

Law of security devices note

Definition

The law of security devices is one of the set of laws, rules and principles formulated to regulate and faster the smooth running of business transactions; it governs the relation between creditors and debtors, regarding performance of obligations with a special focus on the credit system.

What is security device? Black's Law Dictionary defines it as follows;

Is a collateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor.

- ✚ M. Planiol "Security Contracts" as: "those contracts intended to protect creditors against the insolvency of their debtors.
- ✚ Generally, security is an undertaking (either personally or through property) to assure/guaranty the creditor that the debt will be paid or the obligation will be performed to the satisfaction of the creditor.
- ✚ It is an alternative means of securing payment or performance of the obligation in favor of the creditor

Advantages and disadvantages of security devices

- ✚ Provides protection of secured creditors from competition from other competing creditors by giving priority
- ✚ The lender can forcefully collect collaterals even without the help of court
- ✚ Secured credit decreases the engagement of the debtor in risky activities as the lender oversights activities done over or by the collateral
- ✚ Enable the debtor to have an access to credit.
- ✚ It offers financing opportunities **for high-risk debtors** who otherwise have no access to credit.

- ✚ It incentivizes the debtor to pay back the credit since the remedies for default given for the lender, in most cases, costs the borrower than the normal repayment of the debt voluntarily.
- ✚ Smoothening of transactions by securing the creditor's right to be paid or the obligation to be performed. Facilitating the loan system of the country thereby encourages doing a business in the country

Disadvantage

- Though security allows the debtors to have access to credit, it is also criticized that it restricts the debtor to get another credit using the same asset because of the priority of the first creditor over the latter secured rights.
- It may restrict to sell the object or to engage in risky business transactions
- It causes either in accessibility of credit at all or credit with high interest from unsecured creditors or latter secured creditors. Generally, it reduces the subsequent borrowing opportunity of the borrower
- Cost of the transaction
 - ✓ Information cost in investigating the available credits in the financial market and evaluating creditworthiness of the debtor.
 - ✓ Negotiation cost e.g. documentation cost
 - ✓ Filing/registration cost

Natures/features of Security devices

- ✚ Secondary, accessory/contingent contracts i.e. its existence is conditioned upon the valid existence of another right referred to as primary right.
- ✚ They are an accessory because;
 - No security devices/contracts unless there is a valid primary contractual agreement
 - The creditor can't proceed against the security unless there is a failure to perform by the original debtor
 - The security contract extinct as soon as the primary obligation performed

Types of securities

- ✚ **Personal security:** this is when the creditor's right is secured by a human person i.e. guarantor/surety

- ✚ **Real security:** this is when the right is secured by the property/thing, not by the person.
- Real securities again can be classified in to three;
 - Pledge:- when the right is secured by movable properties
 - Mortgage: - when the right is secured by immovable things.
Mortgage has another special security .i.e. antichresis
- Unlike pledge, there is neither dispossession of the thing or transfer of ownership from the debtor before debtor's failure to pay.

Secured Transaction in Movables (Pledge)

Which law governs pledge security?

- Before we proceed to deal with the concept of pledge, it is better to know under which body of law does the issue of pledge is regulated. So far, the pledge has been regulated by different scattered laws namely by the civil code, proclamation no. 97 /19978 (property mortgaged or pledged with bank) and 98/1998 (business mortgaged or pledged with bank) an.
- But currently, the Ethiopian Parliament come up with a single secured transaction law in movable properties i.e. **movable security right proclamation** no. 1147/2019.
- This proclamation clearly repealed the previous two proclamation (proc. No. 97 & 98) see art. 93 /1 & 2.
- The proclamation, however, is silent about the applicability of the civil code except stating that any laws contradictory to the proclamation has no effect under art. 93/3.
- So, one can argue that the civil code is applicable for secured transaction in movable goods so far as it is not inconsistent with the current proclamation.

Definition of pledge

The term 'pledge' is not defined directly under proclamation no. 1147/2019. But we can infer its definition by reading the definition of "security agreement" and "security right" provided under art. 2/44 & 2/43. Though it is not comprehensive one. It is, however, defined in the civil code under art. Art. 2825. It is defines as;

✚ **A contract of pledge is a contract whereby a debtor undertakes to deliver a thing, called pledge, to his creditor as security for performance of an obligation.**

Does this definition sound?

Elements of this definition;

- A contract. Obviously it must fulfill the validity requirements of contract
- A debtor (pledger) undertakes. But what about third parties who are pledged their property for account of debtor?
- To deliver the thing. Doesn't it require actual delivery? Actual delivery is not a requirement see art. 13/1 of the proc.
- To creditor. What about to third party custodian, i.e. other than the creditor?

Creation of security right over movable property (pledge)

- **"Security interest"** means a contingent interest of the secured creditor which can be exercised upon default of the debtor to return the debt.
- **Security right** is a property right in personal property created by **an agreement to** secure payment or performance of other obligation. Art. 2/44. **Is this definition sound? Is security right created only through agreement? What about by judicial and law?**

- Though the definition looks like this, security right can be created in three ways namely;**(sources of security right)**

- ✓ Consensual (parties' agreement) art. 4 ff
- ✓ Through court decision (Judicial lien) art. 2/30
- ✓ Through law (statutory lien) art.1/30. Example lien art. 2/ 23 of a proclamation to provide a warehouse receipt system (proc. No. 372/2003). Under this article, it is provided that the warehouse owner has a lien right which overrides the rights of secured creditor for the warehouse cost. Lien right has priority over security right created in other ways.

❖ So, security interest can be created by the debtor over a thing in favor of the creditor by either of the above ways. But, until it is attached, it is a mere contractual right that a creditor can't have a right over a specific collateral. Rather, over all properties.

- ✓ **2nd. Stage attachment i.e.** making the interest to be enforceable. It must be attached collaterally. The security interest will have attached and thus become enforceable when:

A. Parties conclude a security agreement that creates a security interest. A security agreement;

✚ Must be made in written, art 4/5 of the proclamation.

Security agreement is defined as "an agreement regardless of whether the parties denominated it as a security agreement, between a debtor and a secured creditor that provides for the creation of security right." art. 2/43 of the proc.

- Identification of parties. This shall include the identity of the pledger/grantor and pledgee (**identify parties**)
- Indication of what obligation the security secures. The obligation may be one or more, current or future, fixed

or fluctuating, and determined or determinable art. 5
(Identify the obligation)

- Indication of what property is to serve as a collateral art 4/c & 6/ **(identify the collateral)**

- ✓ Collateral can be categorized into two namely tangible and intangible
- ✓ Tangible/corporeal collateral includes consumer goods, negotiable instruments, farm product, inventory and equipment art. 2/10
- ✓ Intangible/incorporeal collateral may include deposit accounts, IP rights, receivables and others art. 2/22

B. Debtor has ownership right or at least right to encumber the thing. The grantor /pledger shall have an ownership right or at least he must have right to encumber it. Art. 4 of the proc. **(being owner/ has right to transfer)**

C. The secured creditor has given some value (loan) to the debtor. Maximum amount of the debt guaranteed shall be specified art. 6/3 of the proc. & art.2828/1 & 1714 Of civil code. **(value given by creditor)**

✚ Transfer of possession of the thing. Dispossession is encouraged though it is not a validity requirement. Art. 2832 of the code & art. 13/1, 66 & 67 ff of the proc.

❖ Upon the fulfillment of these requirements, a security interest will be created in favor of the creditor i.e. the creditor will get an enforceable security interest, "Attachment".

Scope of security interest

- ✓ The security interest of the creditor is primarily lies on the thing given as a collateral.

- ✓ But, it may also extend to its proceeds art. 7. Proceed, here, refers to whatever received from the collateral including from selling, licensing, insurance, fruits, claims arising from defects, damage or loss of the collateral and also proceeds of proceed. Art. 2/ 36
- ✓ It may be created over existing goods, future goods and hire-purchased goods art. 4/2 & 3. When a security interest is created over “after-acquisition property” i.e. over a property acquired after the conclusion of the security agreement, we call it as “Purchase-money secured right”.

Rights and Duties of the parties to the contract of pledge

Rights and duties of pledger

Rights of the pledger

- To retain ownership right over the thing pledged art. 54 of the proc. & 2834 of the code
- Right to take back the thing pledged upon discharging the obligation art. 2837 of the code and art. 67/1 of the proc.

Duties of Pledger

- Duty to deliver the thing except few exceptions in which the debtor possesses the thing pledged Art. 2832 of the code & art. 13/1, 66 & 67 ff of the proc.
- Duty to cover cost of preservation. Art. 68 of the proc.

Rights and Duties of the Pledgee

Rights of the pledgee

- Right to possess the pledged property. Art. 2832 of the code & art. 13/1, 66 & 67 ff of the proc.
- The right to collect fruit. Art. 7 of the proclamation

- Right to be paid first (Priority Right) art. Art. 45 ff of the proc.

Duties of the Pledgee

- The duty to preserve the thing art. 66 of the proc.
- The duty to return the thing upon extinction of the secured obligation art. 67/1 of the proc.

Perfection of security interest in personal property

- Normally, the mere existence of security agreement alone is not sufficient to be a secured creditor, especially when there are many secured creditors by the same thing. So, one must perfect the interest to be a secured creditor.
- Literally, perfection means excluding other creditors from creating security interest over the property given as a security.
- It is the process of "putting the world on notice" of the security interest in order to make the secured parties' rights fully enforceable.
- **So, what steps shall the creditor goes to perfect his right?** There are four means of perfecting a security interest namely registration/ filing, possession, and control.

A. Registration/filing system art. 13/1. The prior registered becomes the better secured creditor. Basically, this modality of perfection applied for tangible movable properties. This is based on the slogan " first in time, first in right"

- The "first in time, the first in right" has an exception. In case of hiring-purchase or what we call acquisition right, the secured party is not the one who files first. Rather, the one who gives a loan to the borrower in the form of acquisition/purchase-price provided some requirements fulfilled see art. 56 & 57.

For example, if a secured part secures the debt with all present and future-acquired properties of the debtor and assume the debtor acquires after-acquisition property through purchase-price agreement, the former secured creditor has no priority right over the latter property which is acquired through purchase price agreement. I.e. a last in time, first in right.

B. Possession art. 13/2.

- This modalities of perfection applies for movable intangible properties particularly for
 - ✓ **negotiable instruments, document to title to goods, transferable certificated securities.**
- Basically, when we look the nature of these properties, we can recognize that the creditor shall possess them to secure his right. Here, **possession is either an actual/constructive possession art. .**
- Once, a negotiable document perfected, the interest over goods represented by such good is also perfected by default. Art. 18/1.
- Why don't we perfect creditor's interest over such properties through filing?

C. Control art. 13/3, 17 & art. 19. This is applicable for depositing account and electronic securities.

- **In case of deposit account,**
- ✓ Through control agreement. The secured creditor controls the account by reaching an agreement with the grantor and financial institution that the financial institution should follow the orders of the creditor for whatever the transaction is. Third party creditors that do not maintain bank accounts could

effectively control a deposit account of the debtor by requiring a bank to establish a specific collateral bank account to which all proceeds shall be deposited and the withdrawals controlled by that secured party. In other words, the bank that maintains the debtor's collateral bank account would be bound by the instructions of the secured party. Here, the account is under the control of the creditor indirectly as every activities in that account is upon creditor's instruction. (Art. 2/9/a).

- ✓ Through creation of security interest in favor of financial institutions. Art. 17/2. How? What does it mean?
- ✓ Through becoming account holder of the deposit by secured creditor art. 13/3
- Similarly, in case of **electronic securities**, the secured creditor controls the security by
 - ✓ Entering an agreement with the grantor and issuer that the issuer must follow the instruction given by the secured creditor for whatever activities. So, it is under the control of the secured creditor art. 2/9 (b).
 - ✓ By entering or noting the secured creditor's name or his right in the security's recording of the issues art. 19/1

D. Automatic perfection.

- ✓ **Perfection of Proceeds art. 7** i.e. there is continuity of perfection.
- ✓ **Perfection of Purchase-money.** This is when there is purchase-money security interest/ acquisition-property right. In this case, the interest is perfected automatically

upon the creation of the interest without further steps
art. 56.

Priority of security right

Competing parties		Creditor who shall acquire priority?
Secured vs unsecured creditor		Secured creditors art. 45/1.
Perfectured vs unperfected creditors		Perfectured creditor
Perfectured vs perfectured secured party		A creditor who is • first in registering the interest 46/1 • possesses the collateral or • control the collateral
Secured creditor vs buyers, licensee, lease of the collateral		Secured creditors art. 54. Look exceptions.
Secured creditor before commingling of goods vs. secured creditor after commingling of goods		Secured creditor before commingling of goods art. 52/1.
Secured creditor before commingling of goods vs. secured creditor before commingling of goods		Proportionate to their value before commingling art. 52/2.
Acquisition right vs non-acquisition	• IP rights • Equipment • Consumer goods	Acquisition creditor provided he is • In possession of the

right creditors		collateral art. 56/1(a) or Registered within seven days from the date of acquisition 56/1(b)
	Inventory	- In possession of the collateral art. 56/2 (b) or - Registered before the grantor obtains possession of the property and - Notice of the existence of acquisition right is given for no-acquisition creditor 56/2 (c)
Acquisition right vs acquisition right		An acquisition creditor who is first in registering

		the interest 46/1 • possesses the collateral or • control the collateral art. 57
Secured creditor vs. transferee	Negotiable instruments	Transferee provided he • is holder in due course • took the possession with value without the knowledge that the sale violates the creditor's right art. 61/2
Secured by registration vs secured creditor by possession	Negotiable instruments	Secured by possession art. 61/1
Unperfected Vs unperfected secured creditor		Our law is silent. Why? May be date of creation?
Perfected vs perfected	Deposit account	Perfected through becoming account holder has priority over other methods of perfection art.

		62/1
Perfected financial institution creditor vs others perfected creditors	Deposit account	Perfected financial institution creditor Exception: being an account holder art. 62/2
Perfected by control agreement Vs. other methods	Deposit account	Perfected in control agreement art. 62/3 Exception: - the creditor is financial institution or - the creditor is an account holder
Perfected by concluding control agreement vs Perfected in concluding control agreement	Deposit account	The first in concluding the agreement, the first in right art. 62/4
Set off right of financial institution vs secured creditor	Deposit account	Set off right of financial institution Exception: the secured creditor is account holder art. 62/5
Transferee vs secured creditor	Deposit account	Transferee provided he has no knowledge the transfer violates

		the rights of the secured party art. 62/6
Transferee vs secured creditor	Money	Transferee provided he has no knowledge the transfer violates the rights of the secured party art. 63
Secured by possession of negotiable document vs secured by other methods	Negotiable document	Secured by possession of negotiable document art. 64/1
Transferee by possessing the document vs secured creditors	Negotiable document	Transferee provided he has no knowledge the transfer violates the rights of the secured party art. 64/2
Secured by possession vs secured by registration	Certificate d Securities	Secured by possession art. 65/1

Secured by notation/registration on the name of the secured creditor in the record book vs secured by other methods	Electronic security	Secured by notation/registration the name of the secured creditor in the record book art. 65/2
Secured by control agreement vs secured by registration	Electronic security	Secured by control agreement art. 65/3
Perfected by concluding control agreement vs Perfected in concluding control agreement	Electronic security	The first in concluding the agreement, the first in right art. 65/4
Transferee by possessing the security vs secured creditors	Electronic security and Certificated Securities	Transferee provided he has no knowledge the transfer violates the rights of the secured party art. 65/5

Enforcement of secured right

Remedies after Default

A. Repossession of the collateral

This is a process of repossessing the collateral by the creditor without the help of judicial rulings. Repossession of the collateral can be made in two scenarios under Ethiopian personal property secured transaction. i.e.

1. When there was an agreement with the debtor in the security agreement to do so,
2. When the debtor or a person who possesses the collateral failed to object during the attempt of repossessing art. 81.

B. Foreclosure sale with ten day notice art. 82 & 83. The foreclosure sale is required to be a reasonable commercially.

C. Through Judicial relief art. 77

Mortgage

Definition:

- Accordingly, in Black's Law Dictionary;

"Mortgage is **a conveyance (delivery) of title** to property that is given as security for the payment of debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms."

Two elements of this definition;

- To deliver the title to the creditor, it is the title to be delivered not the thing itself.
- Mortgage extinguishes upon performance

- Mr. Marcel Planiol defined mortgage as;

“A real security which without presently dispossessing the owner of the property...., permits the creditor at the due date to take it over and have it sold, in whosever hand it is found and to get paid from the proceeds by preference to the other creditors.”

From this definition we can infer the following elements;

- Mortgage is a **real security** i.e. the collateral is given using a property
- No **dispossession** of the owner, but **dispossession of title** to the thing
- Enable the creditor to enforce his right through selling or taking the thing
- Give the creditor the priority right over other creditors

What properties can be given as a mortgage?

- ✚ Principally, the subject of mortgage is immovable goods including buildings, houses and others.
- ✚ It is only current immovable properties; future properties can't be given as a collateral art.3050/3
- ✚ Can we use special movable goods as a mortgage?
 - ✓ Some may argue by referring art. 3047/2 of the civil code which declares that movable goods can be used as a mortgage provided that special laws provide so.
 - ✓ For example, under art. 171 ff of the commercial code it is provided that business, which is an incorporeal movable property (art. 124 of the comm. Code), can be used as a mortgage to get loan from lenders.
 - ✓ But the movable property secured transaction movable proc. 1147, under article 2/27, incorporate business as a movable and considered as a thing which is subject to pledge.
 - ✓ So, is there contradiction between the two laws?

Basic features of mortgage

1. **It is a real right i.e.** the right created in favor of the creditor is attached to the property, not to anybody.
2. Shall be created over immovable
3. Is an accessory to the principal obligation art. 3109 & 3110.
4. Indivisibility
 - The repayment of parts of the loan doesn't result in the proportionate release of the mortgage art. 3055/3
 - Mortgage is indivisible though the property is divisible/divided like division among coheirs. Each divided part guarantees the whole value of the mortgage. Art. 3080

Advantages of mortgage in relation with other securities

- I. Relatively certain, unlike personal security, as it entitles the creditor to claim his right over the property whoever holds the thing
- II. Doesn't cause dispossession of the debtor. This makes the debtor to use the property with no restriction see arts. 3059, 3081, 3084, 3088

Sources of mortgage

1. Law. For example, an owner who sells his immovable is entitled to legal mortgage on the immovable he has sold as far as he is not paid the full price of the property Art. 3042.
2. Contracts. Contractual mortgage shall fulfill the essential conditions for validity, discussed below.
3. Judicial decision, art. 3044. A court or arbitration tribunal may award judgement creditor a mortgage right over judgement debtor's property.

Creation of mortgage

The following validity requirements shall be met to create mortgage right;

- 1) Shall be in written Art. 3045 (1)
- 2) Registration art. 3052. Mortgage starts to be effective only as of the date of registration. Registration is effective for ten years. Art. 3058
- 3) The mortgagor shall have full owner of the thing, saving, agency, arts. 3049 and 3050.

- 4) Specification of the immovable art. 3047
- 5) Specification of the maximum amount of the claim secured by the mortgage Art. 3045 (2)
 - ✓ Inform other creditors the amount of the right secured over the thing
 - ✓ Enables the debtor to use the thing for additional mortgage

Rights of parties in mortgage contract

➤ Rights of mortgagee

- ✚ **Priority/preference right** from other creditors art. 3076
- ✚ The 1st claim which the creditor can demand to be paid in priority to other creditors is the **principal claim** (Art 3076), 2nd **contractual interest** to be calculated on the principal claim (Art 3077(1), however, since interest is accessory claim to principal claim, the right of other creditors should not be prejudiced by the priority of secured creditor.
- ✚ Hence, the law **limits preferential payment of interest to the amount of interest calculated for the time not exceeding two years** (Art 3077)(2) and (3)
- ✚ As a result, if there is an interest that has been calculated in excess of 2 years' time, **then as regards the payment of such interests the creditor will assume the position of ordinary creditor.**
- ✚ 3rd - **Necessary expenses** incurred for the preservation of the immovable and **insurance premiums**. (Art 3078).
- ✚ If the immovable is insured, then creditor's security right extends to the **compensation paid in case the immovable lost because of the materialization of insured risk** (Art 3069 of ECC and Art 684 of E Commercial code)
- ✚ Another aspect of priority right is the property to which the priority right applies/extends.
- ✚ 1st - The priority right of the creditor applies to the **immovable itself**. The immovable obviously includes **the intrinsic elements** from w/c

the immovable is made some objects, which may be fixed to the immovable **as accessories**. However, the mortgage may transfer some of the intrinsic elements or accessories to 3rd parties separately from the immovable itself (Art 3065).

- ✚ In this case the creditor **cannot follow the intrinsic elements or the accessories in the hands of 3rd party**.
- ✚ If the debtor cannot provide such property, the creditor has the right to demand **immediate performance of the parts of the principal claim** which turn out to be unsecured because of the reduction in the value of the mortgaged immovable which resulted from the transfer of intrinsic elements or accessories (Read Art 3065 and 3073-3075).
- ✚ On top of the immovable, its intrinsic elements and accessories, the law considers the priority right as **extending to improvements** that may be made to the mortgage e.g building additional rooms on mortgaged property (Art 3066).
- ✚ Another property to which the security right extends is **the rent which may be collected from the mortgaged immovable** (Art 3068).
- ✚ This is applicable, **once the due date of the secured obligation arrives, the debtor fails to pay it to the creditor, and any rent collected after the attachment of the immovable** forms a part of the property to which the property extends and, hence the creditor will have priority right on such rents too.

However, when there is more than one mortgage over the same immovables, their priority is determined based on date of registration. Art 3081/1

If there are claims registered on the same date, their right shall be settled proportionately. Art. 3082

✚ **Right of pursuit** art. 3059/2, a secured creditor's right follows the property and thus, he can reclaim even from the hands of buyers of the asset.

✚ **Right to participate equally with other unsecured creditors over other properties** of mortgagor provided the mortgage property lost. Art. 3059/3 and 3089

Rights of mortgagor

✚ **Right to retain ownership right and possession. So, mortgagor can** dispose of the thing, to alienate it, and to grant new rights of mortgage. Refer art. 3084 & 3088

The place of 3rd parties in the mortgage relation

Here, the question is that what is the fate of the 3rd party who acquires rights in rem (ownership, servitude, usufruct etc.) subsequent to the registration of mortgage or the 3rd party who mortgages his property for the debt of another person?

1st - with regards to the buyer of mortgaged immovable, it is the duty of this 3rd party before entering in to contract of sale, to check what rights have been already created and registered on the immovable.

The legal remedies for such 3rd party stipulated under Art 3090, 3091, 3093, 3094, 3085 and **3097**.

- **Remedy 1 :-** As per Art 3090- The 3rd party assumes the position of the **guarantor and then makes use of any rights or defenses available for a guarantor.**
- Art 3090 refers Art 1920 and the ffg of the C. code i.e defenses for the guarantor
- Defenses that can be raised by the buyer
- 1. If the primary obligation is invalid owing to the incapacity or mistake on the part of the debtor (Art 1923) and where
- 2. Primary obligation has been extinguished for what so ever reason- Art 1926(1)
- **3.** Primary obligation has been extinguished through substituted performance (Art 1927)
- 4. The primary obligation has been varied or date of its payment has been extended (Art 1928).

- Moreover, the 3rd party buyer can demand the mortgagee to proceed against other assets of the debtor if he fulfills the following pre-conditions cumulatively,
- a) He has to raise this defense prior to the debtors declaration of bankruptcy and he is expected to show other assets of the debtors w/c are free from any litigation and which are possible to be attached (Art 1936(2))
- b) He has to advance sufficient money to proceed against the assets or properties of the debtor (Art 1936(1)).
- c) The 3rd party demand also the mortgagee to proceed against the debtor within 6 weeks where the primary obligation has fallen due (Art 1938)
- Then, if the creditor fails to proceed against the indicated assets or against the debtor himself as indicated above, it seems possible that the 3rd party can invoke- Art 1937 and 1938(2) to relive himself of an obligation to surrender the immovable to the secured creditor mortgagee.
- Generally, the law consider the buyer of immovable as a guarantor who can raise all possible defenses and defend himself from action brought by the creditor who claims to have security right on the immovable.
- A very serious challenge against this protection of the 3rd party buyer is that it changes the real right of the creditor to the personal right as the creditor is going to face all the defenses.
- **2nd Remedy Art 3093**
- Here the idea is that if the 3rd part cannot avail himself of Art 3090 then the creditor (mortgagee) has the right to follow the property in the hands of 3rd party.
- -Assuming that the immovable has been attached and sold in the hands of 3rd party buyer, the 3rd party has the right to claim

compensation from the proceeds of the sale, for the improvements that he has made on the immovable.

- He also a right to become the owner of fruits that he has collected of the immovable in his hands (Art 3093).
- Moreover, the 3rd party is not liable for any loss or deterioration of the immovable unless the loss is because of his own fault or negligence and unless the loss occurs after he has been informed that a proceeding has been instated for the attachment of the immovable.
- The other possible remedy of the 3rd party is the right to bring action for warranty against the debtor. Hence, this is a right to demand security from the debtor that the 3rd party will not be dispossessed of the immovable.
- If the 3rd party is dispossessed, he has the right to be subrogate to the right of creditor (Art 395 and 3097)
- The next point at issue is the position of 3rd party mortgager. The law refers to such 3rd party as guarantor under art 3105-3108.
- Basically this 3rd party is not liable for the payment of primary debt. Hence, the liability of such one party should be limited.
- Accordingly, the law provides that the maximum liability of the guarantor (3rd party mortgager) is limited to immovable that he has given as security. Art 3105.
- Moreover, the 3rd party mortgager can avail him of all the defenses/remedies that we have stated above for any 3rd party who acquires the immovable mortgaged from the debtor (Art 3107).

Extinction of mortgage

- In principle, as its existence and effectiveness should be evidenced by registration, the extinction of mortgage also should be evidenced by cancellation of the registration.(3109,3110)
- Cancellation of the registration is the main proof of extinction of mortgage – Art 3109. Cancellation may be sought from the court if the

principal claim is extinguished or settled for one or the other reason (see Art.3110).

- Another important ground for cancellation is where the creditor renounces his right of mortgage as provided under Arts. 3110 (b) and 3112 (1)
- But, note that the renunciation of the mortgage doesn't amount to renunciation of the principal claim since the mortgage is simply to secure the payment of the principal claim [see Art. 3112 (2)].
- Another important ground for cancellation is when the creditor makes the subrogation impossible.
- Where the mortgager is not the debtor himself but third party on behalf of the debtor, such third party mortgagor has the right to be subrogated to the right of the creditor as can be understood from Arts. 3106 cumulative Arts. 3095 & 3097.

Antichresis

Definition:

As it is defined under article 3117 of the code, it is a contract whereby the debtor undertakes to deliver an immovable to his creditor as a security for the performance of his obligation.

Definitional elements;

- Is a contract, the source of antichresis is always contractual agreement between debtor and creditor,
- The property shall be immovable like that of mortgage
- The agreement is to secure the debt/obligation by real property
- The property shall be delivered to the creditor, there is dispossession of the property from the debtor

Mortgage Vs. antichresis

- ❖ Unlike mortgage, there is transfer of property to the creditor,
- ❖ The source of antichresis is only contract, unlike mortgage art. 3119
- ❖ No interest for the claim as creditor can use the property art. 3124/2

- Other rules of anticheresis are the same with mortgage relations art. 3118.