Learning outcomes of this Unit

- Distinguish between the different forms of security.
- List the categories of real security in our law.
- Explain why real security is described as an accessory legal relationship.
- Know the following regarding pledge:
  - What this concept means
  - What requirements must be met regarding the object of the pledge
  - What requirements must be met regarding control
  - The rights and duties of the pledgee
Learning outcomes of this Unit (Continued....)

Know the following regarding mortgage:

- What this concept means
- The requirements that must be met regarding the object of mortgage
- The requirements that must be met for the registration thereof
- The distinction between the various categories of mortgages
- The rights of a mortgagee

Identify the conditions that are unenforceable in the case of a mortgage and pledge.

Explain how a pledge and mortgage can be terminated.
INTRODUCTION

Categories of security
- Personal / real security

Definitions

Personal security: creditor on basis performance due (principal debt), acquires creditor’s right as security for payment of principal debt.

Real security: creditor acquires limited real right as form of security against payment of principal debt.
REAL SECURITY

Debtor

Principal debt

Creditor (Bank)

Object/Thing

Limited real right
PERSONAL SECURITY

- Principal debt
- Personal right

Debtor

Creditor (Bank)
Categories of real security

- Pledge
- Mortgage
- Cession in securitatem debiti
- Security granted by operation of law
  - Tacit hypothecs of landlord and credit grantor
  - Judicial pledge
  - Statutory security rights
  - Liens (Retention)
GENERAL PRINCIPLES REGARDING REAL SECURITY

- terminates automatically
- against 3rd parties
- preferential claim
- principal debt and interest
- no entitlements of use and enjoyment
- but *pactum antichreseos*—agreement (may enjoy fruits instead of interest)
- form of security
PLEDGE

Definition

Object
- movable
- single object or collection eg flock of sheep
- incorporeal movable property eg shares in company (Britz v Sniegocki)
- fruit form part of object of pledge
Delivery

- exercise control continuously
- *Constitutum possessorium* not recognised
- if removed from control without permission, may claim back and continue to exercise control
Rights of pledgee (holder of pledge)

- Limited real right as security
- Preferential claim to proceeds of sale in execution
- Sequestration – preferential claim
- Enrichment claim for necessary expenses and useful expenses
- *Prior in tempore potior in iure*
Obligations of pledgee

- Care for property like reasonable man
- No right to use, alienate or enjoy
- Must return on termination
- Pledgor can ask security from pledge in case of neglect of property
- Compensation if damaged or destroyed
  - (intentional or negligent actions)
MORTGAGE

Definition

Object - movable / immovable

Requirements

Functions of mortgage bond

Information in a mortgage bond

Categories

- Kustingsbrief
- Covering bond
- Notarial bond

Rights of mortgagee
Unenforceable conditions

– NB Pactum commissorium

Ownership transfer if payment not in full

Graf v Beuchel 2003 (SCA)

– NB parate executie p 269

May sell without recourse to court

Bock v Duburooro (Pty) Ltd 2004 (SCA)

How parate executie is applied
Termination of pledge and mortgage

Self Study
CESSION IN SECURITATEM DEBITI

Leave out
Homework Activity

- Discuss the obligations of the pledgee towards the pledgor.
- Will attornment be a valid form of delivery to establish pledge? Motivate your answer.
- Briefly describe the following terms:
  - Pactum antichreseos
  - Pactum commissorium
  - Parate executie
- Indicate how pledge or mortgage may be terminated.