Creation of Mortgages under the Mortgage and Property Law of Lagos State

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Abstract
Effective creation of mortgage is central to its eventual realization. For this reason, it is most desirable that all doubts as to whether there was intention to create a mortgage should be eliminated. Such doubt typically hovers around a mortgage said to have been created by the mere fact of deposit of title documents of the landed property. This is because, in the first place, the act of deposit, without more, is of equivocal significance, as the intention to create a mortgage by such deposit may be rebutted by oral evidence. Besides, the creation of mortgage security by mere deposit not only carries with it great uncertainty but also opens a wide room for fraud and disputes. This paper explores the Mortgage and Property Law of Lagos State and argues that the law has put an end to the creation of mortgage by mere deposit. The paper admits that due to its novelty in Nigeria, the judiciary is yet to give meaning to the statutory provisions but hopes, however, that whenever the provisions come for judiciary scrutiny the comparative judicial approach on similar statutory provisions in England would be adopted.

Meaning of "Mortgage"

In the 2nd edition of his book, *The Law of Mortgages*, published in 1950, Waldock described as "classic", the definition of mortgage given by Lindley MR in *Santley v. Wilde*.[1] There, a mortgage was

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defined as "a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given".[2] Today, however, this definition can neither be said to "exactly express the nature of a mortgage"[3] nor be regarded as anything near "classic",[4] as there is no longer any radical title which is capable of being conveyed in the strict sense of the word. This is because as from the inception of the Land Use Act 1978[5] in Nigeria, land has become vested in the Governors of the respective states,[6] and, *ipso facto*, impliedly divested from the erstwhile land owners, who from thence have a mere usufructuary right which is statutorily described as right of occupancy.

As a definition, the one proffered by the Mortgage and Property Law, 2010, of Lagos State, is more apt. It defines a mortgage as:[7]

> a transfer of an interest in specific movable or immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing future debt or the performance of an engagement which may give rise to pecuniary liability and it includes any charge or lien on any property for securing money or money's worth.

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[1] (1899) 2 Ch. 474

[2] (1899) 2 Ch. 474 at 474.

[3] Waldock, C.H.M, *The Law of Mortgages*, 2nd edn (1950), London: Stevens & Sons Ltd/Sweet & Maxwell Ltd, p. 1.

[4] *Ibid*.

[5] . Cap.L5 vol.8 Laws of the Federation of Nigeria 2004, L5 Vol. 7 Laws of the Federation of Nigeria 2010.

[6] . S. I of the Land use Act, 1978. The Act was originally promulgated as a Decree by the military regime (i.e. Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over of government by civilians re-designated Act, vide Section 1 of Adaptation of Laws (Re-designation of Decrees, Etc) Order No. 13 of 1980.

[7] Section 67.

What easily stands out from both definitions is that a mortgage is a security transaction. Both definitions also anticipate a mortgage of "chattels" or "movable property". However, this paper is mainly concerned with mortgages of land. In practice, this is the kind of mortgage most commonly encountered. At first sight, one would expect mortgages of chattels or movables to be equally prominent in the modern world. After all, it is a familiar feature of modern life that such articles as cars and furniture are often bought with the assistance of finance from a finance company; the transaction does not appear so very different from the purchase of a house with the aid of finance from a Mortgage House or Building Society. Why then, is this not an aspect of the law of mortgages too? The reason lies in legal history: In the nineteenth century, to prevent a then prevalent social abuse, the Bills of Sale Act 1878 was passed. This proved be unsatisfactory, as the lender too easily secured priority over other creditors, and draconian enforcement of the security was still possible. Hence the 1882 Bills of Sale (Amendment) Act was passed, which had the general effect of making void all mortgages of chattels unless an extremely cumbersome list of formalities was observed. The rules are of very little importance in practice, since the financing of the purchase of chattels has developed by a totally different route, largely invented to escape the Bills of Sale Acts themselves. In a typical hire-purchase transaction, the transaction takes the form of a sale of the goods by the dealer to the finance company, who then lets the goods out on hire to the individual consumer, who, eventually, exercises his option to purchase the goods by payment of the last installment.

At the Beginning (History of Mortgage)

The modern mortgage, and particularly some of its terminology, can only be understood in the light of the history of mortgages. This is particularly so because of the differing views of the mortgage transaction taken by the courts of common law and the courts of equity.

The Common Law View

At common law, the mortgage was initially like a pledge because it depended on the creditor/mortgagee taking possession and was usually for a fixed term. The taking of possession by the creditor/mortgagee was so that he applied the rents and profits to the repayment of the principal as well as to the satisfaction of his claim,[8] or so that he took all the rents and profits by way of interest while the whole principal remained due.[9]

The date on which the mortgage debt was to be repaid and the fee simple conveyed back to the mortgagor was known as the *legal date for redemption*. The timing was strict and severe. The common law courts took the view that the mortgagor could only request a reconveyance if, but only if, he repaid the mortgage money on or before the legal date for redemption. If he failed to redeem on the legal date for redemption, he lost perpetually his right to redeem, so that the proviso for reconveyance became inoperative. The result was that in that circumstance, the legal fee simple became vested in the mortgagee.[10] Very interestingly, if the mortgagor turned up with the money after the legal date for redemption he could no longer insist on redemption. In fact even before the legal date for redemption, when the mortgagor could repay the money and demand a reconveyance of the land, his right to demand reconveyance was regarded as a purely personal right which was only enforceable by a personal action against the mortgagee, and not by an action *in rem*, i.e., a real action against the land. In other words, during the mortgage, the mortgagor's rights were in essence reduced to personal rights against the

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[8] *Vivum Vadium*

[9] *Mortuum Vadium.* Though regarded as usurious and sinful in the Christian belief, the *mortuum vadium* was nevertheless quite common. See: Waldock, C.H.M, *The Law of Mortgages*, 2nd edn., London: Sweet and Maxwell, 1950, p. 19. The distinction between (and the names) *vadium vivum* and *vadium mortuum* appears to have been first made (or used) by Littleton. See: Volume 21 ER at p. 1067 where the two concepts, and why they were so named, are explained.

[10] Ramsbotham, R.L., *Coote's Treatise on the Law of Mortgages*, 9th end, volume 1, London: Stevens & Sons Ltd., (1927) pp. 1 – 4.

mortgagee; if the mortgagee failed to reconvey on the legal date for redemption, the sole remedy of the mortgagor was to bring a personal action against the mortgagee for a breach of his covenant to reconvey, and the only remedy lay in damages, and not in the recovery of the land itself.[11]

At common law therefore, mortgage looked more like an absolute conveyance than a security because, apart from the creditor/mortgagee taking actual and immediate possession, the risk of the debtor/mortgagor not being able to get back (or redeem) the land was very high; and while the mortgage lasted, the mortgagor had no proprietary right to the land.

A Timely Rescue by Equity

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

To achieve the modification, the court developed the equitable doctrine which produced the effect that, even when a special date was stipulated for repayment, and when by contract and at law the mortgagor forfeited his property to the mortgagee if the date passed without payment, equity allowed the defaulting mortgagor to redeem by afterwards discharging his obligations. This was so even when the parties had stressed that the time for repayment was of the essence of the transaction. In this way, Equity "completely altered the conditions on which a creditor held his security".[12] This prompted Maitland[13] to once say of a mortgage deed that it is one long *suppressio veri, suggestio falsi*, meaning that equity long ago falsified the language of the deed by treating the conveyance as a mere security and by turning the mortgage into little more than a

[11] Fairest P.B, *Mortgages*, London, Sweet & Maxwell, (1980), p. 6.
[12] Waldock, *op. cit*., at p. 21.
[13] *Equity*, 2nd edn., p. 182.

charge. Owing to the development of the equity of redemption, the real effect of a mortgage is much the same as that of a charge and the difference between them is mainly formal.[14] As Maitland pointed out, the mortgagor's conveyance is a sham, because in spite of the conveyance the mortgagor remained the real owner of the property until foreclosure. The gradual assimilation of mortgage to charge is well illustrated by the new form of charge introduced by the English Law of Property Act 1925.[15]

Equity regarded the mortgagor as retaining a significant proprietary interest in the land from the date of creation of the mortgage. This was the "equity of redemption", which encompassed the mortgagor's equitable right to redeem after the contractual (or legal) date for redemption. So jealous was equity in guarding the equity of redemption that the mortgagor himself was unable, on any terms whatever, to surrender his right of redemption to the mortgagee by any clause in the mortgage contract. Thus, talking about the equity of redemption, Eldon LC said in *Seton v. Slade*:[16] "I take it to be so in the case of a mortgage, that you shall not by special terms alter what this court says are special terms of that contract". The court regarded the right to redeem as a special term .in the security contract which could therefore not be altered or contracted out of. No wonder it has been said that "equity has made the most conspicuous element in security the right of redemption".

Equity thereby made the right to redeem a larger one than was usually given to the mortgagor by contract. It may be argued that the intervention of equity to this extent is, by modern standards, an interference with the parties' freedom of contract. However, equity did this in order to protect the debtors/mortgagors, recognizing that they, as "necessitous men are not, truly speaking, free men, but, to answer to a present exigency will submit to any terms that the

[14] Waldock, p. 14.
[15] Section 85.
[16] (1803) vol. 32 ER 108 at 111.

crafty may impose upon them".[17] The equity of redemption thus developed into a mortgageable and transferable interest in land.[18]

The historical interface between common law and equity leaves an imprint in the creation of mortgages to this day. How is this so?: The fact that the equitable right to redeem was exercisable even after the legal date for redemption had passed, gave it a lot more significance than the legal right to redeem on the legal date for redemption. To a large extent, the legal date to redeem remains in the modern mortgage as a reminder of its historical origins. Till today, the passing of the legal date for redemption gives rise to most of the mortgagee's remedies to enforce his security.

This common law relic is today circumvented during creation of the mortgage: the legal date for redemption is usually stated to be a date fairly soon after the creation of the mortgage; the modern mortgagor often finds, to his astonishment, that there is a clause in the mortgage which requires him to repay the mortgage loan six months after the date of the mortgage, when he had been assured by the mortgagee that the mortgage was for a 20-year term, and, of course, the mortgage also contained provisions for repayment over a 20-year period! The purpose of the early choice of the legal date for redemption is to make the mortgagee's remedies available from an early date. This has for long remained a device in the creation of a mortgage.

Reasons For/Uses of Mortgage

Mortgage arises from the need to secure the payment or repayment of money or the discharge of an obligation, which may entail some pecuniary liability. There are always two sides to a mortgage: to

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[17] Per Lord Henley in *Vernon v. Bethel* (1761) 2 Eden 110 at 113, vol. 28 ER 838 at 839,

[18] In *Western Region Traders Syndicate v. Fashugbe* [1960] WNLR 51, the court held that the first mortgage vested the legal estate (interest) in the Syndicate and the second mortgage by the mortgagor was of the equity of redemption; *Yaro v. Arewa Construction Ltd.* (2007) NWLR (Pt.1063) 333 held 6. See also the well-known passages by Lord Hardwicke in *Casborne v. Scarfe* (1738) 3 Atk 603, and Lawrence L. J. in *In re Sir Thomas Spencer Wells* (1933) Ch. 29 at 52.

the borrower, it is a loan for the purpose of meeting his debts or of financing his obligations; to the lender, it is an investment, substantial or speculative. However, the element of genuine investment is much more predominant in mortgages of land: here, the loan is intended to continue for a considerable time and it is often taken to finance the development, improvement or purchase of the land or some other mega project.

It is because of the importance of mortgage to private sector participation in economic development that mortgage law has undergone some changes and simplification over time. However, as one gives credit to mortgages for financing undertakings and investments, one must not forget to give a huge part of the credit to equity, whose jealous protection of debtors transformed the legal incidents and increased the commercial utility of mortgage transactions. Though equity was alert enough to have exorcised the devil of extortion which was inherent in common law mortgage, statutes came to give further respite.

A Further Rescue by Statute

Many statutes come into focus here, but those to mention are the Conveyancing and Law of Property Act, 1881, a statute of general application in Nigeria; the Statute of Frauds 1677, also a statute of general application; the English Law of Property Act, 1925, which though a post-1900 statute and therefore not applicable in Nigeria, was a model for the Property and Conveyancing Law, 1959, of the then Western Nigeria,[19] which became applicable to the States created therefrom; and the Registered Titles Law of Lagos State.[20] There is also the Land Use Act 1978,[21] under which the prior consent of the State Governor is required to the creation of a mortgage. The most recent statute directly on mortgages in Nigeria is the Mortgage and Property Law, 2010, of Lagos State which has amongst others, specific provisions on creation of mortgage. For

[19] Cap. 100 Laws of Western Nigeria.
[20] Cap. L4 Laws of Lagos State, 2003.
[21] Cap.L5 vol.8 Laws of the Federation of Nigeria 2004, Cap. L5 Vol. 7 Laws of the Federation of Nigeria 2010.

brevity, this law is herein referred to simply as the "Mortgage Law".

Creation of Mortgage under the Mortgage Law.

Mortgages are either legal or equitable and the Mortgage Law of Lagos State makes elaborate provision for the creation of each category.

Legal Mortgage

Section 15 (1) of the Mortgage and Property Law of Lagos State, 2010, states in respect of legal mortgage:

> A mortgage of a right of occupancy in land shall be created at Law either by:
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> (1) a demise for a term of years absolute, subject to a provision for ceaser on redemption; or
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> (2) a charge by deed expressed to be by way of legal mortgage; or
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> (3) a charge by deed expressed to be by way of statutory mortgage in the forms provided under this Law.

As from the commencement of the Mortgage Law, a mortgage cannot be created by assignment. By Section 15 (2), any purported assignment by way of mortgage made after the commencement of the Law shall (to the extent of the estate of the mortgagor) operate as a demise of the land to the mortgagee for a term of year's absolute, but subject to redemption. The same is provided in Section 16 (2) in the case of leasehold.

In a mortgage by charge "by deed expressed to be by way of Legal or Statutory Mortgage", the mortgagee takes no actual estate in the land at all, but under Section 17 (1) of the Mortgage Law, he is protected in the same way as if he had a legal estate. This provision in the Mortgage Law is similar to Sections 85 (1) and 86

(1) of the Law of Property Act of England, which have received judicial pronouncements in many cases.[22]

In the case of leaseholds, Section 16 (1) of the Mortgage Law states that a legal mortgage can only be created by:

(1) a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for redemption; or
(2) a charge by deed expressed to be by way of legal mortgage; or
(3) a deed expressed to be made by way of statutory mortgage in the forms provided under this Law; and where a licence to sub-demise by way of mortgage is required, such licence shall not be unreasonably refused.

Section 16 of the Mortgage Law appears to draw from Section 86 of the Law of Property Act 1925 of England. On the whole, the demise (and sub-demise) and charge are the prescribed modes of creating legal mortgages under the Mortgage Law.

Of the two, a mortgage created by charge has a number of advantages over that created by demise or sub-demise. The former enables a mortgagor, by one document, to create a mortgage over a mixed collection of properties; in addition, the document itself is less complex and misleading. Also, if the premises charged are leasehold, there is no risk of the mortgage itself amounting to a breach of a covenant against sub-letting such as is commonly found in leases. Although Section 16 (1) of the Mortgage law provides that "where a licence to sub-demise by way of mortgage is required, such licence shall not be unreasonably refused",[23] most mortgagees would prefer to steer clear of the pitfalls altogether, by taking a mortgage by charge. It is therefore not clear what useful

[22] See, e.g.: *Grangeside Properties Ltd. v. Collingwood Securities Ltd.* [1964] 1 W.L.R. 139; *Grand Junction Co. Ltd. v. Bates* [1954] 2 Q.B. 160.
[23] Same is provided in Section 86 (1) of the Law of Property Act 1925, England.

purpose is served by the retention of the mortgage by demise in the Mortgage Law of Lagos State.

Equitable Mortgage

Section 18 (1) of the Mortgage Law retains the creation of equitable mortgage by (i) agreement to create a legal mortgage, or (ii) mortgage of equitable interest.

(i) Where an agreement to create a legal mortgage is drawn up but it is discovered that the written document is defective in form e.g. by not affixing a seal (but it is otherwise valid), it thus fails to take effect as a legal mortgage but instead becomes an equitable mortgage. The basis for this is the court's power to order specific performance of a contract to create a legal interest in land,[24] and the rule that the defective document nevertheless showed a contract by the parties to create a present security. Equity regards as done that which ought to have been done[25] by effectuating the parties' agreement in equity.

The second instance when an equitable mortgage might arise by agreement to create a legal mortgage is where the parties never actually presently tried nor intended to create a legal mortgage but simply agreed to create the same in the future. There is thus a contract or an agreement to create a legal mortgage. Such an agreement has the effect of creating an equitable mortgage since, by equity, agreements for value are treated as if they are actual performance.[26] However, for an equitable mortgage to result in the two instances above, the transaction which had been entered into has to be specifically enforceable and for this, it has to be in writing and signed by the party giving the security or by his

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[24] *Basma v. Weeks* [1950] AC 441, [1950] 2 All ER 146.

[25] *Walsh v. Lonsdale* (1882) 21 Ch.D 9; *Ogundiani v. Araba* (1978) 6 – 7 SC, 55 at 73.

[26] Again, on the maxim that equity looks on that as done which ought to be done: *Snell's Equity*, 29th end., 2nd impression rev'd, p. 40; *Capital Finance Ltd. v. Stokes* [1968] 1 All ER 573 at 577.

lawfully authorized agent, so as to comply with Section 4 of the Statute of Frauds, 1677.[27]

(ii) Equitable mortgage is created where what is mortgaged is an equitable right or interest. An example is the mortgage by a beneficiary under a trust, which is just a mortgage of the beneficiary's equitable interest.

Equitable mortgage by mere deposit of title deeds

Section 18 (1) of the Mortgage Law of Lagos State appears to outlaw the practice of creating equitable mortgage of land by mere deposit of title documents. The relevant part of the sub-section states: "As from the commencement of this Law, an equitable mortgage of a right of occupancy shall not be created by a mere deposit of title (documents) or charge on a property except it is accompanied by an agreement…" This provision calls to mind Section 2 (1) of the Law of Property (Miscellaneous Provisions) Act 1989[28] of England which provides: "A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each".

Some preliminary discussion of the English position on creation of equitable mortgage by mere deposit after the 1989 Act[29] will throw some light on the import and purport of Section 18 (1) of the Mortgage Law of Lagos State. Until the enactment of

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[27] This .provision is now incorporated into local statutes of some of the States in Nigeria. See, e.g., Section 1 of the Contracts Law, Cap. 34 vil. 1 of the Laws of Akwa Ibom State, 2000.

[28] Section 2 of the 1989 Act was enacted to give effect to the substance of that part of the Law Commission's Report, Transfer of Land: Formalities For Contracts for Sale etc of Land (1987) (Law Com No. 164) which recommended the repeal of Section 40 of the Law of Property Act, 1925, and the abolition of the doctrine of part performance.

[29] See: Essien, E., "*United Bank of Kuwait v. Sahib*: The Rise and Fall of Security by Deposit of Title Documents". (1998) *Journal of International Banking Law, Issue 2, London:* Sweet & Maxwell, p. 80.

the 1989 Act[30] in England, it was a common and legally recognized practice for an owner of landed property who wished to use the property as security for a loan of money to him, simply to hand over his documents of title to the property to the lender, on the understanding that upon his refund or repayment of the loan sum to the lender, the latter would return the documents to the borrower. The handing over of title documents created an informal security, an equitable land mortgage or, more specifically, an equitable mortgage by deposit of title documents. So common and commercially convenient was the practice that the deposits were sometimes made even before the parties thought about consulting a lawyer.[31] Indeed, even after the 1989 Act there were doubts if security could not still be created by deposit of title documents; the business community resigned itself to waiting till the court had the opportunity to make a pronouncement on the matter.[32] That golden opportunity for judicial pronouncement came, and was seized upon, in the case of *United Bank of Kuwait PLC v. Sahib.*[33]

The Beginning of the Rule

The rule that a deposit of title documents for the purpose of securing a debt creates an equitable mortgage owes its origin to the decision of Lord Thurlow in the 1783 case of *Russel v. Russel.*[34] Before that year, the Statute of Frauds 1677, the object of which was to prevent many fraudulent practices which were commonly to be upheld by perjury, required, by Section 4, that contracts for the disposition of land or interest in land were not enforceable unless

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[30] Particularly Section 2 thereof.

[31] Rossdale, P., "Abolition of Security by Deposit of Title Deeds" (1996) vol. 140 S. J. p.1223.

[32] Hill, G., "Law of Property (Miscellaneous Provisions) Act 1989, Section 2" (1990) L.Q.R. 396 at 400; Bently, L and Coughlan, P., "Informal Dealings With Land After Section 2" (1990) 10 L.S. 325 at 341; *Snell's Equity* (29th ed., 1990), at p. 445; *Cheshire and burn's Modern Law of Real Property* (15th ed., 1994), at p. 679.

[33] [1996] 3 W.L.R. 372.

[34] (1783) 1 Bro. C.C. 269, vol. 28 E.R. 1121. Also: Sunnucks, J.H.G., '"Lord Thurlow's Equity' or 'A Cuckoo in the Legal Nest'?" (1970) 33 M.L.R. 131 – 132.

there was some memorandum or note thereof in writing, and signed by the party to be charged or by his duly authorized agent. Some fraudulent parties to a contract started to take undue advantage of the statute by claiming that the bargain which they had voluntarily entered into, and out of which they derived a benefit, was unenforceable because it was not in writing as required by the Statute of Frauds. It was in this circumstance that equity intervened to enforce the contact through the doctrine of part performance, so that unmeritorious people could not, by hiding under the Statute of Frauds, thereby use it "as an instrument of fraud".[35] Part performance thus became applied not as a remedy but as an equitable exigency.

The stage was thus set for the decision in *Russel v. Russel*, for it was there reasoned, first, that by the deposit of title deeds,[36] the contract was sufficiently part-performed so that the sufficient part performance took the case of the Statute of Frauds, thus rendering writing unnecessary. In this way, the doctrine of part performance came to be applied in the context of equitable mortgage by deposit of title documents.[37] It was further reasoned, alternatively or additionally, that the deposit of title documents which could not be accounted for in any other way, was evidence of an agreement to create a legal mortgage.[38]

The decision in *Russel v. Russel* , that a mere deposit of title documents creates an equitable mortgage, has been, and is still, followed in many common law jurisdictions.[39] The decision has, however, met with fierce and sustained criticism almost from the

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[35] See, e.g. *Butcher v. Stapely* (1685) 1 Vern, 636, less than 10 years after the enactment of the Statute of Frauds.

[36] The deposit must be made by the owner, or all the owners, of the property, and for the clear purpose of giving a security: Megarry, R and Wade, H.W.R., *The Law of Real Property* (5th ed., 1984), at p.928.

[37] Bently, L. and Coughlan, P.,. "Informal Dealings with Land After Section 2" (1990) 10 L.S. 325 at 341.

[38] *Russel v. Russel*, n. 7 above: Jessel, M.R in *Carter v. Wake* (1877) 4 CH.D. 605 at 606. The contractual foundation was emphasized in the comparatively recent case of *In re Wallis & Simmonds [Builders] Ltd*. (1974) 1 W.L.R. 391.

[39] E.g. in Nigeria. See *Kadiri v. Olusola* (1956) 1 F.S.C. 59 at 60 – 61: *Usen Fowokan v. Idowu* (1975) 4 D.S.C. 195 at 199

moment of its pronouncement. Eldon L.C. described it as "a decision much to be lamented",[40] while Sir W. Grant M.R. saw it as resting "on very unsatisfactory grounds",[41] for "there is no case where a man is willing to part with his title deeds, in which he will not also be ready to sign a memorandum of two lines; specifying the purpose, for which he had parted with them. By dispensing with any written evidence of the contract, an opening is left for all the fraud and perjury, which the Statute [of Frauds] was calculated to exclude".[42] Romilly M.R., for his part, was irked by "the great inconvenience which arises from depositing deeds without clear written evidence of what it is to secure".[43] It cannot be denied that security by deposit of title documents has proved a "mortgaging system of great importance and convenience",[44] due largely to the informality in its creation. However, it also has its great difficulties, as shown in the judicial statements quoted above. Difficulties that often arise include: What constitutes a "deposit"? Does the delivery of a part only of the documents suffice? Who made, or who has, the deposit? If, for instance, the documents are put in the hands of the wife of the mortgagor, to keep them as between her husband and the creditor, it would be questionable if this would be a deposit.[45] Also, the purpose or intention of the deposit is quite frequently contentious. Even where the act of deposit is proved, deposit itself is of equivocal significance; it is a rebuttable evidence of a contract to mortgage, and oral evidence is admissible to establish the purpose.[46] Such oral evidence to establish the existence and terms of the agreement to mortgage may be fraudulently distorted or even perjured. The purpose becomes even more difficult to ascertain where the deposit was not

[40] *Ex parte Haigh* (1805) 11 Ves, 403, vol. 32 E.R. 1143.
[41] *Norris v. Wilkinson*, 12 Ves. Hun. 192, (1805) vol. 33 E.R. 73 at 75
[42] *Ibid., at p. 76*
[43] *Sporle v. Whayman* (1855) vol. 34 E.R. 738 at 739.
[44] Sunnucks, above, at 132
[45] Megarry and Wade, above, at 546.
[46] *United Bank of Kuwait PLC v. Sahib,* n. 6 above, at 383.

made contemporaneously with the grant of the loan. As noted by the Master of the Rolls, Sir W. Grant:

> Where the deposit is made at the same time that the money is advanced, there is little to be supplied with reference to the nature of the agreement. It is obvious that the purpose of the deposit must be to secure the repayment of the money. The connection is not so direct between a debt antecedentally due and a subsequent deposit: nor is the inference so plain.[47]

The creation of security by mere deposit of documents thus carries with it great uncertainty and opens a wide room for fraud and disputes.

Section 4 of the Statute of Frauds which required some memorandum or note in writing was later repealed by the Law of Property Act 1925, and replaced with Section 40 of the latter Act, which also required "some memorandum or note thereof… in writing, and signed by the party to be charged" or by his duly authorized agent. This statute, however, recognizes equitable mortgage by mere deposit of title documents, for it provides, in Section 40 (2), that "This Section (i.e. Section 40) does not affect the law relating to part performance…"; and in Section 13, it provides that the Act is not to affect prejudicially the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land. The recognition and protection of security by deposit was also followed in England in other statutes, notably the Land Registration Act 1925 and the Land Charges Act 1972.

Section 66 of the Land Registration Act 1925 allowed the proprietor of any registered land to create a lien on the registered land by deposit of the land certificate, such lien to be equivalent to a lien created, in the case of unregistered land, by the deposit by a legal and beneficial owner of the registered estate of the documents of title. Also, the Land Charges Act 1972, Section 2 (4), excepted

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[47] *Norris v. Wilkinson*, 12 Ves. Hun. 192. (1805) vol. 33 ER 73 at 76.

any equitable charge secured by a deposit of documents relating to the legal estate affected, from general equitable charges which required registration under Class C (iii).

The Current Law in England

It is against the foregoing background that one must construe Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and its effect on the creation of security by deposit. Admittedly, the Law Commission on whose recommendation the Law of Property Act 1989, particularly Section 2, was enacted did not, in its report,[48] refer to the deposit of title documents by way of security, nor suggest that the practice created a problem that needed attention. However, the Commission report dwell extensively on the adverse effect of lack of writing,[49] which is an outstanding feature of and a major criticism against a mortgage by deposit of title documents. Also, it has been stated above that one of the rationales for saying that a deposit of title documents creates a security is the presumption that the act of deposit constitutes an agreement, or a contract, to create a mortgage. Though the Law Commission did not mention equitable mortgage by deposit of title documents in those exact words, the Commission clearly intended to include it in its proposals.

Paragraph 4.3 of the Commission's proposals states expressly that "all types of contract should be within the scope of this recommendation. Thus, contracts to grant… mortgages of land will be included." As a deposit of title document by way of security takes effect as an agreement to mortgage, in logic there is no reason why the creation of security by deposit of title deeds should have been excepted from the Commission's proposals.[50]

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[48] Law Com. No. 164: *Transfer of Land* (1987) H.M.S.O., London.

[49] Ibid., paragraphs 2.7 and 2.8. In the Commission's view, lack of writing results in confusion, leads to increased disputes and litigation. Writing, on the other hand, has "the value of the evidential function [which] cannot be doubted", and the evidential function assists in the prevention of fraud. Writing also has "cautionary" and "channeling" functions: See the report, paragraphs 2.9, 2.10, 2.11 and the authorities cited thereunder.

[50] Peter Gibson L.J., in *United Bank of Kuwait Plc. v Sahib,* above, at p. 382.

Also, part performance, the second essential part of the rationale for the creation of an equitable mortgage by deposit of title documents, cannot now apply, for it is inconsistent with the new philosophy of the 1989 Act. The philosophy can be deducible from the Law Commission report at paragraph 4.13, which says, *inter alia.*

> Inherent in the recommendation that contracts should be made in writing is the consequence that part performance would no longer have a role to play in contracts concerning land. Without writing there will be no contract for either party to perform.

It may be recalled that the idea that the mere deposit of title documents constitutes an act of part performance has met with objection on the ground that the normal rule is that part performance can only be relied upon if done by the plaintiff and not by the defendant, but here it is the defendant rather than the plaintiff who part performed (by making the deposit). Besides, for the doctrine of part performance to avail, the act ought to be such that *by its very nature* it is unequivocally referable to some such contract as is alleged.[51] The deposit of title documents has never been held to be unequivocally referable to a security as to merit the status of part performance.[52] As applied, part performance is, indeed, "a blunt instrument for doing justice[53]" and only succeeds in bringing uncertainty and confusion into the law.[54] It is therefore no surprise that section 40(2) of the Law of Property Act 1925 which recognized the doctrine of part performance as a basis of equitable mortgage by deposit of title documents is now expressly superseded by Section 2 of the 1989 Act.[55]

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[51] *McBride v. Sandland* (1918) 25 C.L.R. 69 at 78.
[52] Sykes, E.I. and Walker, S., *The Law of Securities* (5th ed., 1993), at pp. 150 – 151.
[53] Law Com. No. 164, above, at para. 1.9.
[54] *Ibid*; also at para 5.4.
[55] S.2 (8) of the Act.

Since it is clear from the report and proposals of the Law Commission, that the intention of the 1989 Act is to do away with deposit of title documents as security, it follows that the provisions of the Land Registration Act 1925 and the Land Charges Act 1972, and indeed all "earlier legislative references to rights or interests created by deposit of title deeds", though not particularly mentioned in the 1989 Act, "must now be read in the light of the Act of 1989".[56]

The case of *United Bank of Kuwait v. Sahib* has now removed the rigours that attended the method of mere deposit of documents to create a security. It has also brought much needed clarity to Section 2 of the 1989 Act. By falling back on the report and recommendations of the Law Commission, the court has been enabled to give a purposive interpretation to Section 2 of the 1989 Act. This is a welcome approach to statutory interpretation. It is now clear that a deposit of title documents with intention to create a security thereby does not suffice; not even if the deposit is accompanied with a note or memorandum in writing. What is required now is that the agreement itself must be in writing incorporating all the terms which the parties have expressly agreed, and has to be signed by both parties to the security transaction. From when the equitable mortgage by deposit of title documents came to an end, and the *substantive* question of the purpose and terms of the transaction has been solved (by being expressly written down), courts are no longer flooded with disputes regarding the *formal* question of the interpretation of what the parties have written down.

In England, therefore, no equitable mortgage by mere deposit of title deeds can be created as from the 1989 Act. Similarly, under the Mortgage and Property Law of Lagos State 2010, an equitable mortgage of a right of occupancy cannot be created by a mere deposit of the title deed or charge on a property except the deposit of title deed is accompanied by an agreement to create a legal mortgage in favour of the mortgagee/lender. Where the deposit of

[56] *United Bank of Kuwait PLC v. Sahib,* n. 6 above, at 382.

title deed is accompanied by an agreement to create a legal mortgage, and such a legal mortgage is not executed, the mortgagee may within thirty (30) days by an Originating Summons bring an action in court requiring the mortgagor to execute a legal mortgage in his favour.[57] While awaiting definite judicial pronouncement on Section 18 (1) of the Mortgage Law, there is no doubt that taking after Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 of England and the decisions thereon, the Mortgage Law and Property Law signals the *nunc demitis* in the creation of equitable mortgage by mere deposit of title deeds in Lagos State.

Conclusion

The Mortgage and Property Law, 2010, of Lagos State is no doubt innovative and developmental. It has brought further simplicity to the creation of mortgages. The Mortgage Law expressly declares the Conveyancing and Law of Property Act 1881 inapplicable to mortgage transactions in Lagos State.[58] The Mortgage Law has however remained understandably silent on its relationship with the Land Use Act 1978. It is clearly beyond doubt that the Law is subservient to the Land Use Act for two reasons. First, in the hierarchy of laws, the Act, being of the National Assembly, has primacy over the Law, which is of a State House of Assembly. Secondly, the Land Use Act has expressly stated that all other laws are subject to it. Section 48 of the Act provides:

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

[57] Section 18 (2).
[58] Section 68.

A mortgage under the Mortgage and Property Law of Lagos State is therefore still subject to the consent of the Governor under Sections 21 and 22 of the Land Use Act. This is so whether the mortgage is legal or equitable, except that the Governor's consent shall not be required for the creation of a legal mortgage over a right of occupancy in favour of a person in whose favour an equitable mortgage of the right of occupancy has already been created with the consent of the Governor.[59]

When the simplified and easily understandable mode of creating a mortgage under the Mortgage Law, one can safely say that with regard to the creation of mortgages, it can no longer be said that "no one, by the light of nature, ever understood an English mortgage of real estate".[60] With the passage of time, it is expected that the courts will infuse blood and give life to these statutory provisions.

[59] Section 22(a) of the Land Use Act. See generally, Essien, E.: *Law of Credit and Security in Nigeria*, 2nd edn., Uyo: Toplaw Publishments Ltd, 2012, pp. 168-m 176.

[60] Per Lord Macnaghten, in *Samuel v. jarrah Timber and wood Paving Corporation [*1904*]* AC 323 at 326 (HL).