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THE LIE OF THE LAND: MORTGAGE LAW AS LEGAL FICTION

Gary Watt[*]

INTRODUCTION

The English mortgage is a work of fiction. It is a lie. This was most apparent in the days of the classic mortgage by conveyance and reconveyance of the fee simple, for then the mortgage deed was 'one long *suppressio veri* and *suggestio falsi*'.[1] Maitland attributed the falsehood to the 'action of equity', but the mortgage deed was inherently dishonest, for it pretended to convey title when the parties merely intended to create security. Equity tried to give effect to the true substance of the arrangement and was forced to resort to the fiction of giving back to the mortgagor a beneficial interest in the land, the so-called 'equity of redemption', when in fact equity considered the mortgagor to continue to be the true owner of the land despite the mortgage. Equity did not make a liar of the legal deed; it was the other way round.

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[1] F Maitland, *Equity* (1909), revised 2nd edn (edited by Brunyate) (Cambridge, CUP, 1936) 182.

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The Law of Property Act 1925 abolished the mortgage by conveyance and reconveyance of the fee simple, but even then the lie refused to die. We will see that the dishonesty inherent in the classic form of mortgage is perpetuated in the very words by which the statute describes the modern charge by way of legal mortgage. The truth is that 'mortgages have always pretended to a greater or less degree to be something which they are not'.[2] The task of this chapter is to identify the nature of the pretence and to uncover the underlying truth of the English mortgage— which is that the mortgage is today, and was in the days of the classic mortgage by conveyance and reconveyance, a hypothec. We will see that the most persistent fictions are the notion that the mortgagee has a legal estate in the mortgaged land (fee simple or lease, as the case may be) and that the mortgagor's interest in the mortgaged land is merely an 'equity of redemption'.

This chapter agrees with F H Lawson that '[n]othing would be lost if the notion that the mortgagee has an interest in the mortgaged property were entirely given up and the existence of the equity of redemption entirely disregarded'.[3] Others have argued that the doctrine that prevents 'clogs on the equity of redemption' is essential to protect mortgagors,[4] but nowadays mortgagors are protected by common law[5] and statutory[6] rules in ways they were not when the fiction of the equity of

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[2] A W B Simpson, *An Introduction to the History of the Land Law* (Oxford, OUP, 1961) 225.

[3] F H Lawson, *Introduction to the Law of Property* (Oxford, Clarendon Press, 1958) 182; F H Lawson and B Rudden, *The Law of Property* (Oxford, Clarendon Press, 2002) 199.

[4] M G Shanker, 'Will Mortgage Law Survive? A Commentary and Critique on Mortgage Law's Birth, Long Life, and Current Proposals for Its Demise' (2003) 54 *Case W Res L Rev* 69.

[5] Such as the rules against restraint of trade (*Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 HL).

redemption was invented. This is not to pretend that property law can operate without fictions, only that fictions should be abandoned when their efforts to create harmony in the law can be shown to produce the opposite effect. This chapter will demonstrate that the fictions entrenched within our mortgage law have not only rendered it internally discordant, but have also created barriers to harmony with other legal systems, including Civilian, Islamic and Torrens systems.

A broader but no less significant aim of this chapter is to examine the storytelling processes by which fictions in property law at times inform and at other times obscure the science of the law. Property law, like all law, is a work of science fiction, and as we seek to comprehend the science, we will do well to appreciate the fiction. Admittedly, the term 'legal fiction' was traditionally applied in a narrow way to describe facts which the courts knew or believed to be false but deemed to be real—such as the fiction of 'lost modern grant'. Here, fiction is used in a wider sense, to include judicial rhetoric which deliberately or conveniently disguises the truth.

An appreciation of judicial storytelling may be particularly useful in elucidating equity's contribution to the story of the English mortgage, for, as Professor Thompson has noted, it is a subject that 'prompts rhetorical flourishes'.[7] Jeremy Bentham, the pre-eminent legal scientist of the English Enlightenment, understood well the conflict between stories and science. Ogden identifies Bentham's fearful reaction to ghost stories, which he never outgrew, as one motive for Bentham's

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[6] For example, Consumer Credit Act (1974) ss 137–9; Administration of Justice Act (1970) s 36; Administration of Justice Act (1973) s 8(3).

[7] M P Thompson, 'Do We Really Need Clogs?' [2001] *Conv* 502, 515.

drive to banish fictions in favour of science.[8] Nowadays we might be more fearful of a world of science devoid of stories, but Bentham's call to abandon unreasonable prejudices against usury applies as well to the present call to abandon the peculiar fiction of the equity of redemption:

> 'If our ancestors have been all along under a mistake, how came they to have fallen into it?' is a question that naturally presents itself… in matters of law more especially, such is the dominion of authority over our minds, and such the prejudice it creates in favour of whatever institution it has taken under its wing, that, after all manner of reasons that can be thought of, in favour of the institution, have been shown to be insufficient, we still cannot forbear looking to some unassignable and latent reason for its efficient cause. But if, instead of any such reason, we can find a cause for it in some notion, of the erroneousness of which we are already satisfied, then at last we are content to give it up without further struggle; and then, and not till then, our satisfaction is complete.[9]

PROPERTY LAW AS FICTION

Property is a construct. Things may be real enough, but the idea of property rights in and over things is necessarily distinct from material fact—realty is not the same thing as reality. This is nowhere more evident than in the property law system of England and Wales, where, despite popular perception, it is theoretically impossible for any citizen to be an absolute owner of real property. The best that can be hoped for is to be what Maitland called an 'unqualified tenant in fee simple'.[10] The land register

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[8] C K Ogden, *Bentham's Theory of Fictions* (London, Kegan Paul, 1932).

[9] J Bentham, *Defence of Usury* (1787) Letter X.

[10] Maitland, note 1 above, 182.

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adds another layer of abstraction. Even if it were a true mirror of title, it would only reflect a constructed reality; but we know that in England and Wales the mirror is distorted or cracked by 'overriding interests'.[11]

The fact that property law is an artificial construct usually lies submerged within legal language, but occasionally it rises to the surface. Concepts such as 'constructive notice' and 'constructive trust' play a crucial role in working out the most fundamental dilemma of land allocation, the choice between the innocent residential occupier and the innocent third-party purchaser, but the word 'constructive' concedes that the dilemma cannot, as a matter of fact, be resolved by bright-line rules. Sir Robert Megarry identified the storytelling process intrinsic to the word:

> 'Constructive' is, of course, an unhappy word in the law… 'Constructive' seems to mean 'It isn't, but has to be treated as if it were', and the less of this there is in the law, the better.[12]

No doubt the best system of property law would be the one that most closely reflected factual reality, but it would be a naïve and hopeless (not to mention soulless) project to seek to dispel all abstractions from property law. What may be attempted is to identify the points at which coherent constructs of property law, what we might call the science of property law, give way to less coherent, even intuitive, fictions. It must then be determined on a case-by-case, or story-by-story, basis whether the fiction serves any useful purpose. We might retain an apparently useless fiction if, in a harmless way, it adds to the elegance of the law, but a fiction should be removed if it

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[11] Land Registration Act (2002) Schedule 3, para 2.

[12] *Fiduciary Duties (Special Lectures of the Law Society of Upper Canada 1990)* (Ontario, De Boo, 1991) 1, 5.

obstructs the harmonious development of the law. 'Have nothing in your houses that you do not know to be useful, or believe to be beautiful' was William Morris' 'golden rule',[13] and it applies as well to the house of law. Unchecked, fictions tend to breed fictions, and legal science is then in danger of being overrun by illegitimate progeny. 'Legal fictions have their place, but this would be legal fairyland'.[14]

The idea of the "constructive trustee" provides an example of how one fiction may produce another. If an express trustee is a true trustee, a constructive trustee is one step removed from the truth. Yet despite the fiction already inherent in the notion of the 'constructive' trustee, strangers wrongfully interfering with trusts have been held personally liability in equity 'as if' they are constructive trustees;[15] thus the fiction of the constructive trust is overlaid with a further layer of make-believe. In the following section we will see that mortgage law supplies striking illustrations of the same phenomenon.

THE MORTGAGE FICTION

Lord Macnaghten alleged that 'no one, I am sure, by the light of nature ever understood an English mortgage of real estate'.[16] He was right. To understand the English mortgage by conveyance and reconveyance of the fee simple, one has to appreciate that it is unnatural. Like a sphinx, it is a *mischwesen*; a confusion of things. At one level the confusion is caused by the discrepancy between the mortgage at law

[13] William Morris, *Hopes and Fears for Art* (1882).

[14] *Tower Hamlets v Barrett* [2005] EWCA Civ 923, [68] (Neuberger J).

[15] *Selangor United Rubber Estates Ltd v Cradock (a Bankrupt) (No 3)* [1968] 1 WLR 1555, 1582.

[16] *Samuel v Jarrah Timber and Wood Paving* [1904] AC 323, 326.

and the mortgage in equity, but the confusion goes deeper than this. Whereas a *mischwesen* is a confusion of natural things, the classic English mortgage was a confusion of unnatural things, for it was unnatural in both legal form and equitable substance. The legal form pretended to be a conveyance to the mortgagee of the mortgagor's fee simple estate, and the equitable substance pretended to effect an immediate reconveyance to the mortgagor of an interest or estate known as the 'equity of redemption'. The reality, as we will see in the next section, is that the classic English mortgage was a transaction under which the borrower retained ownership with possession, and the lender obtained mere security. In short, the English mortgage pretended to be a pledge or gage of land when in truth it was=a hypothecary arrangement.

It is informative to consider how the story began. It is no easy task, for the story of English mortgage law is like many an old book: its first few pages have come loose and gone missing. G Wood Hill once observed:

> [I]n the course of time, and no one seems to know exactly how it came about, or when it came about exactly, but it did come about … a Court of Equity interfered and exercised its jurisdiction to relieve the mortgagor, from the consequences of his not having tendered the money on the prescribed day… Notwithstanding that he had lost his right, at law, to redeem the property, it was held that he had, in equity, the right so to do, and that was called his 'equity of redemption'.[17]

Our search for the earliest origins of the English idea of mortgage takes us to the Old Testament. John Joseph Powell noted in *A Treatise on the Law of Mortgages*

[17] G Wood Hill, *Lectures on the Law of Real Property in England*, (London, C&E Layton, 1898) 86.

that 'notions of mortgaging and redemption are, by some, thought to have originated with the Jews'.[18] The law of the ancient Israelites required debts and mortgages to be cancelled on the seventh year,[19] and the Levitical law enlarged this obligation by requiring all alienated land to be restored to its original owner in the year following seven times seven years (the 'year of Jubilee').[20]

However, whereas it is plausible that the Christian doctrine of redemption, derived from the Judaic concept, might have created an image with great appeal to the clerical mind of the mediaeval Chancellor, it is doubtful that the Israelite model would have appealed directly. In any case, there is no doctrinal correspondence between the classic English mortgage and the mortgage of the ancient Israelite, for the latter was a species of *vivum vadium* under which the borrower remained in possession of the land and 'instead of signing a mortgage on his property, farmed the property himself to gradually work off the indebtedness',[21] whereas the form of English mortgage, when Powell was writing, was closer in nature to a *mortuum vadium* under which, in the eyes of the law, the land could only be redeemed by repayment of the entire debt at the due date.

Powell, perhaps sensible to this discrepancy, identified Roman law as the more likely inspiration for the classic form of English mortgage.[22] Roman law is a natural candidate, given Chancery's general openness to the Romano-Christian jurisprudence

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[18] J J Powell, *A Treatise on the Law of Mortgages* (1785) 1.

[19] Deuteronomy 15:7–18.

[20] Leviticus 25:8–55. See, generally, R Westbrook, *Property and the Family in Biblical Law* (Sheffield: Journal for the Study of the Old Testament, Supplemental Series No.113, 1991).

[21] R North, *Sociology of the Biblical Jubilee* (Rome, Pontifical Biblical Institute, 1954).

[22] Powell, note 18 above, 2.

of mainland Europe. Thus Chancery's refusal to recognise irremediable mortgages appears to echo the Emperor Constantine's statute against *pactum commissorium* in the context of pledge, *pactum commissorium* being any contractual agreement by which the pledgee would keep the security in the event of the pledgor's default. The statutory prohibition, which was subsequently incorporated in Justinian's Code and is still retained in some form in every modern Civilian legal system, can be translated thus:

> Since amongst other harmful practices the severity of the *lex commissorium* in pledges is on the increase, it has been decided to invalidate it and abolish all memory of it for the future. If therefore anyone is oppressed by such a contract, he shall find relief by this decree, which annuls such provisions past and present and proscribes them in future. For we decree that creditors shall give up the thing pledged and recover what they have given.[23]

There is also some correspondence between the English mortgage by conveyance and reconveyance of Powell's day—and in particular the liability of a mortgagee in possession to account on the basis of wilful default—and a species of *actio praescriptis verbis* described in Justinian's Code:

> If your parents sold a tract of land under the condition that if they themselves, or their heirs, should indefinitely, or within a designated time, tender to the purchaser the price of the property he would restore it; and if you are ready to comply with the above-mentioned condition, and the heir of the purchaser refuses to fulfill the contract, the *Actio praescriptis verbis,* or the action on sale, shall be granted you; and an account shall be rendered you of the amount of the crops taken from the land

[23] Just Cod lib 8 tit 34.3 AD 326. This translation is taken from *Graf v Buechel* 2000 (4) SA 378 (Supreme Court of Appeal of South Africa) [9]. I am grateful to Professor Gretton for bringing this provision of the *Codex* to my attention.

> which have come into the hands of your adversary, after the price was tendered in compliance with the terms of the agreement.[24]

So much for possible biblical or classical inspiration for the idea of the equity of redemption; the next challenge is to identify English equity’s doctrinal explanation for the idea. It is no straightforward task. Lord Bramwell observed that ‘one knows in a general, if not in a critical way, what is an equity of redemption’.[25] In a similar vein, it has been observed that ‘[a]n equity of redemption can be more appropriately illustrated than defined or described’.[26] Our task of understanding the equity of redemption ‘in a critical way’ is not made easier by the scant historical record. The exact period when courts of equity first established the ‘incontrovertible right to redeem… cannot… be traced with precision’,[27] but it is clear that the English mortgage of a fee simple has been through at least four significant incarnations.

In its first incarnation, broadly contemporary with the reign of Henry II, there was no mortgage as such, but a creditor could take possession of his debtor’s land by way of pledge.[28] Under a ‘living pledge’ (*vivum vadium*), the lender took rents and profits in reduction of the debt, whereas under a ‘dead pledge’ (*mortuum vadium*), he did not.[29] The second incarnation, which appears to have occurred sometime in the thirteenth century and to have survived at least until the late fifteenth century,

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24 Just Cod lib 4 tit 54 s 2.

25 *Salt v Marquess of Northampton* [1892] AC 1 HL, 18.

26 JJ Powell, *A Treatise on the Law of Mortgages*, 6th edn (edited by T Coventry) (1826) vol I, 205, note A.

27 *Ibid*, 108, note B.

28 Said to derive from the ‘customary law of Normandy’ (*ibid*, 3).

29 Glanvill, *Tractatus de legibus* (1187–9) Book X c 6.

involved a conveyance to the lender of the fee simple estate in the borrower's land, with the borrower retaining a formal right to re-enter upon repayment of the debt at the appointed date. By this stage, the 'mortgage' label did not refer to the old *mortuum vadium* but to the fact that the land conveyed became dead to the debtor if he failed to repay his debt at the appointed time.[30] The third incarnation, which might have occurred as early as the late fifteenth century and was well-established by the early seventeenth century, is the classic English mortgage under which the mortgagor made a formal conveyance of his land to the mortgagee, and the mortgagee covenanted to reconvey the land to the mortgagor upon repayment of the debt by the mortgagor at the appointed time. At first, the charging of interest was prohibited by usury laws, and the mortgagee went into possession to disguise interest as profits, but the reform of usury laws during the reign of Henry VIII[31] allowed interest to be charged; and thereafter it became rare for the mortgagee to go into possession during the mortgage term.[32] The fourth incarnation is the modern charge by way of legal mortgage, which is discussed later in this chapter.

In his seminal treatise, *The Equity of Redemption*, R W Turner argued that it was not until after Chancery's supremacy over Common Law had been established in 1616 by King James' intervention in *The Earl of Oxford's case*[33]—in fact not until Lord Bacon became Chancellor in 1618—that recognition of the equity of redemption

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[30] Sir Thomas Littleton, *Tenures* (1481); *Sir Edward Coke's Commentarie on Littleton* (1628–9) sec 332.

[31] 37 Henry VIII c 9 (1545).

[32] B Rudden and H Moseley, *An Outline of the Law of Mortgages* (London, Estates Gazette, 1967) 4. See also A M Burkhart, 'Freeing Mortgages of Merger' (1987) 40 *Vand L Rev* 283, 317.

[33] (1615) 1 Ch Rep 1; *His Maiesties Speach in the Starre-Chamber* (20 June 1616) STC 14397 (London, Robert Barker [etc], 1616).

became routine.[34] But Turner's conclusion may have been based on an assumption that the Common Law judges were more hostile to the equity of redemption than in fact they were.[35] It is true that the Court of Chancery was in competition with the Common Law courts at the beginning of the seventeenth century, but for much of the time it was a more healthy competition than is sometimes imagined.[36] It seems somewhat doubtful that the notion of an 'equity of redemption' could have gained the secure grip it had undoubtedly achieved by 1625[37] if Common Lawyers had resisted it as lately as 1618. It is plausible, however counter-intuitive it may appear, that the radical nature of the equity of redemption is evidence that it was introduced before *The Earl of Oxford's case* established the supremacy of equity. After *The Earl of Oxford's case*, Chancery tended to act with a degree of responsibility appropriate to its superior status, so that by the end of that century, under the guidance of Lord Chancellor Nottingham, it had more or less become just another system of precedent-based law.

The equity of redemption does not bear the hallmarks of a restrained, considered Chancery. It is the product of a radical policy-driven Chancery. It does not 'soften and mollify the extremitie of the law' as the equitable function is described in the *Earl of Oxford's case*;[38] it simply ignores the legal deed by which the mortgaged land is conveyed to the lender. Chancery's recognition and protection of the equity of

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[34] R W Turner, *Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* (Cambridge, CUP, 1931) 26 and 27–8.

[35] C M Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law* (New York, Oceana Publications, 2004).

[36] W J Jones, *The Elizabethan Court of Chancery* (Oxford, Clarendon Press, 1967) 278, 481–4.

[37] *Emmanuel College v Evans* (1625) 1 Ch Rep 18.

[38] (1615) 1 Ch Rep 1, 6–7.

redemption is a bare-faced disavowal of the legal form. That Chancery was permitted to 'get away' with this, and apparently without serious objection from the Common Lawyers, indicates that by the time Chancery recognised the 'equity of redemption', there was already a tradition, accepted by lawyers on both sides of the jurisdictional divide, of ignoring the strict terms of the legal mortgage. Why was there such broad acceptance of the equity of redemption? And why has it survived so long when it is clearly a falsehood devised by Chancery in response to a Common Law lie? Some have attributed its success to a 'morality' inherent in the concept:

> [T]he doctrine of the clog on the equity of redemption seems one of the striking examples of the great truth that the ethical standard of our law is often higher than the average morality of the commercial community.[39]

Whether it was purely morality, or that blend of morality and political pragmatism that nowadays passes under the name of consumer protection, is open to question; but doubtless there was a real concern to prevent a mortgagee from taking unconscionable advantage of a debtor's vulnerability. Of course this does not explain why so complex a fiction was required, and neither does it explain why the fiction has lasted so long. More cynically, and perhaps mischievously, Lord Bramwell identified the Chancery lawyers themselves to be the true reason for the success of the mortgage fiction:

> We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or

[39] B Wyman, 'The Clog on the Equity of Redemption' (1908) 21 *Harvard Law Review* 457, 475.

> love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it.[40]

Whatever motivated the Chancery lawyers to develop the equity of redemption, develop it they did. The next challenge is to identify the doctrines by which it was developed, for this will determine whether it is realistic to remove the fiction. There are two main candidates for the doctrinal source of equity's refusal to follow the law in the mortgage context. On the one hand, there is equity's doctrinal commitment to relieve against penalties and, closely related to it, the equitable doctrine of relief against forfeitures.[41] On the other hand, there is equity's willingness to issue injunctions (decrees) requiring specific performance of the mortgagee's covenant to reconvey the mortgaged land to the mortgagor.[42] The two bases are compatible, but distinct. The former is concerned to set aside the conveyance to the mortgagee, whereas the latter is concerned to enforce the reconveyance to the mortgagor. Both bases were united in permitting the mortgagor to bring a bill to redeem even though this was considered at law to be a breach of the mortgagor's covenant to grant the mortgagee quiet enjoyment of the estate 'conveyed'.[43]

Of the two bases of equitable intervention, the latter basis (specific performance of the covenant to reconvey) provides the better doctrinal justification

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[40] *Salt v Marquess of Northampton* [1892] AC 1, 19.

[41] '[T]he relief afforded to mortgagors who had failed to perform the condition and suffered forfeiture to take place in consequence followed upon the same lines as the relief given in the case of bonds' (Turner, note 34 above, 26).

[42] *Ibid*, 21. See also R Wooddeson, *A Systematical View of the Laws of England* (Dublin, Private subscription, 1794) vol III, Lect LVI, sec 409, citing the *Practical Register in Chancery* (1714) 211.

[43] Wooddeson, *ibid*.

for the 'equity of redemption'. For one thing, there is a chronological coincidence between the invention of the 'equity of redemption'[44] and the advent of specific performance of the covenant to reconvey. As Professor Simpson has noted, the equity of redemption 'seems to have come into prominence in the sixteenth century, when the Chancellor became ready to enforce the covenant specifically'.[45] The precise connection, if indeed there was one, between the equity of redemption and specific performance of the covenant to reconvey is hard to discern. It is tempting to say that in the spirit of the maxim 'equity sees as done that which ought to be done', the covenant to reconvey might have been deemed performed before it was in fact performed, so as to vest the 'equity of redemption', in the nature of beneficial ownership, in the mortgagor. The difficulty with this analysis is that the mortgagee had no legal obligation to reconvey before the debt was paid, so technically beneficial ownership could be deemed to vest in the mortgagor only from the moment the debt was paid, whereas the 'equity of redemption' was assumed to exist from the moment the mortgage was made.

Ultimately, the search for a satisfactory scientific explanation for the equity of redemption seems a futile one. It appears that when it invented the equity of redemption, equity did not see as done merely that which ought to have been done *to fulfil the law*, as the maxim would have it,[46] but that it also saw as done that which ought to be done as a matter of policy and morality *in spite of the law*. Whatever

[44] The word 'invention' is used advisedly, for whereas Common Law rules are 'supposed to have been established from time immemorial', it is accepted that the rules of equity 'were invented' (*Re Hallett's Estate* (1880) 13 Ch D 696, per Sir George Jessel MR, 710).

[45] A W B Simpson, *An Introduction to the History of the Land Law* (Oxford, OUP, 1961) 225.

[46] G Watt, *Trusts and Equity*, 2nd edn (Oxford, OUP, 2003) 25.

doctrinal light one attempts to shine on the problem succeeds only in producing a new doctrinal shadow. This dilemma was encapsulated by Powell:

> The truth seems to be, that the interest of the mortgagee before foreclosure is contemplated in a Court of Equity rather as a right than as an estate, while the equity of redemption is considered as having rather the quality of an estate than a right. But it is next to impossible to give a definite denomination to the interests either of the mortgagor or mortgagee, when they vary so much according to the light in which they are viewed.[47]

Even though he does not identify the doctrinal *source* of the equity of redemption, it was reasonably clear to Powell that the doctrinal *result* of the mortgage transaction was to confer on the mortgagee a mere right or interest against the mortgaged land whilst conferring on the mortgagor a substantial estate by the name of 'equity of redemption'. With this discovery he comes close to revealing the true nature of the English mortgage, namely that it is a hypothecary transaction under which the borrower retains a beneficial estate in the land, with factual possession, and the lender receives a mere security right enforceable against the land.

THE TRUE NATURE OF THE ENGLISH MORTGAGE

Before the hypothecary analysis of the English mortgage can reign in peace, it is first necessary to dispose of a pretender to its throne: the trust. The argument runs that if the mortgage transaction confers formal title to the fee simple on the

[47] J J Powell, *A Treatise on the Law of Mortgages*, 6th edn (Thomas Coventry, ed) (1826) vol I.

mortgagee, whilst leaving an equitable estate in the mortgagor, the mortgage transaction must necessarily create a trust by operation of law.

Trust

The US edition of White & Tudor's *Leading Cases in Equity* asserts that the classic mortgage by conveyance and reconveyance is really a trust:

> A mortgage is in fact a conditional conveyance of the legal title, first, in trust to secure the payment of the mortgage debt, and next for the benefit of the mortgagor, who holds the equitable estate in the land, subject only to a lien for the debt.[48]

That assertion was based on a number of American cases, but it finds scant support in the English reports.[49] Orthodoxy asserts that an equity of redemption is 'in many respects most materially different' to a trust.[50] Lord Browne-Wilkinson purported to identify one respect in which they differ: that the mortgagor's action to recover the mortgaged property takes the form of an action for redemption and not an action for breach of trust.[51] However, that fact should, with respect, cast doubt on the nature of the remedy before it casts doubt on the nature of the right. Sir Matthew Hale went deeper when he observed that the power of redemption (by which it is supposed his

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[48] F T White & O D Tudor, *Leading Cases in Equity,* vol II, part II with notes on the American cases by J I Clark Hare and H B Wallace (Philadelphia, T & J W Johnson, 1852) 450, citing the American cases *Fenwick v Morey* 1 Dana 200; and *Glass v Ellison* 9 New Hampshire 69.

[49] Lord Nottingham was clear that "[a]n equity of redemption charges the land, not a trust" (cited in *Burgess* v *Wheate* (1759) 1 Eden 177 at 206).

[50] *Tucker v Thurstan* 17 Ves 131, 133 (Lord Chancellor Eldon).

[51] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 707.

lordship meant the equity of redemption and not merely the legal right to redeem) is inherent in the land, whereas beneficial interests under a trust are collateral to the land and have their origin in agreement of the parties:[52]

> I conceive, that a mortgage is not merely a trust; but a title in equity... There is a diversity betwixt a trust and a power of redemption; for a trust is created by the contract of the party... But a power of redemption is an equitable right inherent in the land, and binds all persons in the post or otherwise; because it is an ancient right which the party is entitled to in equity.[53]

This also fails to inflict a fatal blow on the pretender. It is true that beneficial interests under trusts are enforced in accordance with the terms of the trust, whereas beneficial interests under mortgages may be enforced despite the terms of the mortgage; but the suggestion that the equity of redemption is somehow inherent in the land so as to exist independently of the parties' agreement does not stand up. The equity of redemption is defined by its relationship to the mortgage terms. Before the mortgage, there is no equity of redemption; there is no equitable right to redeem. There is no equity at all—there is only absolute ownership. It is no answer to say that the equity of redemption is inherent in absolute ownership, for equitable ownership is subsumed within absolute ownership, or to put it another way, absolute ownership defines equitable ownership out of existence.

The pretender claims that if the mortgage transaction divides ownership of the fee simple between the mortgagee as legal owner and the mortgagor as equitable

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[52] *Pawlet v Attorney General* (1667) Hard 465.

[53] *Ibid*, 467, 469.

owner, there is a trust as a matter of property law. The fact that the trust does not operate as such in terms of remedy does not mean that it is not a trust, just as there is a trust of property underlying an estate contract even though the parties' remedies are framed according to the terms of the contract – there is no less a trust of property underlying a mortgage than a trust of property underlying an estate contract,[54] so the argument runs. Doctrinally speaking there is some merit in the pretender's claim, but the authorities have not sought to kill it off with fine doctrinal points; rather they have been content to avoid the issue. Thus in one case when the question arose whether a real security in the form of a trust for sale of land was or was not a mortgage, the judge held:

> It is not for a Court of Equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am of the opinion that this was solely a mortgage transaction.[55]

So, like Mortimer in the tower, the pretender still has life in it, but has been stripped of all its power.[56] Even if the mortgage by conveyance and reconveyance was a trust as a matter of property law, equity would refuse to recognise it as such. Equity is committed to attach the 'mortgage' label to *any* real security for a debt, whatever doctrinal form it takes, because equity is committed to protect the vulnerable mortgagor from the power of the mortgagee. However that may be, we should not forget that the trust analysis only has life to the extent that it is true to say that the

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[54] *Lysaght v Edwards* (1876) 2 Ch D 499, 506 (Jessel MR).

[55] *Locking v Parker* (1873) 8 LR Ch App 30, 39.

[56] As depicted in Shakespeare's *The First Part of King Henry the Sixth*, Act 2, scene 5.

mortgagor under a mortgage by conveyance and reconveyance had an estate in the nature of an 'equity of redemption'. As a matter of legal doctrine he was said to have had such, but as a matter of fact he did not. Equity regarded the substantial reality of the transaction as one in which the mortgagor's ownership remained undisturbed and the mortgagee acquired a mere security interest. Add to this the observation that, from around the reign of Henry VIII, [57] the mortgagee did not in fact take possession during the currency of the mortgage, and we can say that the English mortgage has been in fact and function a hypothec since that time.

Hypothec

The distinguished historian of land law, A W B Simpson, observed:

> The medieval mortgage had been both in form and in fact a pledge; the land was actually handed over to the creditor. In form the mortgage continued a pledge; thus in the classical form of mortgage the fee simple was conveyed to the mortgagee. In substance, however, the nature of the transaction changed; it became a hypothecary transaction, in which the entry into possession of the mortgagee was an unusual step.[58]

In fact, by 1620 it was prohibited to disturb the mortgagor's possession of the premises except in the event of default of payment,[59] and by 1756 the mortgagor's right to remain in quiet possession had become so well established that one anonymous author was emboldened to assert:

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[57] B Rudden and H Moseley, *An Outline of the Law of Mortgages* (London, Estates Gazette, 1967) 4. See also A M Burkhart, 'Freeing Mortgages of Merger' (1987) 40 *Vand L Rev* 283, 317.

[58] A W B Simpson, *An Introduction to the History of the Land Law* (Oxford, OUP, 1961) 229, heading 'Pledge and Hypothec'.

[59] *Powsley v Blackman* (1620) Cro Jac 659.

> A Mortgage is the same thing as the Hypotheca of the Civilians, and may be defined a Pledging of Lands, or other immoveable thing, for money lent in such manner, that the profit or Usufructus of the thing pledged remains with the debtor till such time as default is made in payment of the money at the time appointed.[60]

Given the early date of this insight, it is a testament to the power and appeal of mortgage law fictions that they have submerged the truth for so long.

THE CHARGE BY WAY OF LEGAL MORTGAGE

Since 1 January 1926 it has not been possible to create a mortgage by conveyance and reconveyance of the fee simple. It was replaced by the so-called 'charge by way of legal mortgage'.[61] It is also possible to create a mortgage by granting a 3000-year lease, determinable upon repayment of the debt,[62] but this method is not popular and will become even less so as a consequence of section 23(1) of the Land Registration Act 2002, which prohibits the creation of any new mortgage by demise or sub-demise of a registered estate.

Could it be that the charge by way of legal mortgage introduced by the Law of Property Act 1925 is a long-hoped-for *suggestio veri* in the English law of mortgage—a natural creature at last? A W B Simpson welcomed this new form of mortgage as the first 'realistic' form of English mortgage,[63] since it recognises the reality that the borrower remains the 'true' owner throughout. B Rudden and H

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[60] A Gentleman of the Middle Temple, *General Abridgement of Equity* (London, Henry Lintot, 1756) 310.

[61] Law of Property Act s 85(1).

[62] *Ibid*.

63 A W B Simpson, *An Introduction to the History of the Land Law* (Oxford, OUP, 1961) 229.

Moseley agree that the charge by way of legal mortgage 'most nearly approximates to the true position of the parties without recourse to cumbersome fictions'.[64] In an earlier volume of *Modern Studies in Property Law*, Sarah Nield hit the nail on the head when she observed that the charge by way of legal mortgage 'is by nature a hypothecation'.[65]

However, despite the improvement that the new charge represents over the traditional form of mortgage by conveyance and reconveyance, it is clear that the charge 'by way of' legal mortgage still operates in the world of make-believe. In legal form it is a quite fabulous creature: nothing less than a *charge* that professes to be a *mortgage* but which confers a right to possession on the mortgagee 'as if' he had a *lease* and (in favour of a first mortgagee) confers a right to possess title documents 'as if' the security were in fact a *fee simple*. The relevant sections have to be seen to be believed:

> A mortgage of an estate in fee simple shall... be capable of being effected at law... by a charge by deed *expressed to be by way of* legal mortgage: Provided that a first mortgagee shall have the same right to the possession of documents *as if* his security included the fee simple.[66]

> Where a legal mortgage of land is created by a charge by deed *expressed to be by way of* legal mortgage, the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them) *as if*... where the mortgage is a mortgage of an estate in fee simple, a mortgage term for three

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[64] B Rudden and H Moseley, *An Outline of the Law of Mortgages* (London, Estates Gazette, 1967) 32.

[65] S Nield, 'A Reappraisal of s 87(1) Law of Property Act 1925' in E Cooke (ed), *Modern Studies in Property Law*, vol 3 (Oxford, Hart Publishing, 2005) 155, 157.

[66] Law of Property Act (1925) s 85(1), emphasis added.

> thousand years without impeachment of waste had been thereby created in favour of the mortgagee.[67]

The Doctrine of Clogs on the Equity of Redemption

The statutory description of the charge by way of legal mortgage is confusing, but one thing is abundantly clear: this form of mortgage contains no covenant to reconvey the mortgaged land. It follows from this that even if specific performance of the covenant to reconvey might once have supplied a doctrinal explanation for the 'estate status' of the equity of redemption from the date the debt was repaid (and probably, given equity's zealous commitment to see as done that which ought to be done where mortgages are concerned, from the date of the mortgage itself),[68] that doctrinal explanation can no longer hold good.

Parliament has killed off the mortgage by conveyance and reconveyance of a fee simple, yet the courts have so far failed to acknowledge that the notion of the equity of redemption should have died with it. They have failed to acknowledge that land subject to a registered charge is not 'redeemed' as was land conveyed under the classic form of mortgage; rather the charge is simply discharged from the land upon repayment of the debt.[69] The result is that the doctrine preventing clogs on the equity for redemption continues to haunt mortgage law and is prone to 'wander into places

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[67] *Ibid*, s 87(1) and (1)(a), emphasis added.

[68] "A mortgage is an assignment on condition. The condition being performed, the conveyance is void *ab initio*. Equity dispenses with the time." *Burgess* v *Wheate* (1759) 1 Eden 177 at 256.

[69] S Nield, note 65 above, 160: 'a charge is not redeemed, it is discharged'.

where it ought not to be'.[70] It is precisely the sort of fiction that would have horrified Jeremy Bentham.

Giving up the Ghost

There have been calls to exorcise (or to excise)[71] the doctrine of the clogs on the equity of redemption, but until judges accept that the equity of redemption is dead, they are unlikely to acknowledge that the doctrine of clogs on the equity of redemption is only a ghost. None of this would matter if the ghost performed some useful function—perhaps to instil fear into mortgagees who might wish to oppress mortgagors—but the doctrine of clogs has become 'a technical doctrine, in no way connected with oppression in fact'.[72] This is most apparent in the case of a mortgagee taking an option to purchase as a condition of the mortgage. In *Samuel v Jarrah Timber and Wood Paving*,[73] where the doctrine of clogs was applied to set aside the mortgagee's perfectly fair contractual option to re-purchase the mortgaged land, the Lord Chancellor the Earl of Halsbury confessed that he was unable to see the 'sense or reason' of the equitable principle.[74] The rule against purchase by the mortgagee would make sense if the mortgagee was in truth a trustee of the power of sale, since a

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[70] *Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25, 46 (Lord Mersey).

[71] '[T]he doctrine of a clog on the equity of redemption is, so it seems to me, an appendix to our law which no longer serves a useful purpose and would be better excised.' *Jones* v *Morgan* [2001] EWCA Civ 995; [2001] Lloyd's Rep Bank 323 CA Civ Div, para 86 (Lord Phillips MR).

[72] P B Fairest, *Mortgages* (London, Sweet & Maxwell, 1980) 25.

[73] [1904] AC 323 HL.

[74] *Ibid*, 325.

trustee cannot sell to himself,[75] but, as we have seen, the courts have always insisted that the mortgagee is not a trustee and that the power of sale is not held in trust. It is therefore hard to fathom any doctrinal justification for the rule. The rule does not survive because it is part of a coherent doctrinal analysis, but because it is assumed to effect a policy of protecting oppressed borrowers.

Peter Devonshire has criticised the doctrine of clogs on the equity of redemption, especially as it operates to set aside a perfectly sound contractual agreement to repurchase, but he concluded that the doctrine is not completely redundant.[76] Other commentators on the Australian cases have reached a different conclusion:

> The need to protect necessitous borrowers against unscrupulous lenders is as relevant today as ever before. However, it is submitted that the application of the doctrine against clogging the equity of redemption is not the appropriate vehicle through which to safeguard the interests of those in need of protection.[77]

This writer agrees that current mortgage law supplies safeguards of a piecemeal and inadequate type. What is required is to give up the ghost of the equity of redemption

[75] *Tito v Waddell (No 2)* [1977] Ch 106; Hon Mr Justice B H McPherson CBE, ‘Self-dealing Trustees’ in A J Oakley (ed), *Trends in Contemporary Trust Law* (Oxford, Clarendon Press, 1996) 135.

[76] ‘The Modern Application of the Rule Against Clogs on the Equity of Redemption’ (1997) 5 *Australian Property Law Journal* 1, 10.

[77] W B Duncan and L Willmott, ‘Clogging the Equity of Redemption: An Outmoded Concept?’ (2002) 2 *QUT Law and Justice Journal* 35, 49.

and replace it with a comprehensive and coherent statutory scheme of mortgagor protection.[78]

When Chancery judges have sought to explain the doctrine of clogs on the equity, they have normally done so by reference to broad ideas of mortgagor protection. The following statement of Lord Henley, Lord Chancellor, is typical:

> This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms the craft may impose on them.[79]

The learned judge portrays a world in which mortgagees are the Big Bad Wolf and mortgagors are Little Red Riding Hood, but a microscopic examination of the cases reveals something scientific lurking within the rhetoric by which mortgagees are prohibited from turning a mortgage into a sale.

The underlying, 'scientific' aim of the rule is to achieve a fair balance of risk between mortgagor and mortgagee. A vendor may convey land to a purchaser and the conveyance may contain a proviso for reconveyance to the vendor at the original price. This transaction is a conveyance and reconveyance, but it is not, without more, a mortgage. The additional factor that will turn the arrangement into a mortgage is if the purchaser takes security on the land for the recovery of the principal purchase

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[78] J Houghton and L Liversey, *Mortgage Conditions: Old Law for a New Century, Volume I: Property 2000* (Hart Publishing, Oxford, 2001) 163, 180.

[79] *Vernon v Bethell* (1761) 2 Eden 110, 113.

monies. The relevance of this factor is that it turns a sale into a mortgage, and once this has occurred, the mortgage cannot be turned back into a sale. If a single transaction were permitted to take effect as both a mortgage and a sale at the option of the mortgagee at a fixed price, the effect would be to throw all the risk upon the mortgagor. For if the value of the land were to fall below the fixed price, the mortgagee would be able to recover his debt up to the value of the land and to recover any shortfall by a personal action on the contractual bond, whereas if the land value were to increase above the pre-agreed price, the mortgagee would have the advantage of purchase. As between the parties it is not fair that the mortgagee should reap the rewards of any increases in the land value while the mortgagor is left to bear the risk of any decrease. The mortgagee is not permitted to have his cake and eat it. Lord Redesdale put the point in more sophisticated language:

> [A] proviso for re-purchase will not, of itself, be sufficient to turn a *bona fide* purchase into a mortgage, though it be limited to be exercised within a certain time, and at an advanced price... If, however, the purchaser, instead of taking the risk of the contract upon himself, takes a security for the repayment of the principal money... such circumstances will vitiate the sale.[80]

If the fundamental concern is to achieve a fair allocation of risk between the parties, why did Chancery adopt the strict rule that 'a mortgage must not be converted into something else'?[81] Surely it would have been better to allow a closer examination of the particular transaction and to allow a mortgage to be rendered irredeemable if

[80] *Verner v Winstanley* (1805) 2 Sch & Lef 393.

[81] *Noakes & Co Ltd v Rice* [1902] AC 24 HL, 33–4 (Lord Davey).

the parties fairly reached an agreement to that effect. That the rule is so strict can probably be attributed to the very limited judicial resources in Chancery in the seventeenth and eighteenth centuries. It was not until 1729 that the Master of the Rolls (the chief Chancery Master) was appointed to sit as a second judge in certain cases, and even that reform did little to reduce the burden on the Chancellor, because any decision of the Master of the Rolls could still be appealed to the Chancellor. It was not until 1833 that the Master of the Rolls achieved a genuinely concurrent jurisdiction, and it was not until 1813 that a Vice Chancellor was appointed to assist the Chancellor and the Master of the Rolls. When, in 1816, Sir Launcelot Shadwell V-C was asked by a Commission of Inquiry whether the three judges could cope, he is said to have replied 'No; not three angels'.[82] The straightened resources of the Court of Chancery must have encouraged the Lord Chancellor to prefer strict rules (albeit explained and justified in terms of conscience) in preference to case-by-case examination of the individual consciences of the parties to each cause.

In the seminal case of *Newcomb v Bonham*,[83] an absolute conveyance was made on a certain day, and, by another deed made between the same parties on the same day, the land was made redeemable upon repayment of £1000 during the lifetime of a named person. The Lord Chancellor laid down the general rule 'once a mortgage always a mortgage' and held that since the mortgage was redeemable during the lifetime of the named person, it must be redeemable thereafter. It is significant that Counsel for the disappointed mortgagee had argued that the mortgagee had 'run

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[82] Cited in Radcliffe and Cross, *The English Legal System*, 3rd edn (London, Butterworth, 1954) 153 n 1.

[83] (1681) 1 Vern 7.

hazard enough' (that is, had borne sufficient risk), since although it turned out to be a good bargain 'it might have been a bad one'.[84]

If that plea had been accepted, the strict rule prohibiting a mortgage from being converted into a sale might have been replaced by a more flexible attempt to achieve a fair allocation of risk between the mortgagor and mortgagee on a case-by-case basis, but one can only imagine the delays in the Court of Chancery if every mortgage transaction—and every transaction involving a mortgage—had been examined to determine whether the mortgagee had run a fair risk of loss when he entered the transaction. Since then, greater resources have been placed at the disposal of the courts. This might explain why the rule began to thaw with the *Kreglinger* case,[85] in which Viscount Haldane LC attributed the clogs doctrine to Chancery's 'general power to relieve against penalties and to mould them into mere securities'.[86] The thaw was possible precisely because his Lordship chose to define the protection of the mortgagor in terms of a flexible *remedy*. It is less likely that there would have been a thawing of the doctrine if he had traced it back to the fiction of the mortgagor's incontrovertible right to the equity of redemption. According to his Lordship, the purpose of the equitable jurisdiction:

> has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract ...The equity judges looked, not at what was technically the

[84] *Ibid*, 8.

[85] *Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 HL.

[86] *Ibid*, 35.

> form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive.[87]

It is possible to discern a further thawing of the doctrine today. It is still the case that a mortgage cannot be turned into a sale, but the courts have demonstrated a willingness to examine the particular facts in greater depth to determine whether a transaction ought to be defined as a mortgage or a sale. In one recent case, Parker LJ even went so far as to state (without laying down any general rule) that where an option to purchase is granted 'for a price which was to be left outstanding on mortgage', there is a 'very strong likelihood that, on an examination of all the circumstances, the court would conclude that the substance of the transaction was one of sale and purchase and not one of mortgage'.[88] That case was referred back to the Chancery Division of the High Court, where it was held on the particular facts that the substance of the transaction was indeed a sale and purchase,[89] with the result that there could be no finding of a clog on the equity of redemption.[90]

If the transaction had been defined as a mortgage, the sale would probably have been held to be a clog and on that basis set aside. It is a shame that the opportunity did not arise (or was not taken) to construe the transaction to be a mortgage and to attempt a relaxation of the rule against clogs. If the allocation of risk had been acknowledged to be the substantial question, the court could have relied on

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[87] *Ibid*.

[88] *Warnborough Ltd v Garmite Ltd* [2003] Civ 1544 CA [76].

[89] *Warnborough Ltd v Garmite Ltd* [2006] EWHC 10 Ch (Transcript) [34].

[90] *Ibid*, [35].

the fact that the price for exercising the option had not been fixed as a ground for holding the transaction to be a fair one. It is noteworthy that the parties themselves conceived the transaction to be a commercial investment designed to provide a fair return for the taking of risk.[91]

THE STORIES 'OTHERS' TELL

In the introduction to this chapter, two reasons were advanced for removing the fictions from the mortgage law of England and Wales. The first was that the fictions create disharmony within our domestic law. This has now been proved. The second reason is that our domestic mortgage stories create barriers to harmony with the stories of other legal systems; including Civilian, Torrens and Islamic systems. We will now briefly consider each of those systems.

Civilian

In many Civilian jurisdictions, and in many European legal systems that do not have exclusively Civilian origins, the preferred device for securing loans against land is a hypothecary charge. We have seen that when the fictions are stripped away from the English mortgage, it is also revealed to be hypothecary in nature. This revelation suggests great potential for the reception into England and Wales of Civilian ideas of mortgage. This will be especially conducive to the introduction of a pan-European

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[91] *Ibid*, [10].

form of mortgage.[92] In June 2005, the European Commission confirmed that it is giving serious consideration to 'the feasibility and desirability' of a 'Euromortgage' of this sort.[93]

Torrens

It is testament to the seductive appeal of the mortgage story that it survived the wholesale and radical reform of land registration introduced to Australia through the efforts of Sir Robert Richard Torrens,[94] which has since also been adopted elsewhere. In contrast to the system in England and Wales, the Torrens system is 'not a system of registration of title but a system of title by registration'.[95] The Torrens register does not validate documentary title; it *is* title—and the state guarantees it as such.

Surely there is no place in such a robustly realistic system for the notion that the mortgagor has a spectral off-register title in the nature of an 'equity for redemption'. Surely it is a truism that 'the Torrens title mortgagor remains the registered proprietor of the land—the owner, not only in equity but also at law'.[96] The High Court of Australia acknowledged the reality of the situation,[97] but only a few months later it reverted to the fiction when it suggested that 'a mortgage in the old

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[92] G Watt, 'The Eurohypothec and the English Mortgage' (2006) 13(2) *Maastricht Journal of European and Comparative Law* 173; S Nasarre-Aznar, 'The Eurohypothec: A Common Mortgage for Europe' (2005) 69 *Conv* 32.

[93] Commission of the European Communities, 'Mortgage Credit in the EU' (Green Paper, COM (2005) 327 final) para 48.

[94] Real Property Act (Act 15 of 1857–58).

[95] *Breskvar v Wall* (1971) 126 CLR 376, per Barwick CJ, 385–6.

[96] P Butt, *Land Law*, 3rd edn (Sydney, LBC Information Services, 1996) 536.

[97] *Latec Investments Ltd. v Hotel Terrigal Pty Ltd (in Liquidation)* (1965) 113 CLR 265, 275.

common law form ... differs in law from a mortgage under the Torrens System, although not substantially in equity’.[98] Despite that setback, it is clear from more recent decisions that the Australian courts no longer believe the fiction.[99] The courts in England and Wales would do well to follow their lead.[100]

Islamic

Islam does not prohibit the use of land as security for a loan, but it forbids the charging of interest, for this is *Riba* (usury). The ‘problem of interest’[101] is not easily overcome. Francis Bacon argued that ‘all states have ever had it’ and suggested that the argument against usury ought to be ‘sent to Utopia’.[102] According to Bacon, the great attraction of the ‘trade of usury’ is that it provides the usurer with ‘certain gains’, whereas merchant trade can only promise ‘gains of hazard’.[103] Islam accepts that ‘Trade is like usury’[104] but makes this crucial distinction: ‘Allah hath permitted trade and forbidden usury.’[105] The very factor that made usury attractive to Bacon—the reduction of risk—is the very factor that renders it abhorrent to Islamic scholars. In Islam usury is prohibited because the charging of interest represents an unjust

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[98] *Haque v Haque (No 2)* (1965) 114 CLR 98 High Court of Australia.

[99] For example, *Figgins Holdings v SEAA Enterprises* [1999] 196 CLR 245 High Court of Australia; *Gutwenger v Commissioner of Taxation* (1995) 55 FCR 95 Federal Court of Australia, 108–9: ‘The land is under Torrens title so that it is not correct to speak of there being an equity of redemption.’

[100] See generally Nield, n 65 above.

[101] T El Diwany, *The Problem with Interest*, 2nd edn (London, Kreatoc, 2003)

[102] Essay XLI: *Of Usury*, 1612 (London, Dent: Everyman’s Library, 1906) 124.

[103] *Ibid*, 126.

[104] The Qur’an, 2:275.

[105] *Ibid*.

allocation of risk as between lender and borrower; merchant trade, on the other hand, is permitted because a commercial bargain is an honourable transaction in which both parties share the risk:

> [J]ustice in transactions is achieved by approaching equality... For things which are not measured by weight and volume, justice can be determined by means of proportionality.[106]

It might appear that there is no potential for the harmonious coexistence of the English mortgage and Islamic principles. The potential is limited, but in the course of this chapter we have at least discovered something that both systems have in common, and which has until now been covered by layers of fiction. Namely, that the fundamental concern of equity's radical intervention in the mortgage context has been to effect a more just allocation of risk as between mortgagor and mortgagee.

There is, however, a twist in the tale. For the Islamic principle of risk-sharing is said to be exemplified by the traditional legal maxim *Al-Kharaj bid Daman* (return must be justified by risk), but like so much of English mortgage law, reliance on this maxim may be rhetorical. One leading scholar of Islamic finance admits that he has 'yet to read a single satisfactory explanation of what it means'.[107] He goes on to observe:

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[106] M 'Ibn Rushd, *Bidayat Al Mujtahid wa Nihayat Al Muqtasid*, verified by Abd Al Majid Tu'mat Halabi (Beirut, Dar Ai Ma'rifat, 1997) vol 3, 184 (translated by M A El-Gamal in 'An Economic Explication of the Prohibition of *Riba* in Classical Islamic Jurisprudence', *Proceedings of the Third Harvard University Forum on Islamic Finance* (2000). See also *Muwatta' of Imam Malik*, Muhammed Rahimuddin (trans), paras 1353–5.

[107] M A El-Gamal, '"Interest" and the Paradox of Contemporary Islamic Law and Finance' (2004) *Fordham International Law Review* 108, n 48. (Professor El-Gamal holds the Chair of Islamic Economics, Finance and Management at Rice University, Houston.)

> In theory, there may be some differences in risk allocation between Islamic instruments and their conventional counterparts. However, until a few cases are brought to court to test possible discrepancies between the juristic and the regulatory understandings of Islamic finance instruments, it is difficult to say whether or not those differences are substantive.[108]

It may be that the concern for fair allocation of risk that underlies equitable intervention in the English mortgage is not far removed from the concern underlying the Islamic prohibition on usury. However, even if the two systems do not share this common root concern–it is at least clear that both systems struggle with the same task of unearthing fact from fiction.

CONCLUSION

In the preface to his *Treatise on the Law of Mortgages*, John Joseph Powell suggested that 'of all the branches of learning which the science of the law embraces, none appears to be more interesting' than the law governing the English mortgage.[109] This writer would agree with the sentiment but not with the expression. The very thing that makes the English mortgage so interesting is that a functional or factual analysis of the mortgage, which would analyse the mortgage scientifically according to what it actually does, has consistently given way to a fictional analysis of the mortgage, which explains the mortgage according to what judges say it does. In function and fact the English mortgage is hypothecary, which is to say that the mortgagor remains in possession of the land as owner, and the mortgagee remains out

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[108] *Ibid*, n 53.

[109] 1785, Preface, v.

Published as "The Lie of the Land: Mortgage Law as Legal Fiction" Chapter 4 in *Modern Studies in Property Law - Volume IV*, E. Cooke (ed.) (Oxford: Hart, 2007) 73-96.

of possession with a mere security to recover the debt. In the fictional account, the mortgagee is imagined to have a legal estate in the mortgaged land (a fee simple or lease, as the case may be), and the mortgagor's interest in the mortgaged land is said to be a mere 'equity of redemption'.

The mendacity of the classic English mortgage by conveyance and reconveyance goaded an exasperated F F Pollock to declare that '[i]t must be difficult for any one but a lawyer to believe that so clumsy an operation is to this day the regular means of securing a debt on land in England'.[110] We may not agree with Sir Henry Maine that all legal fictions 'have had their day',[111] but this chapter has sought to show that, with the advent of the simple registered charge, the day has surely come to rid English law of the fictional nature of the lender's 'mortgage' and the notion of the borrower's 'equity of redemption'.

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[110] *The Land Laws*, 3rd edn (London, Macmillan, 1896) 134.

[111] H Maine, *Ancient Law*, Everyman's Library edn, 1861 (London, Dent, 1917) 16.