COURSE GUIDE

CLL805
LAW OF SECURED CREDIT TRANSACTIONS I

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INTRODUCTION

The Law of Secured Credit Transactions, a two-semester course, is one of the postgraduate courses at the Master of Laws (LLM) level. The LLM programme and the courses, like the Law of Secured Credit Transactions I, is designed to provide advanced training relevant to and produce the needed higher manpower in the legal profession for educational institutions, courtroom practice, public institutions, the industry and commerce and the society in general. To align the Law of Secured Credit Transactions I (**the Course**) to this general overarching objective, the preparation and presentation of the Course drew heavily from research, experience and strictly on current laws that underlie and impact the area of secured credit transactions. The Course is the first of the two semester programmes that constituted it.

Consequently, the first semester of the Course is concerned with the following:

- An introduction to the laws that regulate secured credit transactions in Nigeria, including the Companies and Allied Matters Act 2020, Secured Transactions in Movable Assets Act 2017, Banks and Other Financial Institutions Act 2020, Bill of Sales Law of Lagos State, among others.
- Concepts, principles and nature of secured credit transactions, like debt security, debt financing options, numerus clausus of security interest, indicia of security interest, possessory and non-possessory interests, etc.

COURSE OBJECTIVES

To achieve the aims stated above, some general as well as specific objectives have been pursued in the preparation and presentation of the Course. While each unit within each module prefaced the specific objectives, the general objectives to be successfully attained at the end of the course material should not be lost sight of. Therefore, at the end you should be able to:

1) Understand the sources of laws that regulate secured credit transactions in Nigeria
2) Understand the definition and nature of the secured credit transactions
3) Distinguish between the possessory and non-possessory security interests as against consensual and non-consensual security interests.

4) Differentiate between proprietary right and security interest.
5) Know the different types of creditors.
6) Understand the difference between attachment of security interest and perfection
7) Know the meaning and implications of priority of interests
8) Distinguish between the various types of pledge and lien.
9) Understand the meaning, creation, and enforcement of mortgage
10) Know the meaning of collateral security

WORKING THROUGH THIS COURSE

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 13 weeks to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are.

a) Course guide.
b) Study Units.
c) Textbooks
d) Assignment file/Seminar Paper
e) Presentation schedule.

MODUILES AND STUDY UNITS

We deal with this course in 16 study units divided into 5 modules as follows:

Module 1 Major Laws Regulating Secured Credit Transactions

Unit 1 Companies and Allied Matters Act, CAP C20 LFN 2004
Unit 2 Land Use Act, CAP L5 LFN 2004
Unit 3 Banks and Other Financial Institutions Act CAP B2 LFN 2011
Unit 4 Bills of Sale Law Lagos State
Unit 5 Secured Transactions in Movable Assets Act 2017

Unit 6 Agricultural Credit Guarantee Scheme Fund Act CAP A11 LFN 2004

Module 2 The Concept of Secured Credit Transactions

Unit 1 Types of Creditors
Unit 2 Debt Financing Options
Unit 3 The Concept of Security

Module 3 The Nature of Security Interest

Unit 1 How to Identify Security Interest
Unit 2 Numerus Clausus and Process of Security Interest

Module 4 Possessory Security

Unit 1 Pledge as a Form of Security
Unit 2 Lien as a Security
Unit 3 Enforcement of Possessory Security Interest

Module 5 Non-Possessory Security

Unit 1 Mortgages
Unit 2 Enforcement of Mortgage Security

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each. We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the law of contract. You will then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous Units.

Each study unit consists of one week's work and includes specific objectives, directions for study, reading materials and Self-Assessment Exercises *(SAE)*. Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

TEXTBOOKS AND REFERENCES

Certain books have been recommended in the course. You should read them where so directed before attempting the exercise.

ASSESSMENT

There are two aspects of the assessment of this course, the Tutor Marked Assignments, and a written examination. In doing these assignments you are expected to apply the knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment following the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

SELF-ASSESSMENT EXERCISES

Self-assessment questions are raised at the end of each module to measure the level of successful engagement with the legal issues covered. The feedback (answers) in the body of the main text is distilled and put up at the end of the course material. This will enable you to understand and apply legal principles to practical situations in resolving legal matters in the field of marine insurance law.

FINAL EXAMINATION AND GRADING

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-assessment exercises and the tutor-marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit and taking the examination to revise the entire course. You may find it useful to review yourself assessment exercises and tutor-marked assignments before the examination.

COURSE SCORE DISTRIBUTION

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments. Best three marks of the four counts at 30% of course marks.
Final examination	70% of overall course score
Total	100% of course score.

COURSE OVERVIEW AND PRESENTATION SCHEDULE

Module / Unit	Title of Work	Weeks Activity	Assessment (End of Unit)
MODULE 1	*MAJOR LAWS REGULATING SECURED CREDIT TRANSACTIONS*		
Unit 1	*Companies and Allied Matters Act, CAP C20 LFN 2020*	1	Assignment 1
Unit 2	*Property Legislations*		Assignment 2
Unit 3	*Banks and Other Financial Institutions Act CAP B2 LFN 2020*		Assignment 3
Unit 4	*Bills of Sale Law Lagos State*		Assignment 4
Unit 5	*Secured Transactions in Movable Assets Act 2017*		Assignment 5
Unit 6	*Agricultural Credit Guarantee Scheme Fund Act CAP A11 LFN 2004*		Assignment 6
MODULE 2	*THE CONCEPT OF SECURED CREDIT TRANSACTIONS*		
Unit 1	*Types of Creditors*		Assignment 7
Unit 2	*Debt Financing Options*		Assignment 8
Unit 3	*The Concept of Security*		Assignment 8
MODULE 3	*THE NATURE OF SECURITY INTEREST*		
Unit 1	*How to Identify Security Interest*		Assignment 9
Unit 2	*Numerus Clausus and Process of Security Interest*		Assignment 10

MODULE 4	*POSSESSORY SECURITY*		
Unit 1	*Pledge as a Form of Security*		Assignment 11
Unit 2	*Lien as a Security*		Assignment 12
Unit 3	*Enforcement of Possessory Security*		Assignment 13
MODULE 5	NON-POSSESSORY SECURITY		
Unit 1	Mortgages		Assignment 14
Unit 2	Enforcement of Mortgages		Assignment 15

HOW TO GET THE MOST FROM THIS COURSE

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self-Assessment Exercises (SAE) are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit. Apart from the feedback (answers) to the SAE, examples are given in the study units. Work through these when you have come to them.

TUTORS AND TUTORIALS

There are 15 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Please do not hesitate to contact your tutor by telephone or e-mail if:

- You do not understand any part of the study units or the assigned readings.
- You have difficulty with the self-assessment exercises.
- You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered during your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

TABLE OF CONTENT

MAIN COURSE

CONTENT

MODULE 1 PRINCIPAL LAWS REGULATING SECURED CREDIT TRANSACTIONS

UNIT 1 COMPANIES AND ALLIED MATTERS ACT, CAP C20 LFN 2004

Unit Structure

1.1 Introduction

The law of secured credit is set against a docket of laws that regulate secured transactions in Nigeria. In this module you will come across the principal laws in this area, which are:

a) Companies and Allied Matter Act 2004 (**CAMA**) 2020
b) Property Legislation The relevant property legislation affecting secured credit law are Land Use Act (LUA) Cap L5 Laws of the Federation of Nigeria 2004; Property and Conveyancing Law 1959 and Conveyancing Act 1881
c) Banks and Other Financial Institutions Act (**BOFIA**) 2020
d) Bills of Sale Law CAP B2, Volume 1 Laws of Lagos of Nigeria 2003
e) Secured Transactions in Movable Assets Act (**STMA**) 2017
f) Agricultural Credit Guarantee Scheme Fund Act CAP A11 Laws of the Federation of Nigeria 2004.

Beyond the above list, other legislations that impact on secured credit in Nigeria include the Property and Conveyancing Law (or its equivalent, Conveyancing Act 1881), Admiralty Jurisdiction Act 2004, Sheriff and Civil Process Act CAP A5 Laws of the Federation of Nigeria 2004,

Civil Aviation Act 2006, Merchant Shipping Act 2007, Assets Management Corporation of Nigeria Act 2010 (including its amendments), Civil Procedure Rules of the various State High Courts (For instance, see Order 59 Rule 2(c) Lagos State High Court (Civil Procedure) Rules 2019) and the various statutory instruments made pursuant to other principal or enabling enactments. You are strongly encouraged to check out the foregoing enactments relative to secured credit.

1.2 Intended Learning Outcome

By the end of the Unit, you will be able to:

- explain the relationship between CAMA and secured credit transactions by companies registered and operating in Nigeria.

1.3 Companies and Allied Matters Act 2020

CAMA as one of the principal laws regulating secured credit in Nigeria is pervasive. This is because the law is the foundation for every corporate activity in Nigeria. Even if there is no specific provision in CAMA respecting secured credit in Nigeria, the law would still find application here because no company comes into existence without CAMA.

An entity can only come into existence after the promoters have complied with the requirements of the law regarding the formation, registration and management of companies in Nigeria. *Can you recall the principal requirements and procedures for the formation of companies in Nigeria?* Independent of the contents of the memorandum of association, the company has inherent statutory power to borrow money and charge its assets as security for repayment: see sections 48 CAMA 2020 and Part B, Chapter 9, particularly section 191 CAMA 2020 thereof. Are there any differences between memorandum of association and articles of association of a company? On these, compare sections 27 and 32 CAMA and National Palm Produce Association of Nigeria Ltd (GTE) & Anor V. Udom & Ors (2013) LPELR-21134 (CA).

It is now settled that the company has inherent powers to borrow money. Do you think that this inherent power to borrow money extends to furnishing the assets, property and business of the company as security by way of mortgage or charge? In fact, even without the inherent powers of the company to borrow money, where the company, acting through its directors, does an act which is beyond the powers of the company, the company nevertheless will be bound as against third parties: ss 45 and 46 CAMA; A. G. Leventis & Co (Nig.) Plc v. Modu (2018) LPELR-45375 (CA). The critical role of CAMA as a principal instrument

regulating secured credit transactions in Nigeria by corporate entities could be seen in debentures and the consequent obligation to register security, for example, charges, furnished by companies in repayment of debt - s 197 CAMA (to be discussed later).

SELF-ASSESSMENT EXERCISES 1

a) *Comment on the statement that "even if there is no specific provision in CAMA as regards security interest, the law will still be relevant to the subject of security."*
b) *Provide at least two authorities to corroborate the position that "a company has inherent powers to borrow money."*
c) *Identify at least one critical role of CAMA in the context of secured transactions.*

1.4 Summary

CAMA 2020 is one of the principal legislations that regulate secured transactions in Nigeria. Generally, CAMA is required to form, register and incorporate a company, the basis on which a company can begin business and enter into secured credit transactions. Specifically, the law made provisions for transactions affecting secured credit in Nigeria.

1.5 Reference/Further Reading

Companies and Allied Matters Act 2020.

1.6 Possible Answers to Self-Assessment Exercises 1

a) The statement is true because security interests are created by companies and individuals. Before a company comes into existence, it must be registered under CAMA. Therefore, apart from the provisions of CAMA on the creations of charges and debentures, the law is critical because any company in Nigeria is founded upon the pedestal of CAMA

b) The authorities to corroborate the position are:

i. Sections 45 and 46 CAMA

ii. A.G. Leventis & Co (Nig) Plc v Modu (2018) LPELR-45375 (CA)

c) One of the critical roles of CAMA as legislative instrument regulating secured credit transactions in Nigeria is in the area of debentures and the requirement of registration.

UNIT 2 PROPERTY LEGISLATIONS

Unit Structure

2.1 Introduction

The principal federal legislation affecting and regulating transactions, including the use of land as security for repayment of debt or discharge of an obligation, is the Land Use Act (LUA). LUA is an overarching legislative instrument. In the context of this course, only the relevant sections of LUA that affect or impact secured credit will be referenced. These are section 1, the vesting provision and section 22 the consent provision. Notwithstanding, it must not be lost on you that other legislative instruments impact the use of land as security for repayment of debt. For instance, the Conveyancing Act (CA) at section 20 as well as the Property and Conveyancing Law (PCL) at section 125, provides for the conditions which must be fulfilled before the mortgagee's power of sale becomes exercisable. See sections 19(1) and section 123(1) of CA and PCL respectively. As you will come across these laws in greater detail in this course, only Land Use Act will be discussed in this unit.

2.2 Intended Learning Outcomes

By the end of this Unit, you will be able to:

- analyse the unique position of LUA as a principal legislation affecting secured credit in Nigeria.

2.3 Property Legislations

2.3.1 Land Use Act

The critical position of LUA is understandable against the backdrop of its salient provisions. Adopting the principle of trusteeship analogous to the position of the principal head of the family in respect of communal land, the LUA vests in the Governor all lands comprised in the territory of each state and commanded that "such land shall be held in trust and administered for the use and common benefit of all Nigerians": Section 1 LUA; Airtel Networks Ltd v. AG of Kwara State & Anor (2014)

LPELR-23790 (CA). Consequently, all transactions in land by any person without the consent of the head trustee, the Governor, are void. Specifically, you may wish to check up on Section 22 LUA; and the case of Mbanefo v. Agbu & Anor (2014) LPELR-22147(SC). You must always bear this in mind throughout the course and in practice.

Noting the influence of LUA in this connection, it has been pointed out that the LUA has drastically altered the gamut of law as to land and dealings with it, especially through mortgages and other forms of alienation. *(Goldface-Irokalibe, 2007:170*) While further discussions on the influence of LUA on secured credit will be found in appropriate sections of the Course.

SELF-ASSESSMENT EXERCISE 2

1) Who is the head trustee of lands comprised in each State and why?
2) Makun Limited created deed of legal mortgage in favour of Alheri Community Bank Ltd. Advise the bank on the role of Land Use Act in the transaction.

2.4 Summary

There are property legislations that impact on secured credit transactions in Nigeria. Prominent among such laws is the Land Use Act, which makes it mandatory for the consent of the Governor of a State to be sought and obtained in respect of transactions in land comprised in any state of the Federation. This is in addition to other laws too.

2.5 References/Further Reading/Web Resources

Conveyancing and Law of Real Property Act 1881.

Land Use Act Cap L5 Laws of the Federation of Nigeria 2004.

Goldface-Irokalibe, I.J. (2007). Law of Banking in Nigeria (Lagos: Malthouse Law Books, 2007).

Property and Conveyancing Law Cap 100 Laws of Western Nigeria 1959.

Smith, I.O. (2007). Practical Approach to Law of Real Property, 2nd ed (Lagos: Ecowatch Publications).

2.6 Possible Answers to Self-Assessment Exercises

1) The Governor is the head trustee. Because s 1 LUA vests all lands comprised in each state in the Governor to hold and administer for the benefit of all Nigerians.
2) The role of Land Use Act in the transaction is that the consent of the Governor must be sought and obtained. Otherwise, the deed of legal mortgage would be void for absence of such a consent.

UNIT 3 BANKS AND OTHER FINANCIAL INSTITUTIONS ACT (BOFIA) 2020

Unit Structure

3.1 Introduction

The outlook of any country's economy is dependent on the supply of credit, which itself is a function of the health of the financial system. Deposit money banks play a vital role in any financial system, and Nigeria is not an exception. Efficiency of financial intermediation is a determinant of the efficiency of the financial system. Financial intermediation is mainly the interplay of the surplus and deficit economic units of society. As a result, the legal system cannot stand aloof. Therefore, among other legislative instruments (for instance, the Central Bank of Nigeria Act 2007), the BOFIA was enacted to regulate the activities of deposit money banks in Nigeria as it relates to and affects their capacity to extend credit.

3.2 Intended Learning Outcome

By the end of this unit, you will be able to:

- explain the role of bankers in the context of the legal regime affecting secured credit transactions.

3.3 Banks and Other Financial Institutions Act (BOFIA) 2020

The law repealed the BOFIA 2004. It is the legal regime regulating banking business in Nigeria. Pursuant to the law except you meet the requirements for the grant of licence you cannot purport to carry on banking business: Sections 2 and 3 BOFIA 2020; Audu v. FRN (2018) LPELR-46643(CA). Among other, the advance of credit or grant of loans is at the core banking business FCMB Plc V. Benbok Ltd (2014) LPELR-23505 (CA).

Viewed in the context of secured credit transaction, BOFIA is pro-secured creditor to the extent that it discourages the advance of financial accommodation without security for its repayment. The law insists that bankers must obtain security for every advance loan and in this connection provides that it is an offence to extend to any person any advance, loan or credit facility or give any financial guarantee or incur any other liability on behalf of any person so that the total value of the advance, loan, credit facility, financial guarantee or any other liability in respect of the person is at any time more than twenty per cent of the shareholders fund unimpaired by losses or in the case of a merchant bank not more than fifty per cent of its shareholders fund unimpaired by losses: Section 19(1)(a) BOFIA 2020. Where the banker finances the acquisition of a motor vehicle, the subject matter of acquisition is a security for the repayment of the loan used to acquire the vehicle.

Thus, the right of the banker is protected to the extent that the law criminalizes the sale, disposal or otherwise parting with the possession of a motor vehicle on which a loan obtained from the bank is still outstanding without first obtaining the consent in writing of the bank prior to the sale or disposal. On this see, Section 1(1) Banks (Motor Vehicle Loans) (Miscellaneous Provisions) Act CAP B4 LFN 2020.

SELF-ASSESSMENT EXERCISE 3

1) The supply of credit is directed related to a country's economic growth.
   (a) Agree (b) Don't agree (c) It applies to advanced economies

2) Furnish authorities to support the position carrying on the business of banking in Nigeria is hinged on the fulfilment of prerequisites required thereto.

3.4 Summary

The financial system being an interplay of surplus and deficit economic units determines the flow credit in any economy. The BOFIA among others is designed to protect creditors who embark and frequently are parties in secured credit transactions.

3.5 References/Further Readings/Web Resources

Banks and Other Financial Institutions Act 2020.
Central Bank of Nigeria Act 2007.

3.7 Possible Answers to Self-Assessment Exercises

1) (a) *Agree*

2) The authorities are sections 2 and 3 BOFIA 2020; Audu v. FRN (2018) LPELR-46643(CA).

3) Financial accommodation.

UNIT 4 BILLS OF SALE LAW OF LAGOS STATE

Unit Structure

4.1 Introduction

Before 2017 the law of secured credit in Nigeria was in a disoriented state. Then apart from CAMA the other law that presents a semblance of statutory regulation of secured credit in movable assets is the Bills of Sale Laws of the various states of the federation. Notwithstanding the STMA 2017, Bills of Sale Law still has application in personal property security. Historically, Bills of Sale Law is a product of statute of general application and thus derives its foundation from the received English Bills of Sale Act 1878.

4.2 Intended Learning Outcome

By the end of the unit, you will be able to:

- explain the extent of application of Bills of Sale Law to secured credit transactions.

4.3 Bills of Sale Law of Lagos

Before the passage of the STMA in 2017, Bills of Sale Law is the only law regulating security in personal or movable assets in Nigeria. The Nigerian Supreme Court states that "a bill of sale, like a deed of conveyance, is a contractual document in the sense that it is a more formal document made pursuant to and giving effect to an antecedent agreement," Per Ayoola JSC in, The Vessel Leona II v. First Fuels Ltd (2002) LPELR-1284.

According to Wikipedia, “a bill of sale is a document that transfers ownership of goods from one person to another. It is used in situations where the former owner transfers possession of the goods to a new owner. Bills of sale may be used in a wide variety of transactions: people can sell their goods, exchange them, give them as gifts or mortgage them to get a loan.” It has been clarified that “a bill of sale will detail a transfer of property or sale of items between a seller and

buyer. This type of document serves as legal evidence that the seller transferred his or her rights to the assets described in the bill of sale."

There are two types of bills of sale – absolute bills of sale and conditional bills of sale. Absolute bills of sale evidence assignments, transfers and other assurances of personal chattels. They are not more than usual contract of sale of goods. In this context, a bill of sale includes bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt attached thereto, or receipts for purchase moneys of goods, and other assurances of personal chattels, and powers of attorney, authorities or licences to take possession of personal chattels as security for any debt." See section 3(1) of the Law for the very wide definition of "a bill of sale" as well as "personal chattels".

Conditional bills of sale, covered under Part 3 of the Law, relates to bills of sale as security for the payment of money. According to Section 8 of the Law, "a bill of sale given or made by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the Schedule hereto." Meanwhile, it is important to note that bills of sale are more suited for transactions involving individuals and non-financial institutions. This is because companies and bankers will prefer to find their security under the STMA 2017 or CAMA 2020 where they are offered a greater degree of protection and control using the instrument of the National Collateral Registry (See Credit Reporting Act 2017) maintained by the Central Bank of Nigeria or charges registry in Corporate Affairs Commission. Another reason is that Bills of Sale Law has restrictive application as far as secured credit is concerned. Similarly, the Bills of Sale Law does not apply to debentures (section 17), after-acquired property (section 10), and obviously it cannot apply to purchase money security interest. You may wish to compare (sections 3(2), 15(2)(b) and 27 STMA 2017).

SELF-ASSESSMENT EXERCISE 4

1) *What do you consider to be the differences between Secured Transactions in Movable Assets Act and Bills of Sale Law?*
2) *Identify the distinguishing feature that set apart the Bills of Sale Law of the various states of the federation.*
3) *While the Central Bank of Nigeria maintains _____, the Corporate Affairs Commission maintains the _____.*

Every bill purporting to create security interest in personal property (a) must be in accordance with the Schedule A form, see **Table 1-4 below**; (b) shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale and (c) must be attested by one or more witnesses, not being party or parties thereto (section 14). Failure to attest and register a bill of sale renders it void for the purpose of creating security interest in respect of the personal chattels comprised therein in favour of any creditor. The law provides registration to be made "within seven clear days after the making or giving of such bill of sale." The place of registration is the Bills of Sale Registry at the Directorate of Commercial Law in the Ministry of Justice, Lagos. The nature of security interest capable of being created under this Law is non-possessory and the grounds for enforcement of the security (sections 12 and 13).

See the table below for an example of Form A of Bill of Sale for the purpose of granting security interest in personal property:

SAMPLE FORM A BILL OF SALE USED AS SECURITY FOR PAYMENT

This Indenture is made the---------- day of----------

between A.B. ---------- of ---------- of the one part and C.D.---------- of ----------of the other part witnesses that in consideration of the sum---------- of now paid to A.B. by C.D. the receipt of which the said A.B. hereby acknowledges (or whatever else the consideration may be), he the said A.B. doth hereby assign unto C.D. his executors, administrators and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of ---------- ---------- and interest thereon at the rate of ---------- ---------- per cent per annum (or whatever else may be the rate). And the said A.B. doth further agree and declare that he will duly pay the said C.D. the principal sum aforesaid together with the interest then due by equal payments of---------- ------- on the--------- day of---------- (or whatever else may be the stipulated time or times of payment). And the said A.B. doth also agree with the said C.D. that he will-------- (here insert terms as to insurance, payment of rent, or otherwise which the parties may agree to for the maintenance or defeasance of the security).

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section 12 of the Bills of Sale Law.

In witness, etc.

---------- Signed and sealed by the said A.B.

in the presence of E.F.

Despite the enactment of Transactions in Movable Assets Act 2017, the Bills of Sale Law of the various states are still of present relevance as far as secured credit transactions are concerned. The only limitation is that it is limited to transactions involving individuals.

4.5 References/Further Reading/Web Resources

Bills of Sale Law of Lagos State.

Onamson, F.O. (2017). Law and Creditor Protection in Nigeria. Lagos: Malthouse Law Books.

Secured Transactions in Movable Assets Act 2017.

http://lagosministryofjustice.org/directorates/directorate-of-commercial-law/

https://www.contractscounsel.com/t/us/bill-of-sale#toc--how-can-i-write-a-bill-of-sale-

https://en.wikipedia.org/wiki/Bill_of_sale

4.6 Possible Answers to Self-Assessment Exercises 4

1) The difference between STMA and Bills of Sale Act are the STMA is a federal enactment, the Bills of Sale Law is a state law; only companies can create and register security under the STMA; but both companies and individuals can create and register security under Bills of Sale Law; and Bills of Sale Law apply to absolute transactions involving outright sale while STMA is limited to creation of security interests only.

2) The distinguishing characteristics of Bills of Sale Law of the various states is that it is a statute of general application based on the English Bills of Sale Act 1878.

3) The Central Bank of Nigeria maintains the National Collateral Registry while the Corporate Affairs Commission keeps the charges register.

UNIT 5 SECURED TRANSACTIONS IN MOVABLE ASSETS ACT (STMA) 2017

Unit Structure

5.1 Introduction

Propped by the desire to improve the country's ranking on the Ease of Doing Business Index, the Nigerian government took innovative and comprehensive steps to overhaul the business climate. The steps taken in 2017 included repealing the CAMA and enacting CAMA 2017, enactment of Credit Reporting Act 2017 and STMA 2017.

5.2 Intended Learning Outcome

By the end of the Unit, you will be able to:

- Iidentify the STMA 2017 as the main law regulating security interest in personal property.

5.3 Secured Transactions in Movable Assets Act 2017

The STMA 2017 is an attempt to create a unitary regime of secured transactions in personal property in Nigeria. Among other objectives, the STMA is directed at facilitating access to credit secured with movable assets, perfection of Security Interests in movable assets and realisation of Security Interests in movable assets. Part of the process of achieving the objectives is the creation of National Collateral Registry.[1] The STMA revolutionised the secured credit climate with respect to the creation of personal property security interests.

However, the STMA is an elitist piece of legislation, applying only to security interests created in favour of a financial institution, particularly deposit money banks.[2] This means that an individual or even a company cannot create security interest in favour of a non-financial institution and

[1] For details, see the link: https://www.ncr.gov.ng/Home/About
[2] To use the Collateral Registry, one must a registered client. A registered client has to be a financial institution.

purport to register at the National Collateral Registry.[3] This is a major drawback of the Act. Further, you must know that the STMA 2017 does not seek to supplant or overreach the prime position of the LUA or CAMA.

SELF-ASSESSMENT EXERCISE 5

1) *The STMA 2017 is innovative and ground-breaking. Despite this, it has its limitations with reference to application. Comment.*
2) *The STMA 2017 is disruptive and has brought about an unwieldy situation between its application and CAMA 2020. Do you agree? Give reasons for your answer.*

Consequently, while the law applies to all security interests in movable assets created by an agreement that secures payment or the performance of an obligation,[4] it neither applies to the creation or transfer of an interest in land other than account receivables[5] nor does it prevent the creation of security interest in the form of charges by companies registered under CAMA.[6] At this point, we shall pause a discussion of the STMA since references and commentaries will be made to it in relevant aspects of the course.

5.4 Summary

The STMA 2017 is an innovative piece of legislation that has brought clarity and certain to an otherwise disparate and dislocated system. The law has made great and commendable inroads into secured credit transactions regime in Nigeria. Today creditors are better off.

5.5 References/Further Readings/Web Resources

Secured Transactions in Movable Assets Act 2017.

Visit National Collateral Register at
https://www.ncr.gov.ng/Home/About

[3] For additional information visit, https://www.ncr.gov.ng/Search/Search/Search
[4] Section 2(1)(a) STMA 2017
[5] Section 2(2)(b) STMA 2017
[6] Section 2(3) STMA 2017

5.6 Possible Answers to Self-Assessment Exercise 5

1) The STMA is innovative and ground-breaking, but these outstanding qualities are beclouded by the limitations of the Act. It does not apply to security interests in immovable property and to interests in ships and aircrafts.

   I disagree. This is because its area of focus or application is well set out in the law. Secondly, the STMA 2017 does not apply to all species of secured credit transactions.

UNIT 6 AGRICULTURAL CREDIT GUARANTEE SCHEME FUND ACT 2004

Unit Structure

6.1 Introduction

According to Corporate Finance Institute, "a sinking fund is a type of fund that is created and set up purposely for repaying debt. The owner of the account sets aside a certain amount of money regularly and uses it only for a specific purpose. Often, it is used by corporations for bonds and deposits money to buy back issued bonds or parts of bonds before the maturity date arrives. It is also one way of enticing investors because the fund helps convince them that the issuer will not default on their payments." This is obviously what the Federal Government aimed to achieve with the enactment of the Agricultural Credit Guarantee Scheme Fund Act Cap B2 Laws of the Federation of Nigeria (LFN) 2004.

6.2 Intended Learning Outcome

By the end of the unit, you will be able to:

- discuss how the law here is designed as a special vehicle for encouraging the flow of credit to agribusiness in Nigeria.

6.3 Agricultural Credit Guarantee Scheme Fund Act 2004

The Agricultural Credit Guarantee Scheme Fund Act established the Agricultural Credit Guarantee Scheme Fund. This is a sinking fund into which shall be subscribed a certain sum to provide guarantees for loans granted for agricultural purposes by any bank. In other words, the fund creates a security for the bankers[7] with the objective stimulating, encouraging and stimulating the diversification of the country's monolithic economic system. If well implemented and supported by the banks, the scheme would create a major boost in agribusiness and thus increase in the country's gross domestic product.

[7] See the Long Title of the Act.

The fund boasts of 50 billion NGN[8], while a guarantee of up to 50 million NGN can be provided for any loan to any individual. While the law must be hailed as a good initiative it does not provide total succor to the farmer. This is because the farmer is still expected to furnish security, where the amount of the loan is more than 100,000 NGN (less than 300USD).[9] Further and detailed discussion of the law will be treated in the Course.

SELF-ASSESSMENT EXERCISE 6

a) Why do you think that the Agricultural Credit Guarantee Scheme Fund Act does not provide succour to the Nigerian farmer?

6.4 Summary

The subject of secured credit transactions is of present interest even to the Federal Government. This is evidence of the critical role the supply of credit plays in an economy. Thus, the Agricultural Credit Guarantee Scheme Fund Act is a conscious effort by the government to provide comfort to the providers of credit, the banks.

6.5 References/Further Reading/Web Resources

Agricultural Credit Guarantee Scheme Fund Act Cap B2 Laws of the Federation of Nigeria (LFN) 2004.

The Corporate Finance Institute. "Sinking Fund". Available at https://corporatefinanceinstitute.com/resources/knowledge/finance/sinking-fund/

[8] Section 5 of the Act
[9] Section 10(1) of the Act.

6.6 Possible Answers to Self-Assessment Exercise

The requirement of security for loan amount in excess of 100,000 NGN (less than USD300) is its major drawback and can work against the farmer.

MODULE 2 THE CONCEPT OF SECURED CREDIT TRANSACTIONS

UNIT 1 TYPES OF CREDITORS

Unit Structure

1.1 Introduction

The supply of credit is a driver of economic activity. Companies represent the vehicle through which economic activities are ventilated. In fact, this has resulted in dominance of companies as the foundation of economic activity. The glaring importance of companies will be appreciated when it is known that 47.42% of global revenue in 2015 were locked in the hands of private businesses in the form of corporations, while the top ten corporations in the world accounted for 7.42% of global GDP in the same period.[1] To achieve these heights and remain dominant players companies rely on the supply of credit. Generally, there are three discernible sources of finance by which any company can finance its operations. These are equity, debt and retained profits. Equity is the contribution of the members to the company and expressed in shares. Debt is represented by borrowing, which can be secured or unsecured. Retained profits is a surplus and is arrived at after

[1] "Study: big corporations dominate list of world's top economic entities" Global Study. The Guardian. (Mon 12 Sep 2016). Available online at https://www.theguardian.com/business/2016/sep/12/global-justice-now-study-multinational-businesses-walmart-apple-shell; also see, How the world's biggest companies compare to the biggest economies". World Economic Forum. Available at https://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/. All accessed 27/4/2020

deducting expenses, payment of taxes and dividend (if declared). When it is said that credit is a life wire, it is usually viewed from the perspective of its role as a catalyst for economic development and explained in terms of its efficiency as to commercial enterprises.

Moreover, there is a correlation between the availability of credit and the efficiency of a country's financial system. What then is credit? In the context of this course, it refers to financial accommodation granted or extended by a person called the "creditor" to another person called the "borrower."[2] In the Nigerian case of UBA plc v. Amsata Supersandals Manufacturing Company Ltd & Ors,[3] the court drew a difference between credit facility and letter of credit. When a credit facility is granted, it may be secured or unsecured; this has given rise to types of creditors. Largely, the class of creditors, the concern of this course, is credit relationships arising between corporate entities. Where credit relationships exist, it is always between the creditor and the debtor. The creditor may be secured or unsecured. The principal object of every credit relationship is the presence of a loan or debt security (like debenture). Where the loan or debenture is secured, it means that the creditor acquired real security or collateral security. The creditor who extracts security interest from the debtor does so for some reasons. You will find out about these issues in due course.

Generally, we discover three types of creditors: These are those that provided as a matter of course financial accommodation and by reason thereof put in place mechanisms to mitigate their exposure to the debtor; those that become creditors albeit they did not set out, or intend, ab initio to extend credit; and those with no prior contact or relationship with the company before transmogrifying into creditor of the company.[4] However, statutorily creditor is restrictively defined as "the person granting a facility on the back of a security interest."[5] It is restrictive because it is not every creditor that grants a facility against a security for its repayment.

[2] McKendrick E. (Ed), (infra) p. 621: credit is said to "denote financial accommodation of some kind (like) the provision of a benefit (cash, land, goods, services or facilities) for which payment is to be made by the request in money at a later date." Similarly, the UK Consumer Credit Act 1974 at section 9(1) credit is defined to include "a cash loan, and any other form of financial accommodation."

[3] (2019) LPELR-49335 (CA)

[4] Gullifer, L. and Payne, J. (2011), Corporate Finance Law: Principles and Policy. Hart Publishing Oxford. p. 74

[5] Section 63 Secured Transactions in Movable Assets Act 2017

1.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- explain the various ways by which the relationship of creditor and debtor is created
- explain the difference between, secured creditor and unsecured creditor.

1.3 Types of Creditors

1.3.1 Adaptive Creditors

These are persons that intentionally extend credit or financial accommodation as a matter of course. This class of creditors are similarly called adjusting creditors or voluntary creditors. They include lenders (like deposit money banks, investment banks), investors and other financiers. Since they voluntarily extend credit or grant financial accommodation, it is expected that they will take steps to protect themselves against the credit risks of the borrower (debtor). A creditor that extends a credit facility and secures the repayment of the debt (loan) with the assets or property of the debtor is said to be a **secured creditor**. The debt is a secured debt. If the debtor or borrower falls into hard times and becomes unable to pay, the secured creditor will have to be satisfied first before consideration to other creditors of the company. This is known as the principle of priority.[6]

1.3.2 Semi-Adaptive Creditors

They are those that deal with the debtor company and subsequently become creditors without any intending to grant credit**.** The creditors falling under this type include trade creditors and customers of goods or services. They are quasi-adjusting. A case in point is where a contractor delivers supplies to a company, which the latter holds off payment to a later date without any prior understanding or agreement with the former. In a contract of sale of goods, an unpaid seller can by contract reserve title to the goods until payment is received from the buyer. In such a case the general property in the goods will not pass to the buyer until full payment.[7] Furthermore, the recent introduction of a statutory regime of personal property security in Nigeria, it is now possible to create security interest in virtually every item of movable property, which facilitates access to credit and promotes financial inclusion.[8]

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[6] For general reading on the principle of priority, see Beale, et al. (2012). The Law of Security and Title-Based Financing, 2nd edition. London: Oxford University Press, Pages 451-555.

[7] See section 19 Sale of Goods Act 1893

[8] See section 1 Secured Transactions in Movable Assets Act 2017

1.3.3 Involuntary Creditors

The creditors in this class had no prior or previous contact with the debtor company before becoming its creditor. The creditors of this class are truly non-adjusting or involuntary. This is because they do not have the privilege or opportunity to negotiate and thus adjust the terms by which the debt is to be regulated. The creditor falling into group (like an employee who is owed arrears of salary; a tort victim who secured judgment for breach of duty of care in a negligence case against the company; or a trader who set out to make supply on cash and carry basis but ended up being owed all or part of the payment for the supplies) are not placed in a position where they can adjust their bargain with the company (like seeking a form of assurance of repayment by way of security interest). Due to how the debt became owed, the creditor did not extract any 'security' which secures payment. In this case, the creditor called an unsecured creditor.

SELF-ASSESSMENT EXERCISE 7

1) *The process of taking funds from surplus economic units to deficit economic units is known as….*
2) *Strictly speaking, financial accommodation is not the same thing as loan…*
3) *Within the classification of creditors, a person or entity that come to be a creditor by reason of tort or judgment of the court is…*
4) *Which enactment facilitates the creation of security in personal property in Nigeria?*
5) *In line with Secured Transactions in Movable Assets Act, ------ grants financial accommodation on the back of a security interest.*
6) *By the authority of UBA plc v Amsata Supersandals Manufacturing Company Ltd & Ors (2019) there is a world of difference between ---------- and ----------*
7) *In your own words, who is a tort creditor?*
8) *Discover and provide an instance of a quasi-adjusting creditor.*

1.5 Summary

We have seen that there are basically two types of creditors – secured creditors and unsecured creditors. Secured creditors are those types of creditors who can extract a security as an assurance that the loan will be repaid, while unsecured creditors do not have such protection. Later in the course, you shall understand the legal position of both types of creditors and appreciate the advantages one type has over the other.

1.6 References/Further Reading/Web Resources

Beale, H., Bridge, M., Gullifer, L. and Lomnicka, E. (2012). The Law of Security and Title-Based Financing, Second edition. London: Oxford University Press.

Gullifer, L. and Payne, J. (2011). Corporate Finance Law: Principles and Policy, Oxford: Hart Publishing.

McKendrick, E. (Ed). (2010). Goode on Commercial Law, Fourth Edition. London: Penguin Books.

Sale of Goods Act 1893.

Secured Transactions in Movable Assets Act 2017.

1.7 Possible Answers to Self-Assessment Exercise 7

1) Financial intermediation
2) False
3) A non-adjusting creditor.
4) Secured Transactions in Movable Assets Act 2017.
5) A creditor
6) A credit facility and line of credit.
7) A tort creditor is a tort victim who secured judgment for breach of duty of care in a negligence case against the company.
8) An instance of a quasi-adjusting creditor is where a contractor delivers supplies to a company, which the latter holds off payment to a later date without any prior understanding or agreement with the former.

UNIT 2 DEBT FINANCING OPTIONS

Unit Structure

2.1 Introduction

Debt financing options deal with the avenues available to a company for raising capital or accessing finance to support its operations. Generally, we have short term financing, which include trade credit and borrowings from microfinance entities that normally do not exceed a term of three months, overdraft facilities with normally tenor of six months to one year; intermediate financing, which extends to a term beyond one year;[9] and long-term financing, which includes debentures. The debt financing structure of a company is informed by many factors like the nature of its activities, its size and its need or purpose for finance. There are two categories of debt financing, namely loan capital and debt security.

2.2 Intended Learning Outcomes

By the end of the unit, you will be able to:

a) identify the different options by which companies finance their operations
b) differentiate between loan capital and debt security.

2.3 Debt Financing Options

2.3.1 Loan Capital

Generally, a loan is a contract and has been defined as an agreement by which one party ("the lender") agrees to pay money to another ("the borrower"), or to a third party at the borrower's request, on terms that the borrower will repay the money together with any agreed interest. For the agreement to constitute a loan, the payment must be made with a view to

[9] A good example is a line of credit normally extended to a customer by the bank.

giving the borrower financial accommodation.[10] Loan is a payment of money to the debtor, or to a third part at the debtor's request, by way of financial accommodation upon terms that the sum advanced, with any stipulated interest, is to be repaid by the debtor in due course.[11] From this definition, a loan is always *(a) an obligation (b) in money's worth and (c) due from the debtor to the creditor*. Is there any difference between a debt and a loan?

Comparatively, a debt does not lend itself to the above characteristics of a loan. A debt is the sum or totality of all claims against a person. In other words, a debt can be money or otherwise than money.[12] For example, a promise to marry is a debt owed by the promisor to the promisee. From time-to-time argument or misunderstanding may arise between the banker and the customer on the loan contract. In the case of Okehia & Anor v. Mortgage Bank (Nig) Ltd & Anor[13] the Court of Appeal gave us a guide on how to approach the issue. Apart from deposit taking, money lending (loan) is another core aspect of financial intermediation. Bank loans take various forms or types and only a few can be discussed here:

1) **Term loan**. This requires to lender to make an advance to the borrower for a term, which can have varying maturity periods or tenor. Usually, it can range from short term (like one year), medium term (up to five years) or long term (up to ten or more years). The packaging of a term loan involves greater documentation.[14] The loan agreement will make provisions for critical details including but not limited to the principal amount, interest rate, events of default, security (if any), whether the repayment is by amortisation or bullet.[15] The loan may be syndicated, that is arranged by a group of lenders.

2) **Revolving loan**. With the line of credit (as it is also called), the banker (lender) makes available to the customer (borrower) a maximum amount of capital over and above the amount standing to its credit over a specified period of time. Because it is a line of credit, the borrower is allowed to repay, and re-draw, the loans granted to it out of the amount: provided that the overall limit of the facility cannot be exceeded. In Midatlantic National Bank v

[10] FCMB Plc v. Benbok Ltd (2014) LPELR-23505 (CA)
[11] McKendrick, E., (Ed). (2010). Goode on Commercial Law, 4th edition. Penguin Books, Lonodon. p. 621
[12] Ekaete v. UBN plc (2014) LPELR-23111(CA)
[13] (2018) LPELR-46263(CA)
[14] On creation of a loan contract, see Ekong v. Ishie Community Bank (Nig) Ltd & Anor (2014) LPELR-22961(CA).
[15] Repayment by amortisation is where the loan is repaid on instalment basis; while bullet repayment means the facility is repaid once and in full at the end of the facility.

Commonwealth Gen. Ltd[16] the US Florida District Court of Appeal held that the bank was not obligated to loan up to the limit of the credit line.

3) **Overdraft loan**. A loan by overdraft can be granted expressly or by implication. As to the former there is an express agreement between the lender and borrower on the application of the customer (debtor). As to the latter, the court stated in Maimasa Farms Ltd v. Mainstreet Bank Ltd that "the law is well settled that where a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, this is nothing but a request for a loan, and if the cheque is honoured, the customer is regarded as having borrowed the money by way of overdraft from the Bank."[17] Since overdraft arises expressly or impliedly, it is no moment to suppose that the absence of a formal offer letter negates its existence: Obichi Investment & Management Consultant Ltd v. Oluchukwu Micro Finance Bank.[18] Generally, the overdraft is repayable either on demand or on notice given or upon any other condition agreed upon by the parties.[19] As to when the cause of action on an overdraft arises, the court held that a cause of action for the recovery of simple debt accrues only if demands for the repayment have been made and the debtor refuses to pay or upon any other condition agreed upon by the parties. However, the due date must have elapsed except there is infraction of performance by the debtor.[20] In other words, overdraft, being in the nature of a simple debt, is repayable on demand or in line with the express conditions for repayment.

2.3.2 Debt Security

A debt is liability on a claim, a specific sum of money due by agreement or otherwise. It is the aggregate of all existing claims against a person, entity, or State, a non-monetary thing that one person owes another, such as goods or services.[21] On the other hand, the statutory definition of security provides that it includes debentures, stocks or bonds issued or proposed to be issued by a government; debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate; any right or option in respect of any such debentures, stocks, shares, bonds or notes; or commodities futures, contracts, options and other derivatives, and the term securities… includes those securities in the

[16] (1980) 386 So So.2d 31, 33
[17] (2015) LPELR-40875(CA); also see, NDIC v. Rabo Farms Ltd & Anor (2016) LPELR-42032(CA)
[18] (2018) LPELR-44204(CA)
[19] Standard Manufacturing Co. Ltd & Anor v. Sterling Bank Plc (2015) LPELR-24741(CA)
[20] Angyu v. Malami [1992] 9 NWLR (PT. 264) 242; Ishola v. S.G.B. [1997] 2 SCNJ 1
[21] Ekaete v UBN plc (supra)

category of the securities listed … which may be transferred by means of any electronic mode approved by the Commission[22] and which may be deposited, kept or stored with any licensed depository or custodian company.[23]

However, our focus is with debenture as a form of debt security. It has been inelegantly defined as "a debt owed by a company to another secured by a deed which prescribes the condition of the realization of the debt. A debenture may be created over the fixed or floating assets of the company."[24] Can you think of a better definition? A preferred definition is that it is a document which either creates a debt or acknowledges it.[25] It may or may not be secured by charge or security over the assets of the company.[26] In other words, debenture can be unsecured, otherwise called 'naked debentures'.[27] Under Companies and Allied Matters Act (hereafter **CAMA**), it is possible to create various types of debentures,[28] and the power of a company to borrow independent of any provision in the memorandum appear settled under CAMA.[29]

SELF-ASSESSMENT EXERCISE 8

1) *What would be an apt authority for holding that commodities future, contracts and other derivatives fall within the definitional particulars of security?*
2) *An instrument, the purport of which is the acknowledgement of an indebtedness, whether supported by security over the assets of the issuer not, can rightly be called----*
3) *On the authority of --------- the ------- is repayable either on demand or on notice given or upon any other condition agreed upon by the parties.*
4) *An obligation in money's worth due from one party to another party is called---*
5) *Debenture is mostly backed by security. However, pursuant to --------- it is possible to have what is otherwise called ----------.*
6) *YC Ltd applied to ABC Bank for a loan. The Bank asked for the company's memorandum of association, which did not provide for the powers of the company to borrow money. In the absence of such borrowing power in the memorandum, will it be safe for the Bank to proceed and grant the facility? Give authority for your answer.*

[22] The Commission refers to the Securities and Exchange Commission established pursuant to section 1(1) Investments and Securities Act (ISA) 2007
[23] Section 315 ISA 2007
[24] Brewtech Nig. Ltd V. Akinnawo & Anor (2016) LPELR-40094(CA)
[25] Levy v Abercoriss Slate and Slab Co (1887) Ch D 260
[26] Sealy L. and Worthington S. (2010). Sealy's Cases and Materials in Company Law, 9th ed, Oxford: OUP p. 556
[27] Sections 198(1) and 205(3) CAMA 2020
[28] See sections 196, 197, and 198 CAMA 2020
[29] Section 191 CAMA 2020

2.4 Summary

Generally, debt financing options have to do with the various ways by which the company finance its operations. We have two major ways: loan capital and debt security. Debt is distinguished from loan. While loan is always an obligation in money's worth, debt is a claim which may or may not be monetary. Three major types of loan capital are term loan, revolving loan (or credit line) and overdraft. A good example of debt security is the debenture. The debenture is an instrument acknowledging indebtedness and may or may not be secured. Discussions on debenture as a form of debt security will be treated in greater detail later in the Course.

2.5 References/Further Reading/Web Resources

Companies and Allied Matters Act 2020.

Investments and Securities Act 2007.

2.6 Possible Answers to Self-Assessment Exercise 8

1) Section 315 Investments and Securities Act 2007
2) Debenture
3) Standard Manufacturing Co Ltd & v Sterling Bank Plc (2015); Overdraft.
4) A loan
5) Sections 173(1) and 180(3) CAMA; it is called "naked debentures"
6) Yes, it will be safe for the bank to extend the facility and not deny solely on the basis of absence of the power in the memorandum. By section 166 CAMA, every company has power to borrow and the failure of the memorandum to specifically provide for such powers did not override the law.

Unit 3 The Concept of Security

Unit Structure

4.1 Introduction

One of the processes involved in the grant or advancement of financial accommodation is the offer letter by the bank which usually contains conditions precedent as well as subsequent, which the proposed borrower must meet. On satisfying the conditions precedent, the parties (lender and borrower) proceed to enter into a formal loan agreement. The loan agreement will contain conditions, otherwise known as covenants. The debt covenants embodied in the loan agreement constitute the first line of defence for the lender. The covenants are principally of three types; these are affirmative covenants[30], negative covenants[31] and termination and acceleration rights.[32]

They are self-help mechanisms. You must bear in mind that the essence of a creditor entering a debt contract including extracting security interest from the debtor is, among others, to insulate itself[33] from the credit risk of the debtor. Credit risk relates to the possibility of the borrower defaulting in its obligations.[34] If the facility is not supported by security the loan agreement as the lender puts the lender to the funds while the borrower is expected to meet and continue to perform its obligations under the agreement.[35] If a loan facility is additionally supported by security, it means that the creditor will acquire security interest in respect of the property and assets of the debtor.

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[30] An example of affirmative covenant is 'right to information.'

[31] Examples of negative covenant include 'negative pledge clause' and 'restriction on disposition of assets.'

[32] Termination and acceleration rights will provide such things events of default, cross default provisions, etc.

[33] "Itself" is intentionally used to refer to a corporate creditor, like a bank.

[34] The risks include asset withdrawal, claim dilution, underinvestment and asset substitution.

[35] For an in-depth reading on debt covenants constituted in a loan agreement, see Onamson, F.O. (2017) Law of Creditor Protection in Nigeria. Lagos: Malthouse Law Books, pp. 82-104; Smith, C.W., and Warner, J.B., "*On Financial Contracting: An Analysis of Bond Covenants*" (1979) Journal of Financial Economics 7, 117; Whitehead, C.K., "*The Evolution of Debt Covenants, the Credit Market and Corporate Governance*" (2009) The Journal of Corporation Law 34(3), 641.

4.2 Intended Learning Outcomes

At the end of this Unit, you will be able to:

- define security
- diffrentiate and explain the two main categories of security
- explain the reasons why creditors insist on taking security.

4.3 The Concept of Security

3.3.1 Definition and Categories of Security

Security can be seen in different senses. It can be seen as interest or right which the creditor acquires in the asset or property of the debtor. It can mean the instrument itself that creates the interest which the debtor granted to the creditor. For example, the instrument of charge or debenture can be called a security in this sense. Finally, security can take the form of the asset or property itself in which the creditor acquires an interest of a proprietary character. For instance, where A furnishes his house as security for repayment of a loan. The house furnished is the security. Thus, security interest is not the same as proprietary right.

Security may be classified into direct/collateral security. The classification or categorisation does not change the character of a security, but merely attuned to enhancing our understanding of the subject of security.

1) Direct Security

Direct security is the same as in rem or real security.[36] Real security is granted to the creditor, and it is this grant that makes him a secured creditor. The grant gives the creditor security interest which is effectively subrogates the creditor into the proprietary position of the owner of the property. Before the advent of personal property security regime in Nigeria, a difference is usually drawn between real security and quasi-security.[37] While real security is created by grant of rights to the creditor, quasi security is created by reservation of title to the goods. An example of the latter is an asset subject to a lease finance, the general property in which is retained by the financier (creditor) while the special property by way of possession is given to the debtor. Under the regime of STMA, thought to implement a unitary security regime, it seems

[36] For an in depth reading on the concept of personal property and associated rights thereto, see McKendrick (ed), n. 60 above, pp. 27-67. For a reading on "taxonomy of assets subject to security."
[37] See STMA 2017

functionally equivalent security devices created by reservation of title still retain their quasi-security character.[38]

2) Collateral Security

Unlike real security, this is also known as *in personam* security or personal security. This is a contract by a third party wherein the third party undertakes to perform the obligation of the debtor. Examples of collateral security include a guarantee and indemnity. Usually, the third party is not a party to the principal agreement. Hence, the contract embodying the collateral security is distinct and different from the principal loan agreement.[39]

3.3.2 Justifications for Security

Apart from the various reasons advanced as to why banks pursue the taking of security with evangelical or apostolic zeal, Gilmore asked, does it (in the event of the debtor's insolvency or bankruptcy) make any sense to award everything to a secured creditor who idly stood by while a doomed enterprise goes down the slippery slope into bankruptcy?[40] That is, granted the reasons for the taking of security which include that it is a statutory requirement, it affords a powerful collection leverage and it gives the lender a measure of control, there are. should be, justifications why the law supports the institution of security. What other reasons do you think account for the taking of security?[41] The following points are some of the justifications for security:

1) Security is justified because everyone is presumed to know the law. What is the jurisprudential perspective to this point? The jurisprudence that ignorance of the law is not an excuse appears to be at play here. Yet, the truth of this jurisprudence in the area of security has been disputed. People do not know the law, albeit, as Lindgren asserts, "we pretend mainly (knowledge of the law) because we think that we couldn't run a legal system without this pretence. If we could enforce only laws that people knew, the law would become totally subjective. Each person would be subject only to those laws that were in the head."[42] Assuming the "ignorance of the law" principle does not operate, what would be

[38] See sections 32 and 39(2) STMA 2017

[39] For detailed reading on collateral security, see Andrews, G., and Millett, R., Law of Guarantees, 6th edition, London: Sweet & Maxwell (2011)

[40] Gilmore, G., "The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman" (1981) Georgia Law Review 13, 605, p. 627

[41] McCormack, G., Secured Credit under English and American Law, Cambridge: CUP (2004), p. 4

[42] Lindgren, J., "The Lawyer's Fallacy – Chicago-Kent Dedication Symposium: Topics in Jurisprudence" (1992) Chicago-Kent Law Review 68:109, p. 112

the implication for Nigeria with over 200 million?[43] The courts support the knowledge of the law perspective when it was held that any person "dealing with a company knows also its powers of borrowing and that the company has power to pledge every part of the company."[44] In other words, it is a case of caveat emptor for creditors.

2) Security is justified based on the theory of freedom of contract or bargain theory. This justification is consistent with "traditional English legal and judicial thinking,"[45] which allows the parties to a contract to enter agreements and arrangements according to their prompting subject only that such contracts do not offend the doctrine of sham or the principle of mislabelling. As far as security transaction is concerned, the courts will not restrict the contractual freedom of the parties.[46]

3) A justification for security holds that promotes economic activity, apart from the fact that it aligns with the theory of property rights. While the latter is related to the freedom of contract theory, the former appeals to the Justinian position in the *Corpus Iuris Civilis*[47] that "a security is given for the benefit of both parties: of the debtor in that he can borrow more readily, and of the creditor in that his loan is safer."[48] Hence, the activities of both parties are thereby enhanced and promoted: for the debtor his going concern situation is supported and sustained; and for the creditor the profit element and return on investment for the shareholders become reinforced.

[43] It means that we will have different legal systems depending on the population, since it is the law known to an individual that is, or will be, applicable to that person. In the end, no law will be enforced at all.

[44] Re General South America Co (1876) 2 ChD 337

[45] McCormack, n. 88 above, p. 12

[46] Re Brightlife Ltd (1987) Ch 200

[47] Justiniani Institutiones 3,14,4: Cited in Kieninger, E. (Ed), Security Rights in Movable Property in European Private Law, Cambridge: Cambridge University Press (2004) p. 7

[48] Represented in the expression, *"pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magius ei in tuto sit creditum."*

SELF-ASSESSMENT EXERCISES 9

1) *What is the Justinian perspective with respect to the justification of security?*
2) *A credit relationship or arrangement whereby the creditor retains the general property before the advent of STMA is called------*
3) *Of the major types of covenants in a debt contract ------- restricts the capacity of the debtor to deal with its business according to its prompting.*
4) *----- is a self-help mechanism which the creditor can use to protect itself.*
5) *The deed of mortgage created by a mortgagor can be properly called-------.*
6) *The possibility or likelihood of the debtor not being able, and thus failing, to meet its obligations under the credit relationship is called --------*

4.4 Summary

In this Unit you have been taken through three concepts – definition of security, categories of security and justification of security. Concerning a definition of security, you saw the different senses in which security can be or has been construed. As regards categories of security, these are principally two – real security and collateral security. While real security is usually granted by the debtor, collateral security is granted by a third party. In respect of justification of security, the reasons for the taking of security call for the need to find justifications for it. Some of the justifications include the theory of property rights, promotion of economic activity, freedom of contract and the presumption of knowledge of the law.

4.5 References/Further Reading/Web Resources

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Whitehead, C.K. (2009). *"The Evolution of Debt Covenants, the Credit Market and Corporate Governance"* The Journal of Corporation Law 34(3), 641.

4.6 Possible Answers to Self-Assessment Exercises 9

1) The Justinian perspective holds that security is mutually beneficial to the creditor and the debtor.
2) Quasi-security
3) Negative covenants
4) A loan agreement or debt contract
5) A security
6) Credit risk

Unit 4 Types of Assets Amenable to Security Interest[49]

Unit Structure

4.1 Introduction

One of the keys to understanding the nature of security interest is to appreciate the assets which the debtor can offer to the creditor to secure the repayment of the financial accommodation. This is because the subject of every security is the asset or property of the borrower (debtor) made available to the lender (creditor). If the debtor defaults, an event of default is said to occur. In such a case several options are open to creditor, one of which is to realise the property and repay the debtor. An understanding of the various types of assets will enable the prospective debtor to make up its mind as to whether to proceed with the loan transaction and if so which of its property or assets it is prepared to make available to the credit as security for repayment of the loan.

4.2 Intended Learning Outcomes

At the end of this Unit, you will be able to identify and discuss the various types of assets which can be put forward by the debtor as security for repayment of a debt, otherwise called loan.

4.3 Types of Assets Amenable to Security Interest

4.3.1 Real and Personal Property

Real property is land, or interests in land. Land is generally seen as a safe asset, so creditors are more at home with in the creation of security

[49] Most of the discussions here will be found in Onamson, F.O. (2017). Law and Creditor Protection in Nigeria. Malthouse Law Books, Lagos, pp. 53-56.

interest. In Nigeria culture land is high valued and this is exemplified by the fact that the individual occupier of any land cannot sell, assign, or in any way alienate his possessory title without the consent of the family head, whose position is analogous to that of a trustee. In fact, individual ownership of land was said to be foreign to native ideas and was the collateral result of the introduction of English ideas.[50] The Land Use Act completely altered the communal land holding structure in Nigeria.
Personal property are every other species of property. Characteristically, personal property are movable. They include motor vehicles, jewelleries, books, etc. The legal regime of secured transactions affecting personal property in Nigeria changed with the enactment of the Secured Transactions in Movable Assets Act 2017 (STMA 2017). Ozekhome points out that:

> Before 2017 the closest Nigeria came to having a legal framework on personal property was the Bill of Sale Act 1882, which is a statute of general application that provided for chattel mortgage. However, chattel mortgage did not see the light of day in Nigeria as there was no bill of sale register, which is a prerequisite of chattel mortgage. In place of chattel mortgage, retained title financing devices, such as conditional sale, hire purchase and financial leases, thrived.

Further discussions on secured transactions involving the use personal property are fully treated in Module 5 of this Course.

4.3.2 Tangible and Intangible Assets

Tangible assets cover choses in possession. They are tangible because they are physical and have a corporeal existence. Tangible assets will include land, equipment, furniture, fittings and fixtures, raw materials, inventory. The most significant point about tangible assets is that they can be possessed. It is not necessary that there must be a nexus between who has possession and who has security interest in those assets. In the absence of other evidence, possession can be evidence of title.[51]

Intangible assets, known choses in action, are assets which are not capable of possession and form a residual category of assets after reckoning with tangible assets. Intangible assets constitute rights against a specific person. The right to sue a person for a debt is a good example. Other examples include trademarks, patents and copyright. For this type of property, there is clearly no problem about a split between who has possession and who has proprietary rights.[52] Can you think of any types

[50] Per Viscount Haldane in Amodu TIjani v Secretary, Southern Nigeria (supra)
[51] See sections 35 and 143 Evidence Acct 2011; Graham & Ors v Esumai & Ors (1984) 11 SC 123.
[52] Gullifer, L. and Payne, J. (2011). Corporate Finance Law: Princples and Policy. Hart, Oxford. p.223

of intangible assets? We can discover two main types, namely "pure intangibles" and "documentary intangibles".[53]

A pure intangible is a right which is not, legally, represented by a document. It is incapable of being dealt with by way of pledge, but only by way of assignment or charge. Documentary intangibles are capable of being dealt with by way of a pledge. There are three kinds[54] namely documents of title to payment of money (such as, bills of exchange, promissory notes, cheques, banker's drafts; documents of title to negotiable securities, such as bearer bonds, share warrants, debentures and notes; and documents of title to goods, like bill of lading. The main feature of documentary intangible is that the debt is locked up in the document. Since the rights are located in a document much of the law governing tangible property will apply to that document because they become transferable by transfer of that document.

4.3.3 Fixed and Circulating Assets

Fixed assets are not subject to disposal in the ordinary course of business of the company while circulating assets change from time to time. Fixed assets include buildings, motor vehicles, furniture, plant and machinery. Circulating assets include inventory or stock, raw materials and book debts (receivables). Taking the point further, fixed assets will be subject to fixed charges while circulating assets will be amenable to floating charges. However, this simple classification does not hold in practice, because this dichotomy appears to have been lost as creditors attempt to take fixed charge security interests over assets that traditionally been subject to fixed charges, with the result that distinction between fixed and floating charges are construed based on parameter other than the nature of assets.[55]

4.3.4 Present and Future Assets

Present and future assets relate to assets over which floating charges can be granted by the debtor in favour of its creditor. This description will limit present and future assets to those assets over which only floating charges can be created. Who can create a charge? What is a floating charge as against a fixed charge? Only a company can create a charge, floating or fixed. While the subject of charges generally will be discussed in the second semester of this Course, we can briefly state the

[53] McKendrick (Ed) op cit, p. 51
[54] But see Gullifer (Ed), op cit, p. 32, where it is contended that the class of what constitutes documentary intangible is not closed and is liable to expansion through mercantile usage.
[55] See Re Yorkshire Woolcombers (1903) 2 Ch. 284; Re Bullas Trading (infra); Agnew v IRC (infra)

differences. Floating charge is an equitable charge over the whole or a specified part of the company's undertakings and assets including present and future assets. The chargor is free to deal and meddle with the assets, including to take them away from the ambit of the security until a crystalising events occurs that causes the floating charge to attach. On the other hand, fixed charge is a security interest that attaches immediately it is created as the assets subject to the charge are permanently appropriated to the payment of the debt thereby secured. The debtor is deprived of the capacity to use the assets.

In this sense too, present and future assets will mean assets which continuously flow in and out in the life of the company as a going concern and constitute the fund of assets subject to floating charge so that such security is one that is ambulatory and hovering over and floating with that class of circulatory property (present and future) until it fixes subject to occurrence of one or more crystallisation events.[56]

SELF-ASSESSMENT EXERCISES 9

1) *List any three types of documentary intangibles?*
2) *Different between fixed assets and circulating assets by description.*
3) *Mr. Boss approached Freedom Bank Limited for a loan to buy a car and take a second wife. He offered to give the bank floating charge over his personal assets. Advise the bank.*

4.4 Summary

In this Unit, you have been exposed to the various types of assetss which the debtor can make available to the creditor as security for a loan.

4.5 References/Further Reading/Web Resources

Onamson, F.O. (2017). Law of Creditor Protection in Nigeria. Lagos: Malthouse Law Books.

4.6 Possible Answers to Self-Assessment Exercises 9

1) Documents of title to payment of money (bill of exchange); documents of title to negotiable securities (share warrants0; and documents of title to goods
2) Fixed assets include buildings, motor vehicles, furniture, plant and machinery. Circulating assets include inventory or stock, raw materials and book debts (receivables).
3) Only a company can create a security interest by way of a charge. Therefore, Mr. Boss would fail in his offer to grant security interest by way of floating charge to the bank.

[56] Illingworth v Holdsworth (1904) AC 355

MODULE 3 THE NATURE OF SECURITY INTEREST

Unit 1 How to Identify Security Interest

Unit Structure

1.1 Introduction

Security interest where validly created subrogates the creditor into the proprietary position of the debtor with reference to the assets subject to security. Generally, security interest sets up a peculiar position where, in the event of the debtor falling into trouble and being unable to pay its debts, the secured creditor becomes placed in a privileged position as against the unsecured creditors who must wait to scoop from whatever, if any, is left after the claims of the former has been satisfied. An understanding of the nature of security interest, which will focus on the categorised topics of indicia of security interest and numerus clausus of security interest, will set the proper background for your efficient grasp of the course. It is not unusual to hear or speak of proprietary right or interest as against security interest. As you shall see shortly, although interrelated, the two terms are not the same. In order to neatly draw the line between security interest as against proprietary right, the court developed what is now known as the indicia of security interest.

1.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- discuss the overall nature of security and security interest
- distinguish proprietary right from security interest.

- list the indicia of security interest as distinct from the characteristics of security.

1.3 The Principles of Security Interest

1.3.1 Security and Purchase Transaction

At this juncture it is important you bear in mind that security or security interest where it is created cannot amount the same thing to other transactional situations. Master Nigeria Limited is owed ₦100 million by Shell Oil Producing Plc. It approaches Action Bank Limited for a loan on the "security" of the amount owed to it by Shell Oil Producing Plc. The Bank accepts and grants Master Nigeria Ltd a credit facility of ₦50 million. The ₦100 million owed to Master Nigeria Ltd is called "receivables" and what it has done is to use the "receivables" to secure the repayment of the ₦50 million credit facility extended to it by its bankers, Action Bank Ltd. This is a security transaction. On the other hand, where Master Nigeria Ltd approaches SME Bank Ltd to "purchase" the receivable and the bank agrees, a different transaction has taken place. For instance, let us assume that SME Bank Ltd has agreed to purchase the ₦100 million receivable from Master Nigeria Ltd at ₦65 million. This is a purchase transaction. As a purchase as against a security, Master Nigeria Ltd has transferred outright its right on the receivable and as a result it no longer has any "duty to repay and no right to redeem."[1]

1.3.2 Proprietary Right and Security Interest

Proprietary right is the bundle of rights exercisable by an owner in respect of his property. The rights are made up of (a) ownership, and (b) possession for a limited interest.[2] Characteristically, such property rights command universality (it can be asserted against the whole world), exigibility (it can be exacted or enforced against a thing (like enjoyment of it) and it curtailed when the thing ceases to exist), transferability, and excludability (the right to stop others from enjoying or intervening in the thing)[3] exists and inures in the owner of the property. The foregoing features constitute rights of ownership and incidents thereof.

When a company borrows money from a bank and uses its assets to secure the repayment of the loan, it has in effect created security as against the specific asset affected. In creating a security, the company (debtor), grants the banker (creditor) security interest in respect of its asset(s). The effect of creating security interest is that the debtor transfers its proprietary

[1] Gullifer (Ed) p. 99.
[2] Sealy, L.S., and Hooley, R.J.A., Commercial Law: Text, Cases, and Materials, 4th ed., Oxford: OUP (2009), p. 64
[3] Bridge, M., Personal Property Law, 4th ed., Oxford: OUP (2015), pp. 2-3

rights to the creditor. Security interest is the proprietary right of the debtor in a thing granted and donated to the creditor to secure repayment of loan or discharge of an obligation. On the relationship between proprietary right and security interest, or as Ferran puts it, "the proprietary nature of security," it has been reiterated that:

> A right in security is a right over property given by a debtor to a creditor whereby the latter in the event of the debtor's failure acquires priority over the property against the general body of creditors of the debtor. It is of the essence of a right in security that the debtor possesses in relation to the property a right which he can transfer to the creditor, which right must be retransferred to him upon payment of the debt.[4]

1.3.3 Indicia of Security Interest

Romer LJ propounded what has come to be known as "indicia of security interest"[5] Absent them in any security transaction, it is not possible to grant proprietary right by way of security interest in the assets of the debtor. As shall be seen, it is submitted that they are dissimilar from features of security, albeit relationship can be established between the two. There are:

1) Once the debt is debt is discharged, the asset subject to the security must be released from the grip of the creditor. This means that security interest cannot attach except and only when the creditor has provided the credit or advanced the facilities. That is, without the accommodation, there will be no justification for maintaining the security.[6]

2) Where the creditor accelerates the debt and therefore takes immediate steps to realise the security for an amount less than the secured obligation, the creditor, as of right, can follow the debtor for the balance.

3) Inversely, where the amount realised is greater than the debtor's outstanding obligation under the loan following a realisation of the security, the creditor must account to the debtor for the surplus. On this, Kay J advised as to duty of the creditor on the surplus:

I have paid my debt; this property, which is pledged to me, and in respect of which I now hold this surplus in my hand, is not my

[4] Armour v Thyssen Edelstachwerke AG (1990) 3 All ER 481, HL, 486. Cited in Ferran, E., Principles of Corporate Finance Law, Oxford: Oxford University Press (2008) p. 354

[5] Re George Inglefield Ltd (1933) Ch 1

[6] For example, see section 12(a) Bills of Sale Law

property. I desire to get rid of this surplus, and hand it back to the person (the debtor) to whom it belongs.[7]

4) Security interest can only be created by grant and not by reservation of absolute interest.[8] Examples financing structures involving the reservation of absolute interest include hire purchase, and finance lease transactions. The elitist STMA 2017 sought to create a regime of unitary security system, but it is doubtful if it has achieved this objective. Comparatively, the Malawian legislation[9] on this appears to fare better. It effectively repealed all legislations that may leave anyone in doubt as to its purpose in this connection.[10] The double-minded approach of the STMA is understandable, for being elitist, the Collateral Registry has no business with individuals but banks only.

1.4 Distinctive Traits of Security Interest

1.4.1 Security Rights as Rights in rem

As seen earlier, rights in rem is different from in personam rights. Rights in rem are real rights that vest the characteristics of property rights on the one who is the owner of the asset. Thus, security interest is an interest of the creditor in the property owned by the debtor.[11]

1.4.2 The Avenues for Grant of Security to be Unrestrained

In other words, it should be possible for the debtor to grant security interest "in the widest possible range of cases." In this sense there should be no hurdles affecting the right of the debtor to create or grant security interest in and over his assets, personal or real. In fact, the possibility must extend to the present and future assets[12] of the debtor "without any additional formalities in the future,[13] and to acquire a non-possessory proprietary interest which does not prevent the borrower from disposing

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[7] Charles v Jones (1887) 35 Ch 544. In the case of Mainama v. Keystone Bank Ltd (2015) LPELR-40877(CA), "a Mortgagee is not a trustee of a power of sale for the Mortgagor, except as to the balance of the purchase price after the sale."

[8] McEntire v Crossley Brothers Ltd (1895) AC 457.

[9] Personal Property Security Act (PPSA) 2013

[10] For example, section 123(1) PPSA 2013 not only repealed the Bills of Sale Act, it repealed the Hire Purchase Act under which lease financing structures and conditional sale agreements are capable of being created. In Nigeria, the Hire Purchase Act and the Bills of Sale Law of the various states, not being repealed or amended under STMA 2017, still apply.

[11] Ferran, E., Corporate Finance Law, Oxford: Oxford University Press (2008) p. 358.

[12] While the Bills of Sale Law prohibits the grant of security interest in respect of future assets (after acquired property), the STMA 2017, just like CAMA, provides for and permits the creation of security in future assets.

[13] See sections 3(2)(b) and 6(1)(b) providing for security interest in future assets and requires no further action to attach

of the asset subject to that interest in the ordinary course of business."[14] What would be the situation where the loan amount is increased, requiring the enhancement of the security? Would the doing of anything in this connection constitute "additional formalities"? [15]

1.4.3 Security Interest Widest Disclosure

This simply means that there must be functional registry where, for the purpose of security, the widest and unrestrained publicity and access to the public should be maintained and enforced. In Nigeria there are many registries in this regard. Examples include the Bills of Sale Registry in the Directorate of Commercial Law of the Ministry of Justice Lagos State, the National Collateral Registry (called the Collateral Registry) established pursuant to the STMA.[16] Why is the requirement of registry a critical feature of security? This is because, among other reasons, it attacks the "false wealth syndrome" birthed by the advent of non-possessory security.

1.4.4 Costs Not to Fetter the Creation of Security Right

Consequently, cost of creating security right in property for the purpose of repayment of debt must be fair and affordable.[17] On this feature, McCormack postulated that the cost is relatively at reasonable levels if "there are no notarization fees or other levies payable on instruments of charge registering a charge and searching the register."[18] This position can only be idealistic. This is because, especially in Nigeria, apart from payment of the legal fees for the preparation of the instrument of security, the debtor must proceed to pay filing fees and stamping fees. Where the security relates to an interest in land, for example by way of deed of legal mortgage, the applicant must additionally pay for "consent fee". Aside from this payment, the system does not promote transparent treatment of applications, so that parties are constrained "to facilitate" the processing of their applications for registration of the instrument creating security. However, it must be noted, with commendation, that the position in the context of the Collateral Registry created under the STMA 2017 is diametrically different. The filing is efficient and most likely cost efficient. The drawback is that it is restricted to corporate entities.

[14] Gullifer and Payne, p. 219

[15] See sections 13 and 19 STMA 2017

[16] The Charges Registry is maintained at the Corporate Affairs Commission and there are separate registries for the purpose of ships and aircrafts in Nigeria.

[17] The other feature of security is that the realization of the security for repayment of loan should be cost effective and rapid. The latter feature is a problem and even under STMA 2017 it has not been resolved satisfactorily.

[18] McCormack, n. 88 above, p. 49

SELF-ASSESSMENT EXERCISES 10

1) *Property rights are said to be made up of certain characteristics. Name them.*
2) *In simple terms, differentiate between propriate right and security interest.*
3) *What would be your apt authority for the development of indicia of security interest?*
4) *ABC Bank realised the security furnished by TEX Ltd for repayment of the loan of one million NGN. The property, which is the subject of security, was told at two million NGN. After reconciliation, it turned out that an excess of 500,000 NGN was left. ABC Bank sought to retain this amount as its windfall. What do you think?*
5) *The features of property rights are said to constitute---------.*
6) *---------- and ---------- are examples of a system of wide publicity for security.*
7) *What issues should agitate your mind with respect to the expectation that the cost of creating and maintaining a security right should be fair and affordable?*
8) *The STMA 2017 is elitist in its outlook and appeared to have failed to realise its aim of creating a unitary security interest regime. Give example of two pieces of legislation which survived the STMA 2017 when the reverse should have been the case?*
9) *The law is that a Mortgagee is not a trustee of a power of sale for the Mortgagor, except as to the balance of the purchase price after the sale. Cite an authority to support this.*

1.5 Summary

In this Unit we considered three principal themes – proprietary right, indicators of security interest and characteristics of security interest. We were able to show the difference between proprietary right and security interest. The indicia of security interest, four of them, propounded by Romer LJ must be present. The characteristics of security help us to appreciate the justifications of security interest as a form subrogated proprietary right.

1.6 References/Further Reading/Web Resources

Bridge, M. (2015). Personal Property Law, 4th ed., Oxford: OUP .

Ferran, E. (2008). Corporate Finance Law, Oxford: Oxford University Press.

Gullifer L. and Payne, J. (2011). Corporate Finance Law: Principles and Practice. Oxford: Hart Publishing.

Sealy, L.S., and Hooley, R.J.A. (2009). Commercial Law: Text, Cases, and Materials, 4th ed., Oxford: OUP.

1.7 Possible Answers to Self-Assessment Exercises 10

1) Universality, transferability, exigibility and excludability
2) Proprietary right is the right of the owner of a property to appropriate the rights and incidents of ownership including to assert against the world, to enjoy it and stop or prevent others from enjoying or intervening in his enjoyment and to dispose it by transfer, sale or assignment. Security interest is the proprietary right of the owner donated to the creditor in respect of the debtor's asset for the repayment of loan or debt.
3) The authority would be the case of Re George Inglefield Ltd (1893)
4) By the principles of indicia of security, where the amount realised is greater than the debtor's outstanding obligation under the loan following a realisation of the security, the creditor must account to the debtor for the surplus. Consequently, Tex Ltd is entitled to the surplus and if ABC Bank insists, Tex could sue to recover.
5) Rights and incidents of ownership.
6) Bills of Sale Register and Collateral Registry
7) The issues include but not limited to institutional impediments that drive up the costs and the requirement of consent under the LUA.
8) They are the Hire Purchase Act and Bills of Sale Laws of the various States.
9) Charles v Jones (1887) 35 Ch 544 OR Mainama v. Keystone Bank Ltd (2015) LPELR-40877(CA).

UNIT 2 NUMERUS CLAUSUS OF SECURITY INTERESTS (Otherwise Form-based Security Interests)

Unit Structure

2.1 Introduction

Under the English legal system, the numerus clausus of security interest are principally four – the pledge, lien, mortgage and charge. The numerus clausus of security interests are generally classified into possessory and non-possessory security interests.[19] Otherwise called "form-based"[20] or formal security interests, the four types of security interest are collectively called consensual security interest.[21] With the passage of the unitary-based functional personal property security legislation in 2017, the numerus clausus of security interests in Nigeria have been expanded to include situations which, hitherto, create are "functionally equivalent security devices,"[22] otherwise called "quasi-security interests."[23] Notwithstanding, there is what is called attachment of security. This involves identifying specifically at what point or stage can it be said that security interest has bitten and thus attached on the assets of the debtor.

With respect to possessory and non-possessory security, you must note the need to appreciate the importance of asset types. In other words, certain asset types may be suitable for possessory security while others may not. For example, tangible property is generally suitable for grant of

[19] See section 8(2) STMA 2017 providing for possessory and non-possessory security interest.
[20] Olekhov, I. (2002). Security Interests in Personal Property: the Perspectives of Harmonisation. IUS Commune Research Propject. An Article on Property Law under the Ius Commune Research Project of Ius Commue and Private Law Programme, Edingburgh. (Unpublished). Page 20. Available at http://www.iuscommune.eu/html/prize/pdf/2002_Olekhov%20.pdf. Accessed 20/12/2022.
[21] Davies, P.L. Gower and Davies' Principles of Modern Company Law, 7th ed, London: Sweet and Maxwell (2003) p. 816
[22] Sections 2(a) and 29 STMA 2017 specifically excluded set-off (or a right thereto), a process by which a claim is counterbalanced, either in diminution or extinguishment, by reason of a cross claim.
[23] Beale, H., Bridge, M., Gullifer, L., and Lomnicka, E., The Law of Security and Title-based Financing, 2nd ed, Oxford: Oxford University Press (2012) pp 235-302.

possessory or non-possessory security. This is as against pure intangibles, not lending themselves to possession, are only amenable to non-possessory security. This must be contrasted with pure documentary intangibles,[24] regarded as goods can be subject to possessory security.[25] Generally, assets subject to security are classified into tangible and intangible assets, real and personal property, fixed and circulating assets, and present and future assets.

In the final analysis, the objective of security interest is to limit the exposure of the creditor to the credit risk of the debtor and thus mitigate the potential loss of the creditor in the event that the debtor falls into financial troubles and becomes unable to meet its obligations under the debt contract. Where this arises, the question of realisation arises. The realisation of security presupposes that the security interest was perfected, as otherwise the creditor is unsecured. Again, in attempting to realise the security, the situation of the debtor becomes paramount. This has given rise to what has been called pre-insolvency concerns or issues.

2.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- describe the types of security interests capable of being created under our law
- appraise the importance of attachment of security interest as a basis for any claim by the secured creditor
- explain the idea of perfection of security and priorities.

2.3 Numerus Clausus of Security Interest

2.3.1 Common law (Form-based) Possessory Security Interessts

Generally, the numerus clausus of security interests under common law are the pledge and lien (possessory), mortgage and charge (non-possessory).[26] We call them, in this course, "formal security interests," because they are fully embeeded in formalism as against its function. The unitary concept of security interest which became part of our legal system following the enactment of the Secured Transactions in Movable Assets Act 2017, brought about a security interest that plays down on the

[24] There are three types of documentary intangibles, namely "documents of title to payment of money (termed instruments), documents of title to negotiable securities (e.g. bearer bonds and notes) and documents of title to goods (like bill of lading)": McKendrick (Ed), n. 50 above, p 52

[25] Gullifer, L. (Ed) Goode on Legal Problems of Credit and Security, 4th ed London: Sweet and Maxwell (2008) p. 6

[26] See Module 4 for further treatment.

formalistic preoccupation of the common law numerus clauses of security interests and favoured greatly a functional security interest that emphasizes function as against form.[27]

These are the pledge and lien, arise in cases where the debtor transfers actual or constructive possession of the asset subject to security to the creditor. When possessory security is in operation, the debtor does not have access to the security. Possessory security moves the asset from the custody of the debtor to that of the creditor. This removes the possibility of the debtor pretending that the assets are available and free of equities. The presence of possessory security entitles the creditor to the right of possession against the world, including the debtor and encumbrancing third parties.

It is not expected that every security interest created by the debtor in favour of the creditor over its assets will be possessory. This is because such a scenario would make borrowing virtually impossible as the debtor would, in the ordinary course of its business, be deprived of the ability to use the assets subject to the security. Hence there was the need for a system which makes it possible for the debtor to obtain finance for its business, create security in respect of its assets and still have the benefit of using the assets. Non-possessory, which seems to give the debtor the best of two worlds, opens access to credit for the debtor and still permit the debtor to retain its assets for its business. Gullifer (Ed) observed that cases arise which allow "a possessory security to be converted into a non-possessory security":

> For example, where documents of title pledged to a bank are released to the pledgor to enable the goods to be sold and a sale takes place, the proceeds become subject to an equitable charge.[28] Similarly(,) if a pledgee in possession of bearer securities has them converted into registered securities, he becomes a mortgagee or charge.[29]

2.3.2 Common law (Form-bassed) Non-poossessory Security Interests

The presence of non-possessory security allows the debtor to continue to trade with its assets. The regime of non-possessory security was facilitated by industrialization and relaxation of the prohibition of interest. It was said to be greeted with doubt because opportunism and misbehaviour may be facilitated thereby. In other words, the debtor retaining and remaining "in possession of the security may lead to fraud

[27] See Module 5 for further discussion of Functional Security Interest in the context of the Secured Transactions in Movable Assets Act 2017..
[28] Section 7(1) STMA 2017 captures this position exactly.
[29] Gullifer (Ed), pp. 6-7

on unsuspecting potential lenders" that may extend credit unknowingly that the asset furnished as security has been encumbered.[30] Possessory security is said to create ostensible or false-wealth problem because: Right thinking people seem always to have felt that there was something vaguely dishonourable, if not outright dishonest, about transactions in which a loan is secured by a debtor's personal property – particularly about transactions in which the debtor is allowed to remain in possession of the property and to enjoy its full use during the loan period.[31]

Despite the initial hostility towards, and distrust of, non-possessory security, it has helped us to sidestep the failings of possessory security. Today, when credit is said to be the engine of economic activity, it is always in reference to non-possessory security. The STMA is not averse to possessory as well as non-possessory security[32] having crystallised them into what we call, in this course, "functional security interest."[33]

2.4 How Common Form-based Security Interests Arise

2.4.1 Attachment of Security

This refers to the 'fastening' of the interest created in the asset. Once the interest has fastened the creditor's security interest becomes a matter of law. McKendrick outlines six conditions, otherwise called the ingredients of attachment, that must coexist and be present before the interest of the creditor can attach:[34]

a) There must an agreement for security. The agreement must conform to the statutory requirements or formalities.[35]

b) The asset to be given in security must be identifiable.[36]

c) The debtor must have an interest in the asset or a power to give it in security.[37]

d) There must be some current obligation of debtor to creditor which the asset is designed to secure.

e) Any contractual conditions for attachment must have been fulfilled.

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[30] Nwogu, T.O., Secured Transactions Law of Nigeria and Cameroun through the Lens of Article 9 of the Uniform Commercial Code of the United States of America (Doctoral Thesis) Department of Legal Studies, Central European University, Budapest (2011), n. 90, p. 36

[31] Gilmore, G., "Security Law, Formalism and Article 9" (1968) Nebraska Law Review 47(4):659 Available online at http://digitalcommons.unl.edu/nlr/vol47/iss4/3. Accessed 23/1/2020

[32] Section 8(2) STMA 2017

[33] See Module 5 for further discussion.

[34] McKendrick (Ed), p. 670; Gullifer (Ed), (2012). Goode on Legal Problems of Credit and Security. Fourth edition. London: Sweet & Maxwell.

[35] For a similar under the unitary or functional security system, see sections 3 and 5 STMA 2017

[36] Ibid, section 6

[37] Ibid, section 4

f) In the case of pledge, actual or constructive possession must be given to the creditor.

Noting that the ingredients must co-exist and be present at the same time, Gulifer (Ed) observed that attachment ceases and the security interest becomes inchoate, reviving ab initio as soon as the missing element is once more supplied."

Can you attempt comparing attachment of security under the traditional or form-based security interests represented by the common law under and the functional security system represented by STMA 2017 in Nigeria and UCC Art 9 in the USA? To draw up such a comparison you must first identify the process of attachment and enforcement of security under the functional system. Kieninger (Ed) (2004) identified three elements of attachments and enforceability. They are:

> *(1) value has been given (this requires no more than simple consideration; it includes the existence of previously extended credit as well as a promise to extend credit); (2) the debtor has rights in the collateral (the debtor's interest need not be full ownership, nor need it necessarily have been paid for, and it might even be a voidable title); and (3) either (i) the debtor has authenticated a security agreement that provides a description of the collateral, or (ii) with respect to specified types of collateral, the collateral is, pursuant to a security agreement, in the secured party's ''possession" (..) or control.*[38]

At this point, it must be pointed out that attachment of security is not the same thing as perfection of security. Also, as you will see further in the course, there are slight differences between the key elements of security interest (attachment, perfection, priorities, etc) under the common law (form-based) security interests and the building blocks of security interest under the functional security interests regime, which STMA 2017 (Nigeria) and UCC Art 9 (USA) represents.

2.4.2 Perfection

Security interest is said to be created if attachment has occurred. Although not perfected, it can be enforced against the debtor. In other words, perfection is not a precondition for enforcement of security interest. What then is the effect of perfection? Without perfection the right of the creditor as against third parties will be curtailed. Perfection occurs when registration formalities have been complied with. Under CAMA registration of a charge must be completed within 90 days of creation;[39]

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[38] Sigman H.C. (2004). "Security in movables in the United States – Uniform Commercial Code Article 9: a basis for comparison" in Kieninger, E. (Ed). (2004). Security Rights in Movable Property in European Private Law. Cambridge University Press, United Kingom. p 65.

[39] Section 222(1) CAMA 2020

section 8 STMA provides that a Security Interest is perfected when a Financing Statement relating to Security Interest has been registered in the Collateral Registry;[40] and the Bills of Sale Law provides that registration must be completed "within seven clear days after the making or giving of such bill of sale."[41]

Perfection has an inextricable relationship with priorities. The power of priorities (see next unit for further discussion on priorities) is felt during the insolvency of the debtor.[42] There are two sides to the issue of priorities: priorities at the scenario of the debtor's pre-insolvency; and priorities at the level of the debtor's insolvency. Priorities will be treated at a later stage of the Course.

SELF-ASSESSMENT EXERCISES 11

1) *A creditor with a security interest that has effectively attached but yet to take steps to achieve perfection will lose --------- to a subsequent creditor with perfected interest.*
2) *It has been aptly submitted that where all the ingredients of attachment do not coexist and are not present at the same, the security interest is ----------*
3) *A registrable charge created by a company must be registered with the Corporate Affairs Commission within ----------*
4) *Where a registrable charge is not registered within the time set for it, the instrument of charge is declared to be ---------- against the liquidator and creditor of the company.*
5) *Attachment of security is not a factor or issue to be trifled with. In light of this and assuming other conditions or ingredients have been met, the asset furnished as security must be ---------- and any -------- set for attachment must have been fulfilled.*
6) *Why do you think non-possessory security was initially characterised as emitting the fire of apparent or false wealth problem?*
7) *Beyond industrialisation, another critical factor that pushed non-possessory security is--*
8) *Do you agree that the concept of numerus clausus of security interests known to English law still applies with equal force in Nigeria?*
9) *Identify, with examples, the three types of documentary intangibles known to you.*
10) *Discover and list no less than four categorisations of assets which are amenable to security.*

2.5 Summary

[40] See Module 5 for further discussion. Also see Merchant Shipping Act 2007 for perfection of interests in ships.
[41] Section 18 Bills of Sale Law. Also see Civil Aviation Act 2006 for perfection of security interests in aircrafts.
[42] For exhaustive reading on priorities, see Beale et al, pp 451-555

Numerus clausus are the pledge, lien, mortgage and charge. These are categorized into possessory security (made up of the pledge and lien) and non-possessory security (constituted by the mortgage and charge). All the numerus clausus of security interests are collectively called consensual security interest. Irrespective of which category a specific type of security falls, there must be attachment before it is said to be created. Six conditions which coexist and be present at the same were identified in this connection. While attachment causes the interest thereby created to fasten on the asset subject to security, it is not the same thing as perfection. Once a security interest has attached, it becomes enforceable against the debtor. However, if it is not perfected, it cannot be enforced against third parties, particularly those that may set up competing equities. Various laws, like the Bills of Sale Law, Secured Transactions in Movable Assets Act, Companies and Allied Matters Act, Civil Aviation Act, and Merchant Shipping Act provide the conditions or requirements for perfection. Another critical consideration has to do with priorities, to be considered later in the Course.

2.6 References/Further Reading/Web Resources

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Credit Reporting Act 2017.

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Secured Transactions in Movable Assets Act 2017.

2.7 Possible Answers to Self-Assessment Exercises 11

1) Priority
2) Inchoate
3) Ninety days
4) Void
5) Identified, contractual conditions
6) Non-possessory security was originally thought of as creating apparent or false wealth problem because the debtor who created such a security interest is left with possession of the same assets charged as security. Security interest divests the debtor of its proprietary right and locates in the security interest of the creditor. Thus, by remaining in possession innocent third parties mistake the debtor as still the owner of the assets when the reverse is the case.
7) Another factor that facilitated the growth of non-possessory security is the relaxation of the prohibition on interest rates.
8) The numerus clausus of security interests known to English law are four – the pledge, lien, mortgage and charge. In Nigeria following the advent of unitary security regime by the passage of the law on secured transactions in personal property (represented by STMA) the numerus clausus no longer applied to Nigeria. The STMA has now made it possible to recognise functionally equivalent security devices as capable of creating security interest.
9) The three types of documentary intangibles are (a) documents of title to payment of money (termed instruments), (b) documents of title to negotiable securities (e.g. bearer bonds and notes) and (c) documents of title to goods (like bill of lading)
10) The categories of assets subject to security (a) tangible and intangible assets, (b) real and personal property, (c) fixed and circulating assets, and (d) present and future assets

UNIT 3 PRIORITY OF SECURITY INTERESTS[43]

Unit Structure

3.1 Introduction

Priorities considered under this unit are in the context of form-based security interests, otherwise known as the numerus clausus of security interests. The priorities regime under functional security interests are discussed in Module 5. The foundation of priority rule is the principle that no one can give what he or she does not have. The latin principle is nemo dat quod non habet. It finds application in respect of legal interests, whether it is "absolute" interest or coming to life "by way of security interest."[44]

3.2 Intended Learning Outcomes

At the end of this unit, you should be able to:

- Understand the meaning of priority in the context security interests
- Explain the different bases of priority rule
- Apply the priority rule in practice

3.3 General priority rule

The foundation or the general rule of priority is said to be the principle that "no one can give what they do not have." It is expressed in the latin phrase *nemo dat quod non habet*. It applies

[43] For a detailed reading on Priorites of all forms of interests, see Beale et al. (2012). The Law of Security and Title-Based Financing, second edition. Oxford University Press, Part IV, Chapters 12, 13, 14, 15, 16 and 17, pages 451-555.
[44] Ibid, p. 451

to interests created by way of security (which is our concern here) as well as absolute interests. What then do you think is the implication of this rule? Simply put, where two legal interests in relation to a thing (property) collide or compete, the first in time prevails. Otherwise called the nemo dat rule, itss application is restricted to legal interests. You will ask, do we have equivalent rule in equity? Yes we do.

In equity the equivalent rule is stated *"qui prior est tempore potior est jure,"* meaning "he who is earlier in time is stronger in law." Accordingly, where there are two competing equitable interests, the general of rule equity is that the person whose equity first attached to the property is entited to priority over the other. Hence, where equities are equal, with neither claimant having a legal interest in respect of the property, the first im time prevails. From the foregoing, what is priority?

Beale, et al (2012) simplified the meaning of priority thus:

> *The rules of priority determine when A's interest in an asset prevails over B's interest. If A's interest is an absolute interes, then, if A has priority over B, there is nothing left for B to have, and B gets nothing. (On the other hand) if A's interest is a security, then, depending upon the amount of the debt secured at the time priority is being considered, there may be sufficient value in the asset to enable B to claim after A has enforced its claim against the debtor.*

How do you achieve or prove priority? This is where the concept of registration enters the picture. Usually, registration of an interest is used to determine priority. However this is not to be taken as laying down a general rule. For instance, under the STMA 2017 (although this applies to functional security discussed fully in Module 5) registering a financing statement without a validly-created security agreement does not achieve third party effectivenesss. In other words, the requirements of the law governing the transaction creating the security interest must be fully complied with if priority is to be effective against third pary encumbrancers.

3.4 Priorities in form-based security interests

3.4.1 Priorities between posessory security interests and non-possessory security interests

What are the rules of priorities between possessory security interests and non-possessory security interests? Beale et al (2012) provided a helpful guide by showing priorities (a) where the non-possessory interest is registered abd (b) wghere the non-possessory interest is not registered.[45] We shall consider them briefly.

(a) **Where the non-possessory interest is registered**.
The behaviour of priority is subject to whether it is a possessory interest followed by a non-possessory interest. In either case, the priority rule differs. Of course, note that possessory interest has to do with pledge and lien; while non-possessory interest relates to a charge or mortgage. With the exception of a charge deffered for second semester, pledge, lien and mortgage are treated in Module 4.

(i) *Pedge or lien followed by charge or mortgage*. Pledge involves transfer of possession from the debtor to the creditor. Where this happens, the general property in the pledged asset remains with the pledgor; while the special property with actionable right residing in the pledgee. The contract of pledge creates a legal interest vesting in the pledgee. Going back to our general rule of first in time, it implies that "any subsequently created security interest (legal or equitable) in the assets will take subject to the pledge, unless an exception to the first in time rule applies." Can you think of any possible exception to this rule in this connection? An example of such an exception would be where the creditor as pledgee authorised the debtor as pledgor to create a non-possessory interest that ranks in priority to its interest. What non-possessory interests are envisaged here? They are charge and mortgage. Generally it would be difficult to create any interest in priority over the interests of the pledgee. Why is this the case? The pledge by its very nature puts the pledge in possession of the property subject to pledge.

[45] Beale, et al (2012), p. 461

As to lien followed by charge or mortgage the position is the same, whether the lien arises as possessory or contractual lien. The mere fact that lienee retains possession of the assets implies that the interest ranks in priority over any subsequently created non-possessory interests. It would be unduly stretching the law too far to supposed that since the nature of the interest of the lienee is not proprietary but merely possessory it should be "subservient" to any subsequent proprietary interest. This would amount determining priority according to the nature of interest as against the general rule of first in time.[46] For purposes of priority, when contractual lien said to be created? It is at the time the contract of lient was entered and not at the time that the lienee asserts its right and takes possession of the assets, especially if the exercise of rights comes later in time.[47]

(ii) *Legal mortgage followed by pledge or lien*. A validly registered legal mortgage ranks in priority over a subsequent incumbrancing pledge in respect of the same assets. The law is strict here. Thus, the priority of a legal mortgagee over a subsequent incumbrancing pledgee will apply whether or not the latter knows of the prior mortgage. Does the strict application extend to exceptions to the nemo dat rule (to be considered below)? Yes, it does, because the mortgagor (who is the grantor of the interest) is neither a buyer nor a seller.

What if the instrument creating the mortgage specifically permits the mortgagor to be remain in possession of the goods, which is the subject of a subsequent pledge? Will the case be different? No, because as rightly pointed out, "merely leaving the mortgagor in possession of the goods would not amount to either express or ostensible authority" to deal with the goods in a manner inconsistent with the proprietary interests of the mortgagee.

With respect to lien, the position is the same so that where the mortgagor creates a subsequent

[46] Re Diesels & Compnents Pty Ltd (1985) 2 Qd R 456, 460 SC Queensland
[47] Geogre Barker (Transport) Ltd v Eynon (1974) 1 WLR 462, CA.

incumbrancing lien the interests of the lienee would be subordinate to that of the mortgagee.

(iii) *Charge or equitable mortgage followed by pledge or lien*. Where there is a prior charge or mortgage followed by a pledge the subsequent incumbrancing pledgee will take free of the charge or equitable mortgage provided it (the pledgee) gave value and had no notice of the charge or mortgage at the time of taking its interest.[48] What is the reason for this position? This is because a charge or equitable mortgage confers equitable interest while pledge grants legal interest. This is similar to the postion of CAMA 2020 on floating charge and fixed charge. Thus a subsequent fixed charge will rank in priority over a prior floating charge, except there is a negative pledge covenant in the instrument creating the floating charge and the incumbrancing pledgee had notice of the negative pledge. Now notice here is constructive, deemed to be complete where the instrument creating the floating charge is filed (registered) with the Commissin.[49]

On the position of the law regarding a charge or equitable followed by lien, there are differing positions. Beale, et al (2012) believes that:

> a lienholder who takes for value and without notice will probably take free of a prior equitable security interest. It would seem very unlikely that the doctrine of constructive notice would apply to the holder of a lien, since usually the transaction which gives rise to the lien is not primarioly one of security buyt relates to sme other sort of service.[50]

On the other hand, Watts (ed) (2010)[51] insists that the possessory lien of an agent is subject to all the rights and equities of third parties available against the principal at that time, and this irrespective of whether the person taking the lien had notice of prior equities. What is the common point in the positions of Beale et al and Watts? It relates to the question of notice. Both of them believes that

[48] Joseph v Lynns (1884) 15 QBD; Beale, et al (2012), p. 476
[49] Section 204 CAMA 2020
[50] See Module 4 for a discussion on lien.
[51] Watts, P.G. (Ed). (2010). Bowstead & Reynolds on Agency, 19th edition. Sweet & Maxwell, UK.

constructive notice would be inputed against the subsequent lienholder. That being the case, the positon of Beale et al is preferred.

(b) **Where the non-possessory interest is not registered**. More often than the creation of non-possessory security interest would require registration.Therefore the law is that an unregistered but registrable non-possessory interest is void against the liquidator and any creditor of the company.[52] Consequently, all possessory securities would have priority over registrable but unregistered non-possessory security interest.

3.4.2 Priority between non-possessory security interests

The brief discussion here is three-fold: where both security interess are registered; where one security interest is registered; and where neither interest is registered

(a) **Where both security interests are registered**.
The general rule of first in time of creations applies to competing security interests. Is there any difference between time of creation and time of registration? Priority is determined by the time of creating the security interest in question and not time of registration. Beale et al (2012) aply explained the position:

> … if security interest 1 is created on 1 May and registered on 18 May, it will have priority over security interest interest 2, which is created on 18 May and registered on 15 May, even though the holder of security interest 2 registered first and could not have discovered security interest 1 from a search of the register.

So registration becomes an issue if the holder registers the interest outside the time allowed for registration. For instance, the allowed for registration every charge created by any company is "within 90 days after the date of its creation."[53] There are cases where the order of priority above will not apply. For instance, as between legal and equitable interests, the legal interest will have priority even if it is created later in time. Provided the holder of the later legal security interest does not have notice of the prior equitable security interest. Also, under the STMA 2017 which is propped on unitary security system and

[52] Section 222(1) CAMA 2020
[53] Ibid

discussed in Module 5, purchase money security interest (PMSI) enjoys super priority status over any prior security interest in respect of the same asset.[54]

(b) **Where one security interest is registered**.
The priority between an unregistered and a registered security interest is that the unregistered interest will be void against the registered interest. That is registered interest has priority over unregistered interest. What are the situations where questions of priority between registered and unregistered interests would arise?

It occurs where the holder of the unregistered interest applied for leave to register out of time[55] the leave would be subject to a condition that the intervening rights of secured creditors are not to be prejudiced. The effect of this is that the priority of registerd interests would not be disturbed at the time of late registration.

Beale, et al (2012) submit that "if the unregistered security is not registrable in that it does not fall within the numerus clausus in section 860(7) of the Companies Act 2006,[56] … then the first in time rule (or an exception to that rule) applies." In other words, the position is not clear cut with respect to the United Kingdom regime. In Nigeria the STMA 2017 which transplanted UCC Art 9 unitary security system based on notice filing has answered the question. See Module 5 for a discussion.

(c) **Where neither security interest is registered**.
Where neither is registered, perhaps because interest is registrable but not registered within the time period (for example 'within 90 days from the date of it creation') and the other is not registrable, the effect is that the out of time registered interest will be void against the security that is not registrable. Subject to the any prior 'within the time period' registered interest, the not-registrable interest would have priority.

3.5 Exceptions to Nemo dat rule

Recall the basic principle of the nemo dat rule, which is where two legal interests in relation to a thing (property) collide or compete,

[54] Section 27 STMA 2017
[55] Section 222(3) CAMA; Section 873 English Companies Act 2006
[56] English Companies Act 2006. See section 222(1) CAMA 2020 for a similar provision

the first in time prevails. We shall discuss a few of the exceptions to this basic rule in relation to security interests.

(a) **A purchaser of legal interest**

The principle here is that a person who acquires a legal interest in good faith and without notice takes priority over the holder of an equitable interest. The situations where this exception arise is equitable interest followed by good faith acquisition of legal interest. Just like the position of CAMA regarding the priority of a subsequent fixed charge over a prior floating charge, the principle is established on the principle that "the person acquiring the legal interest must furnish value[57] and not have actual or constructive notice of a prior equitable interest at the time she acquired her interst.[58]

Do you think the position would be the same if the subsequent incumbrancing interest was also equitable? The position would be that the subsequent equitable interest would be subject to the prior equitable interest on the principle that where the equities are equal, the first in time prevails.[59] However, if the holder of the subsequent equitable interest takes step at a later date to acquire the legal interest in the property, she would gain priority over the holder of a prior equitable interest, albeit he knew of the prior equitable interest at the time the legal interest was acquired. This is known as the doctrine of *tabula in naufragio*.[60]

(b) The rule in Dearle v Hall

As an exception to the nemo dat rule, the rule Dearle v Hall ordains that priority between assignees of chose in action is governed by the order of giving notice of the assignment to the debtor, providing that the assignee giving notice does not know of the previous assignment at the time of its assignment or when the avance is made.

However, the STMA 2017 materially altered the operation of the rule in Dearle v Hall in the Nigerian context. Thus Ozekhome (2017) writes that the rule in Dearle v Hall, which used to be a vehicle towards achieving third party effectiveness in book debts/accounts-receivable, has been supplanted by the collateral registry. Thus, security interests in

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[57] Re Diplock (1948) Ch 465, CA

[58] Pilcher v Rawlins (1872) LR 7 Ch App 259, Joseph v Lyons (1884) 15 QBD 280

[59] The latin maxim is *qui prior est tempore potior est jure,"* meaning "he who is earlier in time is stronger in law."

[60] For a detailed explanation of the doctrine, which is a form of tacking, and other types of tacking, see Beale, et all (2012), p. 506.

accounts-receivable must be registered in the collateral registry in order to achieve third party effectiveness.[61]

(c) Statutory exceptions to the nemo dat rule

The Sale of Goods Act restates the general rule of nemo dat that one cannot give what he does not have thus: where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.[62] These relate to absolute interests whereas our concern is security interest. A few examples would suffice.

(i) *Estoppel*. If the owner of goods represents that another is his agent or allows a person to represent himself as his agent, although no such agency exists in fact, he, the owner will be estopped from denying the existence of his agents authority to act, on his behalf, in relation to the goods. The estoppel exception is given effect by the second limb of section 21(1) providing that "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell" and further fortified by section 61(2) of the Act.

(ii) *Sale by a person with a voidable title*. The buyer, who buys in good faith and without notice of any defect in the title of the seller, will acquire good title if the goods are bought from a seller whose title is voidable but at the time of the sale it has not been avoided.[63]

(iii) *Sale by a seller or a buyer in possession*. See section 25(1) of the Act for the exception in the case of a sale by a seller in possession and section 25(2) of the Act for the exception as to buyer in possession.

(d) **Priority normally established by date of registration**

By now your mind must have been agitated as regards the postion of the nemo dat rule respecting priority established by date or registration. Writing on this, Beale, et al (2012) the rule is capable of being altered by statutory provisions:

> giving priority to a security interest that has been registered over the one has not. There is no consistent pattern to these provisions. Some give priority to the first secured party to register whether or not the secured party knew there was an earlier security interest, others only if the second secured party

[61] See sections 8(1) and 33(3) STMA 2017; Ozekhome (2017), p. 188

[62] Section 21(1) Sale of Goods Act 1893

[63] Ibid, section 23; Kings Norton Metall Co Ltd v Edridge, Merrette Co Ltd (1897) 14 GLR 98

> was unaware of the earlier interest. Some apply oly to legal interests because only a legal interest may be registered under the relevant staturoy scheme; others permit registration of legal and equitable intersts and give priortity to either.[64]

Let us provide you with an example of a security interest where priority is usually established by order of registration as against date of creation. Before then you should always bear in mind that the STMA 2017 regime does not apply to certain security interests. They are security interest over real property (land), any interest created by a transfer, assignment or mortgage in movable property governed by a law for which a registry has been established with regards to ships and aircrafts. Also, the STMA 2017 did not supplant or override or cancel the creation of security interests in the form of charges by companies registered under the CAMA 2020. The limitations imply that multi-registry exists in Nigeria, despite the unitary security system founded on an integrated registry system, on which the STMA 2017 is based.

Against the above background, a typical example within the Nigerian context is *Security interest over ships*. Section 56(1) Merchant Shipping Act 2007 states that If there are more mortgages than one registered in respect of a ship or share, the Priority of mortgagees shall, notwithstanding any express, implied or constructive notice, be entitled mortgages in priority one over the other, according to the date on which each mortgage is recorded in the register and not according to the date of each mortgage itself.

SELF-ASSESSMENT EXERCISES 12

1) *Briefly explain the principle of tabula in naufragio.*
2) *Differential between the doctrines of nemo dat quod non habet and qui prior est tempore potior est jure.*
3) *What is effect of STMA 2017 on the application of the rule in Dearle v Hall in Nigeria?*
4) *State the position of CAMA 2020 where a subsequent fixed is created in the face of prior floating charge.*
5) *Is there any difference in law between "time of creation" of a security interest and "time of registration" of a security interest?*
6) *Enumerate the limitations to the application of STMA 2017.*

[64] Beale, et al (2017), p. 488

3.6 Summary

So far you have been exposed to the principles of priority of security inreersts in its various forms. As much as possible, where the new legal regime of STMA 2017 affects the application of priority as you know, this has been brought out accordingly. The discussion priorities with resepct to form-based security interests will be brought to bear on your understanding of priorities under STMA 2017 in Module 5.

3.7 References/Further Reading/Web Resources

1. Beale, et al (2012). The Law of Security and Title-based Financing.
2. Companies and Allied Matters Act 2020
3. McKendrick, E. (Ed). (2010). Goode on Commercial Law, Fourth edition. London: Penguin Books.
4. Merchant Shipping Act 2007.
5. Secured Transactions in Movable Assets Act 2007

5.1 Possible Answers to Self-Assessment Exercises

1) *The principle of tabula in naufragio is a type of tacking which concerns priorities that arise between the holdders of A and B, of two equitable interests. So far as A is first in time and thus ranks ahead of B, B may still, if given the chance to do so, acquire the legal estate so as to promote his interest in the property ahead of A' interest.*
2) *The difference between the two doctrines is that while nemo dat quod non habet applies to legal interest in an asset and qui prior est tempore potior est jure applies to equitable interest in an asset.*
3) *The effect of STMA 2017 is that the rule in Dearle v Hall no longer finds application in the Nigerian jurisdiction with respect to assignment of choses in action.*
4) *The position of CAMA 2020 is that a subsequent fixed charge will rank in priority over a prior floating charge, except there is a negative pledge covenant in the instrument creating the floating charge and the incumbrancing pledgee had notice of the negative pledge?*
5) *There is a difference in reckoning priority. For instance, where priority is based on time of creation, first-to-create but last-registered interest will be subordinated to a second-to-create but first-registered interest. On the other hand, where date of registration is the basis of priority, then the interest that is first registered irrespective of time of creation will rank in priority over the later registered interest.*
6) *The limitations to the application of STMA 2017 are:*
   (a) Security interest over real property (land),
   (b) Any interest created by a transfer, assignment or mortgage in movable property governed by a law for which a registry has been established with regards to ships and aircrafts.
   (c) It did not supplant or override or cancel the creation of security interests in the form of charges by companies registered under the Companies and Allied Matters Act 2020

MODULE 4 COMMON LAW (FORM-BASED) SECURITY INTERESTS

UNIT 1 PLEDGE AS A FORM OF SECURITY

Unit structure

1.1 Introduction

The pledge is the first form of possessory security. The pledge contract is the oldest means of creating security interest in property for the repayment of loan or discharge of an obligation. It involves the delivery (which may physical or constructive) of the debtor's asset to the creditor as security for "an obligation until payment of a debt or fulfilment of an obligation. Although certain factors disfavoured the continued utility value of the pledge[1] in its traditional sense or formulation,[2] it is, today, widely "confined for business purposes to documental intangibles."[3]

[1] Flint, G.L., Secured Transactions History: The Fraudulent Myth (Spring 1999) New Mexico Law Review 29:263

[2] A distinction has been drawn between traditional (customary) pledge, term pledge, and self-redeeming pledge: Brown, M.E., and Evangel, A. "Mortgage, Pledge and Charge Transactions in Nigeria: Comparative/Distinctive Analysis and Legal Examination" (Sep-Oct 2013) International

There is technical as well as ordinary sense in which the word 'pledge' can be used. When someone makes a pledge, he undertakes or promises to do something. However, when someone furnishes and delivers his asset as assurance for repayment of a debt, pledge takes on technical meaning. In its technical sense, pledge is marked by three characteristics,[4] namely pledge is a pledge and there is no such thing as legal or equitable pledge;[5] unlike other species of security, pledge is rarely evidenced in writing; the pledgee is always put into possession of the asset; and as a fourth element, the pledgee may, subject to exceptions,[6] be permitted to use the pledged property in the ordinary way.[7] Where the pledgee uses the pledged property (like jewels and bracelets), what do you think would be the legal consequences? The pledgee is liable if the property is lost or damaged or misused,[8] and the pledgee must account for the use.[9] The topic of pledge will be examined around creation, possession, dealing and enforcement.

1.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- explain the meaning of pledge in different senses
- understand and know how pledge into existence
- distinguish between the pledge and other possessory security Interests, and
- appreciate the enforcement powers available to the creditor (pledgee)
- apply your knowledge to practical situations.

Organisation of Scientific Research Journal of Business and Management. Available online at http://iosrjournals.org/iosr-jbm/papers/Vol3-issue6/00136100107.pdf Accessed 12/10/2014

[3] Bridge, M.G., Macdonald, R.A., Simmonds, R.L., and Walsh, C., "Formalism, Functionalism and Understanding the Law of Secured Transactions" (1999) McGill Law Journal 44:567, p. 634

[4] Goldface-Irokalibe, p 116

[5] Donald v Sukcling (1866) LR 1 (QB) 585

[6] For example, where cloths or linens are subject of the pledge, the pledgee cannot use

[7] Coggs v Bernard (1703) 2 Ld Rayn 909

[8] ibid

[9] In Okoiko & Anor v Esadalue (1974) NMLE 377, a case of traditional pledge, it was held that no longer can the pledgee take all the profit from his commercial exploitation of the land and still get back his original capital.

1.3 How to Create Pledge Contract

The pledge contract is created by contract only. To explore the topic of creation of pledge, the following questions will be answered: what is the nature of the interest of the pledgee; who are the parties to the contract creating pledgor-pledgee relationship; and who specie of assets are capable of being pledged as security?

1.3.1 Nature of the Interest of the Pledgee

The general property in the pledged asset remains with the pledgor; while the special property with actionable right residing in the pledgee.[10] The extent of interest of the pledgee in the pledged asset did not wash off its proprietary character, although it may be limited when contrasted with the proprietary interest of a creditor with security interest by way of a mortgage. By reason of the creditor's special property in the pledge, he has a right to possession, which is protected against third party that may wrongfully interfere with that possession.[11]

1.3.2 The Parties to a Pledge Contract

The persons who may be able to create a valid contract of pledge are the original owner of the property, mercantile agent, joint owner of a property, fraudulent possessor and the pledgee by way of repledge. With respect to joint ownership (or control or possession) of property, the consent of the other party must be sought and obtained.[12] A fraudulent possessor can create a valid pledge if the contract by which the pledgor came into possession of the goods has not ended before pledging the goods and the pledgee acted bona fide without notice of the defect in the pledgor's title.[13] What specie of property which if in the possession of a fraudulent possessor would pose a clear and present danger?[14]

1.3.3 Properties Amenable to Pledge Contract

Except an asset can be reduced into physical or constructive possession it is not pledgeable. All movable or personal property can be subject to pledge.[15] Under common law, the pledge of land, an immovable property, is not possible.[16] This does not override the lawfulness of

[10] The Odessa (1916) 1 AC 145; Iwuchkwu v Anyanwu (1993) 8 NWLR (Pt 311 307; Sealy, L.S. and Hooley, R.J.A., Commercial Law: Text, Cases and Materials, 4th ed Oxford: OUP, p. 1092; Beale, et al, p. 99

[11] Beale, et al, ibid

[12] Dublin City Distillery Ltd v Doherty (1914) AC 823

[13] Goldface-Irokalibe, p. 124

[14] The clearest case is documentary intangibles, like bill of lading

[15] See section 2(1)(a) STMA 2017 on this

[16] By section 2(2)(b) STMA 2017, the Act does not apply to creation or transfer of an interest in land.

customary pledge of land.[17] Since documentary intangibles constitute property capable of being pledged, what is the implication of the dematerialisation regime being implemented by stock exchanges across the world? The regime allows shares of quoted entities to be held in an electronic central securities depository as against certificated shares issued to individual shareholders.[18] Certificated shares, dematerialised shares and intermediated securities are not subject of a pledge.[19] They can be subject to mortgage or charge.[20]

1.4 Possession and Delivery of the Pledge Property

1.4.1 Delivery

This is at the heart of a pledge, which explains why it is limited to movable or personal chattels capable of actual or symbolic delivery. Documents of title to goods (like bill of lading) are perfected by constructive or symbolic delivery. That is the actual goods are deemed delivered to the pledgee who may not be in actual possession.[21] When bill of lading (BoL) is pledged, the title to the goods embodied in the BoL is in the pledgee-banker. However, it happens that the banker would need to release the BoL so that the debtor could gain possession of the goods, sell them and repay the loan. The banker does this under a **TRUST RECEIPT**.[22] The trust receipt usually states that (a) the debtor holds the BoL as a trustee of the bank; (b) he would use the BoL to sell the goods as the banker's agent; (c) he would hold the goods until sale; and (d) after sale he would hold the proceeds on trust for the banker.

1.4.2 Conditions for Constructive Delivery

Apart from constructive delivery of documentary intangibles as aforesaid, constructive delivery can take place under certain conditions. It can take place where the pledgor agrees to turn over its right to the pledgee in respect of the pledgor's property. This could be completed by the process of attornment:

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[17] Yashe v Umar (2003) 13 NWLR (Pt 838) 465: a pledge cannot transform into permanent ownership.

[18] The Nigerian Stock Exchange depository is called the Central Securities Clearing System (CSCS).

[19] Compare this with the US jurisdiction which permits pledge of registered securities (like shares): sections 9-301 and 9-313(a) US Uniform Commercial Code (revised)

[20] For detailed reading, see McFarlane B. and Stevens R. "Interests in Securities: Practical Problems and Conceptual Solutions". In Guliifer L. and Payne, J. (Eds), Intermediated Securities: Legal Problems and Practical Issues. Oxford: Hart Publishing (2010) p. 33.

[21] When other documents relating to goods that are not recognised as documents of title are pledged, only the documents themselves, and not the goods, are pledged. Examples of such documents not recognised as documents of title are delivery orders, delivery warrants and warehouse receipts.

[22] In North-Western Bank Ltd v John Poynter, Son & Macdonalds (1895) AC 56 HL, the court stated that the trust receipt (letter of trust) preserves the bank's pledge over the documents and goods. Also see, Sealy and Hooley, p. 1099; Beale, et al, p. 114

If the pledgor had the actual goods in his physical possession he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee.[23]

Constructive delivery can also take place if the keys to the warehouse containing the goods are delivered to the pledgee. On this basis, does a valid pledge exist where the contract states "the goods to be locked up, the keys in your possession and you to have right to remove same as desired?"[24] Where there is joint control of the warehouse, the consent of the other party is a necessary condition for the creation of a valid security by way of pledge.[25]

1.5 Dealings with the Pledge Property

Dealing with the property subject to the pledge can arise under varying conditions. These are considered next. It should be noted that where the creditor parts with possession of the property, he, as a general proposition, losses his special property.

1.5.1 Where the Pledgee Redelivers to the Pledgor

A redelivery of the property to the pledgor by the pledgee divests the latter of the special property in the subject matter. Will the case be different if the pledgor obtains possession unauthorizedly or fraudulently? The pledge will be preserved. However, where the interest of a third party who takes the property bona fide for value and without notice has intervened the pledgee's right is lost. The pledgee must protect its possession as losing the same, whether consensually or fraudulently, may potentially wipe away its security interest.

[23] Per Lord Wright in Official Assignee of Madras v Mercantile Bank of India Ltd (1935) AC 53 (Emphasis added).
[24] This appears to be the case in Wrightson v McArthur and Hutchisons (1919) Ltd (1921) 2 KB 807
[25] Dublin City Distillery Ltd v Doherty (1914) AC 823

1.5.2 Where the Pledgee Redelivers under a Trust Receipt.

Dealing with the property subject to the pledge contract could arise in the instance where the pledgee redelivers pursuant to a letter of trust. This is an undertaking by the pledgor to hold the goods and its proceeds on trust for the pledgee. Where this happens, the pledgor is in de facto possession as against the pledgee that has constructive possession. Under this arrangement, the special property of the pledgee is preserved. However, the danger of an irresponsible pledgor repledging the document of title to a third party is highly likely.[26]

1.5.3 Where the Pledgee Repledges to a Subpledgee

The pledgee may meddle with the property like repledging it to a subpledgee. Generally, the pledgee can part with possession by pledging the property to a subpledgee. However, the initial pledge must not be destroyed thereby. This general rule is limited by two qualifications: the terms of the contract must have allowed the repledge; and the repledge must not have been prohibited by necessary implication arising out of the exceptionally special character of the property subject to pledge. Mellor J stated the general principles guiding repledge by repledgee:

In a contract of pledge for securing the payment of money… the pawnee[27] may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge, the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited… (Thus if the pledgee) does pledge the goods to a third person for a greater (or lesser) interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but… the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods.[28] (Emphasis added)

[26] Lloyds Bank Ltd v Bank of America (1938) 2 KB 147.
[27] "Pawnee" and "pawnor" refers to "pledgee" and "pledgor" respectively
[28] Donald v Suckling (supra)

1.6 Pledge Compared with Lien and Mortgage

While lien bears the possessory character of pledge, it is not the same thing as the pledge. The differences between the two will be seen in due course. Meanwhile, the pledge is intermediate between a lien and a mortgage.[29] Lien arises because of the lienor's right to possession of the asset and not for the purpose of security ab initio. For instance, the artificer who retains possession of the motor vehicle until he has been paid the agreed fees for the repair services. However, in the case of pledge the property is primarily and purposely delivered to the pledgee for the purpose of security. With respect to mortgage, the mortgagor conveys its entire interest in the asset to the mortgagee. With the pledge, what is conveyed is the special property in the asset subject to pledge as against the general property, which is retained by, and resident in, the pledgor.[30]

SELF-ASSESSMENT EXERCISES 12

1) *Identify the contents of a letter of trust.*
2) *The principle is clear that where document of title is pledged, perfection is by constructive delivery. However, where other documents other than documents of title are pledge what is really the subject of pledge as the between the documents themselves or the goods represented by the documents?*
3) *What do you understand by the term "attornment"?*
4) *Briefly explain the statement the pledge is intermediate between a lien and a mortgage.*
5) *Identify what you consider to be the defects of the pledge as a form of security.*

1.7 Summary

There is no such thing as a legal or equitable pledge. Pledge is pledge; it is rarely reduced into writing; the creditor is always put into possession; and subject to exceptions the creditor may use the property in the ordinary way. The interest granted to the pledgee is the general (absolute) property while the pledgor retains the special property. On the principle that only movable personal chattels are amenable to be pledged, it is possible, under common law, to make a pledge of land, an immovable property. This is not the case under the Nigerian customary law, where pledge of land is common. Delivery is at the heart of pledge; this is why it is limited to movable personal property. However, it is

[29] Halliday v Holgate (1868) LR 3 Exch 299
[30] Sheehan, D., The Principles of Personal Property Law, London: Hart Publishing (2011) p. 334

possible to make constructive delivery, especially with respect to documents of title, like Bill of Lading. In this case, delivery is usually covered by a Trust Receipt. Constructive delivery can also take place by attornment. As to dealings with the pledged property, it is possible for the pledgee to redeliver it to the pledgor, or to redeliver under a Trust Receipt or even for the pledgee to repledge the property to a subpledgee. Different consequences, as you saw above, flow from such dealings with the pledged property.

1.7 References/Further Reading/Web Resources

Bridge, M.G., Macdonald, R.A., Simmonds, R.L., and Walsh, C. (1999). "Formalism, Functionalism and Understanding the Law of Secured Transactions" McGill Law Journal 44:567.

Goldface-Irokalibe, I.J. (2007). Law of Banking in Nigeria. Lagos: Malthouse Law Books.

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Sealy, L.S. and Hooley, R.J.A. (2009). Commercial Law: Text, Cases and Materials, Fourth edition Oxford: OUP.

Secured Transactions in Movable Assets Act 2017.

Sheehan, D. (2011). The Principles of Personal Property Law, London: Hart Publishing.

1.8 Possible Answers to Self-Assessment Exercises

1) The contents of a letter of trust are that (a) the debtor holds the Bill of Lading as a trustee of the bank; (b) he would use the BoL to sell the goods as the banker's agent; (c) he would hold the goods until sale; and (d) after sale he would hold the proceeds on trust for the banker.

2) The documents themselves, and not the goods represented in them, are pledged.

3) Attornment is a process whereby a third party, usually a bailor of the property subject to pledge, acknowledges to the pledgee that he (the third party) holds the goods (originally belonging to the pledgor) in his custody for the pledgee and constructively makes the goods that of the pledgee.

4) Lien arises as a result of the lienor's right to possession of the asset and not for the purpose of security ab initio but in the case of pledge the property is primarily and purposely delivered to the pledgee for the purpose of security. As regards a mortgage, the mortgagor conveys its general property in the asset to the mortgagee as against the pledge where what is conveyed is only the special property in the property subject to pledge.

5) The major drawbacks of the pledge as a form of security are
   - where the attornor gives the pledgor access to the property and the latter deals with it in a way inconsistent with the security interest of the attornee/pledgee, the security is lost, and
   - if the property is redelivered to the pledgor who parts with possession, the security is lost.

UNIT 2 LIEN AS A FORM OF SECURITY

Unit Structure

2.1 Introduction

Another form of possessory security is the lien, generally defined as a "right in common law in one person to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied."[31] Lien can also be seen as a person's passive right to retain another's property which in her possession pending when the demand of the one in possession is met.[32] From the foregoing is it possible to create a lien arising out of contract? The answer must be in the affirmative. Hence a contractual lien arises whereby contract a creditor is empowered "to detain the goods of the debtor to secure payment or performance of some other obligation, the goods having been delivered to the creditor for some purpose other than security, such as storage or repair."[33]

Apart from contractual lien, the debtor never intended that the creditor should detain its property, since the purpose, in the first place, for putting the creditor in possession was some other purpose. Just like pledge, lien depends on the retention of possession. Unlike the pledge, the lien rights do not avail the lienee with the power to sell where the debtor defaults. The value of lien as a security device is dependent on possession, the loss of which effectively destroys the security. The lienee while in possession has a duty "to look after the assets with reasonable care and skill," including carrying out reasonable

[31] Lien, Entry 802" Halsbury's Laws of England, 5th ed., Vol 8 (2008) p. 5
[32] Ugo v Obiekwe (1989) NWLR (Pt 69) 566
[33] McKendrick (Ed), p. 628

maintenance. However, this duty does not extend "to running the engine of a lorry, or replacing tyres and batteries, or inspecting regularly as was held to be satisfied merely by keeping the vehicle in locked premises."[34]

By its nature, the exercise of lien rights can overreach other person's security or absolute interests. For example, a bank in a lease finance structure provides the money for the purchase of motor vehicle. The vehicle is purchased in the name of the banker, financier. On purchase, the vehicle is released to the company, while the bank, as the owner, retained the papers. In this arrangement, the bank is the bailor/creditor while the company is the bailee/debtor. The latter is entitled, in relation to the vehicle, to do all things that are reasonably incidental to its reasonable use. Thus, it is incidental to the use of the vehicle to have it repaired so as to enable the bailee/debtor to use it in the way in which such a chattel (vehicle) is ordinarily used.[35] Where an artificer who repaired the vehicle retains it in exercise of lien, the absolute interest of the bailor/creditor is suspended.

2.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- explain the meaning of pledge and the different types of lien,
- discuss how lien are created,
- analyse the value of lien as a security interest, and
- explain the implications of intervening third party interests
- apply the knowledge you gained to practical situations.

2.3 Creation of Lien Security Interest

A lien can rise under common law,[36] by statute;[37] or in equity.[38] For example, a company has "a first and paramount lien on every share" not being a fully paid share (whether currently payable or not) called or payable at a fixed time in respect of that share, and the company also has a first and paramount lien on all shares (other than fully paid shares) standing registered in the name of a single person for all money presently payable by him or his estate to the company."[39] Generally, a lien can arise under any of the following permissible circumstances:

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[34] Beale, et al, p. 129
[35] Green v All Motors Ltd (1917) 1 KB 625
[36] Which arises by agreement or operation of law: Re Bond Worth Ltd
[37] For example, see section 5(3) (4) and (10) Admiralty Jurisdiction Act Cap A5 LFN 2004; section 52(1) Civil Aviation Act No. 6 2006, section 164 CAMA 2020; and sections 39, 41, 42 and 43 Sale of Goods Act 1893.
[38] This equates to a case where a lien arises by implication of the law.
[39] Section 164 CAMA 2020.

2.3.1 When the lienee is in possession of the property over which the lien is asserted

This is a case where the lienee comes into possession of the property for a reason other for security. Lien occurs when the lienee retains possession adverse to the interest of the lienor. This can occur by way of bailment.

2.3.2 Where the lienee has done some work for or provided services to the person who transferred possession to him

In this case a mere bailment of the property will not give rise to lien security. It maturates as soon as the lienee has exercised labour and skill which led to improving the state of the property.

2.3.3 When the lienee asserts possession on grounds of custom and practice of the trade or pursuant to the doctrine of common calling

The cases appearing here include "a banker, in relation to all to all securities coming into his possession as banker; a stockbroker; an insurance broker; a factor; a solicitor, in relation to client papers coming into his possession as solicitor."[40]

2.3.4 Where the lien melds with contractual arrangements between the parties

This is typical case of contractual lien and arises where the contract between the parties supports or upholds, expressly or as can be gleaned from the contract.

2.4 Forms of Lien

There are different classifications of lien by different writers.[41] For our purposes, we have two types – general lien and particular lien:

2.4.1 General Lien

This is said to affect all indebtedness between the parties and arises as a common law right. From the context of the banker as a creditor, general lien fastens on "all property belonging to the customer including

[40] Beale, et al, p. 125.
[41] For example, see Goldface-Irokalibe, p. 114; Sealy and Hooley, p. 1107.

negotiable instruments in the banker's hands until his claims against the customer are discharged".[42]

2.4.2 Specific Lien

On the other hand, this relates to the indebtedness or other obligation from a particular transaction involving the parties. In relation to a banker, it arises in connection with a specific property of the customer associated with a specified transaction between the banker and his customer.[43] An example here has to do with documentary credit transactions financed by the bank.

SELF-ASSESSMENT EXERCISES 13

1) A security interest that is capable of fastening on all property belonging to the customer including negotiable instruments in the banker's hands until his claims against the customer are discharged is called----------
2) The conditions for exercising the power of retention are--------
3) Give an example of a statute-based exceptional right of the lienee to sale.
4) A solicitor who becomes a lienee must have done so under what circumstances?
5) Describe any situation where the security interest of the lienee

2.5 Summary

The best way to understand lien as a form of possessory security interest is to see it as the only instance of lawful expropriation because the lienee usually come in possession of the property for a reason other than grant of security by the property owner. Thus, the person (now transformed into a lienee) distrains the property to secure the payment of the debt due from the other (that automatically becomes a lienor) to him. There are two types of general and specific lien. The exercise of the power (distrain) amounts to enforcement. However, the power to sale is not available to the lienee, except by contract or pursuant to a statutory provision, like the Sale of Goods Act.

[42] Goldface-Irokalibe, p. 115
[43] Goldface-Irokalibe, ibid

2.6 References/Further Readings/Web Resources

Admiralty Jurisdiction Act Cap A5 LFN 2004.
Civil Aviation Act 2006.

Beale, et al. (2012). Law of Security and Title-based Financing.

Companies and Allied Matters Act 2020.
Sale of Goods Act 1893.

Goldface-Irokalibe, I.J. (2007). Law of Banking in Nigeria.

McKendrick, E. (Ed). (2010). Goode on Commercial Law.

Sealy and Hooley. (2009). Commercial Law: Text, Cases and Materials.

2.7 Answers to Self-Assessment Exercises 13

1) General lien.
2) The debt must fall due for payment; and the right to retain must be adverse to the right of the lienor A non-adjusting creditor.
3) The Sale of Goods Act 1893 at section 39(1)(c) donates such power.
4) The circumstance is when the lienee asserts possession on grounds of custom and practice of the trade or pursuant to the doctrine of common calling A credit facility and line of credit, especially in relation to client papers coming into his possession as a solicitor.
5) One of the situations where the security interest of the lienee may be suspended or kept in abeyance is where third party exercises encumbrancing lien rights over the same property subject to a lien. An example relates to lease finance by a bank. Where the debtor goes to the artificer to carry out maintenance on the motor vehicle who detains the same until he has been paid for his services, the right of the bank (being in possession of the title to the vehicle) is at this point suspended.

UNIT 3 MORTGAGES

Unit Structure

3.1 Introduction

As noted earlier, the early beginnings of non-possessory security were greeted with scepticism and distrust. This was understandably justifiable since there was no system publicity in place. With the development of the registry system where the public are afforded the privilege of notice of the extent of encumbrance over the assets of a debtor and the priority regime, secured credit hinged on non-possessory has become, today, the fuel of credit and efficient measure of the soundness of a financial system. The non-possessory security which may be taken over all asset types, present and future, of the debtor are the mortgage and charge.

In this Module, the focus is specifically on the mortgage. A mortgage has been defined "a conveyance or oilier disposition of land designed to secure the payment of money or the discharge of some other obligation."[44] It is equally defined as "an agreement which may be expressed by deed between persons in which a borrower of a sum of money puts up his property as collateral for the money given with the understanding that the property will be conveyed back to him upon the repayment of the money and any interests on it.[45] In other words, the mortgage is a security created to transfer an interest in the property coeval or subsidiary to the proprietary interest of the owner of the

[44] Ahaneku V Iheaturu [1995] 2 NWLR (Pt. 380) 758
[45] Dadem, Y.Y., Property Law Practice in Nigeria, 2nd ed, Jos: University Press (2012) p. 135

property (usually the debtor) for the payment of debt or performance of an obligation.

> The interest created by the mortgage is coeval to that of the mortgagor where it is legal mortgage; it is subsidiary where the interest transferred is equitable. The condition for the transfer is that the interest, equal or subsidiary, will be re-transferred to the debtor on the discharge of his obligation. Naturally, a mortgage enjoys certain characteristics. It is a consensual arrangement between the parties (mortgagor/debtor and mortgagee/creditor). As hinted earlier, it can be created over tangible and intangible property. It conveys an interest equal or subsidiary to the debtor's interest. The interest so conveyed, whether equal or subsidiary, is defeasible. Generally, the discussion of mortgage here relates to all species of assets capable of being offered as a mortgage.

3.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- discuss the history and importance of mortgage as a form of security
- undertake a critical appraisal of the principles that underlie the mortgage as a form of security, be able to ask questions and provide the right answers
- deploy the mechanism of mortgage to practical situations.

3.3 A Brief History of Mortgages

Noting that "a pledge in customary law is akin in some respects to mortgage in common law", Muntaka-Coomasie, JCA in Ahaneku v Iheaturu (supra) provided a brief but interesting history of the mortgage:[46]

> The developed law of mortgages is the joint product of common law. equity and statute. In the earliest days of the common law a mortgage was a mere pledge, which took one of two forms. It might be agreed that the lender should enter into possession of the land and should take the rents and profits in discharge of both the principal and the interest of the loan. This was called a Vivumn Vadium, or "living pledge," since it automatically and by its own force

[46] You are strongly advised to review our previous modules on possessory security (the pledge and lien) and attempt to discover the differences between mortgage from other transactions like the pledge and lien.

> discharged the entire debt. But, on the other hand, the arrangement might be that the lender should take the rents and profits of the land in discharge of the interest only, in which case the transaction was called a Mortuum Vadium, a dead pledge, since it did not effect the gradual extinction of the debt.

However, later developments saw land being conveyed in fee simple to the mortgagee on condition that if the loan was repaid upon due date the mortgagor must repossess but if the mortgagor fails, the interest of the mortgagee becomes absolute and the mortgagee's interest extinguished thereby. Noting the hardship this worked, the court observed that "what made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor[47] notwithstanding that he had actually forfeited the land to his mortgagee."[48] That is, either way the debtor/mortgagee loses and suffers double jeopardy: he loses his property for falling in breach of the contract he made; and the loss of his property is not bar to his liability to still pay and discharge the debt.

Interestingly, equity intervened to discover the essence of mortgage, which is to "afford security to the lender, and as long as the security remains intact there is no justification for expropriating the property of the mortgagor merely because of his failure to make prompt payment." Lord Nottingham reechoed this essence when he stated that "in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money."[49] The courts of equity delivered the rule that time not being of the essence of the mortgage transaction, the mortgagor must be allowed to redeem, albeit he fell in breach. Consequently, "upon the date fixed for repayment, the mortgagor has at common law a contractual right to redeem. If this date passes without repayment, he obtains a right to redeem in equity."[50]

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[47] One who gives, grants or bestows a fee. In this sense, it refers to the debtor who made the grant in fee simple.

[48] Kreglinger v. New Patagonia Meat and (old Storage Co. Ltd. (1914) A.C.25, Per Lord Haldane at page 35: Cited in Ahaneku v Iheaturu (supra)

[49] Thornbrough v. Baker (1675) 3 SWANS

[50] Ahaneku v Iheaturu (supra)

3.4 Forms of Mortgages

Two types of mortgages are capable of being created: legal and equitable.

3.4.1 Legal Mortgages

In defining a mortgage as the creation of an interest of a defeasible nature in property for the payment of a debt, the Nigerian Court went on to pronounce on the nature and effect of a legal mortgage:

> The legal consequence of the above definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has secured a release of the property from the mortgagee." Thus, in a legal mortgage, title to the property is transferred to the mortgagee subject to the proviso that the mortgaged property would be reconveyed by the mortgagor to the mortgagee upon the performance of the conditions stipulated in the mortgage deed and upon payment of the debt at the time stipulated therein.[51]

In terms of creation, legal mortgages involve the execution of a deed under seal. While it is not in doubt that the proprietary right of the mortgagor is conveyed to the mortgagee,[52] that interest of the mortgagee, now called security interest, is always subject to the mortgagor's equity of redemption. The deed of legal mortgage may be created under common law or under a statute[53] or both. For example, under common law a legal mortgage of a fee simple where the mortgagor conveys the whole of his beneficial interest to the mortgagee with a covenant to reconvey the estate on repayment of the debt. A legal mortgage can be taken over real and personal property.

3.4.2 Equitable Mortgages

This is an agreement to enter into a legal mortgage, evidenced by deposit of title deeds by way of security without a memorandum. According to the Court Appeal in Akanmode v. FBN:

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[51] Atiba Iyalamu Savings & Loans Ltd v Sidiku Ajalasuberu & Anor (2018) LPELR-44069(SC). Also see, North Vs Bello (2000) 7 NWLR (Pt. 664) 244; Prince Abdul Rasheeed Adetono v Zenith International Bank Plc (2011) 18 NWLR (Pt.1279) 627

[52] In Re First Bank of Nigeria Limited, Suit No: FHC/L/CS/550/2015 (Delivered on 13/5/2016) the Federal High Court, relying on the authority of Okuneye v F.B.N. plc (1996) 6 NWLR (Pt. 457) 749, stated that "a legal mortgage transfers title in the property to the mortgagee."

[53] For instance, the Conveyancing Act 1883, the Property and Conveyancing Law 1959 and the Land Use Act Cap L5 LFN 2004 regulate and substantially impact the creation of legal mortgages.

> when there is a deposit of titled documents with a clear intention that they should serve as security for a loan granted; when there is an agreement to create a legal mortgage in respect of a facility; or when there is a mere equitable charge of the mortgagor's property, then an equitable mortgage is created.[54]

In Daily Times v. Skye Bank (2017) LPELR-43539(CA) held that "it is trite that deposit of title deeds with a bank as security for a loan creates an equitable mortgage as against legal mortgage." It is also possible to create equitable mortgage by agreement that manifests the clear intention of the parties. The intention in this regard is manifested if it is supported by consideration. It can also be created by "a present mortgage of an equitable interest (and it arises) where there is already a legal mortgage."[55] Such a mortgage is a shaky one, especially where full disclosure was not made to the creditor and where there is full disclosure it will always be subordinated the legal mortgage.

3.5 The Concept of Equity of Redemption

In Ejikeme v. Okonkwo & Anor[56], the Supreme Court stated:

> It is a settled rule of equity that any agreement which directly bars the mortgagor's right to redemption is ineffectual. Similarly, stipulations which even indirectly tend to have the effect of making a mortgage irredeemable are equally void and unenforceable as clogging the equity of redemption, a doctrine which applies to all types of mortgages, whether legal or equitable.

Further, the Court of Appeal added that:

> The law is settled that the equity of redemption of the mortgagor cannot be activated unless and until the mortgagor make full repayment of loan advance(d) to it by the mortgagee. It follows therefore, that the mortgagor who has not made any repayment cannot complain that there is a clog in

[54] (2018) LPELR-44456(CA).
[55] Onamson, p. 143
[56] [1994] 8 NWLR (Pt. 362) 266, Per Uwais, JSC

> his equity of redemption when he has not made any actual repayment.[57]

Equity of redemption maturates and is activated after the contractual right to redeem is exhausted by reason of failure of the mortgagor to meet the obligations of the loan as it fell due. Given that the equity of the mortgagor arises when the contractual right to redeem has been lost due to failure meet the debt obligations, do you think the position of the Court of Appeal is well founded? The statement of the Court of Appeal is deserving of qualification to the extent that the equity of redemption is activated after the loss of contractual to right to redeem and subject to the condition that the debtor/mortgagor has taken steps to make full repayment of the loan. Preferable is the statement of the Supreme Court that "a mortgagor has a legal (as against equitable) right to redeem his property once the mortgaged debt is fully paid.[58] When this is done the mortgagee should issue the mortgagor a Deed of release." (Emphasis added) From this perspective, one can appreciate the view of the Supreme Court in N.A.S. Ltd v UBA plc that "the equity of redemption in mortgage transactions is a strong point in equity and it cannot be lightly vitiated."[59]

Generally, the right to redeem cannot be taken away even by an expressed consent by parties that the mortgage is not to be redeemed or that the right is to be continued to a particular time or to a particular description of persons. Except extinguished by sale or foreclosure, the right continues.[60] Always bear in mind that the right to redeem is not the same thing as equity of redemption. It is possible to find for a clog in the equity of redemption of the mortgagor from a provision in the deed comprising the mortgage. In such a case the court should find no hesitation to strike the clause down as a clog. Despite the ruling of the Court of Appeal, it is submitted that where a mortgagor has paid up the facility within the tenure and in compliance with the conditions but the mortgagee refuses to release the security, what is disturbed is not the equity of redemption, but the contractual right to redeem, of the mortgagor.

[57] Amsel Ltd & Anor v. UBN plc (2017) LPELR-42980(CA), per Shuaibu JCA
[58] Jolasun V. Bamgboye (2010) LPELR-1624(SC)
[59] (2005) 14 NWLR (PT. 945) 421
[60] Mohammed v. Abdulkadir & Ors (2007) LPELR-8994(CA)

3.5.1 Examples of Cases Giving Rise to Clog in the Equity of Redemption

The following are circumstances capable constituting a clog in the equity of redemption of the mortgagor include the following:

1) Particularly with respect to a mortgage between individuals, a provision postponing redemption perpetually or if its oppressive and unconscionable or designed to create an unreasonable restraint of trade may be struck down as a clog.[61] However, this may not apply to companies by reason of statutory provision to the contrary.[62]
2) Any provision in the deed of legal mortgage that makes redemption subject to onerous conditions may be cited for clogging the equity of redemption and thus likely to be set aside. Instances of such provisions include a penal clause and a condition that is repugnant and unconscionable.
3) Provision restricting the recovery of original mortgaged assets is bad for a clog because it is capable of conferring collateral advantages on the mortgagee. An example is where the mortgagee is given the option to purchase the asset on redemption.[63]

3.5.2 Exceptions to Clog in the Equity of Redemption

Apparent situations which do not constitute a clog on the equity of redemption include:

1) Compliance with a statutory provision, even if it will unfairly prejudice the equity of the mortgagor, does not amount to a clog in the equity of redemption.[64]
2) Charging of interest over and above initial rate in the life of the loan is not a clog, provided it accords with the prevailing interest rate regime.[65]

3.6 Distinction between a Mortgage and a Charge

The discussion on security interest created by way of charge is deferred to the Module on "Company Securities". A charge is a form of consensual security and may be fixed or floating. On enforcement, the remedies of a chargee, as will be seen in due course appear limited

[61] Beale, et al, p. 156
[62] Section 196 CAMA 2020
[63] Samuel v Jarah Timber and Wood Paving Corporation Ltd (1904) AC 323
[64] Amsel Nigeria Ltd v UBN plc (supra)
[65] Ibid

when compared with that available to a mortgagee. For our purposes at this point, Ferran drew a distinction between charge and mortgage:

> Every equitable mortgage is also an equitable charge but the converse is not true; a mortgage, like a charge, appropriates property for the payment of a debt or the discharge of an obligation but a mortgage goes further than a charge and also operates to transfer ownership in equity to the creditor, subject to the chargor's equity of redemption. A charge gives its holder rights in relation to the property which is the subject-matter of the security but does not effect a transfer of the legal or beneficial ownership of that property. (…) A charge is a form of equitable security.

SELF-ASSESSMENT EXERCISES 15

a) The *common law set up the mortgagee as the lord of the manor and vested him with powers to take the best of all worlds where the mortgagor falls in breach. The irresistible force of equity came to the rescue. How did it achieve this?*

b) *At what point in the life of the security does the equity of redemption of the mortgagor said to arise?*

c) *Apart from creation by mere deposit of title deeds, what other way do you think equitable mortgage can be created?*

d) *In the case of Thornbrough v. Baker (1675) a profound statement that go to the heart of equity intervention in the area of security interest created by way of mortgage. What is this statement and who made it?*

e) *Mortgaged under common law meted out hardship to the mortgagor. Can you identify the egregious form of the injustice?*

f) List, without explaining, two types of charge known to you.

g) XYZ Bank Ltd made and placed a report on the central server. The reports states ABC Enterprises is indebted to the XYZ Bank. This was in line with the regulation from the Central Bank of Nigeria requiring all banks to make and place such reports of every high-risk debtor of the bank. ABC Enterprises desires to liquidate the loan from XYZ bank and approached 5G Bank plc for financial accommodation. 5G Bank checked the central server and of course saw the report on ABC Enterprises. As a result, it declined to grant the loan facility. ABC Enterprises has sued XYZ Bank insisting that such a report is a clog on its equity of redemption. What do you think?

3.7 Summary

The mortgage and charge are non-possessory security. The mortgage grants the absolute interest of the mortgagor to the mortgagee, The common law mortgage worked hardship against the mortgagor. However, equity intervened to give reprieve the mortgagor so that his equity of redemption remains intact even if he breached the conditions of the mortgage as to prompt payment. Thus, equity of redemption is another critical aspect of the mortgage that makes it possible for certain covenants in a deed of legal mortgage to be struck down if they amount to a clog in the equity of redemption of the mortgagor.

3.8 References/Further Readings/Web Resources

Companies and Allied Matters Act 2020.

Land Use Act 2004.

Property and Conveyancing Law 1959.

Beale, et al. (2012). The Law of Security and Title-based Financing.

Dadem, Y.Y. (2012). Property Law Practice in Nigeria, 2nd ed, Jos: University Press.

Onamson, F.O. (2017). Law and Creditor Protection in Nigeria.

3.9 Answers to Self-Assessment Exercises 15

a) Equity achieved this by allowing security created by way of mortgage but insisted that, unlike the common law, the property subject to security cannot be taken away from the mortgagor merely for failure to make prompt payment.
b) The equity of redemption of the mortgagor arises when the debtor has lost the contractual right to redeem.
c) Equitable mortgage can be created by a present mortgage of an equitable interest that usually arises where there is already a legal mortgage on the same property.
d) The statement is "in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money." It was made by Lord Nottingham.
e) The hardship on the mortgage was that when the debtor falls behind in paying the debt, he would forfeit the property and still be liable to pay the debt.
f) The types of charges known to me are fixed charge and floating charge.
g) While there are grounds which, if present, could amount to a clog on the equity of redemption of ABC Enterprises, the action of XYZ Bank Ltd does not fall within those cases. This is because compliance with a statutory provision does not amount to a clog even if it will have deleterious effect on the mortgagor's equity of redemption.

UNIT 3 ENFORCEMENT OF FORM-BASED SECURITY INTERESTS

Unit Structure

3.1 Introduction

The nature of the creditor's interest in the pledge is the special property in the goods subject to the pledge. This affects the extent of rights available to him when there is default by the debtor and the creditor needs to realise the security. The only power available to the creditor is the power of sale. The creditor must ensure that the power is exercised properly and must therefore seek answers to such issues as when to exercise the power of sale, how to exercise the power and after sale how do you deal with the proceeds of sale?

On the other hand, considering how the lienee come about his possession, it is important to note that he is not conferred with a right of possession thereby. Accordingly, his right is limited to retention of the property of the lienor and does not include right to sell

3.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- state the various powers of the pledgee and how to enforce the pledge contract where an event of default occasions
- discuss when and how to exercise the power of a lienee.

3.3 Enforcement of the Pledge Contract

3.3.1 When to Exercise the Power of Sale

This power can arise when the debtor is in breach of any of the conditions (including condition as to payment of interest and principal) of the loan (known as events of default); or where no time is specified for payment, the pledgee serves on the pledgor reasonable notice to pay and the power remains active even when the demand for repayment is inaccurate and excessive.[66] Why should the law adopt this stand? It is simply because the obligation to pay is not the same thing as what to pay.

However, it is important to note that this power does not avail the pledgee of land in Nigeria. That is, the pledgor's right of redemption cannot be choked out by the customary pledgee. How do you think the equity of the pledgor can be clogged? It occurs where the pledgee makes a demand for:

> any amount in excess of the sum for which the lad was originally pledged, or by planting the pledged land heavily with economic trees, or by using other subterfuges to delay or postpone the pledgor's or his successor's right to redeem.[67]

Under the Nigerian customary law the pledge of land is equivalent to a mortgage of land; and for this reason, it has been held that "if a transaction is expressed to be a pledge per se in return for a loan of an amount of money the land is clearly redeemable however long it may be in the possession of the pledgee."[68]

3.3.2 How to Exercise the Power of Sale

This can be exercised in two ways. The pledgee can sell on his own account. This is usually by virtue of an implied authority from the pledgor and for the benefit of both parties.[69] The pledgee may apply for judicial sale of the property subject pledge. Such an application fetters the discretion of the pledgee to sell the property while the application is pending, because of the doctrine of *lis pendens*.[70]

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[66] Goldface-Irokalibe, n. 21 above, p.128; Beale, et al, n. 115 above, p. 563; Stubbs v Slatter (1910) 1 Ch 632
[67] Okoiko v Esadalue & Anor (supra)
[68] Yashe v Umar (supra)
[69] The Odessa (supra)
[70] Goldface-Irokalibe, n. 21 above, p. 129

3.3.3 How to Deal with the Proceeds of Sale

The pledgee must account for any excess or surplus after satisfying the sums secured by the pledge. In other words, the pledgee is a constructive trustee of the pledgor in respect of the surplus.[71] Impliedly, where there is a shortfall, "the pledgee can bring an action for the outstanding balance after applying the proceeds of the sale" towards settling the loan and incidental costs.[72]

3.4 Enforcement of Lien Security

3.3.1 The power to retain

The power of the lienee to detain and retain the goods of another is based on his right to have his demands against the owner of the property satisfied.[73] What are the conditions for exercise of the right to retain possession? The debt must fall due for payment. The right to retain must be adverse to the right of the lienor.[74] Notice to pay the amount due must have been served on the lienor.[75]

3.3.2 The power to sale

As a rule, the power of sale does not inure to the lienee. Thus, any dealing by way of sale is inconsistent with the security feature of lien and can attract action in conversion to the full value of the goods against the lienee. Notwithstanding, the power of sale can arise by contract or pursuant to a statutory provision. An instance is the statutory power of sale available to an unpaid seller as a lienee under section 39(1)(c) of the Sale of Goods Act 1893.

3.5 Enforcement of Mortgage Security

3.5.1 Possession of the Security

The sanctity of the right to possession is expressed in the statement that it can be exercised even before the ink is dry on the mortgage unless there is something in the contract, express or implied whereby the

[71] Ibid, p, 129; Matthew v TM Sutton Ltd (1994) 1 WLR 1455
[72] Jones v Marshall (1899) 24 QBD 269
[73] Ugo v Obiekwe (supra)
[74] Tappendum v Artus (1964) 2 QB 185
[75] On the special considerations that arise in a particular lien against a general lien, see Onamson, n. 10 above, p. 265

mortgagee has contracted himself out of that right.[76] What does the foregoing tell you about possession? It means that the power can be varied by contract. For example, the mortgagor is entitled to reasonable time to the meet the before possession is exercise, if the debt is payable on demand.[77] Would it be right to state that a mortgagor that exercised the right as soon as the deed of legal mortgage is executed by the parties places himself in a position of pledgee? It is not necessarily the case because possession constitutes the pledge and not an enforcement of the pledge. The mortgagee may not want to be paid in driblets,[78] but it enters into possession because it attached primacy to payment of interest as against the principal sum, it cannot escape being so paid. The power of possession does not inure to the holder of equitable mortgage as well as a mere chargee.[79] The appointment of a receiver sidesteps this limitation. What are the consequences of being in possession?

1) The Mortgage Likely to be Reduced in Driblets

The mortgagee that goes into possession must apply the income produced by the property in reducing the amount of the debt. It is immaterial that the mortgagee will realise the debt in insignificant instalments.[80]

2) Duty to Account Arises

In the context of the profits derivable from the property, the mortgagee must exercise utmost diligence with reference to the profits derived from the property while the mortgagee is in possession. The duty to account is strict and may include liability for all money which "but for the wilful default" of the mortgagee must have been made.

3) Duty to Repair the Property

The mortgagee has a duty to repair the property. While in possession the property must skid into disrepair. However, there is a difference between undertaking repairs and carrying out extensive improvements tantamount to improving the mortgagor out of his estate. The latter is usually discouraged by the courts

[76] Four Maids Ltd v Dudley Marshall (Properties) Ltd (1957) Ch 317
[77] Toms v Wilson (1863) 4 B&S 442; Beale, et al, n. 115 above, p. 574
[78] Wellington v Papafio (1952) 14 WACA 49
[79] Gwarzo v. Mohammed & Anor (2012) LPELR-22375(CA)
[80] Ibid

3.5.2 Sale of the Security

The power of sales by implication, under statute[81] or by agreement. Apart from availing a legal mortgage, the power is available to an equitable mortgagee created by deed. However, an equitable mortgagee simpliciter could only sell by an order of court.[82] Certain events precede the exercise of the power of sale. They are highlighted below:

1) The Option to Sell

The option to sell the property subject to mortgage is that of the mortgagee to make, especially as the mortgagee is not holding that power as a trustee of anyone, not even the mortgagor. In fact, the court stated the power of sale is for the benefit of the mortgagee and the court will not interfere with its exercise: provided no corruption or fraud or collusion between the mortgagee and purchaser is disclosed[83] Despite this, the equity of the mortgagor is not extinguished except by effective sale or foreclosure absolute. Is there any possibility that the mortgagor faced with extreme difficulty in repaying the mortgage sum could overreach the power of the mortgagee? The only option available to the mortgagor is to approach the court for an order of sale.[84] A sale at the behest of the mortgagor is more beneficial because of the prospects of better return. This is unlike mortgagee-conducted sale that could led to issues of bad faith, collusion, fraud and other incidences that may impeach the sale.

2) The Conditions for Sale

The mortgagee must serve on the mortgagor the requisite notice. He must exercise good faith in the exercise of the power.[85] Examples of bad faith include where there is collusion between the mortgagee and the purchaser,[86] where the sale price was abysmally low,[87] or where the mortgagee exercised the power after the expiry of the legal due date or the instalment has not fallen due to payment,[88] or the presence of conflict between the parties likely to distort or capable of distorting the totality of the transaction. However, the mortgagee owes a duty to the

[81] Such a statutory power of sale makes provision for service of notice on the mortgagor requiring notice and default has been made in complying with the notice: section 125 Property and Conveyancing Law 1959; section 20 Conveyancing Act 1881 and section 125 Kaduna State Property Law 1990

[82] The Ibadan Division of the Federal High Court confirmed this position in the case of FMBN V. Coop Property Development Company, Suit No: FHC/IB/CS/99/2015 (Delivered 8/1/2018)

[83] Warner v Jacob (1882) LR 2 ChD 220. In Chukwuokeke v. Nigeria Agricultural Co-Op & Rural Devt Bank Ltd & Ors (2018) LPELR-45037(CA),.

[84] Section 114 PCL 1959; section 91(2) English Law of Property Act 1925

[85] Alaede v. Eco Bank (Nig) Ltd & Ors (2015) LPELR-25875(CA)

[86] Ibid.

[87] Mohammed v Abdulkadir (2008) 4 NWLR (Pt 1076) 111

[88] N.H.D.S. Ltd v Mumuni & Or (1977) 2 SC 57

mortgagor and those claiming under or through him (subsequent incumbrancers, sureties and those interested in the equity of redemption) to obtain a true market value, not necessarily the best price.[89] The mortgagee may wish to exercise the power through an agent, like an auctioneer. Whether the sale is by public auction or private treaty, the agent or auctioneer must comply with the law.[90]

3) The Effects of the Sale

When the mortgagee exercises the power, the consequences from the act of sale include the following:

1) Effective sale extinguishes the equity of redemption of the mortgagor.[91]
2) If the power is improperly exercised so that the mortgagee is said to have acted in breach of the duty of good faith, the mortgagee becomes liable in damages to the mortgagor. This is on the principle that the courts are not prepared rewrite the contract for the parties.[92] The power is exercised improperly, for example, where requisite notice was not given or where the sale was concluded in the presence of a conflict. The measure of damages in a case of improper exercise of the power is the value of the property less the actual amount which the mortgagor owed the mortgagee.[93]
3) Where the sale returned an amount higher than the indebtedness of the mortgagor, the mortgagee must account for the surplus. According to Kay J, even if there is no express trust in respect of the surplus, there is undoubtedly fiduciary relationship between the mortgagor and the mortgagee. This transforms the mortgagee a constructive trustee of the surplus.[94]
4) Inversely, the right of the mortgagee to sue for any deficit is not taken away following an effective sale. Thus, where the proceeds is insufficient to liquidate the indebtedness, the mortgagee has the right to sue for the balance.

4) Grounds for Impeaching the Sale

Where the mortgagee exercises his power of sale, either in line with the agreement or under the statute, it can be impeached on the following grounds:

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[89] Beale, et al, p. 581
[90] For example, see section 19 Auctioneers Law Cap 12 Laws of Eastern Nigeria 1961
[91] Sections 111 and 112 PCL 1959
[92] Section 126 PCL 1959; section 21 CA 1881
[93] Pinnock v GB Ollivant & Co Ltd (1934) 2 WACA 164
[94] Banner v Berridge (1880) LR 18 ChD 254. On this, see section 127 PCL 1959; section 21(3) CA 1881

1) A sale can be set aside where the title of the mortgagor is defective.
2) A sale can be impeached if the conduct was tainted with fraud.
3) If the sale was after the mortgagor had discharged the entire debt secured by the mortgage, it will be set aside.[95]
4) It can be voided if the sale was not conducted at arm's length so that the it will be sold at a ridiculously low price[96] as against a proper price.

3.5.3 Foreclosure of the Security

Both the holders of legal mortgage as well as equitable mortgage can exercise this power. It is also available to the chargee, debenture holder or a trustee under a debenture trust deed.[97] The mechanism of foreclosure when exercised satisfies the mortgagor's entire and outstanding obligation. This means the power to sue for any shortfall is taken away.

1) To Whom and when is Foreclosure Said to be Available?

It is available to the legal as well as equitable mortgagee. It is not available to a mere chargee, since no interest is conveyed.[98] A dispute as to the outstanding amount is not a bar to the exercise of the power of foreclosure that has arisen. The right of foreclosure arises when the mortgagor's legal right to redeem has come to an end: that is when the payment becomes due at law and the mortgagor fails to pay. Beale et al states that payment is due "either by the date agreed for redemption or earlier if the proviso for redemption is conditional upon the performance of a covenant that is breached."

2) What are the steps for the grant of foreclosure?

The remedy of foreclosure involves a two-step process. The first step is an application before the court for an order nisi, which if granted would not usually exceed six months. It is commenced by way of originating summons.[99] The effect of the grant of an order nisi is that the right of the mortgagee to sell the property is suspended. If the mortgagor fails to redeem within the period allowed for redemption by reason of the order nisi, the court will make the foreclosure order absolute. An order

[95] Oguchi v FMBN Ltd (1990) 6 NWLR (pt 155) 335
[96] Taiwo v Adegboro (1997) 11 NWLR (Pt 528) 224
[97] Generally, the subject of charge and debenture are considered in the next semester under company securities.
[98] A charge is an appropriation of asset for the settlement of an indebtedness. As will be seen, the strict way of enforcing a charge is by sale or appointment of a receiver
[99] Order 59 Lagos State High Court (Civil Procedure) Rules 2019.

absolute, being the final step, carries with it an order for possession of the security, with the result that the mortgage takes the property in full satisfaction of the mortgage debt. In exceptional cases, the court, exercising its discretion in that behalf, can, on the application of any party before the making of the order, order that the property be sold as against grant of the order absolute.

3) Incidental Matters Relating to Foreclosure

Once an order of foreclosure absolute has been made and considering the extinguishing effect it unleashes on the mortgagor's equity of redemption, the question becomes whether:

1) *It can be reopened so as to revive the extinguished equity of the mortgagor;*
2) *The position of subsequent and prior encumbrancers would be affected, and if so to what extent are they so affected; and*
3) *In the case of an equitable mortgagee that foreclosed, it would require the consent of the Governor before it can be vested with the absolute title of the mortgagor.*

It is possible to reopen the foreclosure on a reason acceptable to the court. Or the mortgagee, unknowingly but to its own hurt, may reopen the foreclosure. For example, if the mortgagee instead of selling the property as an absolute owner sells as a mortgagee. Another case where it may be reopened by the act of the mortgagee is if it takes out an action against the mortgagor on the covenant for the outstanding balance of the loan.[100]

[100] For an exhaustive treatment of the issues, see Onamson, pp. 277-280

SELF-ASSESSMENT EXERCISES 14

1) *Where the pledgee exercises the power of sale and there is a shortfall, what option(s) are open to him in such a situation?*
2) *What are the ways by which the power of sale can be exercised by a desirous pledgee?*
3) *Where the pledgee applies for judicial sell, what is the consequence of his action?*
4) *The general rule is that the power of sale is not available to the lienee. Can you discover and provide any exceptions to this rule?*
5) What is the difference between possession with respect to a mortgage as against a pledge?
6) A mortgagee has the inalienable right to enforce the security even before the ink is dry on the mortgage. This may be the case, but it is not without its corollary. Do you agree?
7) How can a foreclosure order absolute be reopened?
8) ABC Commercial Bank Ltd obtained foreclosure order absolute against the property of Zeetop Ventures. After subsequent sale, it recovered less than what Zeetop owed. What options are open to ABC Commercial Bank Ltd?
9) When a sale by the mortgagee is impeached, what do you think must be at issue here?

3.6 Summary

With respect to enforcement, the power available to the pledgee is the power of sale, which becomes exercisable after the debt has fallen due and remained unpaid or the pledgee has fallen into breach with respect to the conditions of the loan. As was seen in a case, the power of sale is not available with respect to customary pledge of land. In line with the indicia of security interest, where the money realised is above the amount outstanding the pledgee must account to the pledgor for the balance and vice versa. The avenues through which the mortgage can be enforced are brought out clearly to you. They include the right of possession, sale and foreclosure. As to possession, the mortgagee runs certain risks and rarely exercises this right. With respect to sale, once exercised, it is effective and extinguishes the equity of redemption of the mortgagor. However, a sale can be impeached for certain reasons, like fraud. On foreclosure, it

involves a two-step process; the first is application for order nisi; the second is the application for order absolute.

3.7 Possible Answers to Self-Assessment Exercises 14

1) The pledgee can bring an action for the outstanding balance after applying the proceeds of the sale.
2) The pledgee may sell on his own account; or he may apply judicial sale.
3) The effect is that the pledgee fetters his own discretion to sell while the application is pending.
4) An exception is where the power of sale can arise by contract or pursuant to a statutory provision. An instance is the statutory power of sale available to an unpaid seller as a lienee under section 39(1)(c) of the Sale of Goods Act 1893.
5) The difference is that in the case of a mortgage possession constitutes enforcement of the security; while as regards a pledge, it constitutes the pledge itself.
6) I agree. However, the result of such a step is that (a) the mortgagee will be paid in driblets; (b) the mortgagee must exercise diligence with respect to profits realized from the property while in possession; and (c) the mortgage has a duty of repair of the property without necessarily improving the mortgagee out of its estate.
7) It can be reopened upon a reason acceptable to the court being shown by the mortgagor, and by an act of the mortgagee.
8) There is no option open to the Bank. This is because the effect of foreclosure is that the creditor/mortgagee cannot sue the debtor/mortgagor for any balance if less than the amount owed is recovered. The same is the case where a higher amount is recovered.
9) The issue that may inform a sale being impeached is that (i) the title of the mortgagee is defective; (ii) the sale was tainted with fraud; (iii) the sale was after the mortgagee had discharged the mortgage debt; and (iv) the sale was not at arm's length.

MODULE 5 FUNCTIONAL SECURITY INTEREST[1]

UNIT 1 CREATION

Unit Structure

1.1 Introduction

The functional (or "In-Substance") classification of security interests provided by the Secured Transactions in Movable Assets Act 2017, as pointed out earlier, is based on conceptual foundations of the United States Unifrom Commercial Code Article 9 (UCC Art 9) and the UNCITRAL Legislative Guide on Secured Transactions.[2] The In-Substance system of security interests promoted and adopted by many jurisdictions, including Nigeria, is transplant of the UCC Art 9.

As you will see in the module, the touchstone of functional security interests is its unitary conception of security device. The functional security interest does not replace the form-based or common law security interests system. Rather it represents another way by which security interests are classified, understood and applied by different jurisdictions. It construes security interest from the point of the "function it performs" as against the form it takes.[3] There appears to be

[1] For a thorough treatment of functional security interest based on unitary concept under the Secured Transactions in Movable Assets Act 2017, see the following works: Kieninger, E.M. (Ed). (2004) Security Rights in Movable Property in European Private Law. CUP, United Kingdom; Bridge, M. (2015). Personal Property Law, Fourth Edition. OUP, United Kingdom; Dubovec, M. and Kambili, C. (2015). A guide to the Personal Property Act: The Casse of Malawi. PULP, South Africa; and Ozekhome, M.A.A. (2017). Personal Property Law in Nigeria. PULP, South Africa.

[2] Dubovec and Kambili (2015), ibid, p. vii and Ozekhome (2017), ibid, p. vi.,

[3] Ozekhome (2017), ibid. p. viii.

unanimity that functional security interests system stands on four building blocks of "creation (attachment), registration, priorities and enforcement."[4] In this unit, we start with creation of a security interest.

1.2 Intended Learning Outcomes

By the end of the Unit, you will be able to how security interest under the personal property legislation (the STMA 2017) is created as against the creation (attachment) of security interest under common law discussed in Module 3.

1.3 Formal versus Functional security interests

There are noticeable differences between the traditional (common law) security systems discussed in Modules 3 and 4 and the functional security system being considered in this Module. Can you take time to think of such differences?

1) It has been pointed out that the functional approach to security interests tend to "blur the traditional distinctions between the relative property rights attaching to different types of security interests."[5] All rights stand on the same pedestal under the functional approach. The distinctions between legal and equitable rights that impinge on priority status of a creditor in the presence of other encumbrancing creditors under the formal security interests are absent in the functional approach. Ozekhome (2017) points out that the STMA 2017 "abolished the complex distinctin between legal and equitable interest in a movable property, especially as championed by the floating and fixed charges under the Companies and Allied Matters Act 1990."[6] Is this statement correct? It is not totally correct. This is because the distinction still exists especially in the context of charges created by companies. For instance, the STMA 2017 at section 2(3) states that the Act does not "prevent the creation of security of security interest in the form of charges by companies registered under the Companies and Allied Matters Act." On its part, the Central Bank of Nigeria (Registration of Security Interests in Movable Property by Banks and Other Financial Institions in Nigeira) (Regulations, No. 1, 2015) affirmed this position when it provides in Regulation 3(3) that the Regulations shall not apply to (b) charges required to be registered under the

[4] Dubovec and Kambili (2015), ibid, p. 51 and Ozekhome (2017), ibid, p. ix.
[5] Bridge, M.G., et al. (1999). Formalism, Functionalism, and Understanding the Law of Secured Transactions. 44 McGill L.J. 567, pp. 575-576.
[6] Ozekhome, ibid, p. ix

Companeis and Allied Matters Act." Meaning that companies still create charges and in doing so still create security interest by way of floating charges over the debtors undertaking and business and fixed charges in respect of the debtors immovable properties. It means that the STMA 2017 shall continue to operate side by side other legislations on security interests.

2) Under the form-based, security interest is created once attachment has occurred. Even if not perfected at this point, it can be enforced against the debtor. In other perfection is not a precondition for enforcing security interest under the common law or traditional security interest.[7]
3) Under the formal security interests the parties are the debtor and creditor. However, under the functional approach, the STMA 2017 at section 2(2) identifies three parties and proceeded in section 63(1) to describe the parties, to wit: the Borrower, the Grantor and the Creditor. While the borrower and Grantor of security interest. While the borrower is "the person to whom credit is extended with a financial obligation to repay under a Security Agreement;" the Grantor is the "person that has right in the collateral, and includes a grantor of any type of security interest in the form of a charge, chattel mortgage, pledge or lien in movable property." This means that someone one may take benefit of the credit (loan) while another person could bear the burden of the providing security for repayment of the loan.[8] An example here is the parent company guarantee supported by security interest in the parent's movable assets. If this is the position under STMA 2017, it would be a significant departure from the posture of UCC Art 9, where it has been pointed that "guaranties embodied in the promises of third parties, which are personal rights rather than real rights, are not, as such, directly viewed as collateral under Article 9, are distinct from security interests and are governed by a separate, largely non-statutory, body of law…"[9] The UCC Art 9 position on guarantees squwares up with its treatment under the formal approach which reqires third party guarantor to enter into a separate guarantee agreement with the creditor.
4) Unlike the formal or traditional security interest devices that include land or immovable property, the security interest under the functional classification does not include land. However, immovable equipment is included.
5) Enforcement of security interest under formal interest depends on the type of security interest created. As you have seen in

[7] See Module 3, Para 2.4 How Form-based Security Interests Arise.
[8] Ozekhome (2015), p. 70, agreeing with this position.
[9] Sigman, H.C. (2004). Security in Movables in the United States – Uniform Commercial Code Article 9 – A Basis for Comparaison: in Kieninger, E.M. (Ed). (2004) Security Rights in Movable Property in European Private Law. p. 57. CUP, United Kingdom

Module 4, the enforcement powers available to the lienee, pledgee or mortgagee are different. However, this is not the case for the functional approach. This seems to be the attraction of the unitary system of security interest under the functional approach.

1.4 Creation of Functional Security Interest

With a security interest created, the other elements of perfection, priority and enforcement remain dormant and inapplicable. What are the conditions that must be present before security interest can be effectively created under the functional security interest typology? Let us consider some of the conditions. The conditions for attachment of security under the formal or traditional security interest discussed under Module 3 Unit 2.4 can be efficiently extrapolated to the conditions for creation of functional security interest. Please read the said Unit again.

1.4.1 Agreement Between the Parties

It is created between a Grantor and Creditor by way of a Security Agreement, section 3(1) STMA 2017. The creation includes after-acquired property, which is "any asset acquired by a Grantor after the coming into force of the Security Agreement shall take effect without further consent or any other act of the Grantor at the moment the Grantor acquires such asset." There are conditions to be met before an after-acquired movable personal property can be caught within the ambit of the Security Agreement giving life to the security interest. These are:

1) the asset must correspond with description of the collateral in the Security Agreement. Collateral is a term of UCC Art 9 and means any movable property, whether tangible or intangible, that is subject to a security interest.[10] Under the form-based security interests systems it is better known as security which could mean the interest acquired in the asset of the debtor (obligor or grantor) or the instrument creating that interest granted to the creditor (obligee) or the asssset itself which is the subject matter of the security interest.[11] This last variant of the definition of security melds well with the definition of collateral.
2) The Security Agreement must speicifally provide that the interest created includes the Grantor's present and future movable assets. This is like floating charge[12] under the formal or traditional security interests. Assuming Bank A offers loan to the Borrower that used is present and future assets to secure the repayment of

[10] Section 63(1) STMA 2017
[11] Onamson (2017), p. 105
[12] To be discussed in second semester of the course. This is because security interests created by way of floating charge is normally by corporate entities. The STMA 2017 excluded floating charge from its operation, see section 2(3) STMA 2017.

the loan. Later the Borrower requires additional equipment to expand its businesss and approaches Bank B for a loan. Bank B says, yes we will give you the loan but only on the condition that you will use the same equipment to secure the repayment of the loan. The question for you is, if the Borrower collects the loan from Bank B and buys the equipment, which, between Bank A and Bank will rank in priority if the Borrower goes into financial troubles? Is the Bank A with after-acuired property clause in a pre-existing security agreement or Bank B with purchase money security interest (PMSI)[13] in respect of that equyipemt? The after-acquired property clause in a security agreement will not displace any PMSI, wherein the interest of an encumbrancing creditor wtill step in priority to the creditor with after-acquired property security interest in the same property. Put in another way, even though Bank B is an encumbrancing creditor in respect of the Borrower's asssets, the subject of the security agreement, it will rank in priority over Bank A.[14]

1.4.2 Interest of the debtor in the asset

The security interest created must be to the extent of the interest of the Grantor or debtor in the property constituting the collateral. By this, the Act seems to draw a line between general property as against special property in the collateral. In other words, where the extent of rights of the grantor is limited to special property in the collateral he cannot purport to create an interest beyond that interest. This brings us to a critical point: ownership and possession. Do you think there is any difference between ownership and possession in law? If yes, can you attempt an explanation of the differences?

Indeed there is a difference between the two. Citing Honore, Bridge, et al, defines ownership as the 'greatest possible interest in a thing which a mature system of law recognizes' (original emphasis), consisting of a bundle of rights and incidents in respect of the thing… (it) may be abbreviated as the perpetual right to possess and enjoy the thing; the perpetual right to the fruits and profits generated by it; and the right to alienate, bequeath, or destroy it."[15] On the other hand, possession comes when any of the rights of ownership is "surrendered in part without surrendering ownership of the thing itself."[16] In that case, the person to whom the right is surrendered is said to be in possession, having a right to possession of the thing itself but to ownership of it.

[13] Section 63(1) defines PMSI as (a) a right in collateral taken or retained by the seller to secure all or part of its purchase price; (b) a right taken by a person who provides credit to enable the grantor to acquire the collateral if such credit is in fact so used; and (c) a right of a financial lessor.
[14] Section 27 STMA 2017
[15] Bridge, et al (2015), p. 45
[16] Ibid

From this point the idea of general and special property[17] emerges. In a contract of sale of goods, the seller can only transfer the general property (coinciding with ownership) in the goods for a money consideration called the price. Thus, special property is limited in scope will include the possessory right of pledgee or lienee.[18] Thus, "possession is a sufficient right for the purpose of secured financing under the Act,"[19] but the creditor in possession must take further steps to perfect the interest.[20]

Now section 4(1) providing that the security interest created shall be to the extent of the righs that the debtor has in the collateral and section 4(3) providing that a creation of a security interest in any movable asset is effective, notwithstanding any agreement limiting the grantor's right to create such security interest are troubling. One, Ozekhome observes that section 4(1) in a misleading way takes us back to the "old sense of characterising interests in property as either equitable or legal, such that if a debtor has less than a legal right in a collateral, he can only grant that equitable right and nothing more." However, whether the abolished and therefore does not recognise the concepts of legal and equitable rights is open, with respect, to argument.[21] Two, if s 4(1) is taken at its face value, what is effect of s 4(3)? It means that the debtor in possession can grant security interest beyond the extent of his rights in the collateral, despite the limitation to his right to do so.

1.4.3 Formal Contents of the Security Agreement

Even though the unitary conept of security interests is functionally-based, it does commend itself to certain formalities. Consequently, the security agreement created and embodying the security interest must contain certain statutorily-prescribed contents.[22] Thus it must

a) reflect the intention of the grantor and creditor to create a security interest;
b) identify the grantor and creditor:
c) describe the secured obligation including the maximum amount for which the security interest is enforceable;
d) describe the collateral adequately:
e) indicate the tenor of the obligation secured; and

[17] See section 1 Sale of Gods Act 1893, which talks of "property in the goods" to mean general property and not special property.
[18] Section 8(1) STMA 2017 which recognises such possessory right constituting special property.
[19] Ozekhome (2017), p. 73
[20] Section 8(2) STMA 2017
[21] For example, section 4 Malawian Personal Property Security Act 2013 provides that except as otherwise provided by this Act or any other Act or rule of law or equity, a security agreement shall be effective and create a security interest as between the parties according to its terms. Although this is a foreign legislative instrument, its persuasiveness cannot be in doubt.
[22] Section 5 STMA 2017

f) confirm the agreement by parties to submit to arbitration. as first recourse in a situation that any civil dispute arises.

Ozekhome provides a detailed analysiss of the above provisions of the Act.[23] For instance with respect to subsection 5(a) requiring the securing agreement to reflect the intention of the grantor and creditor to create a security interest he observes that the subsection "rests on the freedom of contract: There has to be a consensus ad idem to demonstrate the willingness of the parties to enter into a security agreement. This section mirrors the tenets of the common law contract… (Importantly of the particular subsection) seeks to seeks to eliminate is the bullying that comes naturally from secured lenders because of their stronger position in contractual bargains."[24] Importantly, the characteristic of the functional security interest as based unitary concept and notice filing is brought out here. Thus, it is the financing statement or notice filing that is registered. You may wish to compare this with detailed filing required under CAMA 2020 for company charges.[25]

1.4.4 Identification of the Collaterall

Section 6 STMA 2017 provides as follows:

1) A description of a Collateral is adequate if it is described with:
    a) item, kind, type or category, year of manufacture or any other description that can identify the Collateral; or
    b) a statement that a Security Interest is taken in all the present and future assets of the grantor; and
    c) for the purpose of section 6 (1) (a) and (b), a description of the insurance cover on the collateral.
2) A Security Interest shall extend to the identifiable or traceable proceeds of a Collateral, whether or not the Security Agreement contains a description of the proceeds.

Ozekhome (2017) in his foundational work on Personal Propersity Security Law in Nigeria provided a detailed analysis of the foregoing section. You will do well to read it up at pages.

The Malawi Personal Property Security Act 2013 (PPSA 2013) lays down the importance of the description of the collateral as a ground for enforcing a security. Thus a security agreement shall be enforceable and a security interest created in respect of collateral only if a security agreement contains an adequate description of the collateral that may be generic or specific.[26] This provision is absent in the STMA 2017.

[23] Ozekhome (2017), pp.84-89.
[24] Ozekhome (2017), pp. 84-85
[25] See section 222 CAMA 2020
[26] Section 6(1) Malawi Personal Property Security Act 2013

Although no mention was made of "consumer goods in the section" Ozekhome noted that "a preliminary difficulty, which has not even been settled yet in secured transactions literature, may arise from the meaning of 'consumer goods'," defined in the STMA 2017 as "goods that the debtor uses or intends to use primarily for personal, family or household purpose."[27] How do you think the "preliminary difficulty" should be solved? The STMA 2017 seemingly did not provide any solution. However, in a bold attempt to dissolve the preliminary difficulty, the PPSA 2013 provides that a description is inadequate for the purposes of section 6 if it describes the collateral as consumer goods without specific reference to the item or kind of collateral.[28] Meanwhile the Act defines consumer goods to mean goods that are used or acquired for use primarily for personal, domestic or household purpose. It is submitted that the best way to dissolve the difficulty is to ask what is the primary use for the goods? Or what is the primary intention as far as the use of the goods is concerned?

As can be seen in subsection 2, security interests "extend to the identifiable or traceable proceeds of a Collateral, whether or not the Security Agreement contains a description of the proceeds." It has been explained that the subsection is meant to prevent unconscionable debtors from easily exchanging "encumbered collateral with another asset that is not described in the security agreement, thereby depriving the secured creditor of his security interest."[29]

SELF-ASSESSMENT EXERCISES 15

a) What is ownership?
b) Differentiate between "general property" and "special property."
c) The definition of "consumer goods" under the Malawi PPSA 2013 is substantially the same with definition of the term under STMA 2017. State the definition according to PPSA 2013.
d) What are the constituents of purchase money security interest as distilled in STMA 2017?
e) What is the full meaning of the abbreviation UCC?

[27] Section 63(1) STMA 2017
[28] Section 7 PPSA 2013
[29] Ozekhome (2017), p. 102

1.5 Summary

To create a security interest under the functional security interests classification, certain conditions must be met. They include the presence of agreement between the parties, the debtor or grantor must have interest in the asset proposed to be furnished as security, the security agreement must contain certain statutorily prescribed particualrs and the collateral offered as security must be clearly described.

1.6 References/Further Readings/Web Resources

1) Companies and Allied Matters Act 2020.
2) Bridge, M. (2015). Personal Property Law, Fourth Edition. OUP, United Kingdom;
3) Dubovec, M. and Kambili, C. (2015). A guide to the Personal Property Act: The Casse of Malawi. PULP, South Africa
4) Kieninger, E.M. (Ed). (2004) Security Rights in Movable Property in European Private Law. CUP, United Kingdom
5) Onamson, F.O. (2017). Law and Creditor Protection in Nigeria. Malthouse Law Books, Lagos.
6) Ozekhome, M.A.A. (2017). Personal Property Law in Nigeria. PULP, South Africa

1.7 Answers to Self-Assessment Exercises 15

a) Ownership is the‘greatest possible interest in a thing which a mature system of law recognizes consisting of a bundle of rights and incidents in respect of the thing.
b) General property is the debtor’s bundle of rights ownership) over the goods. On the other hand, special property is limited in scope will include the possessory right of pledgee or lienee.
c) PPSA 2013 defines consumer goods to mean goods that are used or acquired for use primarily for personal, domestic or household purpose.
d) The constituents of PMSI according to section 63(1) STMA 2017 are as follows: a) it is a right in collateral taken or retained by the seller to secure all or part of its purchase price; (b) it is a right taken by a person who provides credit to enable the grantor to acquire the collateral if such credit is in fact so used; and (c) it is a right of a financial lessor.
e) The full meaning is Uniform Commercial Code.

UNIT 2 PERFECTION

Unit Structure

3.1 Introduction

In the last Unit, you studied creation of security interest. In this Unit, you will go to the next step of the building blocks of security interest under the functional security interest (otherwise known unitary security interest based on notice filing). Upon creation of the security interest, the secured party is expected to take further steps to establish its interest in the collateral as one having proprietary in the collateral. Except this is done, the secured party remains unsecured and in the case of insolvency of the debtor (or grantor) the secured party will find itself among the pool of unsecured creditors whose fate of recovery usually depends on what might be left of the insolvent debtor's assets after satisfying secured creditors and other preferred payments having been made.[30] Ozekhome points out that perfection "by way of registration of security interests in the collateral registery" under the unitary security system addresses the shortcomings of the traditional security interests system. The challenges were in the form of "risks and hardship emanating from possessory security interests."[31]

3.2 Intended Learning Outcomes

By the end of the Unit, you will be able to

a) understand the meaning of perfection under functional security interests classification

[30] See section 657 Companies and Allied Matters Act 2020
[31] Ozekhome (2017) p. 110

b) know the requirements of perfection
c) to explain perfection of security interest under the personal property legislation (the STMA 2017).

3.3 Meaning of Perfection

On perfection Sigman (2004)[32] writes that "the concept of ''perfection" is used by Article 9[33] as an element of the priority scheme." However, he cautions that a"the term is somewhat misleading in that it suggests an absolute that is not the case." Explaining further, he said "a perfected security interest generally but not always prevails over a competing interest, and an unperfected security interest does not always lose. Rather, it is necessary to examine the specific priority rule applicable to a particular contest to ascertain whether perfection determines which party will prevail. Perfection is irrelevant vis-à-vis the debtor." For instance, the purchase money security interest enjoys priority over non-purchase money security in the same collateral.[34] Except there is attachment, there can be no perfection. In other words, "perfection is predicated upon the creation of a security interest.[35] What, then, are the requirements of perfection?

3.4 Requirements of Perfection

Section 8 STMA 2017 provides:

1) A Security Interest is perfected when a Financing Statement in respect of that Security Interest has been registered in the Collateral Registry established under this Act.
2) For the purposes of this Act, a Secured Creditor may take possession of the Collateral but mere possession does not perfect the security interest.

From the above provision, perfection occurs when a Financing Statement in respect of a Security Interest has been registered in the Collateral Registry. Although possession is an element of perfection, possession without more does not equate perfection. That is, possession must be coupled with a duly registered financing statement.

Comparatively, the PPSA 2013 provides that perfection occurs when (a) the security interest has been created; and (b) either - (i) a financing

[32] Sigman, H.C. (2004). Security in Movables in the United States – Uniform Commercial Code Article 9 – A Basis for Comparaison: in Kieninger, E.M. (Ed). (2004) Security Rights in Movable Property in European Private Law. p. 118. CUP, United Kingdom
[33] See sections 9-308--9-316 UCC
[34] See section 27 STMA 2017.
[35] Dubovec and Kambili (2015), p. 66.

statement has been registered in respect of the security interest; (ii) the secured party, or another person on the secured party's behalf, has possession of the collateral (except where possession is a result of seizure or repossession); or (iii) the secured party, or another person on the secured party's behalf has control of the collateral that is a deposit account or investment security.

In simple terms the PPSA 2013 ordains that perfection occurs in two cases. First, the security interest has been created (i.e., attachment) evidenced by a financing statement which must be registered in respectof the security interest and the secured party or his agent is in possession of the colateral. Second, a created security interest evidenced by a duly registered financing statement and the secured party has control of the collateral that is a deposit account or investment security. As between the STMA 2017 and the PPSA 2013 the latter is preferred for being detailed and more straightforward.

What, then, are the requirements that you can glean from the STMA 2017 provisions? The first critical requirement is filing of a financing statement. This implies that the security interest must have attached – that is creation must have taken place. The second is possession which must be coupled with a duly registered financing statement on the backs of a duly created security interest. Having met the requirement, the perfected security interest occurs either by control, registration, possession coupled with control or proceeds in the collateral. At this point, you must have noticed that there is a difference between "financing statement" and "security agreement." Can you hazard a guess on the difference between the two?

2.4.1 Defining the Terms: Financing Statement, Security Agreement and Security Interest

Section 63(1) STMA 2017, Financing Statement means the prescribed forms on which infonnation is provided to effect a registration under this Act or any regulation made hereunder. Section 2(1) PPSA 2013 defines financing statement to forms in writing or their electronic equivalent as provided in the Registry Regulations on which information is provided in order to effect, amend, terminate or continue a registration.

With respect to security agreement[36] section 63(1) STMA 2017 defines it as an agreement in any form and howsoever entitled entered into between the grantor and the creditor that creates a security interest under this Act. Against this is the definition in PPSA 2013 that a security agreement is an agreement between the debtor and secured party that creates or provides for a security interest.

[36] See Paragraph 1.4.3 above on the formal contents of a security agreement.

Moreover, STMA 2017 defined Security Interest as a property right in collateral that is created by agreement and secures payment or other performance ofan obligation, regardless of whether the parties have denominated it as a security interest but it does not include a personal right against a guarantor or other person liable for the performance of the secured obligation. On the other hand, PPSA 2013 defined the same term as a property right in personal property that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest, but does not include a personal right against a guarantor or other person liable for the payment of the secured obligation.

We have intentionally brought out the definitions of the key terms from the Nigerian legislation and Malawian legislation to show the similarity amongst personal property security legislations across differing jurisidictions with differing legal origins. This underscored the point that most personal property security legislations rode on the back and throough the lens of UCC Art 9, technically called **legal transplant**.

That said, the order of presenting the terms reflect the order of their creation. Implying that financing statement occurs first, followed by the security agreement. Both the financing statement and the security agreement are on the same journey towards the same destination: to give to life a security interest as intended by the debtor (grantor) and the creditor (secured party). Without these steps business efficacy with respect to the creation of security interest cannot be achieved. You may wish to ask, since the financing statement is not sufficient to create security interest why should I file a financing statement and not the security agreement to close out the transaction once and for all? This takes us to the role or functions of a financing statement. As you will see, this is the beauty of the unitary system as one based on notice filing.

2.4.3 Functions of a Financing Statement

The financing statement is a statutorily prescribed and electronically filed form in the collateral registry that usually contains as much as possible minimal information that "identifies the debtor and the secured party and provides an "indication" of the collateral, which may be specific or in very general terms or even in supergeneric language."[37] The financing statement is the touchstone of the notice filing system under the unitary security interest concept.

On the nature of the financing statement, Ozekhome (2017) states that:

[37] Sigman (2004), p. 76

> A filed financing statement typically describes the borrower's assets in super-generic form and does not contain a specific description of the various assets under encumbrance as obtainable in a document filing system. If the secured party wishes to know which specific assets are under encumbrance, he would have to request the security agreement from the borrower to ascertain the scope of asset encumbrance. As a shorthand formula, if the description in the security agreement is narrower in scope than that covered in the financing statement, then the description captured in the security agreement would be used to determine the extent of encumbrance. However, if the description in the financing statement is narrower than that captured in the security agreement, a third party's effectiveness would be determined by the financing statement.

We present a few functions of a financing statement, and encourage you to read more on this.

1) Unlike the transactios filing sytem under the traditional security interest system, the financing statement which represents the notice filing system is error free because it is implemented on a computerised or automated framework.

2) Since "a financing statement may be filed before attachment of the security interest, indeed, even before a security agreement made," the financing statement is prospective and prophylactic. While it can be filed to evidence a completed secured interest transaction or arrangement between the parties, it can be generated to evidence a prospective or executory secured interest transaction. In this sense, it is prophylactic because it preventively signals and puts on enquiry would-be encumbrancing subsequent creditors that the asset proposed for to secure the financial accommodation may not be free from encumbrances.

3) There is minimal opportunity for fraud. This is because A filed financing statement, however, is not effective unless the filing is authorized by the debtor (grantor) in writing,[38] although a duly made out security agreement is sufficient to constitute consent by the grantor for the registration of initial or amendment financing statement.[39] What is the implication of this provision in relation to a security agreement? It implies that (a) the security agreement is source document for the information contained in the financing statement; and (b) the financing statement can still be filed before attachment or the security agreement is concluded.

[38] Section 13(1) STMA 2017
[39] Section 13(2) STMA 2017

2.4.4 Errors in a Financing Statement

The law recognises that there are instances where material errors[40] that if present could render a financing statement defective and inoperative. A financing statement is inoperative if there are errors the following:

1. The unique identification number of the grantor
2. The serial numner of the collateral that causes the registration not to be retrieved in a search

In respect of Error 1 the effect is that it will render the reegistration ineffective only with respect to the grantor. In the case of Error 2, the effect is that it will render the registered financing statement ineffective only with resepct to the collateral identified by such serial number.

3.5 Modes of Perfection

We shall briefly consider three modes of perfecting a security interest. Meanwhile, bear in mind that the points discussed on the requirements of perfection are relevant for this discussion.

3.5.1 Control

According to Dubovec and Kambili (2015):

> Under the PPSA, perfection by control will be available both to banks but also third parties such as sellers of equipment and inventory or financial institutions that under the Malawian laws are not authorised to take deposits. Canadian experts summarised the essence of control as follows: Perfection by control occurs when the creditor has taken whatever steps are necessary to be in a position to sell the collateral without any further action by the debtor.

While the above submission is point with respect to the Malawian and Canadian jurisdictions where the unitary system operates maximally, it is doubtful if the same scenario may obtain in Nigeria. Why do you think this is the case? This is because in Nigeria the collateral registry, for now, is domiciled in and managed by the Central Bank and the users of the registry is limited to financial institutions. This defeats oe of the cardinal objectives[41] of the STMA, which is facilitate access to credit secured with movable assets and in so doing "stimulate responsible lending to small, micro and medium enterprises," the prime drivers of economic development.

[40] Section 16 STMA 2017

[41] See section 1(b) and 1(c) STMA 2017.\

Secondly, control under the Nigerian jurisdiction is restrictively construed and does not include "third parties sellers of equipment and inventory." Ozekhome (2017) confirms that it "is restricted to bankers only" with reference to 'deposit account.'[42] However, the UCC Article 9 is said to allow "the perfection of a security interest by control with respect to a wider list of assets, including electronic documents of title and electronic chattel paper."[43]

It is not surprising to see Ozekhome (2017) submitting that:

> a fair reading of section 29 ST Act shows that only bankers can use 'control' as a perfection method. Secured creditors dealing on investment property such as shares and other intangible property cannot take advantage of control as a perfection method. They must register their security interests in the CBN collateral registry as well as another specialised registry in order to perfect their security interests in the investment property. It is advised that the law makers should amend the ST Act to enable brokerage account managers to deem their security interests in the debtor's investment property, perfected by virtue of control.

To conclude on this point, you should know that perfection by control cannot apply to all types of assets. Consequently, it is not possible to gain control over tangible property such as inventory as a means of perfection and perfected by control over some intangible assets such as shares, accounts receivable, etc may not be feasible. Apart from this there is need for legislative reform in this and other areas of the law.

3.5.2 Possession

On possession section 8 STMA 2017 provides as follows:

1) A security interest is perfected when a financing statement in respect of that security interest has been registered in the Collateral Registry established under this Act.
2) For the purposes of this Act, a secured creditor may take possession of the collateral but mere possession does not perfect the security interest.

Giving more insight on possession, Sigman (2004) writes that:

> Possession, of course, can be used as a method of perfection only with respect to tangible collateral. Possession has its traditional meaning, with the secured party able to hold possession itself or through its agent (or through a bailee who has attorned to the

[42] Ozekhome (2017), p. 120
[43] Dubovec and Kambili (2015), p. 75

> secured party), but the debtor, of course, cannot serve as the secured party's agent for this purpose. This perfection method means actual, not constructive or other fictitious, possession.[44]

Dubovec and Kambili (2015) restates that possession is an alternative to registration, it has relatively minimal commercial relevance for the perfection of security interests. On his part, Ozekhome (2017) writes that under section 8(2) of the ST Act, possession as a method of perfection of security interest in collateral is not recognised.

Thus, a secured creditor may take possession of collateral, but such possession would not earn him third party effectiveness. Third party effectiveness supposes a situation where an encumbrancing creditor can secure priority over the creditor in posession, or purchaser for value without notice can good title.[45] Ozekhome (2017) gave justifications why possession should not constitute effective perfection:

> if possession is left to be a valid method of possession, then no one may concretely believe the contents of a registry which indicates that no secured creditor or a particular number of secured creditors exist in respect of a collateral, because it could be possible that a secured creditor had already been given possession of that collateral, whose hierarchy would supersede because of the second reason. The second reason is that it is not easy to prove when possession was conferred as to effectively determine the particular time perfection exactly occurred, unlike in registration whereby the date and time constitute an objective way of determining time of perfection.[46]

Do you agree with the position of the learned author? As intelligent as the reasons may appear, they are not entirely tenable. One, the position of the learned author purports constructive possession, which should not be the case. There are jurisdictions where possession is a complete form of perfection. In all such jurisdictions where possession is permitted or provided as a means of perfecting security interest the requirement is, understandably, actual physical possession other than possession by seizure or repossession or even constructive possession. Examples of jurisdictions where possession confers complete perfection include United States, Canada,[47] New Zealand,[48] and Australia.[49]

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[44] Sigman, p. 71

[45] The presence of notice will vitiate the good faith of the third party. As such he cannot take good title, because he who has notice has no equity:

[46] Ozekhome (2017), p. 133

[47] Section 24(1) Personal Property security Act, Revised Statutes of Alberta, Chapter P-7

[48] Section 41 New Zealand Personal Property Securities Act 1999

[49] Section 21(2) Australia Personal Property Securities Act 2009. Generally on possession, see s 24.

Thus, actual possession dispossesses the debtor of the asset. No diligent and prudent creditor will extend financial accommodation on the backs of a non-existent asset or an asset not shown to be in existence at the time of the transaction, except where the asset is to be acquired in future. Where the asset is to be acquired in the future, a prudent creditor would insist on purchase money security interest. Two, assuming other things are held constant and the reasons adjudged tenable, the problem becomes a localised one limited to Nigeria only. The problem in this instance, it is submitted, is one for failure of our legal system to provide against the consequences of information asymmetry (adverse selection) and hidden action (moral hazard), which are the stock in trade of an ethically challenged debtor or the unconscionable creditor that would have no scruples colluding with "a dishonest borrower" to transfer possession to the unconscionable creditor "with a backdated security agreement, thereby hiding the actual time of transfer of possession."[50]

Possession of intangible property confers complete perfection. What is an intangible property? What examples can you proffer? For an understanding of intangible property and examples of assets that constitute intangibles, you should go to Unit 4, Module 2 of the Course and read again about assets smenable to creation of security interest. In this connection, Section 31 STMA 2017 clearly shows us the ways the holder of documentary intangible, in this case negotiable instrument or bill of lading, can have priority over a perfected security interest in the same asset. Can you identify the ways? It occurs where the holder- (a) gave value; or (b) acquired the negotiable instrument or the title document without knowledge that the transaction is in breach of the security agreement towhich the security interest relates; and (c) took possession of the negotiable instrument o the title document.

3.5.3 Automatic Perfection

Section 9 STMA 2017 provides:

1) A security interest in any proceeds of the collateral is perfected automatically without any further action by the grantor or the creditor when the proceeds arise or are acquired if:
   a) The proceeds are described in the Financing Statement; or
   b) The proceeds are in the form of money, accounts receivables, negotiable instruments or bank accounts.
2) If the proceeds are not of the kind covered in the preceding sub section, the security interest will remain perfected if the Creditor

[50] Ozekhome (2017) ibid

registers an amendment adding a description of the asset that is proceeds within 15 days after they arose.

In this case the secured party need not take any further steps as to registration if the above conditions are fulfilled. What are the conditions to be met before automatic perfection can arise under the STMA 2017? One condition is if the proceeds are described in the financing statement. Two, if the proceeds are in the form of money or accounts receivable, or bank accounts. Three, if the proceeds are not described in the financing statement and they are not in the form of money or accounts receivable, etc, but the creditor amends the financing statement and therein described the proceeds. This must be done within 15 days after the proceeds in the collateral arose. PPSA 2013 appears to have more robust provisions relating to perfection that extends to bailees, crops, etc.[51]

SELF-ASSESSMENT EXERCISE 16

1) In jurisdictions where perfection by possession confers complete security interest, what is the nature of such possession?

2) What are the various ways automatic perfection can occur?

3) Carefully bring out the requirements of perfection under the Nigerian STMA 2017?

3.6 Summary

In this Unit, you are able to understand the meaning of perfection and the different ways by which perfection can be achieved. They include control, possession, registration and automatic perfection. The meaning of such technical terms as financing statement and security agreement were brought out and the functions of financing statement explained.

3.7 References/Further Readings/Web Resources

Beale, et al (2012). Law of Security and Title-based Financing.
Onamson F.O. (2017). Law of Creditor Protection in Nigeria.

[51] For example, see sections 16, 17, 18 and 19 PPSA 2013.

3.8 Possible Answers to Self-Assessment Exercises 16

1) In such jurisidictions the nature or the requirement is actual physical possession other than possession by seizure or repossession or even constructive possession.
2) Automatic perfection can occur in three ways. One condition is if the proceeds are described in the financing statement. Two, if the proceeds are in the form of money or accounts receivable, or bank accounts. Three, if the proceeds are not described in the financing statement and they are not in the form of money or accounts receivable, etc, but the creditor amends the financing statement and therein described the proceeds. out of its estate.
3) The requirements are (a) perfection occurs when a Financing Statement has been registered in the Collateral Registry; and (b) although an element of perfection, possession must be coupled with a duly registered financing statement.

UNIT 3 REGISTRATION, PRIORITY AND ENFORCEMENT

Unit Structure

3.1 Introduction

Recall that in our discussion on priorities under form-based security interest, you were told that priority is usually reckoned from the point of creation as against the time of registration.[52] This position, remember, is distinguished from other cases where the law ordains that registration is determined from the time of registration of security interest.[53] In this unit, you will see the position from a slightly different but related against as we examine registration, priorities and enforcement of functional security interests created under STMA 2017.

3.2 Intended Learning Outcomes

By the end of the Unit, you will be able to:

- Understand the concept of registration under the functional security interest.
- Distinguish between the different forms or categories of priorities under the functional security interest
- Apply the law in enforcing functional security interests

3.3 Registration

Ozekhome (2017) put the matter in perspective as followsss:

> Registration, from the perspective of the ST Act, is an important method that lawyers should bear in mind. Thus, there should be no restriction in emphasising the radical distinction between document filing, which is what Nigerian lawyers are familiar with, and the new notice filing system under the ST Act, which is the registration of a financing statement that embodies some specific information. Unlike the requirement in section

[52] Section 222 CAMA 2020
[53] Section 56(1) Merchant Shipping Act 2007

> 197[54] of CAMA to file a copy of a security agreement, thereby impeding the efficiency of the CAC registry due to the overwhelming volume of paperwork which the registry staff are made to navigate on a daily basis in their search, as well as the acceptance of security agreements for filing,[55] **notice filing system under the STMA 2017 is a simple (and usually one page) form providing a minimum amount of information that identifies the debtor and the secured party and provides an "indication of the collateral to which it relates.** (Words in bold are mine). At this point, the question is of what use is registration?

CAMA 2020 pointed us to the necessity of registration when it stated that a registrable but unregistered interest will be void against the creditor and liquidator. In other words, registration makes it possible to achieve third party effectiveness in relation to the relevant collateral. However, in the absence of a validly created security agreement between the borrower and the secured creditor, a filed or registered financing statement will not be effective against third parties as to entitle the secured creditor to a secured position. Thus, if a third party acquires the borrower's collateral[56] purported to have been encumbered by a registered financing statement not backed with a validly-created security agreement, the encumbrancing third party will acquire good tite in the asset, supposedly subject to security interest.

Thus, the effect of third party effectiveness rest squarely on the principle that creation and registration must be present at any one time before a third party effectiveness can be achieved. On this basis, a validly-created security agreement is not enough to trump a third party's right, neither is a stand-alone registration without a validly-created security agreement enough to achieve that. Third party effectives means that the creditor has taken steps to protect its proprietary (or security) interests or right in the collateral by ensuring that it is duly registered in the CBN collateral registry, except in instances where the collateral is represented by a negotiable instrument or document of title and the holder fulfilled the requirements of the law.[57]

To understand the difference between a financing statement and a security agreement we have to advert our mind to the question of what are the **contentents of a security agreement**. Ozekhome (2017) brought out the contents.[58] They are itemised below:

(a) Consensus ad idem, section 5(a) STMA 2017. Parties must show their willingness and freedom to enter a security agreement.

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[54] Obviously this is reference to CAMA 2004 repealed by CAMA 2020. The provision is contained in section 222 CAMA 2020

[55] Ozekhome (201), p. 165

[56] The third party can acquire the asset by sale, gift or court judgment.

[57] Ozekhome (2017), p. 114

[58] Ibid, p. 116

(b) Identification of parties, section 5(b) STMA 2017. The agreement must identify the party with a right in the collateral as against the party advancing the credit or making the loan.
(c) Description of the underling obligations, section 5(c) STMA 2017. The agreement must draw up the terms and conditions guiding the relationship of the parties.
(d) The collateral must be adequately described, section 5(d) STMA 2017. Three reasons have been adduced for the requirement of description of the collateral, to wit: (i) it is a requirement of attachment; (ii) security interest extens to the identifiable or traceable proceeds of a collateral; and (iii) the collateral is the fall back in the event of default. That is the secured creditor would only be entitled to repossess the collateral and nothing more. How do you adequately describe the collateral? This is, and can be, done in two ways:
    (i) the collateral is adequately described if it is accompanied with item, kind, type or category, year of manufacturer or any other elements that can identify the collateral and insurance cover on the collateral.[59]
    (ii) It contains a statement that a security interest is taken in all the present and future assets of the grantor together with an insurance cover on the collateral.[60]
(e) The tenor of the secured obligation must be disclosed, section 5(c) STMA 2017. That is the security agreement is not meant to exist ad infinitum. It must contain a provision as to its lifespan, "to ensure that the security agreement is not valid in perpetuity against the debtor and its assets.

How do you go about registering a financing statement and a security agreement? This is where the role and place of National Collateral Registry (NCR) comes in. The NCR is the registry for security interests created under and pursuant to the STMA 2017. It is domiciled in, and overseen by, the Central Bank of Nigeria. A discussion of the NCR is contained in the next Unit of this Module.

3.4 The Registry

The Registry is the National Collateral Registry (otherwise called the Collateral Registry) domiciled in and controlled by the Central Bank of Nigeria.[61] The head of the Registry is a Registrar appointed by the Governor of Centrral Bank of Nigeria. The

[59] Section 6(1)(a) STMA 2017
[60] Section 6(1)(b) STMA 2017. This envisages a "floating lien" equivalent to floating charge under the traditional or form-based security interest.
[61] Section 10 STMA 2017

Registrar has supervisory and administrative oversight over the activities and operations of the Collateral Registry.

Functionally[62], the Collateral Registry is saddled with:

(a) receiving, registring and storing information abobt security foterests in movable assets;
(b) providing access to persons who may seek information on security interests from the Collateral Registry; and
(c) pe1fohn such other functions a's may be prescrib□d,by regulations made under this Act.

3.5 The Priority rule under the functional security interest system (represented by the STMA 2017

Like the Merchant Shipping Act 2007 considered in Module 3 under priorities of form-bassed security interest, the overarching priority rule[63] of security interests under the functional system in a collateral is determined by the order in which they are registered in the collateral. Basically, the first to register rule applies to the effect that if two or more security rights are perfected in a collateral, determining their priority would not be based on the order in which they are created, but the order in which they are registered. Registry.[64]

It is important to draw your attention that there are different circumstances or situations in which priority rule operates under the functional security system. One of such circumstances or cases iss the priority of purchase money security interest and its proceeds. Consequently, a purchase money security interest (PMSI) in a collateral or its proceeds shall have priority over a non-purchase money security interest in the same collateral created by the same Grantor if the purchase money securit) interest in the collateral or its proceeds is perfected when the Grantor obtained possession of the collateral.[65] Other instances or situations where the law made specific rule of priority that may operate as an exception to the general rule include priority of security interest in processed or commingled goods,[66] priority relating to receipt of funds and cash,[67] priority of lien holders,[68] and priority of holders of negotiable instruments, title documents,[69] and priority of assignees,[70] and priority of judgement creditor,[71] etc.

[62] Section 11 STMA 2017
[63] Section 23 STMA 2017
[64] Ozekhome (2017), p. 201
[65] Section 27 STMA 2917
[66] Section 28 STMA 2017
[67] Section 29 STMA 2017
[68] Section 30 STMA 2017
[69] Section 31 STMA 2017
[70] Section 33 STMA 2017
[71] Section 34 STMA 2017

3.6 Enforcement

Just like the creditor has enforcement rights against in the case of form-based security interest, the creditor with a security interest pursuant to the STMA 2017 enjoys certain enforcement powers, that may not be available to creditor with secured interest under numerus clausus of security interests. Let us briefly consider two of the enforcement rights or powers available to the creditor in the event of debtor default:

3.6.1 Repossession of collateral

Once there is an event default with reference to the covenants in the security agreement, and the secured creditor intends to enforce his security right, the Act "requires that he gives the debtor notice of the default and his intention to repossess the collateral. The notice may be delivered by any method agreed by the parties."[72]

3.6.2 Sale of repossessed collateral

On repossession of the collateral the secured creditor has a right under the Act to sell the repossessed collateral 'as is.' This infers sale in its present condition without any obligation to refurbishing it in view of realising a higher sale price.[73]

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SELF-ASSESSMENT EXERCISE 16

1) Enumerate the statutory roles of the National Collateral Registry in Nigeria.
2) Why do think registration of security interest is important?
3) State and discuss at least two contents of a security agreement.
4) What is the enabling law that created the Collateral Registry?
5) Identify at least two of the enforcement rights available to a creditor whose debtor has defaulted.

[72] Section 41 STMA 2017
[73] Section 44 STMA 2017

3.7 Summary

In this Unit you have been exposed to registration, priority and enforcement under the functional security interest as represented by the Secured Transactions in Movable Assets Act 2017. While there is no doubt that you have been well acquainted with the principles of the subject, it is expected that you will take steps to lay your hands on the law to gain further insights.

3.8 References/Further Readings/Web Resources

Onamson F.O. (2017). Law of Creditor Protection in Nigeria.
Secured Transactions in Movable Assets Act 2017

3.9 Possible Answers to Self-Assessment Exercises 16

1) The statutory functions of the Collateral Registry are:
   (a) receiving, registring and storing information abobt security foterests in movable assets;
   (b) providing access to persons who may seek information on security interests from the Collateral Registry; and
   (c) pe1fohn such other functions a's may be prescrib□d,by regulations made under this Act.
2) It is to enable the secured party to achieve third party effectiveness.
3) The two contents of a security agreement are:
   (a) Identification of parties, section 5(b) STMA 2017. The agreement must identify the party with a right in the collateral as against the party advancing the credit or making the loan.
   (b) Description of the underling obligations, section 5(c) STMA 2017. The agreement must draw up the terms and conditions guiding the relationship of the parties
4) The Collateral Registry, otherwise known as the National Collateral Registry is created pursuant to section 10 STMA 2017