

## GUIDED MODULES ON LAND LAW FOR STUDENTS

### TOPIC ONE

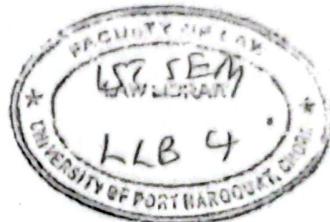
- Sources of Nigerian Land Law
- Historical Evolution of Nigerian Land Law

### TOPIC TWO

1. Meaning of Land Law
2. Purpose of Land Law
3. Peculiar Nature of Land:

Land is peculiar property because:

- Unlike other properties, it is immovable yet capable of being owned.
- Though immoveable, it is transferable in its form.
- It is finite
- Land is capable of being owned in different forms, it means that different enforceable interests may exist on land simultaneously. For instance Bola Chicago may be the owner of black acre in fee simple. Bola Chicago may lease the Blackacre to Joy Nyanga for a term of 99 years at the cost 99 million Naira (at the rate of 1 Million per year). Joy Nyanga in turn may mortgage the Black acre to People's Bank for a loan of 120 million Naira and at the same time build a house on the land and let the property to Bonnyface for a term of 25 years for 30 million naira (at the rate of 1,200,000.00 per year). Bonnyface in turn may sublet the same house to Tola Texas for 20 years at 30 million Naira (at the rate of 1,500,000.00 per year). Tola Texas may take possession of the house and in turn may grant a license to his cousin Ernest Gambi to occupy the house for free for 2 years. These persons all have concurrent enforceable rights on the same property.



#### **4. Definition of Land**

- Under the Interpretation Act
- Under the Property and Conveyancing Law of Western Nigeria
- Under any other Statute or Case Law

#### **5. Aspects of the Definition of Land**

- Land as the Ground and its Subsoil
- Land as things attached to the soil
- Land as Abstract Interest such as Incorporeal Hereditaments.

#### **6. Land as the Ground and its Soil**

- Stool Land
- Communal Land
- Family Land

#### **7. Land as Things Attached to Land**

- The doctrine of *Quic Quid Plantatur Solo Solo Cedit* (Note the cases on the doctrine example Francis V. Ibitoye etc.)
- Exceptions to the Doctrine
- Application of the Doctrine under Customary Law

#### **8. Land as Abstract Interests**

- Incorporeal Hereditaments

#### **9. Classical Concepts of Land Law**

- Title (Note the 2 categories: Absolute Title Versus Restricted Title. Also note the categorisation of title into original and derivative)
- Ownership (Note Tobi JCA in Abraham v. Olorunfunmi)
- Possession (Note the 2 categories: De facto and De Jure) (Also note the decision in the case of the case of Wuta-Ofei v Danquah).
- Estate: Estate is the title to land that a person possesses that is greater than any claim any other person has over the land but subject to the higher ownership of the crown or government. When title to land in a state is vested in the Government or monarchy and the citizens are only given possession for a fixed term of years they are said to have Estate in the land. In England, all land belongs to the crown as the absolute

owner. However, the citizens who occupies land, does so for a period granted by the crown. The right to use and occupy the land is better known as the Estate enjoyed on the land. And this has transformed into ownership in the sense that though he does not own the land but he owns the Estate on the land exclusively and such right is enforceable against any other person.

## 10. Ownership

- Communal or Family Ownership (Note the locus Classicus on this form of ownership)
- Ownership under the Land Use Act (Savannah Bank Ltd V. Ajilo)
- Roman Law as the basis of Distinction between Ownership and Possession

## 11. Conflict of Different Cadres of Ownership in Colonial Times

In the 1920s, ownership of land in Lagos was primarily communal and family based. Given the challenges of acquiring land in Lagos, the British colonialist in the 1920s introduced the Crown Grants Law which introduced the Crown Grants System with the aim of introducing English tenure and individual ownership to land in Lagos which at the time was absolutely governed by customary land tenure system. This raised debates as to the possibility of transforming customary title to fee simple. The challenge with this was that where a customary holding is to be converted into fee simple estate, the maxim *memor dat non habet* will apply, i.e. you can only give what you have, or conversely, you cannot give what you do not have, since the two interests are different in quantum and quality; it becomes impossible to convert one into another. The problem arose because a fee simple holder of land in England was an absolute holder of land whose title was only subject to the allodial ownership of the crown. The Courts stated in Balogun V. Oshodi as follows:

“the whole idea of fee simple is so contrary to native law and custom that...it cannot exist side by side with native customary tenure in respect of the same piece of land. There can be only one *rex lei sitae* and in this case, there can be no doubt that the original *rex lex sitae* is native law and custom, nor can I subscribe to

the proposition that the native law and custom applicable to the area in which the land in dispute is situated has so changed that now it is in accordance with it that land can be held and conveyed in fee simple".

Similarly in Balogun V. Odunsi the court held that it was not possible to convert such interest under customary law into an Estate in fee simple.

This debate today is largely resolved by the Land Use Act.

### **TOPIC THREE: MODE OF ACQUIRING TITLE TO LAND**

#### **1. INTRODUCTION**

The method of acquiring title to land is of fundamental importance for the following reasons:

- In an action for declaration of title to land, the claimant must be able to trace his title to the original owner.
- A seller of land must insert in the deed of conveyance a recital that shows his title and the title of his predecessor in title. The recital must show that the predecessors in title transferred a valid title to him which he is now transferring to the buyer.
- Title to land may be either original or derivative. An original title is one that is the very root, and not derived from any other source, it is the foundation of the title beyond which there is no other title. In action for declaration of title, title to land must be traced as far back as possible from the derivative title to the original owner.

#### **2. HOW TO PROVE TITLE TO LAND**

Something that is inexorably connected to acquisition of title is proving title is proving title to land. The Supreme Court in IDUNDUN V OKUMAGBA stated that title can be proved in any of the following ways:

- By traditional Evidence
- By production of documents of title that are duly authenticated
- Acts of persons claiming the land over sufficient length of time
- Acts of long Possession and Enjoyment of land

- Proof of Possession of Connected or Adjacent Land

Of particular interest is acts of possession. Note the following characteristics of possession:

- It may be de jure or de facto
- It must be exclusive. Udeze v. Chidiebe
- Agu JSC in Buraimoh v. Bamgbosse (Modes of Possession).
- Possessory Rights may be accorded to a trespasser
- In the face of 2 adverse claims with doubtful titles the person in possession is entitled to protection of the law

### **3. METHOD OF ACQUIRING TITLE TO LAND**

Title to land may be Original or Derivative. Therefore the method of acquiring title to land would vary according to whether the title being obtained is original or derivative.

#### **3.1. HOW TO ACQUIRE ORIGINAL TITLE TO LAND**

From a purely legal perspective original title to land means title that is obtained by being the first or original settler on land or to title that in pre-colonial times were obtained involuntarily through conquest. On the basis of this definition there are 2 modes of obtaining original title. By Being the First Settler or By Conquest.

##### **3.1.1. BY SETTLEMENT**

- See quote in STOOL OF ABINABINA V. CHIEF KOJO ENYIMADU (Privy Council 1952 12 WACA 171) quoted Per Oputa JSC in Chief O. Odofin V Isaac Ayola (1984) 11 SC 72.
- OWONYIN V. OMOTOHO [1962] 1 ALL NLR32
- OLUYOLE V. OLOFA [1968] NMLR 462
- ONOGITERE V. ECHEADIARE ITIETIE (1972) 5 S.C. 334

Note that it is still the practice that to prove title to land or to convey land, title of the claimant or conveyor must be traced as much as possible to the original settler.

In addition, it is doubtful that anyone can be the original settler on any land in Nigeria today given the Land Use Act's vesting of all land in Nigeria in the Government (State and Local).

### **3.1.2. BY CONQUEST**

- Acquisition of land by conquest in Pre – Colonial times has been judicially recognized as a mode of acquisition of land under Native law and custom.
- MORA V. NWALUSI [1962] 1 All NLR 681 the court held that the Respondents which tendered evidence that they came into occupation of land in present day Enugu State by conquering the former occupants of the land and evicting them were held to be the occupants of the land. The court held that proof of possession following conquest will suffice to establish ownership.
- See also Echi v. Nnamani [2000] 8 N.W.L.R. (Part 667) 1
- Please note that acquisition of land by conquest is now a criminal offence under section 42 of the Criminal Code and sections 341, 350 and 107 of the Penal Code.

## **3.2. HOW TO ACQUIRE DERIVATIVE TITLE TO LAND**

Derivative title to land may be acquired by: - sale absolute gift, condition gift, borrowing of land and pledge.

### **3.2.1. SALE**

- I. A sale is the permanent transfer of land for monetary consideration or money's worth. It is an act that permanently deprives the original owner from all interests' benefits and claims on the landed property, and he ceases to be recognized as the owner thereof.

#### **II. CHARACTERISTICS OF SALE**

- It is permanent
- The transaction must be conclusive
- The mere exchange of money is not conclusive proof of sale, there must be no doubt as to the intentions of the parties,
- the intentions must be genuinely for the purpose of parting with the entire interest of the owner in the property.
- There must be no vitiating factor like Fraud, Mistake, Duress, Undue Influence etc.

- Both Parties (Transferee and Transferor must have full capacity). Clearly, the person transferring the property must be a person capable of doing so and if he does not have such right, the sale cannot be valid, and the sale is void
- The purchaser must be put in possession

### **III. HOW TO SELL LAND**

The supreme court enunciated how land can be validly sold in the case of *FOLARIN V. DUROJOUYE*(1988) IN.W.L.R (pt. 70) 351,

In the case of *Folarin v Durojaiye* (1988) IN.W.L.R (pt. 70) 351, the court held that, (1) that there are two clear and distinct ways in which land in Nigeria can be 'properly and rightly sold, validly acquired, and legally transferred. They are either (i) under customary law or (ii) under the received English law. Each method of sale has its peculiar incidents and formal requirements and failure to observe these incidents of sale may invalidate the purported sale (2) it is prerequisite to a valid sale under customary law that the purchaser be let into possession.

### **IV. SALE UNDER ENGLISH LAW**

In *folarin v. Durojouye* it was held:

in order to transfer legal title under English law by purchase there must be a valid sale, payment of money accompanied by acknowledgment of receipt and execution of deed of conveyance in favour of the purchaser 479. Where land is sold under English law or statute law, money is paid and receipts are issued, the purchaser can only acquire an equitable interest if he goes into possession.

Thus for a valid sale under English Law:

- Payment of money by the buyer
- Acknowledgement receipt
- Execution of a deed of conveyance in favour of buyer
- Buyer put in possession

In Folarin's Case the court held that there was not valid title because the appellant never entered into possession and had no conveyance of the land.

Putting the buyer in possession gives him an equitable interest that matures into a legal estate. See *Ayinla v. Sijuwola* (1984) 5 S.C. 44.

#### **V. SALE OF LAND UNDER CUSTOMARY LAW**

- Discussions on sale of land under Customary Law must be dichotomized into pre-colonial times, colonial times and contemporary times

- **PRE-COLONIAL TIMES:** In pre-colonial times it was unthinkable to the family or communal land owner to alienate land. There are 2 theories as to why this is the case. The African Humanist theory and the Utilitarian theory. Under African humanism, it was believed that land belongs to the present and future generations unborn and so it is so secured that nobody believed that it could be sold. It was also believed that land belonged to the ancestors who had lived in the past hence the expression ancestral land. Tenancy was recognized in pre-colonial times. Land was usually given out temporarily, and could be recalled at any time, or even where it is understood that foreigners occupy the land as tenants, the understanding is always that the land ultimately belongs to the family as overlords. This attitude has led many observers to opine that land cannot be alienated under customary law. Dr. Elias observed "There is perhaps no other principle more fundamental to the indigenous land tenure system throughout Nigeria than the theory of inalienability of land". In the case of *Lewis v Bankole* (1908) INIR 81 Osborne C.J. declares, that, "the idea of alienation of land was undoubtedly foreign to native ideas in the olden days". The Utilitarian theory on the other hand argues that land was not sold in pre-colonial times because it was not economically viable to do so. The Utilitarian view is led by Professor Abott and Professor Obi.

## **COLONIAL TIMES**

- However, with the advent of colonialism, and improvement in commercial activities, influx of foreigners to cities, the initial and old idea that land is inalienable began to change and also judicial attitude. In the case of *Oshodi v Balogun* (1936) 4 W.A.C.A.1 at 2, the privy council observed as follows: "In the olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago, a custom has grown up of permitting alienation of family land with the general consent of the family and a large number of premises on which substantial buildings have been erected for purposes of trade or permanent occupation have been so acquired.... Their lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in hand of the chief was retained".

- In colonial times there was often uncertainty as to the nature of the estate or tenure transferred to the purchaser

## IN CONTEMPORARY TIMES

- Today it is settled that alienation of land under customary law may take various forms. The owner may sell out rightly, or merely make a gift absolutely to a third party. There may also be conditional gift, or pledge of land or borrowing of land; this with condition that the transfer of possession is temporary and may be recalled or repossessed upon certain agreed conditions.
- In Akinterinwa V. Oladunjoye, [200] F.W.L.R. (Part 10) 1690 the court noted that, for a valid recognised sale of land under customary law, the following conditions must be met.:
  - a. The person selling must have the title under Native Law and custom, to sell and dispose of the property.
  - b. The buyer must pay money
  - c. The purchase must be concluded in the presence of witnesses
  - d. There must be the actual handing over or symbolic delivery of the land bought by the purchaser in the presence of witnesses. See, *Chief Okonkwo v Dr. Okolo* (1988) 2 NWLR (pt 79) 632.
- In the case of Cole V. Folami the plaintiff paid 400 pounds to the head of Famubo Family, Joseph Famubo for the land. The family head delivered possession to him in the presence of witnesses. The court held that the sale was valid.
- In Egeonu v. Egeonu {1978} 11-12 SC 111 the absence of delivery of possession rendered the purported sale void.
- This is a universal principle in Nigeria and applies to all communities.
- Sale of land under customary law is valid notwithstanding that there is no documentation. In Dashe v. Datung it was held by the court of appeal that the making or giving of receipt or deed of conveyance is not rule of customary law.
- In Adesanya v. Aderenmu [2000] F.W.L.R. (PART 15) 2492 the court held that were there is no living witness of the sale of land and the land is in dispute, then possession of land plus receipt would amount to evidence of sale under customary law.

- Please note that under sale of land in English law, receipt is not a proof of title because it is unregistered. Under customary law receipt acts merely as evidence that the person in possession paid for the land.

### **3.2.2. ABSOLUTE GIFT**

- Law recognizes the right of an owner to make a gift of his property.
- A gift is a voluntary transfer of land without compensation.
- A gift is usually made inter vivos see AKUNWATA JOE OGUEJIOFOR ANYAEGBUNAM V. PASTOR OKWUDILI OSAKA [2000] 5 NWLR (Part 657) 386
- A gift of land could either be absolute or conditional.
- An absolute gift is as good as sale in the sense that it totally divests the owner of all his interests in the land. A party claiming absolute gift must prove that in fact there was absolute gift of land and not a conditional gift. See the case of *Isiba v Hanson and Anor* (1967) NSCCS.
- It was held in the case of *Jegede v Eyinogun* (1959) 5FSC 270, that a family which had made an absolute transfer of its land by way of gift could not recall the land upon misconduct.
- A gift may be made by the first settler. Once this is done it is no longer part of family property. BANKOLE V. LAMIDI TAPO (1961) 1 ALL NLR 109. case of *Jegede v Eyinogun* (1959) 5FSC 270,
- Gifts can be made under customary law, Islamic Law and English Law.

### **REQUIREMENTS OF A VALID GIFT**

- For a gift to be valid it must fulfil 2 conditions: absolute and voluntary.
- The gifting must not be in writing but there must be a handing over in the presence of witnesses.

**3.3 CONDITIONAL GIFT:** A conditional gift in contrast to an absolute gift only transfers occupational rights to the tenant and not ownership. recipient of a conditional gift under customary law is known as a customary tenant. He is known as customary tenant while the owner (the donor) becomes his overlord. He holds the land for an indefinite period of time, unlike tenancy under English law which is for a term of years, under customary law, the customary tenant's tenure is perpetual subject only to good behavior and periodic payment of "Ishakole" or rent, this is nothing but an acknowledgment of his standing as a tenant. The land is inheritable by his children, but he must not sell or part with possession of the land.

- Martindale J in *Etim v Eke* (1941) 16 N.L.R 43 at 50 explained the position thus: "It is now settled law that once land is granted to a tenant in accordance with Native Law and custom whatever be the consideration full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion should the grantee deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee's permission any rights in respect of the land".

### **3.2.3. BORROWING OF LAND**

- Law recognizes that a family that experienced shortage of land may resort to borrowing.
- Borrowing of land is a temporary grant of use of land to another person.
- The period is not usually specified, but is tied to the particular purpose for which the borrowing was granted.
- It could be for a planting season, and at the expiration of which the land reverts to the original owner.
- It must be for a temporary purpose otherwise the law would hold that it is not borrowing of land. In the case of *Adeyemo v Ladipo* (1958) W.R.N.L.R. 138 the court held that a temporary grant of land for building purposes was unknown to customary law.
- Where there is borrowing of land and the lender does not request a return of the land at the expiration of the time it may confer ownership of the property on the borrower through the principle of prescription.

### **3.2.4. PLEDGE OF LAND**

- A pledge is created when an owner of land transfers possession of his land to his creditor as security or rather, in consideration of a loan with the object that he should exploit the land in order to obtain the maximum benefit as consideration for making the loan.
- The popular maxim is that once a pledge always a pledge. The pledge is always redeemable, and time does not run against redemption.
- The pledgee is not expected to plant economic trees or commit waste.
- He cannot sell or part with possession. He only takes occupational rights, the ownership's never transferred.
- He is not expected to erect permanent structures, if he does, upon the payment of the debt, the pledgor takes all under the maxim of *quic quid plantatur solo solo cedit*. However, where there are still unharvested crops on the land, the p'edgee is expected to harvest it even after the debt has been paid. See *Amao v Adigun* (1957) W.N.L.R 55.
- Distinguish between pledge and borrowing of land
- Distinguish between pledge and mortgage
- A pledge may be oral or in writing. Discuss
- There is the perpetual redeemability of a pledge. Discuss.

### **4. LONG POSSESSION AND TITLE**

1. Under common law, time runs in favour of an adverse possessor and the exercise of possession over a long period of time may result in ownership by prescription. Unless it is shown that the true owner had no knowledge, actual or constructive of the adverse possession.
2. In urban areas in Nigeria, this principle is subsumed under the statutes of limitation of the various states of Nigeria. Students should discuss how.
3. Under customary law, Prescription is not recognized. In *Nwuba Mora v. H. E. Nwulasi* the Privy Council declared: "there is in Nigeria no law corresponding to the

common law rule of prescription for conferring title to land.". This was and is still the position of the law.

4. However, due to the harshness of customary law, equity comes in to recognize a person that has been in continuous and undisturbed possession of land as being entitled to ownership of the land. This is under the rule in AWO V. COOKEY GAM (1913) 2 NLR 100 and Hauzi under Islamic law
5. Adverse possession is possession arising from non permissive use of land that is continuous and results in a claim for title.
6. Adverse title is title emanating from adverse possession.
7. The rule in AWO V. COOKEY GAM, is that the court in the exercise of its equitable jurisdiction will not give effect to the rules of customary law if invoked simply to support a claim to title as against possession which has acquiesced for an adequate period of time. See dictum of Weber J.
8. See Kwame Adu v. Kwasi Kuma Unreported Appeal number CA /B /264/87
9. This indirectly and inadvertently reintroduces the idea of prescriptive title to customary law. The current position is that the rule in AWO V. COOKEY GAM is a recognition of the principle of prescription on equitable grounds
10. Under the Hauzi rule, once it is demonstrated that the party farmed continuously or lived continuously on a piece of land without any challenge or disturbance of the true owner, the party possessing the land would be granted title. In Hamadu Hunare v. Yaya Nana [1996] 1 NWLR (PART 425)381 the court held that farming on the land for 30- years was adequate to confer title.
11. See HAKIMI BOYOI UMARU V. AISA BAKOSHI [2000] 2 N.W.L.R. (Part 646) 691
12. It must be emphasized that under Islamic law there is a principle that evidence of ownership takes priority over that of undisturbed possession because the former is stronger than the latter. This principle has been qualified by the Supreme Court to be only applicable where the evidence of ownership is firm and not shaky and the owner was unaware of the other person's possession.

13. Dasuki the Islamic scholar fixed the time as 10 years of continuous possession of the land for persons who are not blood relatives. Mahmud the Islamic scholar stated that for blood relatives it is 40 years of continuous possession.

14. There are 5 exceptions to the Hauzi Rule:

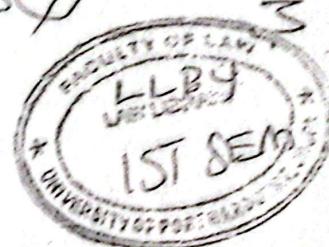
- Cogent Reason on the part of the owner etc. See HAKIMI BOYOI UMARU V. AISA BAKOSHI

15. Where the owner is a female who was prevented from coming out by her husband till the expiration of the time, the principle of Hauzi would not apply.

16. See also JAURO BABAYO V. MALAM KAWUWA WURO DIDI [1995] 3 NWLR 9 Part 3830 376. See DAN IGE V. UMARU DOBI {1999} 3 NWLR (Part 596)550

17. Long Possession is nine tenth of the law in proof of title. Discuss. See VERONICA GRAHAM V. LAWRENCE IIONA ISAMADE ESUMAI (1984) 11 S.C. 141. Discuss the concept

- Is Long possession only a Shield and not a sword discuss with the aid of relevant cases.



### 1.1. Introduction

Co-ownership deals with the concurrent co-ownership of land, that is, where two or more persons are entitled to simultaneous enjoyment of land. It simply arises when two or more persons have concurrent (not consecutive) interests in the same property. (Compare communal and family ownership under customary law). For example, if land is granted to A and B in fee simple, or to A and B in equal shares, A and B are co-owners of the land/property. But if land is granted to A for life with remainder to B in fee simple, A and B are not co-owners. Note, family property is a form of co-ownership: *Obasohan v. Omorodion (2001) FWLR (pt. 67) 980*. It should be noted also that co-ownership is the foundation for partition.

### 1.2. Types of Co-ownership

The main forms of co-ownership that have significance in Nigerian law are joint tenancy and tenancy in common. It is to be known that the use of the word "tenancy" here refers to ownership of a freehold or leasehold estate and is not an illusion to the landlord and tenant context.

### 1.3. The Joint Tenancy:-

In the eyes of the law, joint tenants do not have shares in the land/property or, indeed, any individual existence. They are regarded together as making up a single legal entity, that is, a sole owner: *Burton v. Camden LBC (2000)*. They are together wholly entitled, but individually they own nothing. Of course, they do have rights which are exercisable against each other (e.g. a monetary claim) on any eventual sale. The outstanding feature of the joint tenancy is the right of survivorship (*jus accrescendi*).

### 1.4. Right of Survivorship:-

On the death of one joint tenant, his interest in land passes to the survivors automatically by right of survivorship. This process continues until eventually only one owner survives. At that point, co-ownership ceases and the sole survivor becomes absolutely entitled to the land: *Fynn v. Gardiner (1953) 14 WACA 260*; *Chinweze & Anor v. Mrs. Masi & Anor (1989) 1 NWLR (pt 97)*; *Menkiti v. Agina & Anor (1965) NMLR 127 at 128*. See also Section 3(2) of the Administration of Estates Edict 1988 of

Rivers State. It should be noted that a person cannot benefit from his crime so that if one joint tenant unlawfully kills another he cannot take any benefit by way of survivorship: *Cleaver v. Mutual Reserve Fund (1892) 1 Q.B 147 CA*. Further, it should be noted that the right of survivorship, moreover, is not ousted by a joint tenant's will or by the intestacy rules. The right of survivorship has precedence over any disposition made in a will by a joint tenant in his will, but survivorship does not mean that a joint tenant cannot independently dispose of an interest in the land. However, a joint tenant has the full power to alienate his interest in the property *inter vivos* but if this happens, he destroys the joint tenancy by severance and turns the joint tenancy into a tenancy-in-common. The right of survivorship might be advisable in relation to the family home, but is clearly unsuited to an investment venture between partners or friends.

##### 5. The Four Unities

A joint tenancy cannot exist unless the four unities exist. Joint tenancy is characterized by the existence of four unities, or attributes. These are unity of interest, unity of title, unity of possession and unity of time.

**Unity of interest:** It means the interest held by each tenant must be identical in extent, nature and duration. One cannot have a larger interest than another as together they are entitled to the whole. Similarly, no single joint tenant can sell or lease the land because he does not have the whole legal estate. And an attempt to do so might amount to a severing event. All the joint tenants must assent and join in the transaction.

**Unity of Title:-** It means that all the interests of the joint tenants must arise from one and the same act. All joint tenants must claim title under the same act or document. For example, from a conveyance or devise/will.

**Unity of Possession:-** This means that no joint tenants can claim any portion of the property as his own exclusively. Each joint tenant is as much entitled to possession as the others.'

**Unity of Time:-** The interests of the joint tenants must all vest (i.e. be acquired) at the same time. Hence, if A granted interest in his property to B for life and on the death of B with the remainder to C, B and C cannot

beneficial joint tenants over the property because their interests did not vest at the same time.

**1.6. Consequences of a Joint Tenancy:** A joint tenancy has the following features:

- Each co-owner has only a "prospective share" in the property. If there are for instance four co-owners, each has a potential one-quarter share of the proceeds of sale. They are entitled to any rents and profits pending sale in the same proportion;
- The joint tenancy will continue until only one survivor is entitled to the land by way of survivorship; and
- Any tenant can convert his joint tenancy into a tenancy in common by way of severance.

**1.7. Tenancy-in-Common**

This form of co-ownership is favoured by equity and entails that each co-owner has a separate share in the property. There is no right of survivorship in a tenancy-in-common. The size of each tenant's share is fixed and is not affected by the death of one of the co-owners. Therefore, when a tenant-in-common dies testate, his interest passes under his will but if intestate it is distributed according to the law of intestacy. Tenants-in-common do not hold as one but each has a distinct individual share in the property. For this reason, a tenant-in-common has an action in his own right to protect the property: *Remilekun Adukoya v. Jonathan Oke* (1976) 2 F.N.R. 248; see S. 88 of the Property Conveyancing Law, West.

**SEVERANCE OF THE JOINT TENANCY**

It is to be noted that the legal estate must always be held on a joint tenancy and cannot be severed, i.e. converted into a tenancy-in-common. Words of severance are needed to create a tenancy-in-common. Thus, on a conveyance to two or more persons, a joint tenancy is created unless there are clear words of severance in the grant showing that the tenants are each to take a distinct share in the property. Words of severance include "in equal shares", "share and share alike", "to be divided between", "equally", "between", "amongst", and "respectively". For instance, in *Fynn v. Gardiner (supra)* a gift to "A, R and E their heirs and

"assign" gave the three named persons an estate in fee simple as joint tenants since there are no words of severance in the grant.

A joint tenancy behind a trust can be converted into a tenancy-in-common in a number of ways.

- Acting upon one's share:- The clearest method of severance is to alienate (sell or otherwise dispose of) one's own interest to a stranger or, indeed, another joint tenant. It is to be recalled that joint tenants do not have shares so the act of treating the interest as if it was a share, thereby, converts the joint tenancy into a tenancy in common. This must occur *inter vivos* (during the lifetime of the tenant) and cannot, therefore, be effected by a will: *Gould v. Kemp (1834) E.R. 959*. The act must final and binding which means that there must generally be a valid contract/written transfer dealing with the land/property. A mere statement of intention is insufficient.
- Mutual agreement between the joint tenants:- The joint tenants can all act together and effectively agree to sever their joint tenancy: *Williams v. Hensman (1861) ER 862*. This is more informal than acting on one's share and does not need a valid contract or writing. It must, however, be such that it shows a common intention to sever. It should be noted that no severance of a beneficial joint tenancy arises simply from an agreement to put the property on the market: *Marshall v. Marshall (Unreported 1998)*. If for example, the joint tenants agree that, on death, their shares will pass to their next of kin this will be a severing event: *McDonald v. Morley (Unreported 1940)*. Similarly, if the joint tenants agree that, on sale, the proceeds should be divided (whether equally or unequally), a tenancy in common will immediately arise.
- Mutual conduct of all existing joint tenants:- This covers any course of dealing which intimates that the interests of all joint tenants were mutually regarded as having been severed. For example, where the joint tenants *inter vivos* jointly grant their beneficial interest in the property as a gift.

### **1.8. Notice of Severance**

If a joint tenant desires to sever the joint tenancy unilaterally, he can achieve this by giving all the other joint tenants clear notice in writing of this desire. Although there is no prescribed form for the notice to adopt, the notice must show an immediate intention to sever and not merely be a statement of future aspiration: *Harris v. Goddard* (1983) 3 ALL ER 242 CA. A notice which has been posted, but not received remains effective for this purpose. In *Kinch v. Bullard* (1998) 4 ALL ER 650 CH.D, a wife posted a letter notifying severance to her husband in respect of the matrimonial home. The husband was dying in hospital at the time and did not receive the notice. The wife thought she would now prosper better with the right of survivorship and destroyed the notice. The court held that there was severance despite the fact that the husband never actually received the notice.

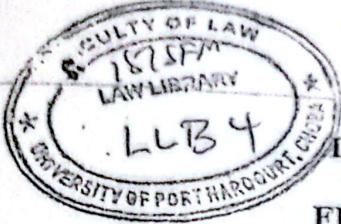
### **1.9. Termination of Co-ownership**

Co-ownership can be brought to an end in a variety of ways:

- Partition:- This is the mechanism whereby the land is physically divided between the co-owners. The joint tenants must be of full age and partition must normally be effected by deed. On partition each co-owner becomes absolutely entitled to a separately plot of land. To be a valid termination of co-ownership, the partition must be done with the consent of all the joint tenants having beneficial interest in the property. Where the land/property is vested on trustees, the trustees of the land have powers of partition.
- Merger:- This will occur where all the legal and beneficial interests are finally vested in one person. For example, when only one joint remains alive, when there is release by one joint tenant of his interest to the other and where tenants in common leave their interest by will or intestacy to a remaining co-owner.
- Overreaching:- It is a process which operates only in relation to co-ownership and only when the purchase money relating to the land is paid to at least two trustees or a trust corporation. In these circumstances, the beneficial interest of the co-owner ceases to be one in the land and becomes transferred into the proceeds of sale. The beneficiaries' interests are overreached and the co-ownership terminates.

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1 | Page



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LAND LAW

## CUSTOMARY LAND OWNERSHIP AND THE DOCTRINE OF QUIC QUID PLANTATUR SOLO SOLO CEDIT.

The indigenous conception of land is that it refers to the surface of the soil only. Things attached to the surface of the soil (e.g, trees and houses), or buried under it (e.g, mineral and precious stones); may be owned and dealt with separately. Thus, in strict customary law the rule, **Quic quid plantatur solo solo cedit**, does not apply the decision in *Omolown V: Olokude* (1958) W.R.N.L.R. 130, Illustrate the customary law position. There, a member of a family was allowed to build a house on a portion of family land. The house was later sold to the defendant who placed tenants therein, but did not himself live there. The family sued to recover possession of the land and house.

It was held that when a member of a family had built a house on family land, "a purchaser of his interest either from himself or through a court sale, could only acquire the right to demolish the house and remove the materials; the purchaser could not, as against the family asset a right to use and occupy the house which was on the family land". The obvious implication of this decision is that under customary law, a house built on land could be owned, sold or otherwise dealt with as a decision was reached in *Moore v. Jones* (1926) 7 N.L.P 84 in which the plaintiff was given a declaration of title to the house standing on someone else's land.

But it is clear that an undiluted operation of this customary law rule could lead to the consequences contrary to natural justice, equality and good consciences cost harm. It would mean, for instance, that if A build a house on B's land without B's consent or acquiescence. A would be entitled to own and occupy the house, and thus pro tanto reduce extent of B's land. Fortunately, the Nigeria courts have, in all cases, taken a position consistent with the principles to natural justice, equity and good conscience. They hold that a distinction must be drawn between the ownership of the house or structure and the right to occupy it. The former belongs to the builder, but the latter cannot be exercised by him in prejudice of the house or the structure and the right to occupy. The formal belongs to the builder, but latter cannot be exercised by him in prejudice of the land owner who has the overriding right to possession. The two cases cited above also illustrate this point.

## OWNERSHIP OF LAND IN NIGERIA

### I GENERAL NATURE OF OWNERSHIP

The terms 'ownership' and 'owner' as applied to land, are very loosely used in African literature. In strict law, however, the terms 'ownership' as applied to land, has a special and definite meaning. It is the greatest possible interest capable of sustaining in land – the maximal or dominant interest. It is that; superior to all other interest or Ownership carried with it,

Please note the following four incidents ownership:-

- (a) Absolute power of disposition;
- (b) Absolute power of destruction or committing waste upon the land
- (c) Absolute power of management and user;
- (d) Absolute right or possession – immediate or ultimate.

The word "absolute" used in relation to such of these incidents, needs an explanation. In theory, the powers and the rights so described, are "absolute" that is to say, free and unlimited. But it must be remembered that under modern conditions, the state may in the exercise of its protective jurisdiction over things within the State, impose restrictions on the alienation and user of land in the interest of sanitation, safety, better husbandry and State revenue. Such restrictions are not inconsistent with ownership.

It should be noted that when the owner of land validly transfers his will interest to another person, e.g. by sale or gift, the transferee (i.e. the person on whom the transfer is made), becomes the owner, with all the rights incidental to ownership.

As ownership is the most superior interest capable of existing in the land and all other interests are inferior to it. An examples of such inferior interests is...

#### **(a) CUSTOMARY TENANCY**

Customary Tenancy confers on the grantees rights in land which are determinable in nature, but which in fact, may be enjoyed in perpetuity subject to good behaviour. The tendency now is for the courts to regard this interest as practically indefeasible, once permanent buildings or other forms of improvements like extensive commercial farming and/or occupation have been

established on the land by the grantees. Any proved misbehaved is usually not punished by a fine.

However, recent events and judicial decisions have shown that whoever owns Land owns permanent fixture therein with a few exceptions; thus in ...

**JIMMY KING (NIG) LTD. v. U.B.A PLC (2020) JELR 91792 (SC)** ; Quic quid plantatur solo solo cedit — What it entails. The Latin maxim means that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is subjected to the same rights of property as the soil itself. In other words, whoever owns the land, owns whatever is permanently affixed to it, such as building and tree plantation. See also; **National Electric Power Authority v. Mudashiru Amuda & anor (1972) 12 SC 99 at 114**. Per Fatai-Williams, JSC (as he then was) **Nnanta Orianwo & ors v. L. O. Okene & ors. (2002) 14 NWLR (Pt.786) 156 at 193**. Land includes building. See; Isaac Gaji & ors v. Emmanuel D. Paye (2003) 7SCM 55 at 69 (2003) 30 WRN 146, (2003) 8 NWLR (Pt.823) 583; Kupoluyi v. Philips (1996) 1 NWLR (Pt.427) 671 at 699.

Note also that maxim Quic quid plantatur solo solo cedit — applies notwithstanding the provisions of states Land Laws.

Generally, by the provisions of the Land Use Act, subject to the provisions of the Act, all Land comprised in the territory of each State in the Federation are vested in the Governor of that State. See section 1 of the Land Use Act. The government grants to whoever applies, a Certificate of Occupancy for a right. Meaning that with the grant and holding of a Certificate of Occupancy, the holder becomes the owner of the land to which the Certificate relates thus, in contemplation of the Law became the owner of the land and whatever development there was on it for the period of the assignment, subject to the reversionary interest of the holder of the Statutory Right of Occupancy. In other words, during the subsistence of the term assigned to the holder of the C of O owns the land and the developments thereon. The long and short of what I have been saying is that the maxim - quic quid plantator solo, solo cedit applies in this case, notwithstanding the provisions of State Land Law.

On the Applications of the Maxim to the ownership of sub surface Mineral Resources.

## PERCEPTION / INTERPRETATION OF RESOURCE OWNERSHIP / CONTROL IN NIGERIA

Historians all agreed that disputes between the regions over the sharing of centrally collected revenue contributed significantly to the review of the Macpherson Constitution. Hence, the Chick Commission of 1953 was set up to revise the revenue allocation system to streamline it with the constitutional changes under the Lyttleton Constitution, giving greater autonomy to the regions and re-assigned functions between the federal and regional governments.

However, following the decision of the 1957 Constitutional Conference, another commission called the Raisman Commission was appointed in 1958 to review allocation arrangements and rectify the defect(s) inherent in the Chick Commission's report. The Commission met that year (1958), this time without the government emphasizing its terms of reference of any of the major principles of revenue allocation. Rather the Commission's attention was devoted to reducing the problems caused by a limited range of independent regional sources of revenue and dissatisfaction over the regional share of the revenue accruing from import duties. It was at this time that oil resources became a dominant factor in generating centrally controlled revenue.

Recall that one of the principal features of Chicks Commission on Revenue Allocation was its emphasis on the principles of derivation. Hence under Chick's formula, 100% of the revenue derived from mining, rent, and royalties went to the regions of origin. Before 1958, oil was discovered in commercial quantity in the Niger Delta and when columbite and tin were in hot demand in the western world. Accordingly, the Commission (Raisman Commission) recommended a reduction of 50%. It redistributed the revenue accruing from this source: 50% to the regions of origin, 30% to the centre, and 20% to the newly designated distributable Pool Account.

Commenting specifically on Allocation of Mineral Royalties and Rents, the Raisman Commission observed in its report that the allocation of the proceeds of mining had presented the Commission with a most perplexing problem. It stated that although the revenue from columbite royalties rose rapidly at the time of the American stockpiling in 1953-55, royalties on tin and columbite minimally yielded a fairly constant annual gain. If these were the only minerals concerned, the Commission remarked, there might be no difficulty in recommending the continuation of the existing system, namely, that all mineral royalties should be returned in full to the Regions in which they originate. The problem, according to the Commission, was oil. At the time, test production of oil on commercial quantities had already commenced in the East. At the same time, exploration was

being undertaken in both the North and the West and along the continental shelf, which was taken to the federal territory.

Then came the turning point. The Committee remarked that although the yield from oil royalties was comparatively small, estimated at 65,000 in 1958-59, it cannot be ignored that this figure might rise remarkably within the next few years. On the other hand, the Commission argued, there was nothing so uncertain as an oil prospect right up to the time it was or was not finally achieved.

They, therefore, stated that there was a double obstacle to their recommending the simple continuation of the existing method of allocating mineral royalties. First, it would involve then in the revenue assessments for the next few years in crediting the Eastern Region with a source of income, which was at once too uncertain about building upon, and too sizeable to ignore. Secondly, it would rob their recommendations of any confident claim to stability for the future since an oil development might occur on the scale, which would quite upset the balance of national development. The Commission, therefore, concluded that the time to change the principle of allocating 100% of revenue accruing from mineral resources to the region of origin was now. At the same time, there was still uncertainty as to which of the regions might be the lucky beneficiary or benefit the most.

In the light of the above, the Commission made the following recommendations regarding mining and mineral taxation.

- i. The jurisdiction over mining royalties and rents should continue to be exclusively federal.
- ii. Whenever a profit-sharing arrangement is negotiated in Nigeria between the Federal Government and the oil company, the Federal Government should consider the desirability of associating other governments within the federation as parties to it.
- iii. It should be made clear in the Constitution that the federal government's jurisdiction regarding mining extends to all financial arrangements and transactions in the field.
- iv. Mining and mineral rents should be shared between the regions of their origin, the federal government, and all the regions together, the last by way of a Distributable Pool. The proportions in which these royalties and rents should be divided should, for the present be, respectively, 50 percent (to the region of origin) 20 percent (to the Distributable Pool to benefit other regions).

As could be seen from the above, the Raisman Commission surreptitiously laid the foundation for the denial of communities of the control of the benefits of minerals/assets located in their areas.

A plethora of laws governs the Nigerian Petroleum industry. The Department of Petroleum Resources (DPR) identifies on its website[1] more than 35 of these under what it calls “principal” and “subsidiary” pieces of legislation. These include the Oil Pipelines Act of 1956, Petroleum Control Act of 1967, Petroleum Act No. 51 of 1969, Offshore Oil Revenue (Registration of Grants) Act of 1971, Exclusive Economic Zone Act of 1978 and the National Inland Waterways Decree of 1997. for the purpose of our Class, the most viable approach to discussing ordinary people’s perception of resource control/ownership in Nigeria is to examine the pieces of legislation that govern ownership and control of petroleum resources.

### 3.1 THE PETROLEUM ACT

The most important petroleum ownership/control legislation in Nigeria is the 1969 Petroleum Act, which explicitly and intricately defines petroleum resources ownership and control issues. This Act repealed the 1914 Mineral Oils Ordinance (the first oil-related legislation since Nigeria formally became a colony), which had forbidden non-British citizens and companies in oil prospecting and exploitation. It also repealed, among other colonial laws, the Minerals Act of 1945, which had vested ownership and control of petroleum in the British Crown.

The 1969 Act transferred the rights cited above to the Nigerian government. This right is enshrined in Section 44(3) of the 1999 Constitution, but the Petroleum Act provides the enabling details.

The Petroleum Act set the stage for Nigerian companies and Nigerian citizens in the oil enterprise. It gave the state the legal basis to promote an operating policy and fiscal environment that would best serve the development needs of the Nigerian society. But, as in present-day Nigeria, the reality is not always a true reflection of the stated intentions.

**The logical consequence of the Nigerian government’s right to “the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters”[2] is that the government can condemn private land for any aspect of petroleum development.** This right, however, is not new, nor is Nigeria the only country where mineral rights vest in the state while individual landowners have only surface rights. For example, in the petroleum-rich Alberta province of Canada, the Surface Rights Act of 1977 vests with the state the right to “explore for and

produce oil, gas and other minerals" while individual landowners control only the "land surface and the right to work on it"<sup>[3]</sup>. Nevertheless, a fundamental difference between Canada and Nigeria is that in Canada, the mineral rights vest in the government of the oil-producing province rather than in the national government.

In Nigeria, the Petroleum Act spawns discontent in the oil-producing communities mainly because it stipulates no clear benchmarks for what should be paid as compensation. Section 77 of the Act expects an oil operator to pay the landowner a fair and reasonable compensation for any disturbance of the surface rights of such owner.

Even though the act is not explicit on actual minimum or maximum amounts payable, residents are generally unaware of what anyone affected by any aspects of oil exploitation might legitimately expect to be paid. There is no government of NNPC outreach programmes through which communities are periodically enlightened about their entitlements on mineral rights, surface rights, and compensation<sup>[4]</sup>. The Petroleum Act's silence on compensation benchmarks and the absence of outreach programmes leave a penumbra, a grey area, over which affected parties could amicably negotiate with petroleum operators.

Another issue of discontent over the Petroleum Act is in the Act's definition of land. The Act defines land in such a way as to limit people's claim to crops, shrines, tombstones, and other physical improvements and expressly excludes the minerals under the land.

#### THE OFF-SHORE OIL REVENUE DECREE

The Offshore Oil Revenue (Registration of Grants) Act was enacted in 1971 as Decree 9. The Decree intended to set apart an economic petro-zone for the federal government- a zone whose petroleum resources the littoral states <sup>[6]</sup>of the Delta could legitimately make no claims. The Act put offshore resources entirely in federal territory, thus amending the 1963 constitution that had defined the continental shelf of a littoral state as part of that state.

The first notable response to years of overt and covert resistance to the law occurred in June 1992 when the Babangida administration enacted Decree 23 to abolish it. With the return to civil rule in 1999 and the eventual "adoption" of a new constitution, the debate re-emerged. The federal government in 2001 instituted a case against the 36 states of the federation, asking the Supreme Court to interpret what constituted the seaward boundary of a littoral state in Nigeria. In April 2001, the court gave a ruling that effectively resuscitated the controversial 1971 Decree

that had only in 1992 been abolished! The Supreme Court ruled that "the seaward boundary of the country's ... littoral states terminated at their low-water mark", thus "effectively giving the federal government control over the offshore oil and gas resources."<sup>[7]</sup>

To avert a wave of protest and resistance that could truncate the country's new democracy, the federal government struck what it called a "political settlement" with the oil states. An Onshore/Offshore Dichotomy Abrogation Act of 2004 made it possible for the littoral states to receive derivation revenues on petroleum resources lying within a water depth of 200 metres.

There are two problems with this Act concerning the Niger Delta crisis: Firstly, it does not still settle the issue of control and ownership of petroleum resources. The act only makes it possible for the littoral states to receive derivation revenues. Still, it does not give them ownership or control over the revenue from which the revenue is derived.

The second problem is aptly stated by the following remarks by Professor Itse Sagay:

By far, the most disturbing consequence of the coastal states' limitation to a 200-metre depth belt for derivation purposes is that all the major offshore oil and gas finds are now in the deep off-shore zone between 1000 and 2,500 metres as against the 200-metre limitation for the coastal states...In short, the future of the Nigerian oil and gas exploration and exploitation lie in the deep offshore outside the derivation zone to the coastal states under the [Onshore/Offshore Dichotomy Abrogation Act]<sup>[8]</sup>

## THE LAND USE ACT

The Land Use Act was enacted in 1978 by a military government. It replaced the pre-existing plural land tenure system in Nigeria, thus bringing uniformity into the Nigerian land tenure system. Its target was the reform of the customary land tenure system, which was considered a clog to development efforts. According to a government statement, "at present it is not only the individual who wants to build his or her house that is facing difficulties in finding a suitable land; the local, state and federal governments are also inhibited by problems placed in their way in acquiring land for development." However, being a law issued by a dictatorship, it did not enjoy robust debate in the legislature.

The effect of the enactment of the Land Use Act was elaborate in the case of *Abioye v. Yakubu*, where the Supreme Court (the highest court in the land) held, *inter alia*, as follows:

- (1) That the Land Use Act has removed the radical title in land from individual Nigerians, families, and communities and vested the same in the governor of each state of the federation in the federation in trust for the use and benefit of all Nigerians (leaving individuals, etc., with 'rights of occupancy'); and
- (2) That the Act has also removed the control and management of lands from family and community heads/chiefs and vested the same in the governors of each state of the federation (in the case of urban lands) and the appropriate local government (in the case of rural lands).

It should be observed that this decision accords with the Court of Appeal decision in the case stated above. It also accords with an earlier decision of the Supreme Court where the court had pointedly said:

"This appeal deals with the interpretation of some of the provisions of the Land Use Act 1978. Since the promulgation of the Act by the military administration of General Obasanjo in 1978, the vast majority of Nigerians have been unaware that the Act swept away all the unlimited rights and interests they had in their lands and substituted them with minimal rights and rigid control of the use of their limited rights by the...governors...This appeal...will bring the revolutionary effect of the act to the deep and painful awareness of many...Section 1 of the Act has made no secret of the intention and purpose of the law. It declared land in each state of the federation shall be vested in the... governor of each state."

The law is well settled that the legal maxim, "quic quid plantatuer solo solo cedit", which translates to, "who owns the land, owns what is above it", applies with full force in Nigeria to land subject of statutory right of occupancy. See **FRANCIS V. IBITOYE (1936) 13 NLR 11**. Also to be said is that under the Land Use Act, a holder of a right of occupancy may with the prior consent of the governor, alienate his interest on that land or any part thereof in favour of a **third party** through any of the recognised methods as enumerated under section 22 of the Act. Therefore, as in the case at hand, the alienation is by way of a sublease for a definite term of 15 years, the sub-leasee becomes the owner of his improvement or development on the land during the currency of the term granted him, so long as the improvement or development was done with the consent or approval of the holder of the right of occupancy. However, when the term created under the sublease comes to an end,

the interest on the land with all the improvements would revert to the holder by operation of the doctrine of reversion.

**EXCEPTIONS TO THE PRINCIPLE OF QUIC QUID PLANTATUR SOLO SOLO CREDIT.**

Please note that there are aptly a few exceptions to the applicability of the Maxim thus in

**UDE V. NWARA & ANOR. (1993) JELR 43303 (SC)**

**Lease of State land —**

The issue for determination was whether the maxim "quic quid plantatur solo solo credit" applies to **lease of State land**

In other words, it is the intendment of the proviso to Section 10 of the State Lands Law applicable in the Rivers State that the maxim quid quid plantatur solo solo credit shall not apply to buildings and other improvements on state lands such as the instant which have been leased for periods of less than thirty years. This is, therefore, an exception to the application of the maxim.

Similarly, in Benin where, by a notorious custom, the rubber trees planted on the land, are regarded as not forming a part of the land (for which see Aigbe v. Edokpolor (1977) 2 S.C. 1, Pp.7-8). So, this section is an example of the exceptions to the application of the maxim as adumbrated by Fatayi- Williams, JSC, as he then was, in National Electric Power Authority v. Mudasiru Amusa & Anor. (1976) 12 S.C 99, at p.114. It must therefore be applied as an exception to the maxim. The law enables the appellant to stay on and remove the buildings after the lease of the land has expired.

The simple explanation is that in Rivers State any government land leased out for a period less than 30 years and the leasee wants to quit the government cannot stop the leasee from removing his improvements by invoking the maxim but can request to buy the improvement therein.

Thanks.

Mr. Coleman.

## 1.1. Nature of a Lease

A lease, as generally understood today, is a document creating an interest in land for a fixed period of certain duration, usually in consideration of the payment of rent. The interest as created is called a term of years, but it is also often referred to as a lease or a leasehold interest. If not created by deed, the general rule is that the lease will be equitable in nature. However, the term lease, term of years, demise and tenancy are interchangeable expression. There are also certain tenancies which are not created by documents, or which are not for fixed periods, which are nevertheless part of the subject of lease. The most comprehensive title for the law governing these various interests is "the law of landlord and tenant". The term "tenancy" is normally used for interests lasting for a relatively short period only while "lease" usually indicates a more enduring interest; there is no hard and fast division and in this course "lease" normally includes "tenancy". Lease is often used interchangeably, either for the document or for the "term of years" or "leasehold interest" created by it, although primarily it means the document. "Demise" is the technical term for "let" or "lease"; thus a lease may be referred to as "demise" and the premises in question as the "demise premises".

The landlord who is the person leasing the land is often referred to as the grantor or lessor, while the tenant, the person to whom the land is leased to, may be described as the grantee or lessee. On the granting of a lease, the lessor retains a reversion, which he may assign; similarly, the lessee may assign the lease and when this occurs it is referred to as assignment. For example, A takes a 60-year lease in 2000. In 2010, he leases the remaining 50-year lease to B. As A retains nothing, he has assigned his interest in the lease. Whereas, a "sub-tenancy, sub-lease or under-lease occurs when the tenant creates a new lease out of his own tenancy (the head-lease) which must necessarily be for a period shorter than the remaining period of the headlease. For example, A takes his 60-year lease

in 2000 and in 2010 grants C a 20-year sub-lease. This is not an assignment because when the 20-year under-lease expires, the remaining term of 30 years is not disposed of A. The parties to the sub-lease are known as the "sub-lessor" and the "sub-lessee" respectively. It should be that the original lessee who is now the sub-lessor cannot sub-let the lease without first seeking the consent of the original lessor who always has the reversionary interest over the demised land.

### 1.2. Essentials of Lease

(1) • The Parties:- For there to be a valid lease, there must be a capable lessor and lessee. As made clear in *Rye v. Rye* (1962) AC 496, one cannot lease property to oneself. Where a landlord does not have the legal power to grant tenancies, the agreement cannot confer a leasehold estate. The parties must be properly be defined as the "landlord/lessor" in part and the tenant/lessee in the other part who are capable in law to enter into a valid contract.

(2) • The Commencement Date:- The commencement date of the lease must be certain. The date upon which the lease is to start must be stated clearly on the document creating the lease and this reckoned with the duration. If no start date is specified, it is assumed that the lease will commence on the tenant taking possession.

(3) • Certainty of Duration:- The duration of the lease must be certain and capable of being ascertained. The lease must have an ascertainable and certain duration. At common law, a lease must commence at, and exist for a time certain, or at or for a time which can be rendered certain: *Harvey v. Pratt* (1965) 1 WLR 1025; (1965) 2 ALL ER 786; S. 50 of Rivers State Landlord and Tenant Law. There is nothing like a lease in perpetuity, the beginning and the ending must be certain. In *United Bank for Africa Ltd. v. Tejumola & Sons Ltd* (1988) 2 NWLR (pt.79) 662, the Supreme Court laid down the principle that "for a valid agreement for a lease to exist, the parties and the property, the length of the term, the rent and the date of commencement must be defined".

Thus in *National Bank of Nigeria Ltd v. Compagnie Frassinet* (1948) 19 NLR 4, it was held that a purported lease to take effect on the

completion of the building, the subject-matter of the lease, was void for uncertainty about its commencement. If it is impossible to calculate the duration of the term, then the lease is void. Thus, in the English case of *Lace v. Chantler* (1944) K.B. 368, it was held that a lease to last for the duration of the war, or until cessation of hostilities was not a valid lease for want of certainty.

- ④ • **Exclusive Possession:-** Exclusive possession is the touchstone of a lease and is the legal right to exclude all others from the demised property. As Lord Templeman concluded in *Street v. Mountford* (1985) AC 809; (1985) 2 WLR 877 HL, "A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair". It is of the essence of a lease that the tenant should be given the right to exclusive possession. Possession of a parcel of land means the occupation or physical control of the land either personally or through an agent or servant. In *Back v. Daniels* (1925) 1 KB 525 at 543, Scrutton, L.J. observed that "I agree... that exclusive occupation does not mean the power of excluding everyone else from the land but does mean the exclusive power of using the rights given him in the soil. Thus, a right to occupy certain premises for a fixed period cannot be a tenancy if the person granting the right remains in general control of the property. This is normally the case with rooms in a hotel or boarding house, so that a lodger is commonly a mere licensee and not a tenant. The test of exclusive possession is usually predicated on the distinction between a lease and a licence.

- ⑤ • **The Rent to be Paid:-** The payment of rent is usual and indicates the existence of a valid lease. Rent is the consideration for the lease. The amount of rent to be paid for the lease must be agreed upon by the parties before the lease is entered. In some cases, there is also the provision for review of the rent subject to the agreement of the parties.

### 1.3. Agreement for Lease

A formal deed of lease is necessary whenever a lease exceeds three years. Section 3 of the Real Property Act 1845 provides that a lease exceeding three years is void at law unless made by deed. But, in equity, such a lease, may in certain circumstances, be treated as an agreement for a lease which is enforceable by an action for specific performance, under the doctrine of Walsh v. Lonsdale (1881) 21 CH.D.9. Thus, if a tenant enters into possession under an oral agreement for a lease of more than three years and acquires an enforceable right to call for execution of a deed in his favour, he is practically in the same position as if he had a deed of lease in so far as his rights and liabilities in relation to the landlord are concerned. In equity, the principle is "Equity looks on that as done which ought to be done"; so that the parties were treated as if the lease had been granted. But there was no such principle at law, and indeed, it would have been strange if the positive requirements of statute could have been so easily circumvented. Yet equity might intervene to restrain the parties from exercising their legal rights in opposition to their equitable obligations. It is trite that where the rules of law and equity conflicted, the rules of equity should prevail. See s. 25(11) of the Judicature Act 1873. Similar provisions are found in the various High Court Laws throughout the Federation, e.g. S. 15 (Lagos); S. 13 (North); S. 16 (West); S. 17 (Bendel) etc. Accordingly, in Walsh v. Lonsdale (1881) 21 CH.D.9 at pp. 15-16, it was held that the relationship of the parties was the same as if the lease had actually been granted.

Also in the Nigerian case of Savage v. Sarrough (1937) 13 NLR 141, it was held by Kingdon, C.J., that in equity the lease though not under seal must be deemed to have been effectively granted and that for practical purposes the parties were *inter se* in the same position as if the lease were valid at law. Similarly in Udolisa v. Nwanosike (1973) 3 E.C.S.L.R. (pt.II) 653 at p. 659, Oputa, J. (as he then was) held that since under the rule in Walsh v. Lonsdale a writing purporting to be a lease which is void at law as a lease because it is not made by deed, may be good in equity as a contract for a lease and may be enforced by a decree of specific performance, the relationship of landlord and tenant had been created in equity since the

plaintiff had gone into possession and paid N400. 00 rent in advance; and the rights and obligations of the parties were the same as if the lease had actually been executed. See also Saidu Chiroma v. Markus Yearn Suwa (1986) 1 NWLR (pt. 19) 751 at 758.

Furthermore, for a valid agreement for a lease to exist, the parties and the property, the length of the term, the rent and the date of commencement must be defined.

#### 1.4. Types of Tenancy

The law of landlord and tenant is usually concerned with periodic tenancies which are determined at a specified period. For our present purposes, we have the following types of tenancies. (See sections 6-9, 50-63 of the Rivers State Landlord and Tenant Law, 1988 for the various types of tenancies).

- ① • Yearly Tenancies:- A yearly tenancy is one which continues from year to year indefinitely until determined by proper notice, notwithstanding the death of either party or the assignment of his interest. A tenancy from year to year differs from a tenancy for a fixed number of years, in that, unless terminated by a proper notice to quit, it may last indefinitely. The appropriate notice to terminate yearly tenancy is Six Months Notice expiring at the anniversary of the tenancy.
- ② • Weekly, Monthly and Quarterly Tenancies (S. 53):- A tenancy from week to week, month to month, quarter to quarter, and the like can be created in a similar way to a yearly tenancy, namely, either by express grant or by inference, such as that arising from the payment and acceptance of the rent measured with reference to a week, month, or quarter, as the case may be.
- ③ • Tenancy at will (Ss. 54-61):- A tenancy at will arises whenever a tenant, with the consent of the landlord occupies land as tenant on the terms that either party may determine the tenancy at any time. A tenancy at will may be created either expressly or by implication, as for example, where a tenant, with the consent of his landlord, holds over after the expiration of the tenancy. It will usually be found where, with the consent of the landlord, the tenant has either moved

into possession or is holding over at the end of a lease pending negotiation of a sale or new lease.

- (4) • **Tenancy at Sufferance or Tennancy on Sufferance:-** A tenancy at sufferance arises where a tenant, having entered upon land under a valid tenancy, holds over after the expiry of the lease without the landlord's assent or dissent. Such a tenant differs from a trespasser in that his original entry was lawful, and from a tenant at will in that his tenancy exists without the landlord's consent. The landlord can claim possession at any time. The landlord can also claim payment (mesne profits) for the tenant's use and occupation of the land (this payment is not technically to be described as "rent"). If the landlord subsequently signals his consent, the tenant at sufferance will be converted into a tenant at will.

- (5) • **Tenancy By Estoppel**: This type of tenancy is based on the principle that a tenant is stopped from denying his landlord's title, and a landlord from denying his tenant's title. As Lord Hoffmann put it, "it is not the estoppels which creates the tenancy, but the tenancy which creates the estoppels." The classic example is where the landlord has no title to grant a lease, but purports to do so. The estoppel will arise on the purported grant and, if the landlord subsequently acquires the relevant title, the lease will be perfected. Thus, the covenants contained in the lease are enforceable by the lessor against the tenant, and the successors in title to either party are themselves equally stopped. The estoppel operates from the time when the landlord puts the tenant into possession, and continues to operate after the tenant has given up possession.

#### 1.5. Termination of Leases/Tenancies

A lease or tenancy may be terminated or determined in any one of the following ways:

- (1) • **By Effluxion or expiry of time:-** A lease or tenancy for a fixed period will automatically determine when the fixed period expires, whereby the landlord's right of reversion takes effect. In such a case, there will be no need to determine the lease/tenancy by notice. All that is needed is notice

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of the landlord's intention to recover possession under the law: *Nweke v. Ibe & Ors.* (1974) 4 ECCLR 54; *Tinuola & Ors v. Okon* (1966) 2 All NLR 188; *Pan Asian African Co. Ltd. v. N.I.C.O.N.* (1982) 9 SC 1 at pp. 77-78.

2. • By Notice: - A tenancy could be brought to an end by the landlord serving the tenant an appropriate notice to quit. This is relevant only to periodic tenancies because a lease for a fixed can only be determined prematurely if the lease so expressly provides: *Tinuola & Ors v. Okon* (1966) 2 All NLR 188. In the case of notice to quit, there are fairly detailed rules regulating the appropriate method and period for termination. The following periods of time shall be given depending on the kind of tenancy in question:
- (a) in the case of tenancy at will or a weekly tenancy, a week or seven days' notice.
  - (b) in the case of a monthly tenancy, a month's notice;
  - (c) in the case of quarterly tenancy, a quarter's notice (three month's) notice; and
  - (d) in the case of a yearly tenancy, half a year's notice

Note, for a tenancy to be effectively determined by notice, in all cases, a fully periodic notice appropriate to the particular tenancy must be given. And at the expiration of which, a seven days notice of owners' intention to recover possession must be issued on the tenant. These are called statutory notices mandatory to eject a tenant by notice and must in writing. In *Mobil Oil (Nigeria) Ltd v. Johnson* (1961) 1 All NLR 93, where the defendant company gave Johnson a notice dated July 30, 1955, but the company nevertheless took possession on August 31<sup>st</sup>, 1955, the notice was held to be invalid, since a full thirty days (or a month's) notice had not been given.

An annual tenancy expires at the midnight of the day preceding the anniversary of the commencement of the tenancy. Hence, except a yearly tenancy is stipulated to be terminated by giving a specified period's notice "at any time" it will not be effective if the notice given does not terminate at the anniversary of the lease. In *Chief Saka Owoade v. Texaco Africa Ltd.* (1973) 2 SC 23, it was held that since the notice was to take effect from the 31<sup>st</sup> of July, 1965, it would therefore expire on the 31<sup>st</sup> of October, 1965. As that date is note the anniversary of the tenancy, the notice is bad and is of

no effect. In *Soley v. Nigeria Airways Ltd.* (1986) 4 C.A (pt. II) 91 at pp. 99-101, Ogundere, J.C.A., held that the oral notice given by the respondent to terminate the yearly tenancy was bad in law and ineffective since only a written notice will suffice. And the written notice given in Exhibit D1 dated October 19, 1981, to terminate the yearly tenancy with effect from the 31<sup>st</sup> day of December, 1981 was also invalid and therefore not effective to terminate the yearly tenancy. The gist of this decision is that it's possible to create a yearly tenancy by oral agreement but only a written agreement is needed to terminate it.

- (3)
- **By Surrender:-** It is possible for a tenant to give up the lease to the landlord, that is, to surrender the lease. This can arise expressly (which can be done by deed) or can occur by operation of law if the parties do some act showing an intention to terminate the lease (e.g. landlord accepting the return of the tenant's keys: *Chamberlain v. Scally (1992) E.G. 90; Harest Ltd. v. Liui (1993) 2 All E.R. 459 at 467; Green v. Jaja (1970-72) 1 R.S.L.R. 75 at 79*). If a tenant surrenders his lease to his immediate landlord, who accepts the surrender, the lease merges in the landlord's reversion and is extinguished. The surrender must be to the immediate landlord; and the transfer of the lease to a superior landlord does not work as surrender but operates merely as an assignment of the lease. Thus if A leases land to B for 40 years and B sublease to C for 21 years, C's lease will be extinguished by surrender if he transfers it to B but not if he transfers it to A.
  - **By Merger:-** If a landlord sells his land to a lessee, thereof, thereof and there is no intervening interest, however, short, a merger may arise. Merger is the counterpart of surrender. Under surrender, the landlord acquires the lease, whereas merger is the consequence of the tenant retaining the lease and acquiring the reversion, or of a third party acquiring both the lease and the reversion. Merger is said to occur when the freehold estate and leasehold estate become vested in the same person. In *Esi & Ors v. Itsekiri Communal Land Trustees & Anor. (1961) WNLR 15*, it was submitted on behalf of the defendants that since the land demised under the lease of 1911 had been assigned to the

successor in title of the grantor, merger had taken place and that the lease had therefore become extinguished and there was therefore no lease again to set aside: *Kodeso v. Aro* (1972) 4 SC 211.

- (5) • By Frustration:- The doctrine of frustration is part of the law of contract, and may sometimes be invoked to discharge a party from contractual liability when some unforeseen event has made performance impracticable. As a general rule, the doctrine does not apply to executed leases; for a lease creates an estate an estate which vests in the lessee, and cannot be divested except in one or other of the ways enumerated above. In other words, the lessor's principal obligation is executed when he grants the lease and puts the tenant into possession. Normally the doctrine of frustration can only apply to obligations which are executory and which can therefore be rendered futile or impossible by later events.
- (6) • By Forfeiture:- The right to forfeit (or re-enter) for breach of tenant's covenant is the most powerful of the landlord's remedies. It allows the landlord to re-enter and put a premature end to the lease. The right to forfeit is dependent upon the lease containing a forfeiture clause. It is therefore better to have the forfeiture clause reflected in the lease agreement.
- (7) • By Abandonment:- This can arise where the tenant manifests an intention to abandon the lease and makes it clear not to make use of the demised property. There must be a clear intention on the part of lessee to abandon the land.

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## MORTGAGES

### 1.1. Definition and Nature of a Mortgage

A mortgage, (whether legal or equitable) is essentially a pledge of property as security for the repayment of a loan. In the case of *Santley v. Wilde* (1898) 2 Ch. 474 Lindley M.R. defined a mortgage as "a conveyance or other disposition of land designed to secure the payment of money on the discharge of some other obligation". It refers to the relationship between the borrower and the mortgagee. Although for the purposes of this study, it is a mortgage of land that is the subject of analysis; it is possible to have a mortgage over chattels, say, a ship (as in *Total Air Management Services Ltd. v. Helipad Ltd.* (2012) June 8 unreported QBD.) a helicopter. The person who borrows the money is known as the 'Mortgagor' and the lender is the 'Mortgagee' and the debt for which the security is created is termed the 'Mortgage debt'. The borrower retains legal title to the land and will remain in occupation of the property. The borrower has a right of redemption (i.e. to pay off the mortgage) at any time after the contractual date for redemption. The lender is a 'secured creditor' and acquires a property interest in the land. For example, on the mortgagor's bankruptcy the mortgagee's claim will prevail against other creditors. If the borrower defaults on, say, repayment the lender has an extensive array of remedies which can be employed. The main remedy of the mortgage is the power to sell the mortgaged property.

It means in effect that as long as the mortgage debt is left unpaid, the mortgagee is the legal owner of the mortgaged property. In the words of Unsworth, F.J. in *Odashile v. Idowu* (1961) ALL NLR 373 "while it lasts, it is an absolute conveyance, in the sense that it vests in the lender the legal title to the borrower's interest in the property without any self-operating condition of defeasance". So long therefore as the mortgage debt remains unpaid, the mortgagor is divested of his title and so cannot transfer it to another. Thus in *Tetteyfo v. Awuku* (1955) 14 WACA 723, X mortgaged his property to O by deed to secure a loan. While the mortgage to O was still subsisting, X purported to sell the property to the plaintiff, but without giving him a conveyance. After the sale to the plaintiff, Y, at X's

request, paid off the mortgage debt and X executed a mortgage by deed in Y's favour. Subsequent to the mortgage to Y, the plaintiff obtained a judgment against X for specific performance of the sale, and upon X refusing to execute a conveyance in accordance with the court's decree, the Registrar, acting on the direction of the court executed a conveyance to the plaintiff. X having defaulted in paying the mortgage debt, Y sold the property to Z. The plaintiff now sued X, Y and Z claiming declaration of title to the property and damages for trespass.

The W.A.C.A. held (1) that since there was no evidence that Y acted malafide (in bad faith), he acquired a valid title to the legal estate by the mortgage to him; (2) that the legal estate being in O at the time of the purported sale to the plaintiff, and in Y at the time of the specific performance, the sale and the decree of specific performance were of no effect, and (3) that accordingly the conveyance to the plaintiff was valueless, as the Registrar could not have conveyed a greater estate than was in X i.e an equity of redemption.

## 1.2. Creation of Mortgages

Basically, there are two forms of mortgages permitted by law to be created for both freeholds and leaseholds which are legal and equitable mortgages.

- (1) • Legal Mortgage:- A legal mortgage of an estate in fee simple must be effected by either (a) a demise for a term of years absolute, subject to the provision for redemption i.e. the term shall cease if repayment is made on a fixed day; (b) a charge by deed expressed to be by way of legal mortgage. Similarly, a legal mortgage of leasehold can be created under S. 100 P.C.L. (West and Bendel) by a sub-demise (sub-lease) for a term of years absolute, less by one day at least than the term vested in the mortgagor and subject to a proviso for cesser on redemption; or by a charge by deed expressed to be by way of legal mortgage.
- (2) • Equitable Mortgage:- Generally an equitable mortgage arises when a second or a subsequent mortgage is created by a mortgagor in respect of the same fee simple over which he has granted a first mortgage (which is a legal mortgage). Equitable mortgages are rare, but will arise where there is insufficient formality to create a legal mortgage. Now, equitable mortgages are created inter alia, (1) by mere deposit of title deeds with a clear

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intention that the deeds should be taken or retained as security for the loan; (2) by an agreement to create a legal mortgage and (3) by mere equitable charge of the mortgagor's property.

### 1.3. Equity of Redemption / The Right to Redeem

Once a mortgage has been created, there will normally be a contractual date set for repayment of the loan. This is known as "date for legal redemption". The date is often set for six months from the date of the loan. Until this date expires, the borrower cannot redeem (without the consent of the lender) nor can the lender exercise some of its key remedies, e.g. sale or appointment of a receiver. At common law, if the money was not paid on the precise date (that is, after the expiration of the fixed date for redemption), the property automatically vested in the mortgagee. That is to say the mortgagee becomes the absolute owner of the mortgaged property on the mortgagor's failure to repay the mortgage debt within six months or as agreed by the parties but not less than six months. This was a harsh and unfair rule and so equity intervened and created an equitable right to redeem, i.e. the mortgagor acquired the equitable right to redeem the property once the legal redemption date had passed upon payment of the mortgage debt, all the interest due, and relevant costs. The right to redeem lasts until sale of the property or foreclosure of the mortgage. This is known as the mortgagor's equity of redemption: *Alli v. Allen* (1966) 1 ALL NLR 101; *Nolade & Ors v. Nolade & Ors*. 3 F.S.C. 72 at p. 74.

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The equity of redemption arises as soon as the mortgage is created and is an equitable interest owned. It is an interest in land which may be conveyed; devised or entailed, and it may descend on intestacy or pass to the state *bona vacantia*.

### 1.4. Effect of Redemption

Where redemption is effected by the only person interested in the equity of redemption, and the mortgage redeemed is the only incumbrance on the property, the effect of redemption is to discharge the mortgage and leave the property free from incumbrances. But if there are several mortgages on the property, the effect of redemption will normally be that the person paying the money takes a transfer of the mortgage, as where a second mortgage is released.

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mortgagee redeems the first mortgage as in the case of Tetteyfio v. Awuku earlier discussed. If several incumbrancers seek to redeem a mortgage, the first in order of priority has the best claims.

#### 1.5. Priority between Mortgage

It is possible that there may be several mortgages charged on the same property. Difficulties may arise, of course, when there is insufficient money to achieve this (i.e. when there is a negative equity) and it becomes crucial to know which lender has first claim to the proceeds of sale. This is known as the priority. The rules governing priority differ according to whether title to the land is registered or unregistered. As to priority between registered charges, the rule is that the mortgages rank in the order in which they are entered on the Land Register. This is irrespective of order of their creation. In relation to equitable mortgages, the chronology of creation becomes important. The rule is that the earlier will prevail over the later. Then as to priority between unregistered charges, if the title deeds are in the physical custody of the lender, that lender always has priority over all others and this rule applies whether or not the prior mortgage is legal or equitable.

#### 1.6. Clog and Fetter on the Equity of Redemption

Any provision preventing a mortgage from recovering the property after redemption is repugnant to the nature of the transaction and void. It is said that there can be "no clog or fetter on the right to redeem". A provision in a mortgage that stipulates that property shall belong to the mortgagee on the occurrence of some event is, thereby, ineffective! Similarly an option to purchase contained in a mortgage deed is void even if it relates to part of the mortgaged land: Jones v. Morgan (2001) EWCA Civ 995. Such a provision contradicts the equitable right to redeem. The traditional approach echoed by Harman L.J. in Grangefield Properties Ltd. v. Collingwoods Securities (1964) 1 ALL E.R. 143 CA, "once a mortgage, always a mortgage and nothing but a mortgage."

Equity will treat as void and unenforceable any provision in the mortgage which would or might destroy the equity of redemption as the equity of redemption of a mortgage ranks as an equitable estate or interest.

Although a mortgagee has the legal estate in the land, his right in equity is

limited to the money secured and holds the land only as security for the money, he has only a mere charge for the amount due to him. Thus in the eyes of equity, the mortgagor is still owner of the land subject to that charge.

Any provision in the mortgage deed which prevent the mortgagor from redeeming the mortgaged property after the legal date of redemption will be deemed to be repugnant to the transaction and thus unenforceable. This principle of repugnance could be illustrated in the case of Obakpolor v. Ekejija (1977) NCLR 259 at 271-273, clause 4 of an agreement which was clearly a loan agreement secured by the borrower's land provides that: "4. The borrower hereby agrees with the lender that in the event of his inability to repay the said loan as stated in paragraph 2 above, he will convey his aforesaid landed property at 60 Agboghorama way, Sapele to the lender on the lender tendering a further sum of N2, 000.00 (two thousand naira) to the borrower. The N1, 200.00 (one thousand two hundred naira) which is the subject of the loan will be deemed as a part payment of the purchase price of 60 Agboghorama way, Sapele".

It was held by the Court of Appeal that in so far as clause 4 amounts to an attempt to prevent the mortgagor from redeeming the mortgaged property after the time stipulated for repayment of the mortgage loan constitutes a ~~clog on the equity of redemption~~ and for that reason it is void and unenforceable. See also Glory v. Nomuoja (1969) NCLR 17 at 24-25.

Note: If, however, the option is granted by the borrower in a separate and independent transaction, it can be upheld: Reeve v. Lisle (1902) AC 461 H.L. That is to say, that once the mortgage has been made, equity will no intervene if the mortgagor, by a separate and independent transaction give the mortgagee an interest in the property, even if it may wholly or partly destroy the equity of redemption, such as an option to purchase or a long lease..

### 1.7. Postponing the Right of Redemption

The right to redeem may, however, be restricted or modified. In the absence of any evidence of fraud or oppression by the mortgagee, the parties can make what bargain they like as to the earliest possible date of redemption of the property. Thus a provision postponing the date of redemption until some future period longer than the customary six months may be valid, provided the mortgage as a whole is not so oppressive and unconscionable that equity would not enforce it, and provided it does not take away the equitable right of the mortgagor to redeem the mortgaged property. In *Fairclough v. Swan Brewery Co. Ltd* (1912) AC 565, a 17-year lease of a brewery was mortgaged on conditions that prevented its redemption until six weeks before the end of the term. This was held to make the equitable right to redeem illusory and therefore void. Thus an excessive postponement of the redemption date may in itself be oppressive and this is a clog on the equity of redemption.

### 1.8. Rights and Remedies of the Mortgage Lender

Where a mortgagor defaults under the terms of the mortgage, the mortgagee is given various rights and remedies:

- Sue (i) • To Sue for the Money Due:- At any time after the date fixed for payment, the mortgagee may sue for the money lent because the breach of his covenant caused the whole of the principal money with interest to become immediately due and payable. Thus, the mortgagor can be sued personally for the recovery of the debt whether or not the mortgage is made by deed! There is a 12 year limitation period for capital and six years for interest within which the lender must commence proceedings for the recovery of the debt. *Gwarzoo v. Mohammed* (2013) 12 NWLR (pt 136) 576 at 629 r/w N
- Sell (ii) • To Sell:- A statutory power of sale is given by the Law of Property Act 1925, S. 20 of the Conveyance Act of 1881 and Sections 123 and 125 of the P.C.L. This was necessary because at common law there is no power of sale. As soon as the mortgage money has become due, that is, as soon as the date fixed for repayment has passed, the legal mortgagee has a statutory power to sell the mortgaged property

provided that the mortgage was made by deed. Where the power of sale has arisen, the mortgagee can give a good title to a purchaser free from the equity of redemption even if the power has been irregularly exercised. Although the power of sale arises as soon as the mortgage money becomes due, it does not become exercisable until one of the following things has occurred: (1) Notice requiring payment of the mortgage money has been served by the lender and this has not been complied with by the borrower within three months; (2) Some interest is in arrears and remains unpaid for two months after becoming due and (3) There is a breach of some other mortgage covenant (other than the covenant to pay the loan and interest). See *Shaleye v. Wema Bank Ltd* (2011) 3 NWLR (Pt 1233) 93 at p. 115.

**Note:** The money received from a purchaser is held by the mortgagee in trust, after any prior mortgagee has been paid off, to be distributed as follows: Firstly, to pay all expenses incidental to the sale; secondly, to pay himself the principal interest and costs due under the mortgage; and thirdly, to pay the surplus, if any, to the mortgagor or any other person entitled to the mortgage property.

**Note:** The lender must act in good faith. This entails that it cannot sell the property to himself, to a family member or business associate or sells it quickly at a knock down price. If the sale is achieved at an under value, the court will interfere only when there is fraud,

(2) negligence or bad faith on the part of the lender;

In addition to the statutory power given specifically to legal mortgagees, the court is afforded an unfettered discretion to order sale at the instance of any person interested in the mortgaged property. This will often be against the wishes of the lender. It may, for example, be utilized by the court as an alternative to foreclosure.

Under equitable mortgage, unless the mortgage is made by deed, the court may order sale not automatic at the instance of the mortgagee..

- To Foreclose:- Foreclosure amounts to a total confiscation of the borrower's interest in the property. In a foreclosure action, the

court declares that the mortgagor's equitable right to redeem is extinguished and the mortgagee becomes owner of the property both at law and in equity. The remedy disregards the fact that the property might be worth more than the debt outstanding and discounts any repayments made over previous years. The right to foreclose does not arise until the legal right to redeem has ceased to exist. The first step in foreclosure is to obtain from the court a 'foreclosure order nisi'. If the property is not redeemed on the date fixed, a foreclosure order (absolute) is made. This destroys the mortgagor's equity of redemption and transfers his fee simple or term of years to the mortgagee, who now becomes sole owner at law and in equity, subject only to prior incumbrances.

This is the  
way to  
an equitable  
mortgagee.

Foreclosure order nisi

**Appointment of a Receiver:-** This is the appointment of a person or company with management powers who may collect rents and profits arising from the mortgaged land. This is relevant to non-residential mortgages as there has to be some income to receive. The statutory power to appoint a receiver is given under law (LPA, CA, PCL) and arises in the same way as the power of sale. This remedy is most commonly used where the mortgagor has leased the property and rents and profits can thereby be intercepted. The receiver is deemed to be the agent of the mortgagor to whom he is accountable at the end of stewardship.

- (5)** **To Take Possession:-** The mortgagee's right to take possession arises automatically at common law and is 'exercisable' even if the mortgagor is not in default. In practice, however, possession will be sought only if the mortgagor is in breach of the mortgage agreement. This is an unsatisfactory remedy, because the mortgagee in possession must not only keep the property in reasonable repair but also account strictly for all rents and profits received.

**Total of ⑤ Remedies available to the Mortgagee Lender**