Trust or ask them to join in the mortgage as mortgagors.

3.5 CONSENT REQUIREMENT

3.5.1 Meeting The Consent Requirement

For a valid mortgage of land to be executed in favour of a banker, the banker may need the consent of one or two persons, authorities or both to the mortgage. Where the land to be mortgaged is covered by a statutory right of occupancy the consent of the Governor of the state where the land situate must be sought if the mortgage to the banker must be valid.[67] Where it is covered by a customary right of occupancy it is the consent of the Local Government that granted the right in the first place that must be

secured.[68] Besides these consents which are secured from governmental agencies the banker mortgagee may also need to secure the consent of the family members of the mortgagor where the land sought to be mortgaged to him is family land.[69]

The requirement of the consent of any of the above mentioned authorities or persons before a valid mortgage can be executed in favour of a banker does not make any distinction between a legal and equitable mortgage. This is so particularly in the case of the consent of the Governor or that of the local government authority provided for by the Land Use Act[70] which does not make any distinction between a legal and equitable mortgage. The only instance when consent may not be required is where consent was obtained before creating an equitable mortgage which is being sought to be converted to a legal mortgage. In that situation consent will not be required to create the legal mortgage from the earlier equitable mortgage for which consent was obtained.[71]

As for the deemed right of occupancy[72] which was earlier thought not to require the consent of the governor or that of the local government authority before mortgage or any other form of alienation because it was not granted by any body, the case of Savannah Bank Vs. Ajilo[73] dispelled all doubts in this regard by stating categorically that consent of the Governor or the local government must be obtained before the right can be alienated either by way of mortgage or by way of sale.

Even though it has repeatedly been stated that the mortgagee banker is to obtain the requisite consent, in practice it is actually the mortgagor that has the duty to obtain the consent needed to validate the mortgage sought to be made because he is the

party alienating the land and not the banker mortgagee who is a mere beneficiary of the mortgage. This practice has obtained judicial approval in many cases such as Savannah Bank Vs. Ajilo[74] cited above; Alhaji Ferdinard Ibekwe Vs. Mrs. Lucy Maduka[75] and a host of other cases. In the two cases mentioned here the mortgagor whose duty it was to obtain the consent of the Governor before alienating his land by way of mortgage failed to discharge that duty. On being sued on the mortgage by the mortgagee he pleaded that the mortgage is null and void the consent of the Governor having not been obtained before the mortgage. But the court held that since the duty of obtaining governor's consent lies on the mortgagor he can not be heard asserting lack of Governor's consent against the mortgagee. For if he were allowed to assert lack of consent against the mortgagee he will by that allowance be benefiting from his own wrong doing.

The reason why emphasis is being laid on the banker obtaining consent is due to the fact that if such consent is not obtained he will be the loser because the mortgage will be invalid and void. So the banker owes himself a duty to see that the mortgagor obtains the requisites consent before mortgaging the land sought to be mortgaged to the banker.

In today's Nigeria of individual ownership of land, it is usually one consent that the banker mortgagee may need to see that it is obtained by the mortgagor. This is usually either the consent of the Governor or that of the local Government Authority but harcly that of the mortgagor's family. This is more so if regard is had to the fact that most of the people who mortgage land to banks are not rural people who own land[76] along family or

communal lines but town people who own land along individualistic lines.

However, whenever family land is being sought to be mortgaged by a member of the family not as a representative of the other family members but in his individual capacity the banker as mortgagee should insist on getting the consent of the other family members to the mortgage[77] failing which his mortgage will be void or voidable depending on the status of the family member mortgaging the land. It will be void if he is an ordinary member of the family[78] and voidable if he is the head of the family.[79]

The only problem will be how to know whether a certain landed property sought to be mortgaged to a banker is family property because the mortgagor will naturally want to conceal this fact where he knows it is family land but yet wants to unilaterally mortgage it. To ascertain whether a certain landed property sought to be mortgaged to him is family property or not the banker may in addition to calling for the title documents to the land also make searches in the land registry where the land is registered and where the land is not registered he may have to find out from the other family members of the mortgagor whether the land is family property or not. As a matter of fact even where the land is registered it will pay the banker huge dividends if he still finds out from the other family members of the status of the land sought to be mortgaged where he suspected it to be family land.

Normally where consent of the family members of the mortgagor will be required for the validity of the mortgage it will follow that consent of two persons or authorities will have to be secured for the mortgage to be valid since it has earlier been pointed out

that consent of the Governor or local government authority is needed for the mortgage of all rights of occupancy recognised by the land use Act including the deemed right of occupancy. Thus if the family land sought to be mortgaged is covered by a customary right of occupancy, it is the consent of the relevant Local Government Authority that must be obtained alongside that of the family, and so on.

On the issue of getting consent provided for by the 1978 Land Use Act, that is, consent of the Governor or that of a Local Government Authority before mortgage or any other form of alienation of land is effected a number of vexed questions have arisen calling for answers.

First, there is the question of what is the effect of an alienation (mortgage in this case) which is done without consent either of the Governor or the local government authority?

Secondly, when exactly does an alienation take place?

And finally, at what time is the consent to be sought?

Beginning with the first question S.26 of the land Use Act provides that "any transaction or any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."

The above provision is lucid enough to require no further explanation save to state that "the provisions of this Act" requires consent of either the Governor or the Local Government Authority before alienation failing which the alienation (mortgage in this case) will be null and void.

What is meant by the mortgage being null and void is that it is unenforceable and can be repudiated by either party to the mortgage. It is however not illegal. Under such mortgage money paid to the mortgagor is treated as money had and received which the mortgagee banker can sue him to recover.[80] Viscount Simmonds in Denning Vs. Edwardes[81] where a similar provision to S.26 of the Land Use Act 1978 came for consideration held that the agreement was merely inchoate until the consent is obtained. The agreement is only complete and effective after the consent has been granted. This was also the holding in the Nigerian case of Orjiako Vs. Orjiako[82] where the court held that the only effect of S.26 of the Land Use Act is to make an agreement to alienate conditional upon the necessary consent been obtained.

With regard to the second question, when exactly is an alienation (mortgage in this case) deemed to have taken place? Nigerian Courts are yet to determine this question on the basis of section 26 of the Land Use Act. But in the cases of British and French Bank Ltd. Vs. Akande[83] and; Solanke Vs. Abed[84] in which section 1 of the Lands and Native Right Ordinance 1916 which is in Pari material with section 26 of the land Use Act came in for consideration it was held that alienation will be deemed to have taken place when the agreement to alienate is completed. Accordingly it was held in the two cases that consent must be obtained before the agreement to alienate is completed.

The above reasoning seems to suggest that actual transfer of the property sought to be mortgaged to the banker is not necessary before an alienation can be said to have taken place.

On the third question, at what point should the consent be obtained, the law is that consent must be obtained before the agreement to mortgage the property is completed. Otherwise the agreement is null and void.[85] However, consent is not required before the parties start negotiation towards reaching an agreement to mortgage but is required before such an agreement is concluded. This means that the point at which consent is required is between the starting of negotiation towards an agreement to mortgage but before the agreement to mortgage.[86] This has been the law on when consent should be obtained.

But the recent Court of Appeal decision in the case of Awojugbagbe Light Industries Ltd. Vs. B. N. Chinukwe[87] on the point seems to be saying a different thing. The facts of the case were that the appellant was granted a loan of N215,000.00 on the 11th of October 1979 by the second respondent to establish a nail factory. The appellant mortgaged his property at Nos. 60 to 64 Abobielu Layout Ijebu road, Ibadan, which was registered as No. 13 in volume 22 at the land Registry in Ibadan to the second respondent. A deed of mortgage (exhibit E) was prepared. By exhibit H (a letter dated 13/2/1980) the first respondent sent copies of exhibit E to the second respondent that the Governor has given his consent to the mortgage on September 12th 1985. In the said letter the mortgaged property was properly described as being at No. 60 to 64 Abobielemu Layout but incorrectly described as having been registered as No. 31 at page 31 volume 1473. After the letter was obtained the mortgage deed was registered with the date 8/10/1985 inserted in it as the date of execution. By 3/2/1987, the appellant was indebted to the second respondent to the tune of N354,610.27. The second

respondent thereupon appointed a receiver to take over the property mortgaged. The appellant then filed an action contending among other things that the mortgage was void consent of the Governor having been obtained after the deed of mortgage has been executed.

The court of appeal in a controversial decision held that where there was execution of mortgage deed before the Governor gave his consent contrary to the stipulation of section 22(1) of the Land Use Act, the instrument can not for reason of obtaining consent subsequent to execution be rendered invalid in view of section 22(2) of the Land Use Act.

Section 22(2) of the Land Use Act on which the Court of Appeal relied to hold as it did provides that:

> The Governor when giving his consent to assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the Governor in order that consent given by the Governor in S.22(1) may be signified by endorsement thereon.

In relying on the above provision of the Land Use Act, the Court of Appeal held further that there is nothing in the Act preventing prior execution of an instrument before an approach is made to the Governor for his consent. So that the provision that the consent of the Governor must first be had and obtained before mortgage can be made, means no more than that the agreement entered into will remain inchoate until the Governor's consent thereon is sought and obtained. In so holding the Court of Appeal drew

inspiration from section 88 of the Kenya Crown Land Ordinance[88] which is substantially similar to the provision of section 22(2) of the Land Use Act with however the important dissimilarity that the Kenyan law is very clear on the point that consent can be obtained after the agreement to mortgage has been duly completed and the deed of mortgage executed.

The decision of the Court of Appeal in this case has been roundly criticized as being "an embellishment quite extraneous and uncontemplated within the provision of the Act."[89] It has been suggested that the Court of Appeal may be laying down an ideal situation and perhaps making projections into the future by holding as it did in the case under consideration. But if it purports to interprete the provisions of the Act in its present form, then it must be said with respect that the court was amiss both in principle and the law. This is because if the Court of Appeal position represents the law on the point, it will mean that parties to a mortgage could conveniently ignore the statute and execute a deed of mortgage in breach of same and only seek the Governor's consent whenever it suits them. This situation will render nugatory the Governor's management and control of land under the Land Use Act.[90]

It is submitted with respect that the above criticism of the Court of Appeal decision in Awojugbagbe Light Industries Ltd. Vs. B.N. Chinukwe[91] can hardly be faulted given the present provisions of the Land Use Act on the point. It may well be that the Court of Appeal was driven to hold as it did by the overwhelming desire to prevent the mortgagor customer whose duty it was to obtain consent of the Governor at the proper time but who refused or neglected to

so obtain it from benefiting from his own wrong as he sought to do i.e claiming that the mortgage to the banker is void by reason of lack of Governor's consent before the execution of the mortgage deed. But since the Supreme Court has in cases like Savannah Bank Vs. Ajilo[92] and a host of other cases[93] held that a mortgagor whose duty it is to obtain consent of the Governor to a mortgage but who refused or neglected to so obtain it can not be heard to raise lack of Governor's consent at his suit or that of the mortgagee on the mortgage, the Court of Appeal ought to have simply knocked out the bottom from the mortgagor's case in Awojugbagbe Light Industries Ltd. Vs. B.N. Chinukwe[94] by simply holding that the appellant who was the mortgagor is estopped from benefiting from his own wrong doing instead of embarking on a fishing expedition that did not bring in any fish.[95]

What is more, the Court of Appeal decision in Awojugbagbe Light Industries Ltd. Vs. B.N. Chinukwe[96] seems to conflict with the fact that alienation of land takes place when the agreement to alienate (mortgage in this case) is completed. Now if consent is to be obtained after the agreement to alienate has been completed as suggested by the Court of Appeal in the said case, it will come to a violent conflict with the provision of the Act requiring Governor's consent before alienation.[97]

All said and done it is clear that the law in this area is far from being settled. He will therefore be a prudent banker that will insist on consent being obtained before the agreement to mortgage land to him is been concluded.

On the issue of consent as a whole it can not be doubted from the exposition of the law on the issue that a banker mortgagee

needs to ensure that the requisite consent is secured to back up a mortgage of land to him by a borrowing customer if he is to take the benefit under the mortgage. Should he fail to do so and the necessary consent is not obtained the mortgage to him will fail and he will have no other remedy against the customer but to proceed against him in court for money had and received to the benefit of the mortgagor and on the mortgagor's personal obligation to repay the loan.

3.6 REGISTRATION AND OTHER MEASURES

3.6.1 Registering The Banker's Mortgage

If after determining, through investigation of title, that the mortgagor has a good title to the property sought to be mortgaged, that no overriding interest exist on the land sought to be mortgaged and after meeting any consent requirement and determining that the property sought to be mortgaged is not Trust Property sought to be mortgagee without the consent and authority of the beneficiaries the banker should naturally accept the mortgage being sought to be made in his favour proper regard being had to other considerations such as the value of the property offered as security to the banker by the borrowing customer vis-a-vis the sum sought as advance.

Having accepted the mortgage the immediate important thing to do is to register it where it requires registration. With certain types of property failure to register mortgages created over them speedously and timeously or never at all may wreck unpleasant consequences on the banker mortgagee. Of these types of property land and ships come in for easy mention.

In respect of land the mortgagee banker should ensure that the mortgage is registered in the register of charges in the land registry of the registration district where the land is situate. This should be done immediately after the due execution o the mortgage. Either of two very unpleasant consequences will hit a banker who toys with registration of a mortgage over land.

If he failed to register the mortgage at all it will become null and void. The cases of Onashile Vs. Idowu & Ors.[98] and; Amankra Vs. Zankely[99] are authoritative on this point.

In Onashile Vs. Idowu & Ors.[100] the appellant who was the defendant in the High Court mortgaged to the bank certain unregistered land situated within a registration district. The bank did not register the mortgages in the land registry. Later the bank sold the land to the first and second respondents under the power of sale conferred by the Conveyancing Act.[101] On appeal it was held that the mortgage to the bank was void for non registration and being so void the purported sale by the bank was of no effect and did not convey the legal estate to the first and second respondents. And in the case of Amankra Vs. Zankely[102] it was held that a registrable instrument such as a mortgage of land which is not registered is ineffectual and confers no estate on the mortgagee.

If on the other hand the mortgagee banker registers a mortgage of land to him but does so with great delay, the mortgage to the banker will be postponed to that of a later mortgagee who registers his mortgage before the banker in the event of a competition between their mortgages.[103] And with S.191 of the Kaduna State Law Of Property Edict and S.193 of the Property And Conveyancing Law of

the states making up the former western region of Nigeria providing that registration of a mortgage constitute actual notice of the mortgage to other mortgagees, the banker who allow other mortgagees to register their own mortgages before him will stand affected with notice of other mortgagees mortgages but nobody will stand affected with notice of his own mortgage.

With respect to ships, priority of mortgages among mortgagees of a ship is determined by order of registration and not by order of creation.[104] In fact with ships the type of mortgage to be created over them depends on registration and not on the instrument creating the mortgage so that an unregistered legal mortgage over a ship will only qualify as an equitable mortgage until registered in the port of registry.[105] So also an equitable mortgage if registered in the port of registry will rank as a legal mortgage.[106] Again with ships a registered mortgagee of a ship retains priority over all other mortgagees irrespective of any express, implied or constructive notice he might have in respect of any prior unregistered mortgage.[107]

Where the property mortgaged is company property then in addition to any registration which might be required by any law, the mortgage must also be registered in the company's register of charges and also with the Corporate Affairs Commission for the mortgage to be valid.[108] Without such registration the mortgage will be void.[109] For the registration with the Corporate Affairs Commission to be valid it is required to be made within ninety days of creating the mortgage.[110]

3.6.2 Insuring The Mortgaged Property

The mortgagee banker has the right to have the mortgaged property insured by the mortgagor especially ship mortgages.

Thus a well drafted mortgage agreement ought to contain an obligation by the mortgagor to insure the property mortgaged. The insurance is taken out either in the sole name of the mortgagee banker or in the joint names of the mortgagee banker and the mortgagor for an amount equal to the full reinstatement value of the mortgaged property should the risk insured against occur. The mortgagor if he thus insured the mortgaged property should produce evidence of the insurance and evidence of its being maintained in force by him.

If the mortgagor fails to insure, the mortgage agreement should provide that the mortgagee banker may insure and recover the premiums paid as part of the money secured by the mortgage. The banker should ensure that such insurance money is recovered as at when due.

The importance of insuring the mortgaged property is to enable the banker mortgagee maintain a claim against the insurance company should the risk insured against occur to extinguish or reduce the value of the mortgaged property. Where this happens the banker's security shift from the mortgaged property to the insurance money. This then means that if the mortgaged property is not insured and the mortgaged property is destroyed or consumed by any cause the banker as mortgagee will be left with no security but a bare right to sue the mortgagor on his personal obligation to repay the advance which is procedurally dilatory and expensive with an uncertain outcome. This underscores why the banker as mortgagee

should provide for the insurance of the mortgaged property either by the mortgagor or by himself in the mortgage instrument.

3.6.3 Consolidation Of Mortgages

In equity a mortgagee has a right of consolidation against a mortgagor who had mortgaged more than one landed property to the mortgagee. In such a situation the mortgagee will be entitled to refuse redemption of one property by the mortgagor without redemption of the other or others. In other words the mortgagee would be entitled to consolidate the mortgages and insist that the mortgagor should redeem them together.

The rationale behind the right of consolidation is to ensure that a mortgagee to whom two or more property are mortgaged by a mortgagor is not deprived of the most valuable property by the mortgagor choosing to redeem the most valuable property while leaving unredeemed the property of lesser value.

The doctrine of consolidation of mortgages right from the time equity recognised it to this day apply in practice only to mortgaged landed property as opposed to personal property.

In equity the right of consolidation of mortgages will normally exist in favour of a mortgagee even where it is not made a term of the mortgage agreement. That is to say, the right where not expressly provided for in the mortgage agreement will be implied. This was affirmed in White Vs. Pledge[11] the leading case on the whole subject of consolidation of mortgages. The brief facts of White Vs. Pledge[12] were that a mortgagor created two mortgages over two separate landed property of his to two different mortgagees. Later one of the mortgagees assigned his mortgage to the other mortgagee thus uniting the two mortgages in the assignee-

mortgagee. The assignee mortgagee consolidated the two mortgages and it was held that where the owner of different property mortgages them to different persons and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all. This right the mortgagee consolidating has not only against the mortgagor but also against a perso the mortgagor has by one deed assigned the equity of redemption of all the property, although the assignment is made before the mortgages became united in title.

Apparently the equitable doctrine of consolidation of mortgages to some extent offends the law against clogging the mortgagor's equity of redemption by which a mortgagor is entitled to redee the mortgaged property whenever he comes within means and is of that mind. The equitable doctrine of consolidation of mortgages by insisting that he must redeem all his mortgaged property with the mortgagee which he may lack the means to do some how infringes the mortgagor's equity of redemption. It is perhaps for this reason that S.115(1) of the Kaduna State Law Of Property Edict and S.115 of the Property And Conveyancing Law of the states making up the former western region of Nigeria restrict the application of the right of consolidation in mortgages of landed property only to those mortgage agreements which expressly provide for the application of the right. So for a mortgagee banker to be entitled to the right of consolidation under the law in these states, the mortgage agreement must specifically and expressly confer the right on him. If it does not so provide the banker

mortgagee cannot claim the right by implication as he would have done in equity.

Even though in equity and under statutory law the right of consolidation has existed only over real property as opposed to personal property, there is nothing preventing a mortgagee banker to stipulate the application of the right in a mortgage agreement covering real and personal property or covering purely personal property.

Where the right of consolidation of mortgages exist, the type of the mortgage or even the properties mortgaged is unimportant. Thus there can be consolidation even if one mortgage is legal and the other equitable, or if one mortgage is of realty and the other is of personalty. The doctrine has even been applied to two mortgages on the same property.[13]

Even so where the right of consolidation exist it can only be exercised after certain conditions have been met.

First, consolidation being an equitable doctrine which does not override the legal right of the mortgagor to redeem, the legal dates for redemption must have passed before a mortgagee banker can insist on consolidation of two or more of the mortgages involved.

Secondly, the mortgages sought to be consolidated must have been made by the same mortgagor for mortgages made by different mortgagors can never be consolidated. It is however immaterial that the mortgages were made to different mortgagees once it is proved that the mortgages were made by the same mortgagor but the mortgages now vest in one mortgagee, there will be the right of consolidation.[14]

Thirdly, there must be simultaneous union of mortgages and equities, that is both mortgages must be vested in one person and the equities of redemption vested in another.[11]

In the light of the apparent benefits of the right of consolidation, a banker who has several mortgages from a single mortgagor should always consider making the right of consolidation a term of the mortgage agreement. This is because the value of property differ. So a banker should not release the most valuable property with the greatest cover margin and be left with the less valuable property with a lower cover margin if he has a choice in the matter. The right of consolidation gives him that choice.

3.6.4 Tacking The Mortgage

The right of a mortgagee banker to tack the security is a right to make further advances to the mortgagor on the security of the first property earlier given as security if the value of the property is well in excess of the money earlier advanced. The right to tack if properly utilised will dispense with the necessity of second or third mortgages and their concomitant risks to the mortgagee banker.

Before the enactment of the Kaduna State Law Of Property Edict, a first mortgagee to whom a mortgage of land had been made could in any transaction make further advances which would be tacked unto the initial advance and thus take priority over the second mortgagee. There was then a general right to tack.

But the Kaduna State Law Of Property Edict abolished the general right to tack by providing that the right to tack exist only in three cases.[12]

First, if an arrangement to that effect has been made with the subsequent mortgagees.

Secondly, if the first mortgagee had no notice of the subsequent mortgages at the time when the further advances were made.

Thirdly, where the mortgage imposes an obligation on the mortgagee to make such further advances whether or not he had notice of a subsequent mortgage or mortgages.

After thus providing circumstances under which the right to tack will exist in favour of a banker mortgagee the Edict[117] went on to provide that a mortgagee will not be deemed to have notice of a mortgage merely because it was registered if it was not so registered at the time when the original mortgage was created or when the last search, if any, by the mortgagee was made which ever last happened. This provision of the Edict however has a rider that it can only be invoked where the mortgage was made expressly to secure a current account or other further advances.

This effectively means that a banker whose mortgage secures a running account need not search every time an advance is made and cannot be deemed to have notice of a registered mortgage unless it was either registered when he made his last search in the register of charges or he was given express notice by the subsequent mortgagee. This being the case a banker whose mortgage does not secure a running account should not rely on the third case to tack as he would be affected by subsequent mortgages that have been registered whether or not he had notice of them.

Where a banker does in fact receive notice of a second mortgage he should immediately rule off any running account secured

by his mortgage because of the rule in Devaynes Vs. Noble, (clayton's case)[118] which provides that in such circumstances if the account is not ruled off but continued each subsequent pay in by the mortgagor will go to reduce the indebtedness subsisting at the date on which notice of the second mortgage was received and each subsequent debit will be treated as a new advance which will rank after the subsequent mortgage.

In Clayton's case[119] Devaynes was the senior partner in a firm of bankers. Upon his death the surviving partners continued to carry on business under the former partnership name of Devaynes, Dawes Noble & Co., despite a written notice from Devaynes' son and from the trustees of Devaynes that the continued use of the name Devaynes was without their consent. Upon the bankruptcy the following year of the surviving partners, a number of questions of law fell to be argued in chancery, one claimant being selected to represent each class of creditors.

In this way Nathaniel Clayton represented those who, after Devaynes' death, continued to deal with the partners both by paying in and drawing out, some withdrawals being made (after the death) before any credits were paid in. In the case of Clayton himself, the sum of $1,713 which was his balance at the death of Devaynes was reduced within a few days to 453 by withdrawals, no payment is being made at that time; and before the bankruptcy, withdrawals amounted to considerably more than the whole sum of £1,713. Clayton, however, claimed that the sum of £453 was due to him from Devaynes' estate on the ground that subsequent withdrawals from the account were to be set against later credits.

Sir Williams Grant M. R. however held that Clayton was not so entitled his £453 having been appropriated to the settlement of the bankruptcy of Devaynes and Co. Firm.

To counteract this, the banker mortgagee should rule off the account of the mortgagor after receiving express notice of a subsequent mortgage created by the mortgagor in favour of another mortgagee so that all subsequent paying in by the mortgagor may be credited to a new account against which will be debited all advances subsequent to the date of receipt of notice; the indebtedness subsisting at the date of receipt of notice will then continue to rank in priority to the subsequent mortgage and will not be reduced. The balance of indebtedness representing net advances on the new account should be kept to a minimum, since though secured, ranks after the subsequent mortgage.

If the second mortgage is expressly subject to the banker's mortgage securing an amount to a specified sum, the bank may lend to that amount by way of fixed advance and still preserve priority.

Perhaps the only case in which a bank may be sure of tacking further advances onto his original mortgage and still retain priority whether or not he had notice of a subsequent mortgage is where the mortgage imposes an obligation on him to make further advances. The obligation must be in the mortgage itself and not in some other document such as a facility letter for it to be so effective.

The right to tack applies both to reality and personalty.[120] The only difference that may exist between real property and personal property on this may be that the right to tack is not restricted in personal property as it is in real property. This

then means that a banker mortgagee will have a wider area within which to exercise the right where personalty is involved than he would have where realty is involved since there is no law circumscribing the area of operation in respect of personalty as there is in respect of realty. The only condition to the exercise of the right of tacking in personalty cases will seem to be that the right should be made a term of the mortgage agreement between the mortgagee banker and the mortgagor.

On the whole, tacking deals with priority. It is a special way of obtaining priority for a secured loan by amalgamating it with another secured loan of higher priority. Preserving the right to tack further advances therefore is a very useful mechanism a banker who is prepared to make further advances to a mortgagor customer should avail himself of. A typical example of where a banker may be compelled to make further advances is where he is financing the construction of a building under a self-liquidating advance and where the work is to be paid for in stages. Without the right of tacking the banker may find that he is receiving notices of subsequent mortgages at a time when the building is incomplete. The banker will then be in a fix. If he makes further advances they will rank after the subsequent mortgages he had received notice of. If he refuses to make further advances the building will remain uncompleted thereby denying him a saleable property. This is one fix the banker must avoid by availing himself with the right of tacking.

3.7 LIMITATION OF ACTION

3.7.1 The Limitation Law

The limitation law is a relevant law that a mortgagee banker must constantly avert his mind to during the life span of the mortgage for fear of the mortgage becoming statue barred. Different limitation laws apply in the various states of Nigeria with the 1966 Limitation Act applying, by virtue of S.71 of that Act and by virtue of the court of appeal decision in R.C.C. (Nig) Ltd Vs. Buratto,[21] only in the federal capital territory. The Kaduna state Limitation Edict shall be the main reference law in discussing this sub-topic though sporadic references shall be made here and there to other states limitation laws.

Even though the Kaduna State Limitation Edict does not specifically provide for the limitation period for actions founded on mortgages, section 18 of the said Edict prescribes five years as the limitation period for actions founded on contract, tort and other actions. Since a mortgage is a form of contract, it follows that the limitation period for actions founded on mortgages should be five years.

But that is not the end of the matter. For section 4 of the same Edict prescribes ten years as the limitation period for actions to recover land. Now an action to recover land can and in practice usually arise from contract which covers mortgages. This being the case what will be the limitation period for an action by a mortgagee banker to recover land which has been in the possession of the mortgagor or by a mortgagor to recover land which has been in the possession of the mortgagee banker pursuant to the mortgage?

Section 11 of the said Limitation Edict which provides for limitation of redemption actions will appear to be useful in resolving this knotty legal position. The section provides:

> When a mortgagee of land has been in possession of any of the mortgaged land for a period of ten years after the expiration of the time fixed for redemption... no action to redeem the land of which the mortgagee has been so in possession shall be brought to recover it by the mortgagor or any person claiming through him.

Since the above provision fixed ten years as the period beyond which a mortgagor cannot assert his equity of redemption against a mortgagee who has been in possession of mortgaged land, it stands to reason that the limitation period for actions founded on mortgages particularly mortgages of land in kaduna state is ten years as provided by section 4 of the Kaduna State Limitation Edict and not five years as provided by section 18 of the same Edict which prescribes five years as the limitation period for actions founded on contractors and other actions.

What is more section 18 of the Edict is cast in generic terms as against the specific provisions of section 4; and the rule of statutory construction is that specific provisions of a statute override general provisions of that statute in respect of the subject matter they governed.[11]

The limitation period for actions on mortgages of land being ten years under the Kaduna State Limitation Edict it means that in Kaduna State a mortgagee banker must bring an action to enforce a mortgage of land within ten years of the cause of action arising, failing which the cause of action will become statute barred and no

action can be brought by the mortgagee banker in respect of the said mortgage in any court of law. The same will be the fate of a mortgagor who fails to take steps to redeem mortgaged land within the ten years limitation period. For mortgages of other types of property beside land, of course the limitation period is five years as provided by section 18 of the Limitation Edict.

Now when can a cause of action be said to have arisen or accrued for the purposes of the Kaduna State Limitation Edict? Section 10(1) of the Kaduna State Limitation Edict provides that no right of action to recover land shall be deemed to accrue unless adverse possession of the land in issue has been taken by the person in whose favour the Limitation period can run. The implication of this provision is that in Kaduna state a mortgagee banker to whom land has been mortgaged by a mortgagor can only assert the statute of limitation against the mortgagor if he has been in adverse possession of the mortgaged land. Similarly a mortgagor of land in Kaduna state can only frustrate the banker's security by asserting that the debt is statute barred if he has been in adverse possession of the mortgaged land. By the provision of S. 8(1) of the edict it is the taking of adverse possession by the person claiming a benefit under the Edict that gives rise to a cause of action to the person against whom the Edict is invoked.

The provision of section 10(1) of the Kaduna State Limitation Edict gives rise to a number of burning questions.

First, what does adverse possession exactly connotes?

Secondly, for possession to be adverse, must the party relying on adverse possession be in actual possession of the mortgaged land or is constructive possession sufficient? If constructive

possession is sufficient, can possession by a receiver appointed by a mortgagee banker in the enforcement of the mortgage be considered as such sufficient constructive possession?

Thirdly, does the requirement of adverse possession under section 10(1) of the Edict exclude any other incident from giving rise to a cause of action for the purposes of the Limitation Edict?

And finally, in relation to other types of property beside land not covered by section 10(1) of the Limitation Edict, what incident or incidents give rise to a cause of action?

Beginning with the first question, it will appear that adverse possession not only connotes possession that is inconsistent with the claim of the party against whom it is asserted that he is the legal owner or owner of a substantial interest in the land in issue but also possession that is capable of extinguishing whatever interest or estate the party against whom it is asserted may have in the land in issue. Either way it is possession that seeks to "annex" or "swallow-up" the interest or estate of the party against whom it is asserted in the land in issue.

This being the case can a mortgagee banker who takes possession of mortgaged land to secure his security successfully claim to be in adverse possession as to give rise to a cause of action to the mortgagor which if not utilised by the mortgagor within the ten years limitation period will entitle the mortgagee banker to assert the statue of limitation against him? The answer to this question is in the negative. For taking possession of mortgaged land by a mortgagee banker to secure his security does not qualify as an adverse possession vesting in the mortgagor a

cause of action, and as such can not entitle the mortgagee banker to protection under the Limitation Edict.

Not so a mortgagee banker taking possession of mortgaged land in enforcement of his mortgage. For such taking of possession qualifies as an adverse possession and so can be asserted against a mortgagor who fails to take any legal action within the ten years limitation period stipulated by the Kaduna State Limitation Edict. Indeed section 11 of the Kaduna State Limitation Edict No. 12 1990 by providing that:

> when a mortgagee of land has been in possession of any of the mortgaged land for a period of ten years after the expiration of the time fixed for redemption... no action to redeem the land of which the mortgagee has been so in possession shall be brought to recover it by the mortgagor or any person claiming through him,

is saying that only possession taken by the banker mortgagee in the enforcement of the mortgage after the expiration of the mortgagor's date of redemption qualifies as an adverse possession.

With regard to the second question on whether possession of the party claiming adverse possession has to be actual possession or whether constructive possession is sufficient? the answer to the question will depend on the construction that is placed on section 10(1) of the Limitation Edict which is silent on the point. Thus while a strict construction of section 10(1) will exclude constructive possession, a liberal construction of the section will include constructive possession. If the provision is so liberally constructed there is no reason why possession of the mortgaged property by a receiver appointed by the mortgagee enforcing the

mortgage should not be treated as an adverse possession which the banker can assert against a mortgagor under the Limitation Edict.

Concerning the third question whether adverse possession is the only event that gives rise to a cause of action for the purposes of the Limitation Edict or whether there are other events? the simple answer to this question given the express and explicit provision of section 10(1) which governs the point, is that adverse possession is the only event that can give rise to a cause of action for the purpose of the Limitation Edict. This adverse possession can be asserted by the mortgagee banker when the mortgagor fails to pay any interest due under the mortgage agreement or when he fails to pay the principal sum or breach any fundamental term of the mortgage agreement between him and the mortgagee banker.

On the fourth and last question requiring knowledge of incidents that give rise to a cause of action in respect of other types of mortgaged property other than land which is covered by section 10(1) of the Limitation Edict, it will appear that even though such property are not covered by section 10(1) of the edict which covers land, the incident or event that gives rise to a cause of action for the purpose of the Kaduna State Limitation Edict is also adverse possession. The above view is informed by the rationale behind the legal stipulation that adverse possession of the mortgaged land should be the event that gives rise to a cause of action for the purposes of the Kaduna State Limitation Edict. This rationale is borne out by the fact that adverse possession of the mortgaged land by the mortgagee or mortgagor will more than any event bring home to the mortgagor's or mortgagee's mind the

perilous station of his interest or estate in the mortgaged land and thus galvanise the mortgagor to redeem the mortgaged land or the mortgagee to take steps to realise the mortgage. If this rationale holds good for land there is no reason why it shouldn't hold good for other types of mortgaged property.

Indeed section 33(1) of the Kaduna State Limitation Edict which is informed by the above rationale does not draw any distinction between landed property and any other types of property. The section provides that the period of limitation will be postponed where evidence is shown that at the time the cause of action was supposed to have arisen, fraud or concealment was practised on the party against whom the statute of limitation is being asserted by the party asserting the statute of limitation or his agent or any person through whom he claims and his agent. Also by the provision of the same section 33(1) of the said edict a honest and genuine mistake by a party against whom the statuce of limitation is asserted as to when a cause of action is supposed to arise in favour of the party asserting the statute of limitation will also operate to postpone the period of limitation. In all these cases the period of limitation will not begin to run until the party against whom it is asserted discovers the fraud, concealment or mistake as the case may be or could with reasonable diligence have discovered it.

Barring any Postponing factor such as the ones provided by section 33(1) if the period of limitation begins to run against a mortgagee banker, acknowledgement of the debt secured by the mortgage by the mortgagor either by partly paying a portion of the mortgage sum or interest thereon or by a mere written

acknowledgement will have the effect of making the limitation period recommencing afresh from the date of the acknowledgement and not before.[123] And this acknowledgement will not only bind the mortgagor making it but any other person in possession with him. However where two or more mortgagees are in adverse possession by virtue of the mortgage, acknowledgement of the mortgagor's title or his equity of redemption can only bind the mortgagee making the acknowledgement and his successors in title but cannot bind the mortgagee who did not acknowledge the title or equity of redemption of the mortgagor. Neither does it bind his successors.[124] Thus for such a mortgagor the limitation period does not recommence afresh.

In Lagos state S.29 of The Lagos State Limitation Law fixed twelve years as the limitation period for actions to recover land; and six years as the limitation period in respect of contracts, tort and other actions. Like in Kaduna state the implication of this provision is that even though a mortgage may be a specie of contract whose limitation period has been pegged at six years, if the mortgage involve land and not some other type of property the limitation period will be twelve years and not six years. Indeed this was confirmed in U.B.A. Vs. Europharm (Nig) Ltd[125] in which the Court of Appeal Lagos division relying on section 29 of The Lagos State Limitation Law held that the statutory limitation period for a mortgage of land is twelve years and not six years which is the limitation period for contracts and torts.

Also in Lagos state as in Kaduna state, an acknowledgement of the mortgagor's title or his equity of redemption in the mortgaged property by a mortgagee after the limitation period has begin to run in his favour will have the effect of renewing the limitation

period so that it will start afresh from the date of the acknowledgement and not before. Similarly an acknowledgement of the mortgage debt by the mortgagor in whose favour the limitation period has began to run will have the effect of renewing it. Thus in Akinola Vs. Faseun and others[126] where the plaintiff lent some money to the defendants on the security of their farm land the contention of the defendants that the debt was statute barred was rejected by the Lagos High Court which held that since within the twelve years limitation period there is evidence of written acknowledgements of the debt by the defendants in the form of reply letters to the plaintiff's demand letters, the limitation period has not ran its full course because of the many recommencing periods it suffered as a result of the defendants' acknowledgement letters.

Section 6(2) and section 12 of The Limitation Law of Oyo State provides for the intendment of the limitation law which is to prevent a situation whereby a landowner or an owner of some other property who has allowed an adverse claimant to remain in possession of his property for a period of twelve years or less, depending on the property involved, without resisting such possession to come to court after that period to claim the property. This provision of the law was up held by the Court of Appeal, Ibadan division, in Adejumo Vs. Olawaiye[127] where the Court of Appeal likened the doctrine of limitation to that of laches and acquiescence and held that it will be unfair for the plaintiff who had acted as if he had waived his rights thereby putting the defendant in a situation which it would not be reasonable to place him if the plaintiff's remedy were afterward to be asserted.

Although a statute of limitation is a double edge sword capable of cutting the mortgagor customer like the mortgagee banker a mortgagee banker will do well to remember that where the sword of the limitation law cut him his loss is usually greater than that of a mortgagor where it cuts him. The reason is that while a mortgagor caught by the limitation law may lose his property to the mortgagee banker he will be free of any legal action to recover any amount of the secured sum that the mortgaged property could not pay. Thus it may turn out that even where a mortgagee banker is suppose to benefit from the limitation law going against the mortgagor, the mortgagor may nevertheless emerge triumphat where the value of the mortgaged property which he has lost to the mortgagee banker by virtue of the limitation law is far less than the sum advanced to him by the mortgagee banker.

On the other hand where a mortgage debt becomes statute barred under a statute of limitation, the mortgagee banker if he is not in possession of the mortgaged property will lose all his "goods" unless where the mortgagor is a conscionable man and decide on his own to pay him the sum due under the statute barred mortgage.

But that as it may the fear of a mortgage becoming statute barred is that of an equitable mortgagee whose mortgage is under hand. For it is only the equitable mortgagee whose mortgage is under hand that requires the assistance of the court to enforce his mortgage. As for the legal mortgagee banker and the equitable mortgagee banker whose mortgage is under seal, they can without reference to any court enforce their mortgages and so fear no statutory bar.

But for the equitable mortgagee banker whose mortgage is under hand, the fear of the statute of limitation may well be the beginning of wisdom and he will do well if he periodically renews the limitation period by demanding acknowledgement of the mortgage debt from the mortgagor either in the form of part payment of the mortgage sum or in the form of reply letters to his demand letters.

Before bringing to a close the discussion on the limitation laws a question which may have very little to do with securing the banker's mortgage, but a question of very practical and legal importance to the discussion of the limitation laws must be asked and considered here. This question is, can a mortgagee banker in possession under a statute barred mortgage be legally ejected from possession through the instrumentalities of judicial process by reason of his mortgage becoming statute barred?

The law in America is that a mortgagor cannot maintain ejectment against the mortgagee until the debt is repaid.[128] The debt is not satisfied by mere lapse of time. The statute of limitation is a bar to the remedy only but does not extinguish or even impair the obligation of the debtor. It is available in judicial proceedings only as a defense and can never be asserted as a cause of action by the mortgagor. It is to be used as a shield and not as a sword.

Even though there has not arisen a case in which this question was decided by our courts, it is submitted that should the question arise it is likely to be decided along the line of American law on the point if regard is had to the Court of Appeal decision in G.O. C. Vs. Fakayode[129] where the Court of Appeal while commenting on

difference that may exist between a legal and equitable mortgage on this matter relates to the procedure of the mortgagor getting his property back and not to the duty of the bank to release the mortgaged property to him.[13]

So no matter how much a banker may want to secure his mortgage he must stop short of denying the mortgagor his legal right to redeem the mortgaged property. It is for this reason that the law forbids a mortgagee banker from seeking to clog the equity of redemption by inserting conditions into the mortgage agreement intended to make the property irredeemable. The law's position against clogging the mortgagor's equity of redemption was summed up in the case of Samuel Vs. Jarrah Timber Corporation[14] where Lord Lindley held "once a mortgage always a mortgage."

In further protection of the mortgagor's equity of redemption the law has since recognised that a mortgagor at the time of going into a mortgage agreement is a necessitous man likely to be imposed upon harsh conditions which would result in his losing his property. So the law provides that no contract between a mortgagor and a mortgagee at the time of the mortgage and as part of the mortgage transaction can be valid if it prevents the mortgagor from getting back his property on paying off what is due to his security.[15]

Accordingly such terms in a mortgage agreement which gives the mortgagee banker an option of purchasing the property, or which insert a clause limiting the redemption period or which contain a warranty by the mortgagor not to redeem after a particular date or which limit redemption only to the mortgagor or certain heirs will be struck down as clogs on the equity of redemption.

Thus in Ejikeme Vs. Okonkwo & Anor[134] a provision in the mortgage agreement which permits the mortgagor to redeem the mortgage only after thirty-five years was held as clogging the equity of redemption and therefore invalid. The facts of that case were that sometimes in 1966 the respondents (both now deceased) borrowed from the appellant the sum of $3,700 to develop a landed property at No. 3 Iweka road Onitsha which property was mortgaged to the appellant as security for the loan. Repayment of the loan was to be made by half of the rents collected from the secured property monthly for a period of thirty-five years at the end of which the property may be re-assigned to the mortgagors. The original mortgagors died during the civil war before the whole debt is amortised and their successors in title gave notice to the mortgagee to pay the outstanding debt on 20/6/1982. But the appellant refused this bid and stuck to the original agreement of collecting half the rents in payment. The mortgagors successors refused to make the payments and the appellant sued in the High Court. The High Court held that the covenant not to redeem until thirty-five years has elapsed was irregular, a clog on the mortgage and cannot stand, and that the respondents were therefore entitled to an immediate right of redemption. Dissatisfied the appellant appealed to the Court of Appeal and finally to the Supreme Court which both confirmed the decision of the High Court.

The rationale and thrust of the doctrine of equity of redemption was graphically stated by Northington L. C. in the New Zealand case of Vernon Vs. Bethey[135] where he held:

> This court as a court of conscience is very jealous of people taking securities for loan and converting such

> securities into purchases. And therefore I take it to be an established rule that a mortgagee can never at the time of making the loan provide for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any term that the crafty may impose upon them.

It should however be noted that even though the mortgagor's equity of redemption is a legal right which is jealously protected by the law, the law jealous protection of the right is relaxed after the mortgage transaction has been completed and the right itself will be extinguished after the date fixed for redemption has come and passed.

The protection of the right is relaxed after the completion of the mortgage transaction because the mortgagor can no longer be said to be a necessitous man that can be imposed upon. If therefore after the completion of the mortgage transaction the mortgagor decides to sell the mortgaged property to the mortgagee banker, the sale will be valid. Also if the date of redemption of the property came and passed without the mortgagor redeeming, his legal equity of redemption stands extinguished and the mortgagee banker can among other things foreclose the mortgagor's equitable right of redemption.[36]

Before any of the above situations arises however, the banker mortgagee has no choice but to put up with the mortgagor's equity of redemption.

3.9 ENFORCEMENT OF MORTGAGES

3.9.1 Enforcement Measures

Should the mortgagor fail to exercise his right of equity of redemption before or on the date fixed for redemption, the banker mortgagee is entitled to enforce the mortgage with a view to recouping the money loaned to the mortgagor. He can thus enforce the mortgage by either sale, foreclosure, appointment of a receiver or taking possession of the mortgaged property.

The machinery for the banker enforcing the mortgage by either of the above means depends on the type of mortgage that was executed in his favour. If it was a legal mortgage or an equitable mortgage under seal the banker can by himself enforce the mortgage without going to court. But if it was an equitable mortgage under hand, the mortgagee banker will have to go to court to enforce the mortgage through any of the remedies stated.

3.9.2 Sale Of The Mortgaged Property

The power of a mortgagee banker to enforce his mortgage by way of sale of the mortgaged property depends on the type of mortgage that was created in his favour by the mortgagor customer. If it is a legal or equitable mortgage under seal he can sell the mortgaged property without recourse to court. But if it is an equitable mortgage under hand he must apply to court for a judicial sale of the property.

The mortgagee banker has a right to sell the mortgaged property at any time after the mortgagor's equity of redemption has lapsed. Perhaps this is the most significant power a mortgagee banker has against the mortgaged property.

However, where the property mortgaged is land, the mortgagee banker in addition to waiting for the mortgagor's equity to lapse, must also meet the following conditions:-

First, the banker mortgagee must have served notice requiring payment of the mortgage money on the mortgagor and the mortgagor has defaulted in making payment of the mortgage money or part thereof for three months after such service.

Secondly, some interest under the mortgage must be in arrears and unpaid for two months after becoming due.

Thirdly, there must have been a breach of some provision contained in the mortgage deed or in law which was to be observed by the mortgagor, besides however a covenant for payment of the mortgage money or interest thereon.[137]

Whenever the right of sale arises in favour of a banker mortgagee, the mortgagee banker in the exercise of his power of sale is not a trustee of the power of sale in favour of the mortgagor. This means that the mortgagee banker need not act as the mortgagor wishes or in the best interest of the mortgagor and so is entitled to sell the mortgaged property when it suits him to do so. The right is exercised solely for his own benefit.[138]

However, the mortgagee banker in the exercise of his power of sale comes under a duty to take reasonable precaution to obtain the true market value of the property at the moment he chooses to sell it. It is for this reason that it will be a wise precaution for a banker to obtain an independent valuation from an expert valuer before selling. Once he takes this reasonable precaution and still sells at an undervalue he can not be liable to the mortgagor in damages for the undervalue sale. The case of Ekaeteh Vs. Nigerian

Housing Development Society Ltd & Anor[139] is authoritative on this point. In that case property was mortgaged by the plaintiff to the first defendant in consideration of the sum of #2,500,000 advanced to him by the first defendant. The first defendant sold the property in exercise of its power of sale. The learned trial Judge found that the property was sold at an undervalue, but was unable to award the plaintiff damages because he further found that there was no evidence before him upon which he could determine the price which the property would have fetched. He also could not find that the first defendant did not exercise reasonable precaution before selling the property at the price for which it sold it. The plaintiff appealed against the refusal of the trial court to award him damages and also for refusing to set aside the deed of conveyance in favour of the second defendant.

It was held that a sale at an undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue.

Secondly, that if a mortgagee selling under a power of sale takes pain in exercising that power, to act in good faith, his conduct with regard to the sale is unimpeachable.

Thirdly, that since there is no evidence of malafide or collusion on the part of the first defendant, the sale to the second defendant cannot be set aside.

Where however evidence of bad faith or lack of due diligence is discovered on the part of the mortgagee banker in the exercise of his power of sale he will be liable to the mortgagor in damages if he sells at an undervalue. The case of Cuckmere Brick Co. Vs. Mutual Finance[140] established this point. In that case the

mortgagee sold a property without mentioning that the property had planning permission for 100 flats, a fact which would have increased the value of the property had it been mentioned, it was held that the mortgagor was entitled to damages from the mortgagee, representing the difference between the price obtained and what would have been obtained had the mortgagee revealed the true worth of the property.

Even though a mortgagee banker in the absence of bad faith and carelessness cannot be damnified in damages for selling the mortgaged property at an undervalue, he is not allowed in law to sell to himself or even to his agent or nominee for him without a court order.[141] It was this law that informed the rather intriguing developments in the case of Nigerian Loan and Mortgage Co. Ltd Vs. Ajetunmobi[142]. In that case land was leased to the respondent for 99 years. He mortgaged the land to the appellant for money to be used to erect a building in accordance with his covenant in the lease agreement. He however did not use the money to build and also failed to pay the interest due on the loan. The appellant in its exercise of its power of sale sold the land to itself having failed to get a bidder that will buy the land at a high price. The appellant, then started building on the land. Later both parties discovered that a mortgagee cannot sell to himself without a court order. Following this discovery the respondent managed to get into possession of the land and excluded the appellant's builders on it. The appellant company obtained an order for possession from a Magistrate Court and the parties agreed that the appellant company can go into possession. While the company was in possession it expended more money on building on the land. The respondent then

advertised the land for sale but the appellant company put up a caution notice and so the respondent could not get a buyer. When the respondent could not pay principal and interest on demand the appellant company gave him a notice of foreclosure. Thereafter the respondent again managed to get into possession of the building erected on the land by the appellant company and changed all the padlocks. The appellant company then brought an action against the respondent for the principal and interest due and also its expenditure on the building. It was held that the appellant company was entitled to both and if the respondent cannot pay, the appellant company can bring an application for judicial sale of the mortgaged land to itself if it is still interested in buying same.

The rule that a mortgagee banker in exercising his power of sale can only sell to himself or his agent or nominee with an order of the court so entitling him was somehow relaxed in the privy council case of Tsekwong Lam Vs. Wong Chit Sen[143] . In that case the judicial committee of the Privy Council held that there was no inflexible rule that a mortgagee exercising his power of sale under a mortgage could not sell to a company in which he had an interest. In that case however the mortgagee and the company have to show that the sale was made in good faith and that the mortgagee had taken a reasonable precaution to obtain the best price reasonably obtainable at the time.

Whenever the mortgagee's banker's power of sale arises and is duly exercised by the mortgagee, it will not be defeated by an earlier illegal sale of the property by the mortgagor. This fact was emphatically stated in the Supreme Court case of Kasunmu Vs. Scott and others[144].

In that case one Laja Mortgaged his property in Lagos to one Miss Peter. Before and when Laja eventually mortgaged the property to Miss Peter the first three defendants in the case were in possession of the property as tenants of Laja. Laja later sold the property to the fourth defendant while the property was still under mortgage to Miss Peter who later in exercise of her power of sale sold it to the plaintiff. When the plaintiff moved in to take possession of the property in pursuance of the sale to him by Miss Peter the mortgagee, all the defendants denied the plaintiff's title to the property. When the case went to court the trial High Court shared the view of the defendants holding that the defendants, particularly the fourth defendant, is entitled to continue in possession pursuance to the sell made to him by Laja. But that the fourth defendant having purchased the property from Laja while the property was under mortgage to Miss Peter took the property subject to the mortgage. Accordingly Miss Peter the mortgagee has effectively exercised her power of sale under the mortgage and the plaintiff who purchased from her is entitled to take possession of the property.

Before exercising the power of sale when it arises it is advisable that the banker mortgagee should take vacant possession of the property first before selling if only to satisfy potential buyers and increase the attraction of the property. Nothing shows the desirability of taking vacant possession before selling than the case of Kasunmu Vs. Scott and Others[143] just considered.

Even though a mortgagee banker has a limited title to the mortgaged property, when he sells the mortgaged property in exercise of his power of sale he will vest full title in the

purchaser who buys from him.[146] In fact section 126(2) of the Kaduna State Law of Property Edict provides that the title of the purchaser will not even be defeated by the fact that no case has arisen to authorise the sale or that due notice of the imminent sale has not been given to the mortgagor or that the power of sale was improperly and irregularly exercised. In essence section 126(2) of the Edict is saying that failure by the mortgagee banker to comply with section 125 of the Edict which stipulate that a mortgagee before exercising the power of sale should meet the requirement of notice requiring the mortgagor to pay up the money owing to the mortgagee will not operate to defeat the purchaser's title. If the improper or irregular sale by the mortgagee has any grievous effect at all it is that it renders the mortgagee liable to an action for damages at the instance of the aggrieved mortgagor. But so far at the sale to the purchaser is concerned it cannot be invalidated.[147]

Provisions of other state laws in Nigeria particularly in Anambra state of Nigeria on the point are similar to the provision of section 126(2) of the Kaduna State Law of Property edit. Thus in Oguchi Vs. Federal Mortgage Bank (Nig) Ltd[148] the Court of Appeal, Enugu division relying on section 64(1) of the Anambra State Law of Property Edict that a mortgagee exercising the power of sale is as in good position as any owner of property selling his property and where he prematurely or irregularly sells to a purchaser, the sale to the purchaser can not be defeated. However the sale must not be fraudulent. For if it is fraudulent it will be set aside for lack of good faith both in the mortgagee banker

and the purchaser from him and it will be inequitable to allow it to stand against the mortgagor.[149]

If after selling the property by the banker mortgagee there remains a surplus after satisfying the banker and the expenses of realising the property, then the banker mortgagee, except where notice of a second mortgage has come to him, must hand over the surplus to the mortgagor. If he fails to do so the mortgagor can sue him in court for money had and received.

Where, however, the mortgagee banker had received notice of a second mortgage, he should hand over the surplus to the second mortgagee instead of to the mortgagor. In fact where inspite of notice of the second mortgage to the banker mortgagee he hands over the surplus to the mortgagor instead of the second mortgagee he will be liable in damages to the second mortgagee.[150]

Sale of the mortgaged property is the most popular form of remedy or means of enforcing mortgages by mortgagee bankers for all types of property. This is because it easily recoups all monies of the mortgagee banker with the mortgagor and settles the mortgagor's indebtedness to the banker once and for all.

The exercise of the power of sale by the mortgagee banker extinguishes any interest or right the mortgagor may still have in the mortgaged property and vest it in any surplus money that may accrue out of the proceeds of sale, and that is where there are no subsequent mortgagees who will be better entitled to the surplus than the mortgagor, provided that they had given notice of their mortgages to the mortgagee banker. Where there is no surplus and it is established that the sale by the mortgagee banker was fraudulent the mortgagor's interest in the mortgaged property will

nevertheless be extinguished and vested instead in the fraudulent mortgagee banker.

3.9.3 Appointment Of A Receiver Over The Mortgaged Property

Instead of an outright sale of the mortgaged property the mortgagee banker may decide to appoint a receiver over the property who will administer it and collect whatever money, for instance rents that may be accruing from the property. Where the mortgagee banker lacks the power to appoint a receiver by virtue of the fact that his mortgage is an equitable mortgage under hand he can apply to court for the appointment of the receiver who if so appointed may have precisely the same function and power of a receiver appointed by the mortgagee banker.

As a means of enforcing mortgages, appointment of a receiver either by the mortgagee banker or by the court is not very prominent as it is in the case of charges, and where it is resorted to in respect of mortgages, it is usually over landed property as opposed to personal property such as insurance policies or stocks and shares of a company.

The power to appoint a receiver over landed property is statutory[151] while in respect of other types of property the power is often inserted into the mortgage agreement between the banker mortgagee and the mortgagor.

It is worth noting that while the Kaduna State Law of Property Edict[152] does not disqualify any person or body corporate from being appointed a receiver, the Companies and Allied Matters Act[153] disqualifies an infant, any person found by a competent court to be of unsound mind, a body corporate, an undischarged bankrupt unless

he shall have been given leave to act as a receiver or manager of the property or undertaking of the company by the court by which he was adjudged bankrupt, a director or auditor of the company, any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of the companies and Allied Matters Act from being a director by reason of having been convicted by a High Court of any offence in connection with the promotion, formation or management of a company, from being appointed as a receiver or manager. The implication of the provisions of the Kaduna State Law of Property Edict is that, subject to the prudence of the banker mortgagee or of the court any person can be appointed a receiver, while in the case of the Companies and Allied Matters Act the implication is that for a person to be appointed a receiver he must not labour under any of the disqualifying factors of S.387(1) of the Companies And Allied Matters Act enumerated above.

The two provisions of the different laws providing for qualifications for appointment as a receiver don't always come into conflict with each other in that while section 387(1) of the Companies and Allied Matters Act strictly governs appointment of receivers and managers over property of a company and has no application on appointment of receivers over individual property, section 131 of the Kaduna State Law of Property Edict is a general provision dealing with appointment of receivers over landed property either of an individual or of a company. However where the two provisions come into conflict section 387 of the Companies And Allied Matters Act will prevail not only because it is a federal statutory provision but also because it is a specific

statutory provision that oust or qualify the general provision of section 131 of the Kaduna state Law of property edict.

Where a receiver is appointed by a mortgagee banker or the court his duty shall be to manage the mortgaged property and collect all incomes such as rents and profits accruing from the property, in the name of the mortgagor or the mortgagee banker. He can also insure the property against any loss during the period of his receivership. The receiver shall do all such things that will realise the security of the mortgagee banker by paying off the principal sum of money secured under the mortgage and interest thereon.[154]

As a general rule the receiver has the right to take control of any asset or assets which is subject to the mortgage he is appointed to enforce. There is however one important exception to this rule which is that if the mortgagor entered into a contract with a third party before the receiver was appointed and if, by reason of that contract the third party had a lien over assets of the company which came into his hand, the receiver would not be entitled to control any asset which actually came into the hands of the third party and which the third party held by reason of his lien.[155]

So once a receiver has been appointed he should find out whether any such contract has been made by the company. If so, he has a duty to prevent any of the assets which are subject to the mortgage from falling into the hands of the third party entitled to the lien.

154

A typical case where in practice, a receiver may be appointed by a mortgagee banker so entitled is where the mortgaged property let by the mortgagor and a sale subject to tenancy is considered unwise for the simple reason that it may not be easy to find a purchaser immediately who will be ready to purchase the property subject to the existing tenancy. So appointment of a receiver is resorted to in the interim.

When a receiver is appointed in the above circumstances the appointment instrument should be exhibited to the tenants who must thereafter pay all their rents to the receiver.

Strictly speaking, even though a banker mortgagee appointing a receiver may set out the terms of the receivership in the receivership instrument, he has no say in the manner in which the receiver conducts his receivership. However, in practice, the banker normally keep a close eye on the activities of the receiver. As the banker does this he should take care not to appear to be too closely involved in the activities of the receiver or else he would be deemed to have entered into possession of the property. And if he is so deemed, he will be subject to precisely the inconveniences of a mortgagee in possession[156] which the appointment of the receiver might have been intended to avoid.

It is important for the mortgagee banker to bear in mind that his appointment of a receiver takes effect only when the document appointing the receiver has been received by the receiver and the appointment accepted by him.[157]

Generally speaking, enforcement of mortgages by appointment of a receiver is a middle course remedy available to a mortgagee banker who will be hard put to sell the mortgaged property or to

take possession of the property. Both selling and taking possession will be difficult where the property is under the occupation of a third party with rights or claims against it. So appointment of a receiver is resorted to.

From the point of a mortgagor, appointment of a receiver is perhaps the most favourable remedy the mortgagee banker can use against his property in that if the receiver appointed by the banker managed the property well and repaid all his indebtedness to the mortgagee banker, his property will be released to him free of the mortgage and he will become landlord over it once more. This remedy therefore is by far more comfortable to him than the remedies of sale and foreclosure which will extinguished his title to the property for ever.

3.9.4 Foreclosure

Foreclosure as a means of enforcing mortgages means nothing more than the mortgagor's equity of redemption becoming extinguished and radical title to the mortgaged property vesting absolutely in the mortgagee. Thus when the date fixed in the mortgaged agreement for the redemption of the property comes and passes without the mortgagor redeeming the property by paying off the sum secured and any interest thereon, the mortgagee banker can foreclose the mortgagor's right to redeem the property and the property will become that of the mortgagee forever.

From the above explanation of the mortgagee's remedy of foreclosure it is clear that foreclosure as a means of enforcing bank mortgages is a means with great benefits to the mortgagee banker but with injustice to the mortgagor. A simple illustration will reveal these. If for instance the money secured under the

mortgage is ₦500,000.00 and the value of the mortgaged property is ₦1,000,000.00, the mortgagee banker will be ₦500,000.00 better off and the mortgagor customer will be ₦500,000.00 worse off if he mortgagee banker chooses to enforce his mortgage by means of foreclosure.

The great injustice of the remedy of foreclosure to the mortgagor is also borne out by the fact that even though the mortgagee banker will be entitled to retain his ₦500,000.00 where the value of the property turned out to be greater than the sum he loaned to the mortgagor, the mortgagor will not be entitled to retain the difference between what was loaned to him and the value of the mortgaged property where the mortgaged property turned out to be worth less than the sum advanced because the law is that a decree of strict foreclosure does not extinguish the debt unless the mortgaged property is of sufficient value to satisfy it.[158]

Enforcement of mortgages by the remedy of foreclosure however is not such a sweet orange to the mortgagee banker that does not contain some quantity of bitterness. For lying in wait of the mortgagee banker desirous of exercising the right is a dilatory and expensive procedure that may not even at the end of the day foreclose the mortgagor's right of redemption.

The procedure usually is that the mortgagee banker obtains from the court a foreclosure order nisi. This states that if the debt is repaid by a certain day, usually six months from the date of making the order nisi, the mortgage will be discharged. But that if, the money is not paid, the mortgage will be foreclosed absolutely. If, when the date comes, the debt is not repaid, a foreclosure absolute is made, and the property becomes that of the

mortgagee forever. Thus in Nigerian Housing Development Society Ltd. Vs. Mumuni[159] where a foreclosure order nisi was made in favour of the appellant mortgagee against the respondent mortgagor it was held by the Nigerian Supreme Court that the appellant mortgagee was entitled to a foreclosure order absolute on the respondent mortgagor failing to redeem the mortgaged property on the appointed date.

Although a foreclosure absolute is in its terms final, the court will occasionally open a foreclosure absolute, as for example, when an unforeseen circumstance prevented the mortgagor at the last moment from raising the money.

It is the above cumbersome, dilatory, expensive and uncertain procedure that led George Osborne into remarking that "foreclosure in operation is, slow, costly and forecloses imperfectly.[160]

It is a combination of these drawbacks that make mortgagee bankers to be reluctant of enforcing their mortgages through the foreclosure route. Since even where it is resorted to the court may occasionally open a foreclosure absolute in proper cases so that the mortgagor can redeem. Again the court often makes an order of sale where an order of foreclosure is sought.

Where a mortgagee banker has started foreclosure proceedings he is not permitted without the consent of the court to exercise his power of sale after the foreclosure order nisi has been made but before a foreclosure absolute because this would deprive the mortgagor the right to redeem given by the court.

3.9.5 Taking Possession Of The Mortgaged Property

A mortgagee banker's power to take possession of the mortgaged property by way of enforcing his mortgage is neither statutory nor dependent on an express provision providing for the right in the mortgage deed, instead it is derived from the estate vested in the mortgagee banker as a result of the mortgage.

A mortgagee banker who is entitled to enforce his mortgage by taking possession of the mortgaged property, it will appear from the Supreme Court decision in Awojugbagbe Light Industries Ltd. Vs. B. N. Chunukwe & Anor[161] that he can forcefully acquire possession from the mortgagor if the mortgagor is in possession and refuses him entry. If he does so he will not be liable for damages for forcible entry because the right to possess the property had become vested in the mortgagee banker and the forcible entry was done in furtherance of his right.

The facts of the case were that between October 1979 and 1987, the second respondent granted a loan of ₦215,000.00 to the appellant secured by a mortgage deed executed over the appellant's landed property. By May 29, 1987 the appellant's indebtedness stood at ₦364,142.08. When the appellant failed to pay the said sum on demand the second respondent exercised its power under the mortgage deed and appointed the first respondent as a receiver over the mortgaged property.

After the first respondent had served notice of his appointment on the appellant and the appellant failed to comply with his request for the keys to the premises, the receiver with the aid of security dogs and their handlers took over the possession of the premises. In consequence of this, the appellant

instituted an action in the High Court of Oyo state seeking declarations, injunction and damages for trespass. The High Court after hearing the case dismissed the appellant's claim. His appeal to the Court of Appeal and finally to the Supreme Court were also dismissed. On the issue of forcible entry by the mortgagee, the Supreme Court per Mohammed Bello C.J.N. (as he then was) held that a mortgagee who, like a landlord exercising his right to possess after the expiry of his tenant's lease, entered and took possession of the mortgaged property in exercise of his right under the mortgage agreement is not liable for damages for forcible entry because the right to possess has become vested in the mortgagee and his agents.

Sound as the reasoning of the Supreme Court in the above mentioned case may appear, it is doubtful if it will not have the negative effect of encouraging mortgagees to resort to self help or taking the law into their hands, actions both forbidden by law. The supreme court itself in the case of Nwarike Vs. Commissioner of Police[162] stressed the need for parties not to resort to self help in the pursuit of what they perceived to be their bonafide rights but rather should have recourse to the law courts for the resolution of their differences.

It is for this reason that the United States law on the point appears to hold better reason. In the United States jurisdiction, taking possession of a mortgaged property by the mortgagee in enforcement of his mortgage must not only be legal but must also be peaceably made.[163] This position appears not only more reasonable but conforms more to the spirit of the law than the Nigerian position under which a mortgagee banker can literally invade the

property in the possession of the mortgagor in the name of enforcing his mortgage by taking possession of the mortgaged property.

Usually where a mortgagee banker takes possession of the mortgaged property to enforce the mortgage, the taking of possession will not be the actual means of enforcing the mortgage but will only be a means to the actual means which could be either sale of the mortgaged property, appointment of a receiver or foreclosure. In this way taking of possession of the property by the mortgagee banker is always an interim remedy pending the final remedy. The point being made here brings to the fore the fact that the various means of enforcing the banker's mortgage can be exercised concurrently except of course the right of sale during the tenure of a foreclosure nisi.[164]

It should be noted that even though a mortgagee banker will usually take possession of the mortgaged property with a view to exercising some other remedy of his that will recover him his money on loan, instances exist when the mortgagee will take possession of the mortgaged property and not exercise some other remedy but simply remain in possession, lease out the property or rent it out.

Where the mortgagee banker instead of exercising some other remedy of his that will extinguish forever any interest or right the mortgagor may have in the mortgaged property, he chooses to rent or lease it out, the mortgagor may later have the proper y back free from the mortgage after the mortgagee banker has recouped his money on loan from the rents paid to him by the tenants to whom he had leased or rent out the property. If this happens the

mortgagor will enjoy the same benefit which he enjoys where a receiver is appointed by the mortgagee banker over the property.

Again even though a mortgagee banker is entitled under Nigerian law[165] to forcefully eject a mortgagor in possession in the exercise of his power to take possession of the mortgaged property in other to enforce his mortgage he cannot so eject tenants who are in occupation of the property as tenants of the mortgagor. In this case he takes possession by directing the tenants to pay to him instead of to the mortgagor. The rents which he thus receive must be applied by him in satisfaction of his claim for principal and interest. This also may end in the mortgagor getting back his property free of the mortgage.

Finally, in practice, it is very rare indeed to find a mortgagee banker exercising his remedy of taking possession of the mortgaged property. The most important practical reason for this is that it is more easier and simpler to appoint a receiver than to take possession. Another reason is that the banker mortgagee seems to fear the application of the rule that a mortgagee in possession is liable to account to the mortgagor for the rents and footing of wilful default, a rule that was forcefully applied in the case of White Vs. City of London Brewery Co.[166] to hold the mortgagee liable not only for the rents he actually collected but for the higher rents which he would have collected had he let it as a "free" house.

With respect to ships, enforcement of mortgages is usually commenced by the mortgagee banker taking possession of the mortgaged ship after which if the mortgagor customer does not take steps to settle the money owing by him to the banker mortgagee, the

banker mortgagee may sell off the ship. This much was decided in the case of Adalma Tanker Vs. Mercantile Bank and Ors.[167]

In that case the plaintiff in 1978 bought a tanker ship named Sintus later renamed Mt. Adalma I from a foreign firm in sweden for 75,000 U.S Dollars. The plaintiff approached the defendant to buy the ship from him. Later when the ship entered Nigeria it was mortgaged by the plaintiff to the defendant for 785,000 U.S. Dollars. It was provided in the mortgage deed that the defendant will only be entitled to take possession of the ship on default by the plaintiff to redeem her if he had registered her in the port of registry. The plaintiff defaulted and the defendant took possession of the ship on 17/11/1993 even though he was yet to register the ship as required by the mortgage agreement. He went on to advertise the ship for sale. At the suit of the plaintiff against the seizure and advertised sale of the ship by the defendant it was held that even though the defendant is entitled to take possession of the ship and advertise her for sale on failure by the plaintiff to redeem its mortgage, the defendant cannot in the circumstance of the case legitimately exercise these rights without complying with the provisions of the mortgage agreement.

A mortgagee banker will normally be entitled to take possession of a mortgaged ship on the default of the mortgagor or on the mortgagor doing anything that will jeopardise the security.[168] If the mortgagee banker so takes possession of the ship he may use her or sell her to recoup his money on loan to the mortgagor. Where he takes the option of using the ship he must use it as a prudent man would and not anyhow because he will be liable to the mortgagor for any imprudent use. Thus where he takes

possession for purposes of speculation which results in a loss through a disadvantageous sale he will be liable to the mortgagor for the value of the ship at the time possession was taken by him.[169]

NOTES AND REFERENCES

1. Megarry R.E. A Manual of the law of Real property 6th ed. (1982) p. 68 quoted in Sheldon and Fidler's Practice and Law of Banking 11th ed. (Macdinad, Mup 1982) P.349
2. Section 119 of the Kaduna State Law of Property Edict No.20 1990' and section 193 of the property and conveyancing Law (Cap 100) Laws Of Western Region of Nigeria. 1959.
3. Sections 4 and 31 of the Registration of Titles law (Cap 121) Laws of Lagos State 1973 and section 9 Registration of Titles Law (Cap 181) Laws of Western Region of Nigeria 1959.
4. Bridges vs. Mess (1957) Ch.475; London and Cheshire Insurance Co. Ltd Vs. Laplagrere Property co. Ltd. (1971) 1 All E.R. 435
5. London and Cheshire Insurance Co. Ltd Vs. Laplagrene Property co. Ltd & Anor (1971) 2 All E.R. 435
6. Ibid
7. Hodgson Vs. Marks (1971)2 ALL E.R. 687
8. Okoye Vs. Dumex (1959) 20 n.l.r. 123
9. Section 193 of the Property And Conveyancing Law (Cap 100) Laws Of Western Region of Nigeria 1959.
10. Rights Of Occupiers As Overriding Interests: Justice Journal (June, 1991 Issue) P.101-104.
11. Sweet Vs. Denfam (1954) 32 W.L.R. 688; Bendal Vs. Whiter (1952)21 ALL E.R. 130, Particularly Lord Denning's Judgment.
12. (1905) A.C. 1175
13. Ibid at P. 1223 per Lord Hodson.
14. Ibid

15. Ibid at P 1234

16. Williams & Glynn's Bank Vs. Boland (1980) ALL E.R. 408

17. City of London Building Society Vs. Flegg (1987) 2 ALL E.R. 435 at 445

18. (1987)2 ALL E.R. 435

19. (1980) ALL E.R. 408

20. (1978) 1 ALL E.R. 104

21. 19

22. (1980) ALL E.R. 408

23. 19

24. (1980) ALL E.R. 408

25. Ibid

26. Section 34 of the 1925 Property Law and section 32(2) of the kaduna State Law Of Property Edict No.20 1990.

27. (1980) ALL E.R. 408

28. (1978)1 ALL E.R. 104

29. (1980) ALL E.R. 408

30. (1987) 2 ALL E.R. 435

31. (1980) ALL E.R.408

32. Ibid

33. (1984) 2 ALL E.R. 435

34. Ibid

35. (1980) ALL E.R. 408

36. (1978)1 ALL E.R. 104

37. (1980) ALL E.R. 408

38. (1987) 2 ALL E.R. 435

39. (1980) ALL E.R. 408

40. Ibid

41. (1987) 2 ALL E.R. 435

42. Ibid at 453

43. (1990) 1 ALL E.R. 1111 At 1115

44. Ibid

45. Mozley and Whiteley's law Dictionary 9th ed P. 196

46. (1992) 8 N.W.L.R. (pt. 258) P 211

47. (1978) N.S.C.C. 334

48. Ibid

49. Ibid; See also Osagie Vs. Oyevinka (1987) 3 NWLR (Pt 59), P.144; and Abhalim Vs. Namme (1992)8 N.W.L.R. (pt 258) P.211

50. (1993) N.W.L.R. (pt 316) p.182 at. 197 -198.

51. Ogundiani Vs. Araba (1978) N.S.C.C. 334

52. (1987) 3 N.W.L.R. (Pt 59) p.144

53. (1970) 30 E.R. 713 at 714

54. (1990) 1 ALL E.R. 1085 at 1101

55. (1990) 1 ALL E.R. 1085 at 1101

56. Willians Glynn's Bank Vs. Bolland (1980)2 ALL E.R. 408 at 451

57. Ibid.

58. (1971) 2 ALL E.R. 684 C.A.

59. Williams and Glynn Bank Ltd Vs. Boland (1980) 2 ALL E.R. 408 at 451.

60. Ibid at 452

61. (1990)1 ALL E.R. 1085 at 1097.

62. (1990) 1 ALL E.R. 1111 at 1115

63. (1971) 1 ALL E.R. 435 at 451

64. (1990) 1 ALL E.R. 1085

65. Rights Of Occupiers As Overriding Interests: Justice Journal (June, 1991 issue) p. 101 - 104

66. Curson L.B: Law of Trust 2nd ed. (mcdonald, MEP 1981) p.270

67. SS.21 and 22 of the land use Act (Cap 203) Laws Of The Federation Of Nigeria 1990.

68. Ibid

69. Ajuwon Vs. Akanni (1993) NWLR (Pt 316) p. 182

70. S. 51 of the Land use Act (CAP 203) Laws Of The Federation Of Nigeria 1990.

71. Section 22 of the Land Use Act (CAP 203) laws Of The Federation Of Nigeria 1990.

72. Section 34 and 36 of the Land Use Act (CAP 203) Laws Of The Federation Of Nigeria 1990

73. (1989) 1 NWLR (pt 97) p.305; Innih Vs. Ferado A & C. Ltd. (1990) 5 NWLR (pt 152) P 604

74. Ibid

75. (1995) 4 NWLR (pt 392)P. 716.

76. Jegede Vs. Eyinogun & Ors (1959) 1 N.S.C.C. 226

77. Agbloe Vs. Sapper 12 WACA 187

78. Ekpendu ors Vs. Erika & Ors (1959) 1 N.S.C.C. 64.

79. Ibid.

80. Singh Vs. Kubhuya (1963) 3 ALL E.R. 499.

81. (1961) A.C. 245

82. (Unreported) Suit No. JF/27/55 decided by the High Court of Plateau State.

83. (1961) W.R.N.L.R. 272.

84. (1962) 1 ALL N.L.R. 230.

85. British and French Bank Ltd Vs. Akande (1961) W.R.N.L.R. 272 Solanke Vs. Abed (1962) 1 ALL N.L.R. 230.

86. Ibid.

87. (1993) 1 N.W.L.R. (pt 270) p. 485.

88. Referred to in Umezulike I.A. In an article: The heady question of execution of mortgage deed before consent: Awojugbogbe Light Industries Ltd. Vs. B.N. Chinukwe (Justice Journal May - June, 1993) p.69 at 71.

89. Ibid.

90. Section 1 of the Land use Act (Cap 203) Laws Of The Federation Of Nigeria 1990.

91. (1993) 1 N.W.L.R. (pt. 270) p.485

92. (1989) 1 N.W.L.R. (pt. 97) P. 305

93. Alhaji Ferdinand Ibekwe Vs. Mrs Lucy Maduka (1295) 4 N.W.L.R. (pt. 392) 716; Solanke Vs. Abed. (1961) N.R.W.L.R. 7.

94. (1993) 1 NWLR (pt 270) p. 485

95. Savannah Bank of Nigeria Vs. Ajilo (1989) 1 N.W.L.R. (pt. 97) P. 305.

96. (1993) 1 N.W.L.R. (pt. 270) P. 485.

97. Section 22 (1) of the Land Use Act (CAP 203) Laws Of The Federation Of Nigeria. 1990.

98. (1961) 2 N.S.C.C. 171.

99. (1963) 3 N.S.C.C. 243

100. (1961) 2 N.S.C.C. 171

101. (1881)

102. (1963) 3 N.S.C.C. 243.

103. Section 119 of the Kaduna State Law Of Property Edict No 20 1990 and section 119 and 194 of the property and conveyancing Law (Cap 100) Laws of Western Region of Nigeria 1959; see also Amankra Vs. Zankley (1963) 3 N.S.C.C. 243.

104. Black Vs. Williams (1857) Ch. 408

105. Section 325(1) of the Merchant shipping Act (Cap 224) Laws Of the Federation of Nigeria 1990.

106. Ibid.

107. Adeniji O.A. The Law and Practice of Banking in Nigeria (Ife, I up) P. 127

108. Section 197-207 of the Companies And Allied Matters Act 1990.

109 Ibid

110. Ibid

111 (1896) A.C. 187

112. Ibid

113. Megarry and Wade op. Cit. P. 883 quoted in Sheldon and Fidler's Practice And Law Of Banking 11th ed. (Mcdonald, Mup 1982) p. 382.

114. Sharp Vs. Rickards (1909) 1 ch. 109

115. White Vs. Pledge (1896) A.C. 187 at 198

116. Section 116(1) of the Kaduna State law of property Edict No 20 1990.

117. Section 116(3) of the Kaduna State Law of Property Edict No 20 1990.

118. (1816) 1 Mer. 572; 35 E.R. 781.

119. Ibid.

120. Oluyade P.A. Nigerian Law Of Conveyancing 1st ed. (Ibadan Iup 1978) p. 188.

121. (1993) 8 NWLR (pt. 312) P. 508 at 515 paras G - A.

122. Oyiola Vs. Ferri (1992) 3 NWLR (pt. 298) p. 407.

123. Section 11 of the kaduna State Limitation Edict 1990.

124. Section 30(1) and (2) of the Kaduna State Limitation Edict 1990.

125. (1990) 6 n.w.l.r. (pt 155) P. 239

126. (1973) A.L.R. 78. See also section 32 of the kaduna State Law of Property Edict 1990.

127. (1996) NWLR. (pt. 425) 436 at 445

128. Frank Vs. Le Roy 49 Cal. 314

129. (1994) 2 NWLR (pt 329) p. 744 at 766

130. Ibid

131. Oluyade P.A. Nigerian Law of Conveyancing 1st ed. (Ibadan I up 1978) p. 191.

132. (1904) 4. 323

133. Ibid

134. (1994) 8 NW.L.R. (pt. 362) 266 at 276.

135. (1961) Zedan 113

136. Samuel Vs. Jarrah Timber Corporation (1904) A.C. 323

137. Section 125 of the kaduna State law of property Edict No 20 1990.

138. Ekaeteh Vs. Nigerian Housing Development Society Ltd and Anor. (1973) 1 N.S.C.C. 373

139 Ibid.

140 (1971) 2 ALL E.R. 633; See also Bank of Cyprus London Ltd. & Ors Vs. Gill (1979) 2 Lloyds Rep. 508

141. Bank of Cyprus London Ltd. & Ors Vs. Gill (1979) 2 Lloyds Rep. 508.

142. (1944) 17 N.L.R. 137.

143. (1983) 2 Lloyds Rep. 438.

144. (1967) 5 N.S.C.C. 227.

145. Ibid.

146. Section 126(1) of the Kaduna State law of Property Edict No 20 1990.

147. Section 126(2) of the Kaduna State Law of Property Edict No 20 1990.

148. (1990) 6 N.W.L.R. (pt 156) P. 465.

149. Victory Merchant Bank Vs. Pelfaco Ltd (1993) 9 N.W.L.R. (pt 317) p. 340 at 354 C.A.

150. Thomson Vs. Bratt (1920) 1 ch. 508.

151. Section 131 of the Kaduna State Law of Property Edict No 20 1990.

152. Ibid.

153. Section 387(1) of the Companies and Allied Matters Act 1990.

154. George Baker Vs. Eynon (1974) ALL E.R. 900

155. Ibid.

156. White Vs. City of London Brewery Co. (1889) 42 Ch. D. 237.

157. Section 131(8) of the Kaduna State Law Of Property Edict No20 1990.

158. Nigerian Housing Development Society Ltd Vs. Mumuni (1977) A.L.R. 241

159. Ibid.

160. George Osbome E. Cases And Materials On Secured Transactions 2nd ed. (Macdonal, MP. 1982) P. 475

161. (1993) 2 N.W.L.R. (pt 270) p. 485.

162. (1986) 3 N.W.L.R. (pt 14) P. 361.

163. Gillet Vs. Eaton 6 Wis. 30 See also Barclays bank Ltd Vs. Bird (1954) Ch. 274, Birmingham Citizens Permanent Building Society Vs. Caunt (1962) Ch. 883.

164. Nigerian Housing Development Society Ltd. Vs. Mumuni (1977) A.L.R. 241.

165. Awojugbagbe Light Industries Ltd Vs. B.N. Chinukwe (1993) N.W.L.R. (pt 270) p. 485.

166. (1889) 42 Ch. A. 237.

167. (1986) F.H.C.N.L.R. 414.

168. Adalman Tanker Vs. Mercantile Bank & Ors. (1986) F.H.C.N.L.R. 414

169. Ibid.

CHAPTER FOUR

CHARGES AS ENCUMBRANCE ON BANK SECURITIES

4.1 INTRODUCTION

The term "charge" has a multiplicity of meanings some of which fall outside the concept of security. For instance, a statement by the maker of a will that he is devising his property to X who is charged to pay N1,000.00 monthly to Y constitute a charge over the property but does not strictly fall into the meaning of a security.

In relation to security the term has the broad meaning of embracing all forms of security be it mortgage, pledge, hypothecation or lien. Still in relation to security a charge has a dual character. When given by an individual over some property of his, it takes the form of a legal or equitable charge. But when given by a company over its own property it takes the form of a fixed or floating charge. This work is concerned with charges as a banker's security given either by an individual in the form of a legal or equitable charge or given by a company in the form of a fixed or floating charge.

A charge no matter the form it takes, in so far as it relates to security for a debt owed has been defined as "the appropriation of real or personal property for the discharge of a debt or personal obligation without giving the chargee either a general or special property in or possession of, the subject matter of the security."[1]

From this definition arises the essential character of a charge, that is, that nothing is conveyed to the chargee banker, but only a burden is imposed on the property to yield an interest,

right or what is elegantly referred to as security to the banker chargee. It is that security the banker may later convert to pay the chargor's debt on default by the chargor. If any difference exist on the quantum of burden each of the various types of charges imposed on the property charged, such differences shall be brought out through the discussion on the different types of charges which shall proceed presently in the order in which they are mentioned above.

4.2 CLASSIFICATION OF CHARGES

4.2.1 Legal Charges

It is worth noting that even though charges have been classified in this work into legal and equitable charges, there is, in practice, no such thing as a legal charge except in odd instances or by statutory creation.[7] In Kaduna state it is section 110(1) of the Kaduna State Law Of Property Edict that provides for a legal charge in respect of landed property. The section provides:

> Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies including the right to take possession from the occupiers and the persons in receipt of rents and profits or any of them as if:

a) where the mortgage is the mortgage of a right of occupancy, a mortgage term for three thousand years without impeachment for waste had been thereby created in favour of the mortgagee; and

b) where the mortgage is the mortgage of a term of years a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee.

Even though the full import, meaning and implication of the above provisions of the Kaduna State Law Of Property Edict is yet to be pronounced upon by any court it is humbly submitted that the decision of Unurhoro J. in Omo-Bare Vs. New Nigerian Bank Ltd[3] while relying on Section 105(1) of the Property And Conveyancing Law of the former western Region of Nigeria which is in parimaterial with section 110(1) of the Kaduna State Law Of Property edict is a decisive authority on the import, meaning and implications of section 110(1) of the Kaduna State Law Of Property Edict.

The brief facts of Omo-Bare Vs. New Nigerian Bank Ltd[4] were that the plaintiff as the managing director of a company (Hibaconis Company Limited) borrowed money on behalf of the company from the defendant to finance importation of goods from abroad and created a legal charge over two property of his. The loan was not repaid when demanded and the defendant advertised the property for sale. The plaintiff instituted an action to restrain the defendant from selling the charged property on among other reasons that the consent of the Governor was not obtained before creating the legal charge. But the court held that even though a legal chargee enjoys the same protection, powers and remedies that a legal mortgagee enjoys, a legal charge does not like a legal mortgage vest a legal estate in the chargee and so no consent is required.

The decision of the court in the above mentioned case reveals the essential character of a legal charge, and indeed all types of charges in the following respects:

First, that unlike a legal mortgage to which a legal charge is likened by section 110(1) of the Kaduna State Law Of Property Edict, a legal charge conveys no legal estate to the chargee and it is for that reason that consent of the Governor which is required before a legal mortgage is created[5] is not required when a legal charge is created.

Secondly, that the similarity between a legal charge created by section 110(1) of the Kaduna State Law Of Property Edict and Section 105(1) of the Property And Conveyancing Law of the former western region of Nigeria relates more to the powers and remedies the legal chargee and legal mortgagee enjoy but less to their status as holders of an interest in the property subject to the security.

Thirdly, that in terms of conveying, or vesting an interest in the property subject to the security to or in the beneficiary of the security agreement even an equitable mortgage is higher in status than a legal charge since it conveys or vests in the mortgagee an equitable estate in the property mortgaged and, it is for that reason that consent of the Governor is required before an equitable mortgage is created.[6]

One intriguing question worth asking and considering here is, whether by vesting in a legal chargee the same powers and remedies of a legal mortgagee, section 110(1) of the Kaduna State Law Of Property Edict and Section 105(1) of the Property And Conveyancing Law of the former western region of Nigeria thereby empowers the

legal chargee not only to enforce his remedies without recourse to court as a legal mortgagee is entitled but also to secure his security like the legal mortgagee by availing himself of any remedy such as taking possession of the charged property?

The answer to this question will depend largely on the legal incidence upon which the legal mortgagee secures his security by taking possession of the mortgage property; so that if the legal incidence is the legal estate vested in the legal mortgagee, then the legal chargee cannot take possession of the property charged in order to secure his security, no estate being vested in him. But if the legal incidence is the remedy of the legal mortgagee, then the legal chargee will be entitled to secure his security by taking possession of the charged property, his remedies being the same with those of the legal mortgagee.

Text writers and Judicial authorities are in agreement that taking possession of the mortgaged property by a legal mortgagee for whatever reasons or purpose is not dependent on any express agreement between the mortgagee and mortgagor nor on any statutory provision but on the legal estate vested in the mortgagee by reason of the legal mortgage.[7] This being the case a legal chargee lacks the power to take possession of the charged property to secure his security. In fact his right to take possession of the charged property to enforce his security is a mere privilege conferred on him by section 110(1) of the Kaduna State Law Of Property Edict and Section 105(1) of the Property And Conveyancing Law of the former western region of Nigeria which entitles him to all the remedies of a legal mortgagee without exception.

Apart from the fact that no legal estate in the charged property is conveyed or vested in a legal chargee, a legal charge also differs from a legal mortgage with regard to the method of creating and discharging the two types of security. With regard to method of creation, a legal charge is a shorter and simpler document than a legal mortgage. With regard to the method of discharge, a discharge note is always scribbled on the title deeds of the mortgagor by the mortgagee on the discharge of a legal mortgage while no such discharge note is written on the title deeds on the discharge of a legal charge.

It is the above distinctive qualities of a legal charge coupled with the unity of remedies it shares with the legal mortgage that makes it a very commendable security device attracting both bankers and their borrowing customers. The beauty of the security lies in the following benefits it confers on the banker chargee and his chargor customer.

First, a chargee banker and a chargor customer need not suffer the expenses and dilatory procedure of obtaining Governor's consent before creating a valid charge since no estate is conveyed or vested in the chargee banker on the creation of a legal charge. Yet the chargee banker enjoys the benefit of a conveyance whenever default is made by the chargor customer in that he can sell the charged property, or appoint a receiver over it, or foreclose the chargor's right to redeem the charged property or take possession of it. It might be said that the legal chargee banker enjoys the benefits of a legal mortgage without suffering its burden.

Secondly, the chargor customer is spared the stigma of a legal mortgage which lingers on even after the discharge of the legal mortgage by reason of the indelible discharge note.

For both the chargee banker and the chargor customer a legal charge expressed to be by way of a legal mortgage is a relatively simpler document to prepare and understand than a legal mortgage which has been derisively described as "a conglomeration of legal nonsense or one long suppression of truth and suggestion of what is false."[8]

However, since a legal charge can only be created over land it follows that a chargee banker can only enjoy the benefits of a legal charge where land is the subject matter of the security. As for charges over other types of property beside land, the chargee banker will have to be contented with an equitable charge.

4.2.2 Equitable Charges

An equitable charge is an agreement whereby a borrowing customer subjects his property to some burden or liability in the form of a security in favour of a banker from whom he borrows money but without transferring title or possession of the property to the banker.

The only requirement of an equitable charge seem to be the intention to create the charge and the existence of a definite property on which the charge shall attach.[9]

With regard to form, it was held in Cradock Vs. Scottish Provident Institution[10] that no special form is required to create an equitable charge. Thus an equitable charge may take the form of a letter promising to execute a formal document of charge or the

form of a bare agreement to charge a particular property of the debtor in favour of the banker.

From the decision of an American court in the case of Metcalfe Vs. Archbishop of New York[11] it will appear also that an equitable charge can arise where an equitable mortgage for some extraneous reasons is not specifically enforceable. The brief facts of the case were that a clergy man purported to mortgage his beneficent at a time that mortgages of such property were forbidden by statute. the court held that a good equitable charge had been created.

This decision is hard to justify legally and rationally regard being had to the intention of the parties which is that a mortgage not a charge be created; unless of course, the word charge and mortgage are used in the instrument creating the mortgage interchangeably and it is difficult to determine which form of security is meant. Then the court finding that a mortgage is not allowed in respect of that transaction falls back on an equitable charge which is the only reasonable security that can be created in respect of that property and in that transaction.

Even though the decision in the American case of MetCalfe Vs. Archbishop of New York[12] may not have any binding effect on Nigerian courts the attempt by the court in that case to read an equitable charge into an equitable mortgage is of considerable relevance to Nigerian courts regard being had to the view of Buckley L. J. in Swiss Bank Corporation Vs. Lloyd's Bank Ltd[13] where he said an equitable charge may take the form of either an equitable mortgage or an equitable charge not by way of mortgage.

An equitable charge like an equitable mortgage lacks the formality and requirement of law and so can only be enforced in

equity. This being the case it will appear that charges as a form of security either to banks or some other creditor were not recognised by common law since as stated earlier a legal charge is quite rare and, where it exists, it is often the creature of a statute. It is therefore with the advent of equity that charges as a form of security acquired some eminence.

Perhaps the best way of bringing out the salient features of an equitable charge is to discuss the differences between it and its "cousin-security"- the equitable mortgage, first as to their mode of creation and secondly as to their basic framework. This is discussed under 4.3.1.

4.2.3 Fixed And Floating Charges

A fixed charge is a charge created by a company over specified asset or assets of the company. Once a fixed charge has been created over such asset or assets, the company can not dispose of the asset or assets covered by the fixed charge except subject to the charge.

Unlike a fixed charge, a floating charge does not attached to a specific asset of the company but hover above the whole or part of the property of the company subject to the floating charge. Also unlike a fixed charge, a floating charge does not prevent a company from disposing of the property covered by the floating charge. For instance, where a floating charge is created over the stocks-in-trade of the company, the company can continue to dispose its stocks-in-trade as if the charge does not exist. But as soon as the charge crystallizes the charge will fix upon whichever assets comprise the company's stocks-in-trade at the moment of crystallization. It is this quality of not preventing the company

from dealing with its property as it deems fit that makes a floating charge more attractive to companies than a fixed charge.

Section 178(1) and (2) of the Companies and Allied Matters Act in defining a fixed and floating charge assigned to them the characteristics mentioned above and went on to state that a floating charge on crystallization becomes a fixed equitable charge on such of the company's assets as are subject to the charge.

Perhaps the best definition of a fixed and floating charge is the one given by Lord MachNaghten in Illingworth Vs. Houldsworth[14] where his Lordship observed:

> I should have thought that there is no much difficulty in defining what a floating charge is in contrast to what is a specific charge. A specific charge is one that without more fastens on ascertained property or property capable of being ascertained and defined; a floating charge on the other hand is ambulatory and shifting in nature, hovering over and so to speak, floating with the property which it is intended to affect until some event occur or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

Charges, whether fixed or floating, created over property of the company are effected or evidenced by a debenture which has been defined as "a written acknowledgment of indebtedness by the company setting out the terms and conditions of indebtedness"[15]

Even though a floating charge may have for the chargor company the desirable advantage of allowing the company to continue to deal with the property subject to the charge as though the charge does not exist, it poses serious disadvantages to the banker chargee

which may have adverse effect on the security created in favour of the banker. Some of these disadvantages include the following:-

First, when a floating charge finally crystallizes, the chargee banker may discover that the value of the charge is substantially lower than he had anticipated. This may happen where for instance the company sells some of its assets covered by the floating charge and instead of using the money to buy other assets that will be subject to the floating charge, the company uses it to settle debts owed by the company. Another instance when the value of the charge may be reduced is where before the charge crystallizes some assets subject to the charge are seized and sold by the Sheriff in execution of a judgment of a court and the proceeds paid over to the judgment creditor by the Sheriff.[16] The value of the charge will also be reduced if it turns out that some of the assets which the chargee banker might have thought subject to the charge were not in fact subject to the charge because the company never own them. This might happen if any of the company's assets is held under hire-purchase agreement. In such cases the assets are owned by the hire-purchase owner and the company's interest in the assets are subject to his rights. Thus when the floating charge crystallizes, the chargee banker would have no better right than the company in respect of these assets, unless he paid off the owner.[17]

Secondly, a floating charge ranks second to a fixed charge even if the floating charge was created first. Thus if a fixed charge is created over assets which are already subject to a floating charge, the fixed charge would have priority over the floating charge even if the fixed chargee had notice of the

floating charge at the time that the fixed charge was being created. The only situation in which a floating charge will have priority over a fixed charge is where the floating charge contains a provision prohibiting the company chargor from creating subsequent fixed charges that will have priority over the floating charge. If there is this provision in the floating charge and the fixed chargee has notice of it at the time his fixed charge is being created then the floating charge will have priority over the fixed charge in the event of a competition between them.[18]

The reason why a prior floating charge is postponed to a subsequent fixed charge is that since a floating charge allows a company to continue to deal with its property as it deems fit, it may as well deal with it by creating fixed charges over it. Connected to this reasoning is the fact that since a floating charge only attaches to property subject to the charge at crystallization, a fixed charge which though created after a floating charge, attaches to the property before the floating charge, and so should have priority over the floating charge.

The only way a banker chargee to whom a floating charge has been given by a company can prevent his floating charge ranking second to a subsequent fixed charge is for him to stipulate in the debenture creating the charge that the company shall not create fixed charges that will rank in priority to the banker's floating charge.[19]

If for any reason the banker chargee cannot prohibit the company chargor from creating subsequent fixed charges, then the banker should in addition to his floating charge take fixed charges

over as many assets of the company as possible so as to minimise the adverse effects of the floating charge.

4.3 EQUITABLE CHARGE AND EQUITABLE MORTGAGE

4.3.1 Distinction Between Equitable Charge And Equitable Mortgage.

With regard to the mode of creation, an equitable charge can be created over the property of the chargor by mere oral words of grant. Without the deposit of any security. Thus in Montague Vs. Earl of Sandwich[20] it was held that a covenant to charge, without more, constitute a charge. However, for that charge to be valid, it appears from the decision of the court in that case that the covenant creating it must not be vague but must be definite as regards the property charged. In other words it must specifically identify the property charged. Otherwise it will be void for vagueness.

On the other hand even though an equitable mortgage can be created by mere words of mouth and sometimes even without such words, it must be accompanied by a deposit of the security or document of title to it with the banker for an equitable mortgage to be created.

Again since in general there is no such thing as a legal charge, there is no need for an equitable charge to be regarded as an agreement to create a legal charge even where legal estates are involved. In the case of an equitable mortgage there is the presumption that an equitable mortgage signifies an intention by the two parties, that is, the banker mortgagee and his mortgagor customer, to eventually create a legal mortgage.[21]

A fundamental distinction also exist between an equitable charge and an equitable mortgage with regard to their nature. For while an equitable charge does not involve the conveyance of any interest or estate from the chargor to the chargee banker,[22] an equitable mortgage does involve some splitting or division of ownership rights between the mortgagor and mortgagee banker.[23] In other words a certain portion of the mortgagor's equitable interest in the property is splitted and conveyed to the mortgagee banker.

The above distinction naturally leads to another distinction between an equitable charge and an equitable mortgage where land is charged to the banker as security. This distinction is that while an equitable mortgagee banker by virtue of some of the equitable interest splitted from the mortgagor and conveyed to him can foreclose the remaining equitable interest in the mortgagor on default by the mortgagor to redeem the mortgage as at when due, an equitable chargee banker cannot foreclose because nothing is vested in him. As was held in Re Lloyd[24] foreclosure depends on the possession of a proprietary interest, legal or equitable, which is not available to an equitable chargee.

The result is that while an equitable mortgagee banker possesses the potentiality of a full beneficial ownership through the process of foreclosure, the equitable chargee banker can never attain the position of a full beneficial owner. All that he can achieve is judicial sale of the property charged. Accordingly it was held by the court in the case of Ogundiani Vs. Araba[25] that an equitable charge merely gives the equitable chargee a right of payment out of the charged property and therefore that the chargee

can only enforce his security through judicial sale or appointment of a receiver under an order of court but never by foreclosure.

Neither can an equitable chargee banker take possession of the charged property like an equitable mortgagee who can take possession by an order of court. For possession like foreclosure is the prerogative of a mortgagee, the two being hinged on an estate or title to the property in the mortgagee which has become absolute at law on the failure of the mortgagor to redeem the mortgaged property as at when due. An equitable charge carries with it no proprietary interest in the property charged to entitle the equitable chargee to the remedies of foreclosure and taking possession of the charged property like the equitable mortgagee.

Again while consent of the Governor is required before an equitable mortgage is created by reason of the equitable estate that is conveyed to the equitable mortgagee on the creation of the equitable mortgage, no such consent is required before an equitable charge is created since it does not vest in the equitable chargee an estate or interest in the property charged.

Finally, even with all these differences between an equitable charge and an equitable mortgage, in most cases the practical way of discerning whether a given credit transaction between a banker and his customer is an equitable charge or an equitable mortgage, regard must be had to the phraseology employed in creating the security because traditionally certain language creates a charge and other language creates a mortgage.

4.4 CREATION OF CHARGES

4.4.1 Types of Property Over Which Charges Are Created

In respect of legal and equitable charges, they are usually created over landed property, particularly over Agricultural produce. When so created they are referred to as agricultural Charges. Fixed and floating charges as stated earlier are solely created over company property. The various types of charges and the property over which they are created shall be considered here in the order in which they are above mentioned.

4.4:1 Agricultural Charges

Agricultural Charges whenever and wherever they are created are usually created over land and its produce and over any movable property of the borrower. Where the borrower holds an insurance life policy or stocks and shares, they may be created over these property in addition to the land and its produce.[26]

The banker will be very prudent if in addition to charging all or some of the borrower's property listed here he also apply to the Agricultural Credit Guarantee Scheme Fund Board for the loan to be guaranteed by the board of the scheme. For if he applies and his application is granted, he will be entitled to claim seventy-five percent of the loan from the board if the borrower customer defaulted in payment.[27]

If the loan is so guaranteed the banker should in compliance with Section 11 of the Agricultural Credit Guarantee Scheme Fund Act ensure, where the loan is to be used for the purchase, for instance of livestock and machinery farming input, that the money is paid directly to the supplier of these items who shall furnish the bank with a copy of the delivery note or other document in

evidence of the delivery of the items concerned. Even where an Agricultural Charge is not guaranteed by the board it is advisable that the banker should take this step to safeguard against the borrower using the loan for some other purpose other than for which it was meant. And if he so uses it the chances of the banker being repaid will be rather remote.

Even though it is a rule of law that a chargee, legal or equitable, is not entitled on the creation of the charge to take possession of the charged property, in practice chargee bankers often insist on taking possession of the farm produce charged to them as security for a loan. But since the produce charged may be so bulky that it will be impossible for the banker to take physical and actual possession of them, bankers have over the years devised a practical method of taking possession of the produce by storing them in the bank's warehouse or by having them delivered to an agent acting on behalf of the bank.

Where the bank has no warehouse of its own but is taking possession of the produce by having them delivered to the warehouse of some other person or that of an agent for the bank, the bank should ensure that a warehouse-keeper's receipt is issued to the bank by the warehouse-keeper on taking possession of the produce on behalf of the bank. The receipt is an acknowledgment by the warehouse-keeper that the goods are held to the order of the bank. It should however be noted that a warehouse-keeper's receipt is not a document of title to the produce but merely a document evidencing the receipt of the produce by the warehouse-keeper on behalf of the banker.

After taking possession of the produce and storing them in the warehouse, the banker at a point will have to release them to the chargor customer for sale to pay the debt secured by the charge. It is at this point that the chargee banker will have to insist on a trust receipt being given to him by the chargor customer taking possession of the produce for purposes of sale. The trust receipt affords a measure of protection to the banker chargee should the chargor customer suddenly dies or becomes bankrupt as the banker will be able to show that the produce or proceeds of the produce where the produce have been sold, belong to the banker same having been charged to him by the chargor customer.

By the trust receipt the chargor undertakes to act as trustee and agent to the bank in the sale of the goods. He also undertakes to pay in the proceeds of sale to the bank. Even with this there is the risk that a fraudulent borrower may defraud the bank in breach of the trust as contained in the trust receipt. For instance he can sell the goods and divert the funds instead of paying them to the banker. Again he may pledge the produce to another banker for yet another loan instead of selling them to pay the first banker. Where he sells them to a bonafide purchaser for value and refuse to pay off the banker, the purchaser can not be forced to redeliver the goods to the banker.[28] Also if instead of selling he pledges the goods to another banker who had no notice of the first banker's charge, the second banker will take priority over the first banker who will accordingly lose his security.[29]

It is these inherent risks in a charge of agricultural produce that makes it imperative for the banker to trust a customer before agreeing to accept this form of security. In this regard the

banker will find the remark of F.L. Roland in a lecture to the Institute of Bankers in England instructive enough. He said:

> "Your success as a country banker will show itself in the extent to which your reading of the farmer's character is correct, far more effectually than in the accuracy with which you enumerate his sheep or put a price on his milky cows and baby pigs, his implements or his stocks of corn"[10]

Speaking in the same wise Bowen J. in Sanders boss Vs. Maclean & co[11] observed that "-----mercantile genius consists principally in knowing whom to trust and with whom to deal."

Apart from the shortcomings associated with trust receipts, Agricultural Charges over farm produce are also afflicted by such risks as fluctuation in the prices of the produce, loss through damage or deterioration of the produce especially where they are perishable, the risk of crop failures and a whole load of other disadvantages. It is for these serious risks that a banker taking Agricultural Charges over farm produce should only lend to a certain percentage of the estimated value of the produce and not to the full percentage of the estimated value.

However, charges over agricultural produce do have some advantages. First, they have the major attraction of being self-liquidating. Secondly, if the produce are in high demand with a wide and stable market, there is certainty that sufficient sales would be made to pay off the bank. Thirdly, should the customer fail to pay off his debt, the banker may demand payment of same from the Agricultural Guarantee Scheme Board set up by the Federal Government of Nigeria to underwrite agricultural credit risks and

thereby minimise the problem of lack of collateral securities among farmers. However, for the banker to maintain a claim against the federal government the loan to the customer chargor must have been guaranteed by the scheme. Even where it is so guaranteed the banker must comply with the procedure of maintaining a claim against the board stipulated by Section 12(1) and (2) of the Agricultural Credit Guarantee Scheme Fund Act.[32]

4.4.1.2 Fixed And Floating Charges Over Assets Of The Company

Since a company has power to borrow money for the purpose of its business, it is only natural that it should also have power to give its property as security to the lender. Accordingly Section 166 of the Companies and Allied Matters Act provides that:

> A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.

The above provision not only gives power to a company to borrow and give security to the lender, it also spells out the form of security to be given by the company and the property over which the security will be created. Thus the company can charge its undertaking, its machinery and equipments, its paid and unpaid shares or any other property of the company.

A relevant question to ask here is, how does the company's power to charge its own property particularly shares, stand vis-a-

vis the capital maintenance doctrine which prohibits the acquisition by a company of its own shares[13], seeing that if the company eventually redeems its shares charged in favour of the chargee banker, the company will be acquiring its own shares?

The answer to this question is provided by Section 160 (2)(a) of the companies and Allied Matters Act which provides that "a company may acquire its own shares for the purpose of settling or compromising a debt or claim asserted by or against the company." This provision is an exception to the capital maintenance doctrine prohibiting the acquisition of the company's shares by the company. By this provision therefore a company can charge its own shares and acquire them back by way of redeeming them without offending the capital maintenance doctrine.

In respect of any other property of the company such as land, machineries and other assets the company is entitled to charge them for a loan so long as the borrowing is permitted by the company's memorandum and articles of association and is in furtherance of the objects of the company.[14] For if the borrowing is not permitted by the company's memorandum and articles of association nor is it in furtherance of the objects of the company, it will be ultra vires the company and in violation of Section 39(1) of the Companies and Allied Matters Act which prohibits a company from entering into transactions that are ultra vires it.

However Section 39(3) of the Companies and Allied Matters Act has abolished the common Law and the 1968 companies Act provision which makes an ultra vires transaction void ab initio and incapable of ratification by the company by providing that no transaction shall be rendered invalid by reason only that it is ultra vires the

company. Accordingly neither the company nor the third party dealing with the company can escape the specific performance of a contract by reason of the ultra vires doctrine. If ultra vires has any efficacy under the new law it is that it can be used as an internal control mechanism by the share holders and creditors of the company to restrain directors of the company from entering into ultra vires transactions. As for the third party who enters into a contractual relationship with the company, his interest can never be defeated by ultra vires as it would have been under the old law.

Again Section 68 and 69 of the Companies and Allied Matters Act abolished the doctrine of constructive notice under the old law by which constructive notice of the contents of such public documents of the company such as the memorandum and articles of association of the company was imputed on third parties dealing with the company, who by virtue of the constructive notice they were deemed to have of the contents of the memorandum and articles of association could not enforce an ultra vires transaction against the company because they were deemed to know that the transaction was ultra vires the company but deliberately entered into it.

The cumulative effect of all these is that a banker as chargee of company property under the new law need not bother himself about ultra vires for he is a third party against whom ultra vires has been abolished.[35]

4.5 SECURING THE BANKER'S CHARGE

For legal and equitable charges over land and its produce the banker chargee should take possession of the produce after harvest and store them in his warehouse or the warehouse of an agent for him. If the produce are kept in the warehouse of an agent of the

bank or in the warehouse or a person without any relationship to the banker the banker should insist on a warehouse-keeper's receipt which though not a document of title, does show that the banker has some claim over the property in respect of which the receipt is given.

When release of the produce is eventually sought by the chargor for purposes of sale and repayment of the banker, the banker should ask the chargor to issue him with a trust receipt which will constitute the chargor into a trustee for the banker in respect of the produce and their proceeds after sale. As such trustee the chargor is bound to hand over to the chargee banker the proceeds of sale of the produce. Although as noted earlier under 4.4.1:1 above, where the chargor is a fraudulent man he may breach the trust by pocketing the proceeds of sale or even pledge the produce further to another banker. And in either case the banker stands the loser.[36] This then means that for the banker's charge to be properly secured he must take it from a customer he trusts.[37]

Where an Agricultural Charge include a charge over the chargor's domestic animals such as cattle, sheep and goats, the banker may need to be paying constant visits to the chargor's farm to take physical inspection of their number and well being. This will guide against the chargor selling some of them away while they are still under the charge. It is however not advisable for the banker to take possession of livestock as the cost of maintaining them may be too much for the banker. And if he maintains them and add the cost of maintenance to the chargor's total indebtedness to him the chargor may be unable to repay the total loan.

For fixed and floating charges over assets of a company, the first and perhaps the last thing a banker should think of doing to secure his security is to have the charge registered, first in the company's register of charges[39] and secondly with the Corporate Affairs Commission.[40] With regard to the requirement of registration, there is no distinction between a fixed and a floating charge. Both must be registered.[40] Registration either in the company's register of charges or in the Corporate Affairs Commission is the responsibility of the company creating the charge.[41] In fact where registration with the Corporate Affairs Commission is effected on application by the banker, the banker shall be entitled to recover from the company chargor the amount of any fees properly paid by him to the commission on the registration.[42] The registration with the Corporate Affairs Commission should be effected within ninety days of the creation of the charge failing which the charge will be void.[43] There appears to be no time frame within which registration of the charge in the company's register of charges should be effected.

The Companies and Allied Matters Act Appears to be silent on the effect of a failure to register a charge in the company's register of charges as it merely stipulates criminal sanctions for such failure by the company.[44] In the absence of such an express provision it is difficult to say that a failure to register the charge by the company in the company's register of charges will make the charge so created void even in the face of the express provision of Section 197(1) of the Act which makes a charge void if not registered with the Corporate Affairs Commission within ninety days of the creation of the charge. This is because Section 197(1)

of the Act is cast in specific terms and not in generic terms. So it can only govern registration with the Corporate Affairs Commission as opposed to registration in the company's register of charges.

Now if Section 197(1) of the Companies and Allied Matters Act renders a charge void for lack of registration with the Corporate Affairs Commission within ninety days of the creation of the charge but Section 191 of the same Act will not so invalidate a charge for failure to register it in the company's register of charges, what will be the fate of a charge registered with the commission within the ninety days period but not registered in the company's register of charges? Can such a charge be held valid merely because it has satisfied the provision of the Act which would have rendered the charge void had it not been complied with even though another section of the same Act which merely stipulates criminal sanctions against non registration has not also been complied with?

These are difficult questions to answer. Unfortunately, neither judicial authority nor the Companies and Allied Matters Act itself provide the much needed answers. In the absence of answers from these authorities it will be preposterous to venture in to providing some. It is for this reason that the law on this point should be clarified by either legislative enactment or judicial pronouncement by our courts.

Be that as it may, it is however not in doubt that registration of a charge in the company's register of charges without registration of the charge with the Corporate Affairs Commission renders the charge void by virtue of Section 197(1) of

the Companies and Allied Matters Act which is very explicit on the issue.

Where a charge is void by reason of non registration it can not be enforced and the only remedy left for the banker chargee is to sue the chargor company for money had and received for the banker's use.[15]

Even though it is the duty of the company chargor to register the charge, it is more in the interest of the banker chargee that the charge is registered since if the security fails by reason of lack of registration it is the banker and not the company that will be the loser. It is for this reason that where the company is dragging its feet over the issue of registration the banker as chargee should ensure that the charge is registered by effecting the registration himself and then recover the expenses of registration from the company as provided by Section 199(2) of the Companies and allied Matters Act.

Apart from the risk of the charge becoming void by a failure to have it registered and registered, speediously and timeously, there is also the risk of the charge being postponed to a later charge which is registered first in the event of a competition between the two. Even though the doctrine of constructive notice which imputes constructive notice of all registered instruments on all persons dealing with property affected by the instrument after the registration of the instrument has been abolished by Section 68 of the Companies and Allied Matter Act, Section 68 is read subject to Section 197 of the Act which makes registration of charges with the Corporate Affairs Commission mandatory.

Since Section 68 of the Act which abolished the doctrine of constructive notice is read subject to Section 197 of the Act one would have thought Section 197 will contain a provision on the doctrine of constructive notice or any other type of notice to which the abolition by Section 68 must be read subject to. Surprisingly and strangely enough, Section 197 does not make any provision on the doctrine of constructive notice or any type of notice for that matter. In this situation, the question that looms large is what could have been the legislative intendment of subjecting Section 68 of the Act to Section 197 of the Act? The answer to this question must lie in the general legislative purpose of reading a certain section of a statute subject to another section of the same statute or of a different statute entirely.

In the case of Kaycee (Nig) Ltd Vs. Prompt Shipping Corporation[46] where the phrase "subject to" came in for consideration the Supreme Court held that the expression "subject to" when used in a document or enactment assigns a subordinate position to a clause, section or an enactment or provides for qualifications. The court held further that when a provision in a statute is subjected to another provision of the same statute or another statute the provision to which the other provision is subject is superior or overrides the provision subject to it in respect of the subject matter which the two provisions govern. The Supreme Court went on to hold that where a Bill of lading, as in that case, is made subject to the provisions of the Carriage Of Goods By Sea Act, the former is subordinate to the latter and would be postponed till the latter had been considered or is negatived where both are in conflict.

From the interpretation of the expression "subject to" by the Supreme Court in the above mentioned case it is clear that the expression is normally used in legislative enactments to subordinate one provision of a statute to another provision of the same statute or a different statute where the two provisions dealing with the same subject matter tend to conflict with each other. This then means that for one provision of a statute to be subjected to another provision of the same statute or a different statute the two provision must be on the same subject matter.

This then means that the subject of Section 68 of the Companies and Allied Matters Act dealing with constructive notice to Section 197 of the same act dealing with registration of charges with the Corporate Affairs Commission is grossly meaningless and constitutes a flagrant invasion of the legislative wisdom that stipulate the condition that before a given provision of a statute can be subjected to another provision of the same statute or a different statute the two provisions must govern the same subject matter. Even if it is taken that since Section 68 of the Act which abolished constructive notice provides that it is subject to Section 197 of the same Act providing for registration of charges, then there is no need for Section 197 to have a provision dealing with constructive notice, the argument will still hold good that the failure by Section 197 to mention any thing about constructive notice has created an invidious hiatus in the law in this area and there is a crying need for it to be plugged.

However, even with this type of hiatus in the law, it may not be totally wrong to conjecture that the legislative intendment of subjecting Section 68 of the Act to Section 197 of the same Act is

to make the abolition of the doctrine of constructive notice by Section 68 inapplicable to registered charges under Section 197 of the Act. If this be the case, it means then that a banker chargee apart from wanting to register his charge timeously and speediously to save it from becoming void will also have as his motive the desire to affect subsequent chargees with constructive notice of his charge by registering his charge promptly. If he fails to do so and the subsequent chargees get their charges registered before him he will be affected with constructive notice of the later charges whether or not he had checked the company's register of charges or the Corporate Affairs Commission to avail himself of actual notice of these charges. And if he is so affected, his charge will be postponed to that of the later chargees in the event of a competition between their charges.

Registration of charges as pointed out earlier is the first and last step a chargee banker should take to secure his charge. Having taken it the banker can afford to fold his hands and wait for the charge to mature for redemption and if the chargor company cannot redeem, the banker can then enforce his charge.

4.6 ENFORCEMENT OF CHARGES

With regard to equitable charges over farm produce and other property of the farmer the main mode of enforcing the charge is by judicial sale of the charged property. All the chargee banker need to do is to institute an action in the court seeking a judicial sale of the charged property after the date of redemption has come and passed without the chargor redeeming the charge. It is however not clear whether before bringing proceedings for judicial sale of the property, the chargee banker like a legal mortgagee banker

exercising his power of sale of a landed property mortgaged to him, must first give notice to the chargor customer of his intention to commence legal proceedings to have the charged property sold. In the absence of any legal authority requiring such notice, the chargee banker can commence proceedings to have the charged property sold to recoup his money unless, of course, the instrument creating the charge requires such notice in which case the banker must comply with the provision of the charge agreement by giving notice to the chargor before commencing judicial proceedings for sale of the charged property.

After the sale of the property charged the court will apply the proceeds of the sale first to the settlement of the sale expenses, then to the settlement of the sum secured under the charge and if after these any surplus remains it will be paid over to the chargor. But if the sum realised from the sale is not enough to clear all the chargor's indebtedness to the banker the banker can proceed against the chargor in court on his personal obligation to repay the loan.

Where the charge is guaranteed by the Agricultural Credit Guarantee Scheme Fund Board, Section 12(1) and (2) of the Agricultural Credit Guarantee Scheme Fund Act requires that the banker should first proceed against the chargor customer for the whole sum secured by the charge and it is only on failing to recover the whole sum from the customer chargor that the banker can demand payment of the percentage of the loan guaranteed by the scheme from the Board. This being the procedure stipulated by the statute from which the Agricultural Guarantee Scheme derives its

existence it must be strictly followed by the banker for him to be entitled to the sum guaranteed by the scheme.[47]

Where, however, a legal charge is created over the land or where it is created over both the land and its produce, the chargee banker shall be entitled to the remedies of a legal mortgagee in enforcing the legal charge over the land as provided by section 110(1) of the Kaduna State Law Of Property Edict and Section 105(1) of the former western region of Nigeria Property And Conveyancing Law. This means that the banker will be entitled to sell the charged property or appoint a receiver over it or foreclose the chargor's right of redemption or take possession of the charged property without recourse to court. This then makes it imperative for a banker to always take a legal charge over the land of the chargor in addition to any charge he may take over the chargor's agricultural produce.

With regard to fixed and floating charges over company property the major means of enforcing these charges is by appointment of a receiver or a receiver and manager not only over the property charged but sometimes even over other property of the company not subject to the charge.[48] It is worth noting that unlike the Kaduna State Law Of Property Edict which does not disqualify anybody from being appointed a receiver, section 387(1) of the Companies and Allied Matters Act disqualifies an infant, any person found by a competent court to be of unsound mind, a body corporate, an undischarged bankrupt, unless he shall have been given leave to act as a receiver or manager by the court by which he was adjudged bankrupt, a director or auditor of the company and any person convicted of any offence involving fraud, dishonesty, official

corruption or moral turpitude and who is disqualified from being a director of a company by reason of a High Court conviction for an offence in connection with the promotion, formation or management of a company from being appointed as a receiver or manager over the property of a company.

The Companies and Allied Matters Act being a federal and specific legislative enactment on who is qualified to be appointed a receiver over the property of a company it will prevail over the provision of the Kaduna State Law Of Property Edict should the two provisions come into conflict with each other.

Subject to any provision in the debenture deed, a receiver is usually appointed by the court. The circumstances under which a receiver may be appointed by the court are well stated by section 208(1) and (2) of the Companies and Allied Matters Act. These include where the company fails to pay the debt secured by the charge or where the company is being wound up or when the company ceases to carry on business and a whole load of other circumstances which tend to put the security of the banker at a risk.

The courts have amplified the circumstances under which a chargee can apply to court for the appointment of a receiver. For instance in Fasakin vs. Fasakin[49] the Court of Appeal held that a chargee can apply to court for the appointment of a receiver where the security of the chargee is in jeopardy even if no event has happened which either under the debenture or the trust deed makes the security enforceable, or where the company has sold the whole or substantially the whole of its undertaking and assets otherwise than in the ordinary course of business and has ceased to be a going concern or where a judgment has been entered against the

company and execution of the judgment is likely to issue or where a company is proposing to distribute among its shareholders a reserve fund which constituted practically its only assets thereby putting the chargee banker at risk or where the company's auditors declare at General meeting and without being challenged by the directors that after providing for liabilities the company's assets will only cover principal loans secured and that the company's credit and funds were exhausted, and a host of other circumstances.

From all these it is clear that a chargee banker will be entitled to apply to court for the appointment of a receiver not only when there is default by the chargor company to redeem the charge but at any time circumstances arise which put his security at a risk.

In Agbaje Vs. Adelekan[50] the Court of Appeal stated the purpose of a court appointing a receiver at the instance of a person entitled for a receiver to be appointed for him. The court held that a receiver is appointed to collect and receive the rents, issues and proceeds of land or personal property for the purpose of paying same to the person on whose behalf the receiver is appointed.

However, apart from the court, where the debenture creating the charge entitles the chargee banker to appoint a receiver he can do so in accordance with the terms of the debenture without recourse to court.

Where the banker is doing the appointment instead of the court he should make sure that he observes all the formalities laid down in the debenture before making the appointment. He may, for

instance have to demand for payment before making the appointment. If he is so required but does not do so the appointment will be void.[51] He should also be careful to demand for the correct amount. If he demands for more than what he is entitled to, the demand will be ineffective.

The banker should also note that it is not every person that can be appointed a receiver over company property because Section 387(1) of the Companies and Allied Matters Act disqualifies certain persons from being appointed receivers. These include an infant, any person found by a competent court to be of unsound mind; a body corporate; an undischarged bankrupt, unless he shall have been given leave to be so appointed by the court that had adjudged him bankrupt; a director or auditor of the company; and any body convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude. In fact Section 387(2) of the Act makes it a punishable offence to appoint any of the above persons a receiver over company property.

The timing of the appointment is also important. The banker should ensure that all interests and other charges are debited to the company's account before the appointment is made. If, for instance interest is to be allowable against tax, it must actually be borne; and so must be debited to the account before the appointment. If it is only debited after the appointment, the company may have ceased trading, or it may not be allowable on other grounds.

Again under English law prompt appointment of a receiver before the appointment of a liquidator will earn the chargee banker the priority of being paid before the expenses of winding up and

any corporation tax payable in respect of any capital gain arising on the sale of the company's property. But a delay in the appointment of a receiver which leads to the appointment of a liquidator before the receiver, will deprive the banker of all these priorities.[52] However under Nigerian Law[53] the banker will not be entitled to any priority even if he appoints a receiver before a liquidator because the law here is that expenses of liquidation in all cases rank in priority over all debts of the company.[54]

The banker appointing a receiver should also note that his appointment of the receiver only takes effect when the document appointing the receiver is handed to the receiver and the receiver accepts the appointment.

No less important to note also is the fact that for the appointment of the receiver to be valid notice of the appointment by the banker or by the court must be given to the registrar of companies within fourteen days of the appointment.[55]

The receiver after his appointment by the banker or by the court should immediately give notice of his appointment to the debtors of the company who after receiving notice of the receiver's appointment must act according to the direction of the receiver and not in accordance with the directions of the company.

Once a receiver has been appointed the company and its directors have no power to deal with the assets of the company which the receiver is appointed to administer until the receivership has ended unless the receiver abandons any particular asset or assets of the company.

NOTES AND REFERENCES

1. Sykes E.I. The Law of Securities 2nd ed. (The Law Book society, LBSU, 1973) p. 271.

2. Ibid at p. 278

3. (1978) A.L.R. 180 at 199-200.

4. Ibid.

5. SS. 21, 22 of the Land Use Act (Cap 203) Laws Of The Federation Of Nigeria 1990.

6. Ss. 21, 22 and 51 of the Land Use Act (Cap 203) Laws Of The Federation Of Nigeria 1990.

7. Holden Milnes J. The Law and Practice of Banking Vol.2: Securities for Banker's Advances 2nd ed. (Pitman, PUP 1986) P. 85-86; see also Birmingham Citizens permanent Building Society Vs. caunt (1962) ch. 883

8. Maitland F. W. Equity (Revised by John Brunyate 1936) p. 182 quoted in Holden Milnes J. The Law and practice of Banking Vo.1.2: Securities for Banker's Advances 2nd ed. (Pitman, PUP. 1986) p. 48.

9. White Vs. Conroy (1921) 21 S. R. (N.S.W.) 257.

10. (1893) 69 L.T. 380; see also Swiss Bank Corporation Vs. Lloyds Bank (1980) A. C. 584.

11. (1836) I My & Cr. 587

12. Ibid

13. (1980) 2 All E.R. 419 or (2980) A.C. 584

14. (1886) 32 Ch. D. 525

15. S. 650 (1) Of The Companies And Allied Matter Act (Cap 59) Laws of the Federation of Nigeria 1990.

16. Tauton VS. Sheriff of Warmickshire (1895) 2 Ch. 319.

17. Re Marrison, JOnes & Taylor (1914) 1 Ch. 50.

18. S.179 Of The Companies And Allied Matter Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

19. Ibid

20. (1886) 32 Ch. D. 525.

21. Ogundiani Vs. Araba (1978) N.S.C.C. 334.

22. Omo - Bare Vs. New Nigerian Bank Ltd (1978) A.L.R. 180 at 199 - 200; also see Ss. 51 Of The Land Use Act (Cap 203) Laws Of The Federation Of Nigeria 1990.

23. Ss. 21, 22 and 51 of the Land Use Act (Cap 203) Laws Of The Federation Of Nigerian 1990.

24. (1903) 1 Ch. 385

25. (1978) N.S.C.C. 334

26. S.10 (1) of the Agricultureal credit Guarantee Shceme Fund Act (CAP 13) Laws of The Federation Of Nigeria 1990.

27. S.7 (1) of the Agricultral credit Guarantee scheme Fund Act (CAP 13) Laws Of The Federation of Nigeria 1990.

28. Joseph VS. LYon (1884) 15 Q.B. 280

29. Lloyds Bank VS. Bank of America Nationa Trust and Savings Association (1938) 2 K.B. 137.

30. Journal of the Institute of Bankers Vol. LIX (1938) P 208.

31. (1883) 11 Q.B.D. 327.

32. Salako VS. Alao (1994) 8 NWLR (Pt 360) P 47 Stipulates a duty to comply with statutory Provision prescribing procedure of enforcemtns of rights.

33. S.160 (1) of the Companies And Allied Matters Act (Cap 59) Laws Of The Federation of Nigeria 1990.

34. S. 166 Companies And Allied Matter Act (Cap 59) Laws Of The Federation of Nigeria 1990.

35. Ss. 39 (3),68 and 69 of the Companies And Allied Matters Act (Cap 59) Laws Of The Federation of Nigeria 1990.

36. Joseph Vs. Lyons (1884) 15 Q.B.D. 280; and Lloyds bank Vs. Bank of America National Trust and Savings Association (1938) 2 K.B. 137.

37. Roland F.L., Journal of the Institue of Bankers Vol. LIX (1938) p.208 On the need of a banker to deal only with customers he trust where Agricultural Charges are concerned.

38. S. 191 (1) of the Companies and Allied Matters Act (Cap 59) Laws Of The Federation of Nigeria 1990.

39. S. 197 (1) and (2) of the Companies And Allied Matters Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

40. S.191 and S.197 (1) of the Companies And Allied Matters Act (Cap 59) Laws of The Federation of Nigeria 1990.

41. S. 191 (1) and S. 199 (1) of the Companies And Allied Matters ACt (Cap 59) Laws Of The Federation Of Nigeria 1990.

42. S. 199 (2) of the Companies And Allied Matter Act (Cap 59) Laws of the Federation of Nigeria 1990.

43. S.197 (1) of the Companies And Allied Matters Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

44. S.191 (2) of the companies and Allied Matters Act (CAP 59) Laws of the Fedration of NIgeria 1990

45. Fasakin Vs. Fasakin (1994) 4 N.W.L.R. (pt. 340) P. 597.

46. (1986) 1 N.W.L.R. (pt 15) P 180.

47. Salako Vs. Ako (1994) 8 N.W.L.R. (Pt 360) P.47, See also Ajewale Vs. Adetimo (1994) 3 NWLR (pt 335) P.739 at 770 - 771.

48. Fasakin Vs. Fasakin (1994) 4 NWLR (pt 340) P. 597.

49. (1994) 4 NWLR (pt 340) P 597.

50. (1993) 8 NWLR (pt 316) P.166.

51. Holden Milnes J. The law and practice of Banking Vol.2 Securities for Banker's Advances 7th ed. (Pitman, Pup 1986) P.83 -84.

52. Re Barleycorn Enterprises (1970) 2 ALL E.R. 155.

53. SS.492 - 494 of the Companies And Allied Matters Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

54. S. 392 (1) of the Companies And Allied Matter Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

55. S. 393 of the Companies And Allied Matters Act (Cap 59) Laws Of The Federation Of Nigeria 1990.

CHAPTER FIVE

THE BANKER'S LIEN

5.1 DEFINITION OF LIEN

The word lien has been defined by the Supreme Court in Ugo Vs. Obiekwe[1] as "----a right in one man to retain that which is in his possession belonging to another till certain demands...by the person in possession are satisfied." As for the banker's lien perhaps the case of Ibrahim Alabi Vs. Standard Bank of (Nig.) Ltd[2] affords the best definition. In that case the court held that:

> A banker's lien is the right of a banker to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged, and it attaches to all securities deposited with a banker as a banker by a customer or by a third party on the customer's account, to instruments paid in for collection, and to money held for the account of a customer which is the customer's money and not money paid in under a mistake of fact, unless there is an express or implied contract between the banker and the customer which is inconsistent with the lien.

The above definition does not only define what a banker's lien is but also defines its scope of operation by delimiting the property of the customer with the banker on which the banker's lien can attach. This definition will generally set the tone and tempo of discussing the banker's lien in this work.

5.2 SPECIAL FEATURES OF A LIEN

There are two distinctive features of a lien that distinguish it from other forms of bank securities already discussed in this work. These are the uncontractual character of a lien and the possessory nature of a lien. These shall be briefly considered here in turn.

A lien unlike a mortgage or charge arises from events and not from any express contract between the banker and his customer. It is an unintended consequence of the business transactions between the banker and his customer. Commenting on this distinctive quality of a lien, the learned authors of paget's law of Banking observed that "---the only security which is peculiar to banking, is only a fortuitous occasional security."[1]

A lien thus come into being by chance. It arises from a unilateral "self-help action" by the banker to recover money due to him from the customer without the parties formally or informally agreeing that this should be so. Thus apart from any specific security, the banker can look to his lien as a protection against loss on loan or overdraft or other credit facility. It is the banker's alternative security where a specific security either in form of a mortgage or charge fails to amortise the customer's total indebtedness to the banker. As such a security, it serves as a buffer zone between the possession of specific but inadequate securities by the banker and the total lack of specific securities by the banker.

Secondly, a lien unlike the other forms of security earlier discussed is possessory in nature. This means that before a banker can claim the right of lien on the property of his customer he must

have the property of such customer in his possession. Otherwise his claim of lien avails him nothing. This much is contained in the definition of a lien. Thus the banker can not claim the right of lien and subsequently seek possession of the property of his customer to attach his claim of lien on. His claim of lien can only be valid if he is in possession of the customer's property at the time the right of lien arises. In fact the law is that the banker's lien usually attach only to such property of the customer with the banker which came into the banker's possession as a banker when there is no question or contemplation of indebtedness on the part of the customer.[4]

5.3 TYPES OF BANKER'S LIEN

There are two types of banker's lien namely: particular banker's lien and general banker's lien. These are sometimes referred to as legal and equitable banker's lien respectively.

A particular or legal lien arises in respect of a particular or specific property of the customer in a particular or specific transaction between the banker and his customer. This is why it is sometimes referred to as a special lien in addition to particular and legal lien. It would best be understood through a practical illustration.

A typical situation where a particular or legal lien will arise is in respect of banker's commercial credit or what is sometimes referred to as documentary credit transactions. Under banker's commercial credit or documentary credit transactions, a German exporter of goods may draw a bill of exchange on a Nigerian importer of his goods which are being shipped to Nigeria aboard a German ship. The bill of exchange may, on the instruction of the

Nigerian importer or on the insistence of the German exporter, be accepted and paid for by a bank in Nigeria of international repute with which the Nigerian importer may or may not have any money. The bank, called the accepting bank, will then take possession of the goods on arrival in Nigeria in addition to the bill of exchange already accepted and received by it. If the importer has no money with the bank or has some money with the bank but which is not sufficient to pay the bank for the cost of the goods imported plus any bank charges thereon, a particular or legal banker's lien will then arise in favour of the banker entitling him to retain possession of both the goods and bill of exchange until the customer is able to pay for all money due from him to the banker in respect of this particular transaction.

A particular or legal lien can not be negatived by any contractual term between the banker and his customer. It operates effectively irrespective of whether or not the customer approves of it. Indeed it is an aspect of its validity that the lienor customer need not contemplate its occasion before becoming indebted to the banker.[5]

A general or equitable lien on the other hand binds all the property of the customer with the banker until all the claims of the banker against the customer have been extinguished. Thus a general lien unlike a particular lien is not restricted to the transaction in respect of which it arises but extends to all transactions between the banker and his customer unless it has been expressly negatived by a term in a particular transaction between the banker and his customer. In respect of only that transaction in which a general lien has been negatived will it not apply.

An example of a general lien is where A borrows ₦500,000 from C bank. Later A's cheque is lodged with C bank by D bank for collection. C bank can assert a general or equitable lien over A's cheque until A pays his debt to C bank.

The banker's general lien exist by mercantile custom and is binding on the customer whether or not he knows of its existence.[6] The validity of a general banker's lien was established long ago in the English case of Brandao Vs. Barnett.[7] The brief facts of that case were that the plaintiff who was a Portuguese merchant had a London agent whose name was Burn. Burn habitually purchased exchequer bills for his principal the plaintiff, received the interest upon them on his behalf, and at proper intervals exchanged them for others. Burn had an account with the defendant bankers and there kept several tin boxes in which he lodged the plaintiff's and other such bills, and of which he held the keys. On 1st December 1836 Burn took out several bills, delivered them to the defendants and, as was his custom, asked them to get the interest upon them and to exchange them. This the defendants did, but, before Burn returned to pick up the new bills, acceptances were presented on his account in excess of the credit balance upon it, and paid. Upon Burn's failure the defendants claim a lien on the bills in his hands.

As part of his judgment in this case Lord Campbell of the House of Lords in England held that "Bankers most undoubtedly have general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with lien..."

Whether particular or general lien, it is worth noting that a lien does not vest any property subject to the lien in the banker entitled to the right of lien, but merely a right to retain the property. Thus, according to Perry,[8] a lien has merely a nuisance value, in that the owner of a property can not get it back until he has paid up. The possessor of the property, in this case the banker, cannot sell and so get the money owing to him, because he is not the owner.

However, this is as far as theory goes. In practice, as Perry himself admitted[9] the banker can sell the property subject to his lien by virtue of the implied pledge doctrine which places him on the same footing with a pledgee who though not an owner can sell property pledged to him by a pledgor who has failed to redeem his pledge as at when due.[10]

5.4 PROPERTY SUBJECT TO THE BANKER'S LIEN

The case of Ibrahim Alabi Vs. Standard Bank (Nig.) Ltd[11] apart from defining the banker's lien also attempted defining the property of the customer with the banker on which such a lien attaches. In that case the defendant banker refused to honour a cheque drawn on it by the plaintiff customer on the ground that it has a lien or right of set off on the plaintiff's credit balance with it for legal cost awarded to the defendant banker against the plaintiff customer in a suit between the two.

The court held that the bankers's lien attaches to all securities deposited with the banker as banker by a customer or by a third party on the customer's account, to instruments paid in for collection and to money held for the account of a customer which is the customer's money and not money paid in under a mistake of fact,

unless there is an express or implied contract between the banker and the customer which is inconsistent with lien.

From the above, it is clear that even though the court in Ibrahim Alabi's case[12] attempted identifying the customer's property with the banker that is subject to the banker's lien it did not do so with specification as it merely enumerated the species of such property. The only property that is mentioned with specification by the court is money which as shall be seen later under this heading is not so much a subject matter of the banker's lien as it is the subject matter of the banker's right of set off. Thus the court far from showing with some degree of clarity and certainty the types of property subject to the banker's lien actually tended towards confusing and confounding the unsophisticated and uninstructed mind in the law of banking by its use of such shrouding, ambiguous and misty phrases as "all securities" and "instruments paid in for collection." The use of these phrases, without more, it is submitted with respect can be quite dubious in certain contexts and is apt to confuse in all contexts. It is for this reason that these phrases are reduced to their barest import for the purpose of ascertaining with specification the customer's property which is subject to the banker's lien.

Beginning with the phrase "all securities," what can be the import of that phrase in the context in which it is used in Ibrahim Alabi's Case?[13] Does it refer to property deposited with bankers by their customers to secure advances made or does it refer to some other property of the customer with the banker which is with the banker otherwise than as security for an advance?

The clear and simple answer to this question negates the first arm of the question but affirms the last arm. It is this: "All securities" as used in Ibrahim Alabi's Case[14] refers to property of the customer with the banker which is with the banker otherwise than as security for an advance. This is because property of the customer with the banker which is deposited with the banker to secure an advance made to the customer is like property of the customer deposited with the banker for safe custody,[15] deposited with the banker for a purpose inconsistent with lien.[16] That is why title deeds of a customer are ordinarily not subject to the banker's lien because they are usually deposited with the banker as security for advances.[17] What is more, property of the customer deposited with the banker to secure advances made by the banker to the customer is usually so deposited when there is contemplation of the customer's indebtedness to the banker. In fact it is made pursuant to the customer's indebtedness or what comes to the same thing, it is made with the customer's indebtedness in view and as it were, the customer's indebtedness to the banker constitute the event or occasion of the deposit. This, as has been pointed out earlier detracts from the distinct character of a lien (particularly a general lien which usually apply in these cases) which is that it normally attaches to property of the customer deposited with the banker when there was no question or contemplation of indebtedness on the part of the customer.[18]

The next question to ask is, what are these property of the customer with the banker to which the banker's lien attaches? The answer to this question is supplied by the phrase "instruments paid in for collection" used in Ibrahim Alabi's Case[19] to denote property

of the customer with the banker which is subject to the banker's lien. This then means that the two phrases, "all securities" and "instruments paid in for collection" used Ibrahim Alabi's Case[20] to denote property of the customer with the banker that is subject to the banker's lien are mutually inclusive and not mutually exclusive.

What then does the phrase "instruments paid in for collection denotes? The answer is, it denotes property of the customer that is collected by the banker as a banker from another banker or from a third party on behalf of his customer. These property are frequently negotiable and quasi negotiable instruments. The negotiable instruments include such property as bills of exchange, treasury bills, bearer bonds and promissory notes while the quasi negotiable instruments include bills of lading, share certificates, I owe you, postal and money orders. It is these property of the customer with the banker that are frequently subject to the banker's lien.

From all these it will appear then that the decisive test of determining whether or not a certain property of the customer with the banker is subject to the banker's lien rest more with how the property came into the possession of the banker than with the type of property involved. Accordingly, if the property of the customer with the banker was deposited by the customer it is unlikely to be subject to the banker's lien notwithstanding its nature. But if on the other hand it was paid in for collection by another banker or a third party, it is likely to be subject to the banker's lien its nature notwithstanding. The reason for this is that property deposited with the banker by the customer is likely to be so

deposited either for safe custody or as security for advances made or to be made by the banker to the customer - purposes both inconsistent with lien.[21] But this can hardly be the case if they are paid in for collection by either another bank or a third party.

This then means that if negotiable or quasi negotiable instruments appear to be more liable to the banker's lien than other types of property, it is because they are more liable to be paid in for collection than other types of property and not because they are negotiable or quasi negotiable instruments.

A provision worthy of mention in a consideration of the property of the customer with the banker that is subject to the banker's lien is that the property must have been received by the banker in his capacity as a banker and in the course of banking business.[22] This provision appears to be an extra or additional requirement to the provision of "instruments paid in for collection."

The requirement that for a property to be subject to the banker's lien it must have come into his possession in his capacity as a banker and in the ordinary course of banking business suggest that certain property come into the possession of the banker not in his capacity as a banker and not in the ordinary course of banking business. What then is this property that comes into the possession of the banker not in his capacity as banker and not in the ordinary course of banking business?

The straight answer is property entrusted to the banker as trustee thereof, and arguably property deposited with the banker for safe custody. Arguably because it may be contended that property deposited with the banker for safe custody are so

deposited with him in his capacity as banker and in the ordinary course of banking business just like instruments paid in for collection. This contention may hold good if regard is had to the volume of items that are now being taken to banks for safe custody. It therefore follows that what makes property deposited with the banker for safe custody not lienable is not so much that it does not come into the possession of the banker in his capacity as banker and in the ordinary course of banking business as that it is deposited with the banker for a purpose inconsistent with lien.

Indeed deposition of property with a banker for a purpose consistent or inconsistent with lien is the litmus test for lienability or non-lienability of any property of the customer in the possession of the banker claiming right of lien. If the property is deposited with the banker for a purpose consistent with the banker's lien the banker's lien will attach to it. If it is deposited for a purpose inconsistent with lien such as safe custody the banker's lien will not apply.

Other Nigerian cases besides Ibrahim Alabi's Case[23] tend to identify the property of the customer that is subject to the banker's lien by what might be termed the isolationists approach. By this approach the property of the customer on which the banker's lien can not attach are brought out and whatever is not mentioned among such property can be taken as subject to the banker's lien. The two cases of Delalu Vs. Akappo and African Continental Bank Ltd,[24] and Cooperative Bank of Eastern (Nig) Ltd Vs. Eke[25] clearly indicate this approach.

In Delalu's case[26] the plaintiff brought an action against the defendants to recover the title deeds of his mortgaged property and

for discharge of all claims between the first and the second defendants. The first defendant had requested financial assistance from the plaintiff who thereupon created a legal mortgage with a mortgagee over his property and gave the proceeds of the loan to the first defendant. When the plaintiff requested settlement of the debt and redemption of the mortgage, the first defendant said he had arranged to obtain money from his bank, that is, the second defendant, to clear the debt but that the second defendant wanted to see the appropriate document. At the plaintiff's request the mortgagee forwarded the mortgage and title deeds to the second defendant who did not then pay off the mortgage debt or return the deeds because their legal department had not yet approved of this step, to do so. The first defendant by a cheque drawn on the second defendant bank paid off the mortgage and the plaintiff instituted an action to recover his title deeds and discharge the claims of the defendants.

The second defendant resisted the action contending that it has a lien over the plaintiff's title deeds for the unpaid debt of the first defendant. It was held that although bankers have a general lien upon a customer's securities deposited with them to secure an overdraft this lien does not extend to securities deposited by a customer and known to the bank to belong to another person and to have been deposited for a special purpose. The court further held that a bank has no right to retain another person's security when the customer who deposited the security with the bank overdraws his account.

The holding of the court in the above case clearly shows that lack of ownership of the property with the banker by the debtor

customer bars the banker's lien from operating as effectively as does "purpose inconsistent with lien." However there is a rider to lack of ownership of the lienable property by the debtor customer operating to bar the banker's lien. It is that the banker must have knowledge of the fact that the property does not belong to the customer. If he lacks that knowledge, it will appear from the judgment, that the banker's lien will apply unhindered.

From this decision it is clear that for a banker's lien to apply on the lienable property of the customer, it must not only be deposited with the banker for a purpose consistent with lien but must also be the property of the debtor customer against whom the lien is sought to be asserted by the banker. Where the property is not that of the debtor customer the banker must be able to show that he was ignorant of the fact of the debtor's lack of ownership of the property he took to be subject to his lien. The only snag, however, for a banker seeking to show that he didn't know that the property belongs to another person other than the debtor customer is that it avails the banker nothing if he is yet to sell off the property pursuant to his perceived if erroneous claim of lien to recoup his loan. For if it is shown that the property indeed is not owned by the debtor customer, the banker's lien being not a right contractually conferred on the banker for which he can say that he has been caused by the debtor customer to act to his detriment or alter his position to the same effect, will ceased and the banker can no longer claim any lien on the property to say nothing of selling it off. It will appear that not even the common law doctrine of holding out will apply to relieve the banker in

this respect as it would have, were it a mortgage or some other form of banker's security.

In Cooperative bank of Eastern Nigeria Ltd. Vs. Eke[27] the defendant operated two accounts with the plaintiff banker, one a personal account in her own name and the other an account in her business name. She obtained a loan on the first account and later sought an overdraft facility on the second account. She deposited as security for the second account for which the overdraft facility was sought, title deeds to property belonging to a third party with a power of attorney executed by the third party authorising her to use the title deeds as security for a loan. The bank refused to grant the overdraft and also refused to release the title deeds holding them as a lien for the first loan. The plaintiff banker then brought an action to recover the first loan.

It was held as in Delalu's case[28] that a banker's lien does not attach to security deposited by a customer if it belongs to another person or if it is deposited for a distinct or special purpose inconsistent with lien.

Thus these two case (Delalu's case; and the Cooperative Bank of Eastern Nigeria case) set the property of a third party free from the banker's lien where the banker knows that it is not the property of the debtor customer. Of course, also free are property deposited with the banker for a purpose inconsistent with lien which as has been made clear are often property deposited with the banker for safe custody.

Another property that is also free of the banker's lien is money - no matter whose money it is. Its freedom however is no freedom. It is the freedom of a morsel of food jumping from the

frying pan right into the fire. This fire is the banker's right of set off. The court in Ibrahim Alabi Vs. Standard Bank (Nig) Ltd[29] held that a banker's right to retain money held to the account of a customer until an indebtedness of a customer is paid or discharged is a right of set off rather than a lien. This right entitles the banker to retain the credit balance in the customer's account against a debt due to the banker from the customer or, in other words, to treat funds in the customer's account as not available to meet drawings. And this in fact was what was done by the defendant banker in this case.

Before bringing to a close the discussion on the property of the customer debtor that is subject to the banker's lien it is important to note the following ancillary issues.

First, even though property of a customer deposited with the banker as security for an advance is not ordinarily lienable no matter the state of account between the banker and the customer, it may become lienable if the customer, still owing the banker in respect of some unsecured debt, does not immediately recover possession of the property on discharge of the security. Although there is no Nigerian case on this point the English case of Re London and Global Finance Cooperation[30] will be of strong persuasive effect on Nigerian courts should the point arise for determination. According to Buckley J. in that case, the securities being consciously left in the possession of the banker after satisfaction of the specific advance for which they were deposited with the banker, might be regarded as having come into the hands of the banker anew in the way of business or as impliedly repledged or redeposited.

Secondly, even though a banker's lien will not ordinarily apply on property deposited with the banker as security for advances, it will appear that a lien or a right of set off will apply on the proceeds of such security if it is realised and a surplus remains after the sum secured has been paid but leaving unpaid an unsecured debt of the customer to the banker. In a situation like that the banker will, subject to the right of any third party such as a subsequent mortgagee or chargee, be entitled to the surplus or a sufficient part thereof to cover the unsecured debt of the customer. By this it is clear that immunities attaching to the property deposited do not attach to what is merely a converted part thereof. Again, here there is no Nigerian judicial authority on the point but the English case of Re Bowes, Earl of Strathmare Vs. Vane[11] will be of strong persuasive effect should the point arise for determination in our courts. In that case North L. J. held that even though the banker had no general lien on the security itself, the surplus arising from the sale of such a security will be retainable by the banker by way of set off for his further claim against the customer's estate.

Lastly, but perhaps more fundamentally, even though a lien does not derive its existence from any contractual agreement between the banker and his customer, the banker and the customer can nevertheless make provision for the operation of the banker's lien in any specific security agreement they may enter into to secure a debt taken by the customer from the banker. If this happens, the general law that provides that property of the customer deposited with the banker to secure an advance will not ordinarily be subject to the banker's lien will be subject to the

provision in the security agreement between the banker and the customer so that if the security agreement provides that such property deposited as security with the banker will be lienable, it will be lienable.

All said and done, it can with reasonable certainty be maintained that the customer's property with the banker that is ordinarily subject to the banker's lien is that which is paid in for collection, that whose purpose of being in the possession of the banker is not inconsistent with the banker's lien, that which though deposited with the banker by the customer to secure an advance, is left in the possession of the banker long after the discharge of the security. It is also reasonably certain which property of the customer in the possession of the banker the banker's lien would not ordinarily attach. These include property deposited with the banker either for safe-custody or for other purposes inconsistent with lien such as to secure advances, property belonging to a third party; and money.

5.5 DUTIES AND POWERS OF THE BANKER UNDER LIEN

A lien being right to retain depends on possession and is lost if possession is given up. Thus if a customer instructs his banker to pay out a certain sum in exchange for shares in a company the banker will have a lien on the share certificate deposited with him. If, however, the customer takes the certificate away and then takes it back to the banker saying, "take charge of this for me," it is probably that the right of lien will be lost, since the purpose of deposit will then be safe-custody on which as have been stated, the banker's lien can not ordinarily apply.

It is for this reason that a banker owes a duty to himself to retain the possession of property subject to his lien and not release it to the customer or to his agent no matter for how brief a time. Possession by the banker is of the essence of his lien.

The banker also owes a duty to himself and the customer to present for payment bills, notes and cheque subject to lien, to the paying authority or agent at their maturity. He must also give notice of dishonour if they are not paid. These obligations are based on his position as agent or as holder for value.[32]

The power of a banker under lien relate to the power of the banker to enforce the lien and recoup the money owed him by the customer. That a banker has power to sell off the property subject to his lien by way of enforcing his lien makes the banker's lien exceptional to other types of liens under which the lienee has no power of sale.[33]

NOTES AND REFERENCES

1. (1989) 1 NWLR (Pt. 69) p. 566
2. (1976) A.L.R. 404
3. Megrah Maurice, Paget's Law of Banking 8th ed. (Butterworth Bup, 1972) P.495.
4. Ibid at P. 500
5. Ibid
6. Brandao Vs. Barnett (1846) 12 CL & Fin 787
7. Ibid
8. Elements of Banking, 2nd ed. (Methuen & Co. Ltd, Mup 1975) P. 271
9. Ibid
10. Brandao Vs. Barnett (1846) 12 CL & Fin 787
11. (1976) A.L.R. 404
12. Ibid
13. Ibid
14. Ibid
15. Megrah Maurice Paget's Law of Banking 8th ed. (Butterworth, Bup 1972) P.500
16. Ibid
17. Ibid
18. Ibid
19. (1976) A.L.R. 404
20. Ibid
21. Magrah Maurice: Paget's Law of Banking 8th ed. (Butterworth, BUp 1972) P.499
22. Ibid
23. (1976) A.L.R. 404
24. (1967) A.L.R. 277

25. (1979) A.L.R. 491

26. (1967) A.L.R. 277

27. (1979) A.L.R. 491

28. (1967) A.L.R. 277

29. (1976) A.L.R. 404

30. (1902) 2 Ch. 416

31. (1886) 33 Ch. D. 586

32. Smart P.E. Chorley and Smart leading cases in the Law of banking 5th ed. (Sweet and Maxwell SWUP, 1983) P.253.

33. Megrah Maurice, Paget's Law of Banking 8th ed. (Butterworth Bup, 1972) P.499 - 500

CHAPTER SIX

CONCLUSION

6.1 SUMMARY

The law regulating legal encumbrances and Bank securities like other topics in the law of banking generally is still at its infancy stage in Nigeria. In its underdeveloped stage it still draws a lot of substance and inspiration from England where it originated. Accordingly, like in England, the law regulating legal encumbrances and bank securities in Nigeria is still largely case law as opposed to statutory law. In most cases where statutes exist they regulate property or securities subject to legal encumbrances and not legal encumbrances as such. One of such statutes is the Kaduna State Law Of Property Edict No.12 of 1990 which governs disposition of land generally.

Nigerian court cases dealing with legal encumbrances and bank securities have not been synthesized and collected into a single volume. The result is that these cases are scattered in various law reports making them rather inaccessible for quick and easy reference. A modest attempt has been made in this work to examine some of these cases and to collect them into a single volume for easy reference by the Nigerian banker.

A holistic appraisal of the law regulating legal encumbrances and bank securities will tend to reveal two major contending interests vying for dominance. These interest are those of the banker security receiver and those of the customer security creator.

From the point of view of the banker, the law regulating bank securities may well be reduced to answering three questions.

These questions are: how does he secure a valid security from his borrowing customer? how does he protect the security created in his favour by the borrowing customer from the adverse interests of third parties or even the possible fraud of the customer? and which form of security will best afford him easy and speedious enforcement? If the law provides favourable means for him obtaining a valid security, it is a good law. Thus the law providing that the mere deposit of documents of title to land or any other property with the banker pursuant to an advance facility transaction constitutes a valid equitable mortgage under hand even though there is no written memorandum of the customer showing the purpose of the deposit, is a law after the banker's heart. Likewise it is a commendable law if it provides him with the means of protecting his security from the adverse interest of third parties or the fraud of the customer creating the security. Accordingly the law giving him priority over all subsequent and prior unregistered mortgagees and chargees if he registered his own mortgage or charge with the appropriate registering authority is a good law. The law is also a good law which entitles him to investigate the title of the customer to the property to be subject to the banker's security and that which enables him to take possession of the mortgaged property or documents of title to it to protect himself from the possible fraud of the customer. In the same way the banker will prefer the law that will make him the chief enforcer of his security. Thus the legal mortgage, the equitable mortgage under seal and the legal charge are the best of securities to the banker.

From the point of a not too conscionable customer, however, the banker's interest in a security transaction is hardly ever his interest. Accordingly he will rather have a law that makes it possible for him to create an invalid security in favour of the banker, the law that leaves out openings for him to perpetrate fraud against the banker, the law that will put the banker at his mercy when it comes to enforcing the security and the law that gives him a perpetual right of redemption of his property given as security to the banker. The interests of the unconscionable customer being largely unholy, the law does not subject itself to accommodating them unless where the banker is imprudent enough to expose himself to the customer's unholy use as where he takes an equitable mortgage under hand or he does not make a demand for the settlement of the secured sum on or before the date fixed for redemption and also failed to take steps to realise the property subject to his encumbrance on default by the customer to redeem.

Both statutory and case law regulating bank securities in Nigeria seek to reconcile, harmonise and unify the banker's and customer's security interests differences by fashioning out an urbane and evenly balanced law for the purpose of commercial harmony and expansion. Thus for instance, while a legal mortgagee banker may be entitled to take possession of the mortgaged property to secure his security, the law imposes a duty on him to account to the mortgagor not only the proceeds and dues which actually accrued to him by virtue of his being in possession but also a duty to account to the mortgagor the dues or proceeds which would have probably accrued to him had he put it to a better use. Again even though the banker is entitled to enforce his security on default by

the customer to redeem his property, the customer is entitled to an equity of redemption.

Even with these "checks and balances" robust possibilities for the banker to advance his security interest sometimes at the expense of the customer and even innocent third parties do exist not only within the Nigerian bank security legal framework but even within the commercial environment of a banker-customer security transaction which is inherently banker biased. Within the legal framework, such security forms as legal mortgages, equitable mortgages under seal and legal charges are tailor-made to advance only the interest of the banker in that he is made the chief taker and the chief enforcer of his security. The security of the legal mortgagee banker may not only cut the customer but sometimes even innocent third parties such as prior equitable mortgagees which he had no notice of their mortgages and all subsequent mortgagees whether or not they had notice of his mortgage. The immense advantages conferred on the banker by the legal mortgage without doubt often tempt the banker to insist only on a legal mortgage to the exclusion of any other form of security. This is so especially in the case of the Nigerian banker who is largely ignorant that other forms of security such as the equitable mortgage under seal and the legal charge equally confer similar advantages on the banker if not from the point of securing his security or gaining priority over third parties with adverse and competing claims on the property subject to his encumbrance, at least from the point of enforcing the banker's security. Sometimes commercial exigencies may make it burdensome to the customer if the banker should insist on a legal mortgage. One of such commercial exigencies may be the

desire of the customer to avoid the stigma of the indelible discharge note that accompanies the discharge of a legal mortgage on the redemption of the mortgage by the customer. This work has demonstrated that recourse should be had to the other forms of security which will not impose an undesirable burden on the customer but which still entitles the banker to some if not all the advantages of a legal mortgage. Likewise where stocks and shares are offered by the customer to the banker it will make more commercial sense if the banker instead of insisting on a legal mortgage of such stocks and shares accepts an equitable mortgage under seal over such stocks and shares. For in this instance an equitable mortgage under seal will accord more with commercial expediency than a legal mortgage. This effectively means that the best security a banker should take in any given security transaction with his customer is not determined only by legal considerations but is subject to both legal and commercial influences. It is well that this is so, if for nothing, to meet the legal standard of "check and balances" earlier referred to.

Often securing the banker's security is as important a consideration as the form of security to be created in favour of the banker by the borrowing customer. This work has not only dwelled extensively on the various steps a banker should take to secure the security created in his favour by the customer from the adverse claims of third parties and the possible fraud of the customer but has shown that there is a necessary link between the form of security created in favour of the banker by the customer and the means that may enable the banker to secure such security. For instance taking possession of the mortgaged property by a

mortgagee banker to secure his security is a means of securing a banker's security that can be used by a legal mortgagee by reason of the legal estate that is vested in the legal mortgagee banker with the creation of the legal mortgage. All other mortgagees including even a legal chargee banker can not secure their security by this means because of the lack of a legal estate in them.

Even though both statutory and case law regulating bank securities in Nigeria seek to create an enabling environment for bank securities transaction by giving effect to both the legitimate interests of the banker and the customer, certain shortcomings have been spotted within its ranks. Some of these shortcomings will be highlighted here and recommendations for overcoming them made.

6.2 RECOMMENDATIONS

6.2.1 Irrelevance Of Mortgagee's Motive In Selling Mortgaged Property

One of the palpable shortcomings of case law regulating bank securities in Nigeria is the provision that the motive of a mortgagee seeking to sell mortgaged property in the enforcement of his security is not material[1]. This law though designed to enhance the interest of the mortgagee banker is capable of hurting the legitimate interest of the mortgagor customer or that of a subsequent mortgagee or mortgagees if any, where the first mortgagee invested with the power of sale decides out of a spiteful or evil motive to sell the mortgaged property at an undervalue to hurt the legitimate interests of either the mortgagor or subsequent mortgagee or mortgagees if any. If he does this, he might while acting within the law turn the security of a subsequent mortgagee or mortgagees or the legitimate expectations of the mortgagor who

would have been entitled to the surplus that would have resulted from a well motivated sale to a mere illusion. This, indeed is unacceptable.

Of course it may be argued that since by the decision of the Court of Appeal in Ekaeteh Vs. Nigerian Housing Development Society Ltd. and Anor[2] a mortgagee is required to exercise due care and diligence in selling and is prohibited from fraudulently selling at an undervalue some measure of protection is afforded the mortgagor or any subsequent mortgagee from the evil or spiteful motive of the first mortgagee. It is, however, submitted that spiteful motive negates good faith; and if good faith is negated due diligence is undermined and if due diligence is undermined what is left as a measure of protection to the mortgagor and subsequent mortgagees if any is the prohibition of a fraudulent sale at an undervalue which can not easily be established against a wily spiteful mortgagee especially if regard is had to the fact that fraud being a criminal offence it has to be proved beyond reasonable doubt.[3]

It is recommended that the law in this area be reformed through legislative enactment to render the motive of the mortgagee in selling a relevant consideration so that if he sells at an undervalue and his motive for selling is found to be spiteful he will be liable to a suit in damages at the instance of the aggrieved mortgagor or subsequent mortgagee. In this respect there should be no difference between the law of banking and criminal law or the law of tort in which motive is considered relevant for the purposes of determining culpability or liability. It is recommended that the quantum of damages where evil motive is established against the mortgagee who sold at an undervalue should

be the amount less the true and fair value of the mortgaged property.

6.2.2 The Law In Awojugbagbe Light Industries Ltd Vs. B.N. Chinukwe

Another aspect of the law of bank securities in Nigeria that requires reforms are the various principles laid down by the Court of Appeal and Supreme Court in the case of Awojugbagbe Light Industries Ltd Vs. B.N. Chinukwe.[1] Two legal principles laid down in this case required to be either overtaken by a statutory provision or to be overruled by the Supreme Court whenever the opportunity presents itself in the form of a case or cases with similar facts and circumstances coming before that court for determination.

The first principle is that which provides that consent of the Governor is not required before the completion of a mortgage agreement between a mortgagee and a mortgagor but can be obtained after the completion of the mortgage transaction. It is submitted that this can not be the law on the issue in Nigeria because it conflicts with both the letter and spirit of the Land Use Act on the requirement of Governor's consent before alienation. The condition for a valid alienation of land under the Land Use Act is that consent of the Governor must first be had and obtained before the alienation is effected. It is therefore preposterous for the Court of Appeal to hold that a valid alienation can be made before consent of the Governor is obtained thereby turning the requirement of Governor's consent into a mere rubber stamp requirement. The Supreme Court needs to overrule the Court of Appeal on the issue,

or else the requirement of the Land Use Act that the consent of the Governor must be had and obtained will stand violated.

The second principle is that a mortgagee entitled to take over possession of the mortgaged property from the mortgagor who is in possession can legally do so by whatever raw or foul means he can avail himself if the mortgagor refused or neglected to deliver quiet and peaceful possession to him. Thus he, as happened in the case, can bring in dogs to chase out the mortgagor from the premises and he will still be acting within the law. It is submitted that this is bad law not only because it is likely to encourage lawlessness on the part of mortgagees who will definitely prefer to resort to self-help to get into possession of the mortgaged property than seek legal enforcement of their right but that two wrongs do not make a right. Again to entitle a mortgagee to take possession of the mortgaged property by whatever means available to him will be like saying that a landlord who is entitled to recover possession of his rented premises having terminated the tenancy between him and his tenants vide the requisite quit notices can do so by whatever means he deems fit. Since this is not the law between a landlord and his tenant there is no reason why it should be between a mortgagee and mortgagor. The law between a landlord entitled to recover possession of his premises in the occupation of a tenant holding such premises over is that the landlord must sue the tenant to court which can after hearing the case forcefully eject the tenant from the premises if despite the court order ordering him to vacate and deliver up the

said premises to the landlord, he still refuses or neglects to do so before or at the date appointed by the court.[6] In America the above law which applies between a landlord entitled to take over possession of his premises from a tenant holding such premises over applies between a mortgagee entitled to take over possession of mortgaged property from a mortgagor holding such premises over. This law is strongly recommended for Nigeria.

6.2.3. Reconciling Section 197 Of The Companies And Allied Matters Act To Section 68 Of The Same Act.

There is a crying need to relate section 197 of the Companies And Allied Matters Act to section 68 of the same Act given that the two provisions are supposed to govern the issue of abolition of constructive notice. this will make the law in the area much more intelligible, cohesive and less liable to ambiguity and confusion. While section 197 of the Companies And Allied Matters Act provides for registration of charges, section 68 provides for the abolition of the doctrine of constructive notice without the two provisions of the Act being related either by subject matter, that is registration of charges, or abolition of constructive notice, or being relate by the legislative phrase of "subject to". It is submitted that unless the two sections of the Companies and Allied Matter Act are reconciled to each other the law will remain confusing and even ambiguous.

6.3 CONCLUDING REMARK

It is worth noting that legal encumbrances and bank securities are two sides of the same coin: the coin of a security transaction, in that it is the legal encumbrance that is cast on the property of the customer borrower that yields a security to the banker. It is in this light that legal encumbrances and bank securities were discussed in this work.

NOTES AND REFERENCES

Nash Vs. Eads (1880) 25 S.J.95.

(1973) 1 N.S.C.C. 373.

Adelaja Vs. Fanoiki (1990) 6 WSRN 40 S.C at 60 para 3; see also S.138(2) of the Evidence Act (Cap 112 Laws Of The Federation Of Nigeria 1990.

(1993) 2 NWLR (Pt 270) p. 485.

Ibid.

SS.7,8,9 and 10 of the Recovery of Premises Law (Cap 115) Laws of Northern Nigeria 1963.

BIBLIOGRAPHY

TEXT BOOKS

1. Adekanye F: Practice of Banking Vol I (Ife, IUP, 1979)
2. Adeniji A.O: Law and Practice of Banking in Nigeria (Ife, IUP, 1981)
3. Cortes on Mortgages 6th ed. Vol.I
4. Curson L.B: Law of Trust 2nd ed. "McDonald, MEP, 1981)
5. George Orsborne E: Cases and Materials on Secured Transactions 2nd ed. (Mcdonald, MEP, 1982
6. Holdens Milnes J: The Law and Practice of Banking Vol.2. Securities for Banker's Advances (Pitman, Pub. 1989).
7. Igweike K.I: Law of Banking and Negotiable Instruments (Ibadan, IUP, 1983)
8. Ituwe C.E: Elements of Practical Banking (Ibadan, IUP, 1982)
9. Maitland F.W: Equity (Revised by John Brunyate 1936)
10. Megarry and Wade op cit
11. Megarry R.E: A Manual of the Law of Real Property 6th ed (1982)
12. Megrah Maurice: Paget's Law of Banking (Butherworth, Bup. 1972)
13. Mozley and Whiteley's Law Dictionary 9th ed.
14. Oluyede P.A: Nigerian Law of Conveyancing 1st ed. (Ibadan, IUP, 1978)

15. Perry F.E: Elements of Banking 2nd ed. (Methuen, MUP, 1975)

16. Sheldon and Fidler: Practice and Law of Banking 2nd ed (McDonald,MUP 1982)

17. Smart P.E: Chorley and Smart Leading Cases in the Law of Banking.

5th ed. (Sweet and Maxwell, SWUP,1983)

18. Sykes E.I: The Law of Securities 2nd ed. (The Law Book Society, LBSU, 1973.)

JOURNALS

1. Journal of the Institute of Bankers Vol. LIX (1938)

2. Justice Journal June, 1991 Issue

3. Justice Journal (May - June 1993 Issue_