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The "Mendacious" Common-Law Mortgage

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THE "MENDACIOUS" COMMON-LAW MORTGAGE

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The common-law mortgage has been much maligned. Legal historians have called it everything from "clumsy" to "mendacious." Following their lead, the current Restatement (Third) of Property: Mortgages and the leading treatise on mortgage law denounce the modern incarnation of the common-law mortgage – the "title theory" of mortgages – in favor of the "lien theory". As many states have adopted this view, the common-law mortgage has been nearly eliminated from the modern legal landscape.

But the consensus is wrong. Critics of the common-law mortgage have relied upon a superficial view of the device. They appreciated neither the background law that explained its basic contours, nor the changes it underwent over time. This article exposes their misunderstandings by placing the common-law mortgage in the relevant doctrinal and social context of the turn of the seventeenth century. This snapshot shows how – at the height of the common-law, before equity became a major aspect of the legal landscape – the common-law mortgage made perfect sense. It then demonstrates how well-intentioned interventions by equity judges caused ultimately problematic changes to the form of the mortgage that scholars and jurists have confused with the inherent common-law device.

This shows several things. The common-law mortgage was a logical and clever device, undeserving of the criticism to which it has been subject. Judges should be wary when disregarding parties' clearly stated intent in contracts. And the modern theory of basic mortgage doctrine needs reassessment. We also gain a different view of a fundamental legal institution and greater understanding of legal history.

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INTRODUCTION

Scholars and judges have formed a durable and univocal consensus that the common-law mortgage is inherently problematic. The great English judge Lord Macnaghten declared: "[N]o one, I am sure, by the light of nature ever understood an English [i.e. common-law] mortgage of real estate."[2] His colleague Lord Bramwell referred to mortgages as involving "a system of documents which do not mean what they say."[3] The leading English legal historian of all time, Professor F. W. Maitland, referred disapprovingly to the "clumsy mortgage by way of conditional conveyance" that was still "incumbering our modern law".[4] And he more famously called the mortgage "one long *suppresio veri* and *suggestio falsi*."[5] Another great legal historian, Professor T. F. T. Plucknett, wrote: "The old common law mortgages . . . suffered from the incurable defect that they employed formulas which contradicted the true nature of the operation—they spoke of feoffments in fee, and leases for years, when the transaction was really neither[.]"[6] And he further claimed: "The fact that the mortgage was not a very satisfactory institution is shown by the continued use of the mediaeval statutes merchant and staple."[7] More recently, Professor A. W. B. Simpson wrote that "mortgages have always pretended to a greater or less [sic] degree to be something which they are not,"[8] and he referred disparagingly to the "mendacious legal mortgage."[9] Professor G. Watt lately echoed such views, declaring: "the mortgage deed was inherently dishonest."[10] Professor J.J. Rabinowitz summed up such sentiments:

> The origin of this obviously artificial device, which does not correspond either to the true economic significance of the transaction or to the intention of the parties, has never been satisfactorily explained. Nor is the reason for it quite apparent. Why should a mortgage, given to secure a debt, take the form of an immediate and absolute conveyance of the mortgaged property, when what is intended is a forfeiture of the property to take effect in the future in the case of non-payment of the mortgage debt?[11]

Such queries and criticisms are rooted in what appears at first glance to be the fundamentally backward structure of the mortgage. Whereas its purpose is to allow a creditor to seize property upon default, a common-law mortgage takes the form of a grant of legal title to a creditor upon origination of a debt.[12] The grant is subject to a

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[2] Samuel v. Jarrah Timber and Wood Paving Corp. [1904] AC 323 (HL) 326 (appeal taken from Eng.).

[3] Salt v. Marquess of Northampton [1892] AC 1 (HL) 19 (appeal taken from Eng.).

[4] 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 124 (2d ed. 1898).

[5] F. W. MAITLAND, EQUITY 269 (A. H. Chaytor & W. J. Whittaker eds., 1913). Maitland referred to the law prior to the major land-law reform of 1925.

[6] THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 606 (5th ed. 1956).

[7] *Id.* at 608; *cf. id.* at 606.

[8] A. W. B. SIMPSON, A HISTORY OF THE LAND LAW 242 (2d ed. 1986).

[9] *Id.* at 247.

[10] Gary Watt, *The Lie of the Land: Mortgage Law as Legal Fiction*, *in* 4 MODERN STUDIES IN PROPERTY LAW 73, 73 (Elizabeth Cooke ed., 2007).

[11] Jacob J. Rabinowitz, *The Common Law Mortgage and the Conditional Bond*, 92 U. PA. L. REV. 179, 180 (1943). The author called the conveyance "absolute" because he assumed a defeasance in a separate deed, but he was fully aware that the mortgage was a conditional grant. *Id.* at 179; *see also* Jacob J. Rabinowitz, *The Story of the Mortgage Retold*, 94 U. PA. L. REV. 94, 94 (1945–1946).

[12] *See* PLUCKNETT, *supra* note 6, at 607; 2 POLLOCK & MAITLAND, *supra* note 4, at 122–23; SIMPSON, *supra* note 8, at 142, 242; H. D. Hazeltine, *General Preface: The Roman Fiducia cum Creditore and the English* Mortgage of R. W. TURNER, THE EQUITY OF REDEMPTION: ITS NATURE, HISTORY AND CONNECTION

condition that title will return to the debtor upon repayment.[13] In other words, a creditor holds title—i.e. is the owner in the eyes of the law—of property for the duration of a mortgage. A mortgage debtor—whom one expects is the owner—is not the owner, at least while the debt is outstanding. The debtor regains title only upon repayment, by undoing the mortgage grant. In other words, a creditor becomes technical owner of property before he or she has any real entitlement to it by a grant that is undone if all goes as planned. This seems backward, if not absurd. Furthermore, common-law mortgages tended to have certain clauses that everyone knew "do not mean what they say."[14] Who would have possession during a mortgage, for instance, or when the debt was actually due, were often stated differently in a mortgage deed than everyone understood to be intended. Such disjunctions between common expectation and common appearance of a mortgage inspired criticisms ranging from disapprobation to condemnation.

The view that the common-law mortgage is inherently problematic is not only academic orthodoxy; it has also significantly affected the structures of law in operation. Today different states structure their mortgages differently. Some follow "title theory," others follow "lien theory" or "intermediate theory."[15] Title theory is the common-law mortgage.[16] Lien theory allows a debtor to hold title all the way until the completion of a foreclosure proceeding.[17] Intermediate theory splits the difference by vesting title in a creditor automatically upon default.[18] "Today fewer than 10 jurisdictions follow the title theory."[19] And most jurisdictions have abandoned it because of the criticisms above claiming that the common-law mortgage is inherently problematic. The Restatement (Third) of Property: Mortgages, along with the leading treatise on mortgage law, agree.[20] The consensus about the common-law mortgage has therefore driven it to the brink of extinction.

But the consensus is wrong. When properly understood, the common-law mortgage is unproblematic; it is merely a straightforward utilization of existing legal structures to make land a security for a debt. As the Restatement acknowledges, the only way to understand the common-law mortgage is through English legal history.[21] And examining the history of the mortgage renders it explicable. Within the doctrinal structures of land title and secured lending of the pure common law—before equity affected the mortgage—it was explicable and straightforward. After equity assumed an effectively exclusive jurisdiction over mortgages, they changed – and not for the better; but this was an effect of equity, not the inherent common-law mortgage.

Why then did the critical consensus arise? First, some scholars and jurists simply could not get over the fact that a mortgage began with a grant, which did not give possession, which would be reversed when everything went as planned. But such a view was unreasonably short sited. At the time the common-law mortgage assumed its

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WITH EQUITABLE ESTATES GENERALLY xxxi–xxxii (1931); J. L. Barton, *The Common Law Mortgage*, 83 L. Q. REV. 229 (1967).

[13] *See* authorities cited *supra* note 12.

[14] *See* Salt v. Marquess of Northampton [1892] AC 1 (HL) 19 (appeal taken from Eng.).

[15] *See* GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW 199–210 (6th ed. 2014); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a (AM. LAW. INST. 1997).

[16] *See* authorities cited *supra* note 15.

[17] *See* authorities cited *supra* note 15.

[18] *See* authorities cited *supra* note 15.

[19] NELSON ET AL., *supra* note 15, at 201.

[20] *Id.*; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a(1) (AM. LAW. INST. 1997).

[21] RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a(1) (AM. LAW. INST. 1997). ("English legal history is crucial to understanding the title theory.").

form, the prevailing legal structures of remedies and secured lending created a pervasive risk of encumbrances upon title to land. The value of land title was thus constantly at risk. To use land as a security required a stable value. A mortgage cleverly preserved the value of title by handing title over to a creditor and thereby disabling a borrower, either intentionally or accidentally, from encumbering the title: if the borrower does not own the land, how can he or she encumber it? A mortgage also prevented other creditors from reaching the title: the property was the creditor's, not the debtor's. The reciprocal concern—that a creditor would encumber the title during the mortgage—was addressed by the common-law doctrine of conditions subsequent, which nullified any encumbrances made between grant upon condition and operation of the condition.[22] The common-law mortgage, in other words, gave a creditor absolute priority to a title, preserved its value, and still allowed a borrower to redeem an unimpaired title. And none of the above analysis was too complicated for contemporary lawyers—or even lay people—to appreciate. The mortgage was simply the analogue of one of the most widespread types of financial transaction at the time—a pawn. The mortgage debtor simply handed over title until he or she repaid a debt, just like anybody who borrowed upon a pawn—at the time everyone from the king to a commoner—handed over a valuable item until repayment. In short, the supposedly backward structure of the mortgage was exactly what allowed it to function as a security, in exactly the way that everybody commonly borrowed on assets.

Second, scholars and jurists failed to realize that clauses in a mortgage that did not mean what they say were not a characteristic of the common-law mortgage *per se*. Relatively late in its life the common-law mortgage became subject to an effectively exclusive jurisdiction of the Court of Chancery. While Professor Watt has described how the Chancery engaged in "barefaced disavowal of the legal form" of mortgages.[23] And Professor Simpson summed up the Chancery's jurisdiction thus: "[T]he Chancery freely interfered with mortgage transactions with a complete indifference to the terms agreed by the parties; in no branch of the law was the sanctity of agreement less regarded."[24] In response to such treatment, parties came to draft mortgage deeds differently. They made them positioning devices to obtain particular results in equity, rather than literal statements of rights and responsibilities: parties knew that literal terms would not be given effect.[25] A gulf thus opened between expression and intent in mortgages. This gulf grounded many criticisms. But this gulf was a response to judicial alteration of fundamental premises of contract by equity, not an inherent characteristic of the common-law mortgage.

In short, the common-law mortgage was not so bad; so our understanding must change. And changing our understanding matters in several ways. First, and most basically, we have a new understanding of a fundamental legal institution. The significance of mortgages both historically and in the present day hardly needs mention. They have not only been a core aspect of finance since at least the seventeenth century, but remain suffused throughout the present-day economy.[26] Deeply understanding such

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[22] *See infra* notes 262-263 and accompanying text.

[23] *See* Watt, *supra* note 10, at 80.

[24] SIMPSON, *supra* note 8, at 246.

[25] *See infra* section II.

[26] By the first quarter of 2018, total outstanding mortgage debt in the United States was just under $15 trillion. *Mortgage Debt Outstanding*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm [https://perma.cc/QTC6-QHDW]; *see also* John Patrick Hunt, *Should the Mortgage Follow the Note?*, 75 OHIO ST. L.J. 155, 158 (2014) (noting that "[m]ortgage finance historically has been under-studied relative to its importance").

an institution has value for its own sake. And that understanding must now take the form, not of axiomatic criticism, but appreciation. The common-law mortgage was at least unobjectionable, perhaps even clever.

Second, the basic mortgage doctrine predicated upon now-debunked criticisms needs re-appraising. Most states and the leading scholarly authorities on mortgages reject title theory simply because it is a species of common-law mortgage.[27] Their preference for lien theory is therefore unfounded when the common-law mortgage is redeemed. It is therefore time for a wholesale reconsideration of basic mortgage theory.

Third, the process of coming to a new understanding of the mortgage sounds another cautionary note about unintended consequences of judges disregarding the stated terms of parties' private agreements. In developing equitable mortgage doctrine, judges in Chancery altered fundamental premises of contract law to disregard express language. Private parties' response was to hide their intent behind explicit statements that they did not mean in the hope of obtaining particular results. This generated a widely reviled legal institution. Courts should therefore be wary of what will happen when they fail to give effect to parties' clearly stated contract terms.

Finally, the analysis necessary to understand the mortgage contributes to legal history. Not only do we understand the history of the mortgage itself better, but we learn more of the much-neglected history of remedies and secured lending. Professor D.J. Ibbetson recently wrote:

> As legal historians, and as lawyers, we spend a good deal of time looking at substantive law and at the forms of action; but we spend remarkably little time looking at remedies. This is a curious imbalance, since for the litigants in any case it is the remedy that normally matters.[28]

The substantive right beneath secured lending and execution of civil judgments is obvious: the former is a debtor's pledge, and the latter is a court's judgment. The remedy is the question for both. Yet little legal history exists for either. To understand the common-law mortgage, the legal history of both is needed. And some of that appears below.

This article proceeds in several parts. Part I explains the common-law mortgage in light of the relevant legal context. It considers the mortgage from roughly 1580 to 1620, when the common-law mortgage was both fully developed, and as yet unaffected by equity.[29] It sets out the prevailing legal structures that created a pervasive risk of encumbrances to legal titles to land. It does this first by explaining how the writ of debt and bonds operated as the basis of lending. It then shows how remedies for lenders reached land. And next it explains how other forms of secured lending fit in that framework to create a setting in which the mortgage made sense. It thus provides a summary of remedies and secured lending historically, which incidentally shows how the mortgage was arguably the peak of a hierarchy of securities for lenders.

Part II next considers the changes wrought by equity upon the common-law mortgage. It shows how, in response to equity, parties hid the intent of their mortgage contracts beneath forms of language not openly expressing their meaning. They aimed to get a result from the Court of Chancery, not state what they meant. This disjunction

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[27] *See, e.g.*, NELSON ET AL., *supra* note 15, at 209.

[28] David Ibbetson, *The Assessment of Contractual Damages at Common Law in the Late Sixteenth Century*, *in* LAW AND LEGAL PROCESS 126 (Matthew Dyson & David J. Ibbetson eds., 2013).

[29] The period roughly 1580 to 1620 forms what the rest of this article refers to as "our period."

constituted the supposed mendacity grounding criticisms of the mortgage. Part II thus shows how criticisms of the common-law mortgage are really criticisms of the side effects of equitable intervention.

Part III then reassesses the validity of the consensus that the common-law mortgage is problematic. It considers in detail each criticism of the mortgage presented at the beginning of this article. It shows that the pure common-law mortgage is undeserving of the consensus view, while its post-equity successor may be.

Part IV then shows how, in the absence of the traditional criticism of the common-law mortgage, the leading position on basic mortgage theory in America needs reassessment. It shows that both the Restatement (Third) of Property: Mortgages and the leading treatise on mortgages, which have influenced the majority of states, have an improperly supported preference for lien theory over both title and intermediate theories. Part IV therefore concludes that a reassessment of basic mortgage theory is needed.

I. THE COMMON-LAW MORTGAGE HISTORICALLY

The common-law mortgage cannot be understood in isolation. It must be set in the contemporary context of its operation to understand how and why it had the form that it did. This section considers debts and secured lending from roughly 1580 to 1620. It explains the basic structures of the writ of debt, simple securities like bonds, advanced securities like recognizances and statutes merchant and staple, and shows how all such instruments found effect in remedies of the day. It then sets the common-law mortgage in this context. In so doing it shows how the common-law mortgage was a logical element of a coherent system, and, indeed, even arguably the peak of the hierarchy of securities at that time.

A. The Writ of Debt and Bonds

At common law all questions of credit and debt began with the well-known writ of debt. It was the form of action by which to claim a sum certain owed.[30] Other actions, such as covenant or *assumpsit*, also availed creditors; but the former was oriented toward recovery of unliquidated damages,[31] while the latter was to some extent still in development, and was, in any case, primarily a means to recover unsecured debts.[32] Debt actions came in two forms, *sur contract* or *sur obligation*. Debt *sur contract* was available upon parol debts, while debt *sur obligation* required a sealed writing attesting to a debt.[33] Debt *sur contract* was therefore the form of action for unsecured creditors, given it had at least two comparative disadvantages. First, the action died with a debtor, leaving an unsecured creditor without recourse against a decedent's estate.[34] Second, a defendant in such an action could elect wager of law as the method of trial.[35] This meant

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[30] A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 61–70 (1975); *see also* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 321 (4th ed. 2002); PLUCKNETT, *supra* note 6, at 362–63.

[31] SIMPSON, *supra* note 30, at 6, 13; *see also* D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 92 (1999). The vitality of covenant as a form of action after the medieval period has also been questioned. SIMPSON, *supra* note 30, at 117; IBBETSON, *supra* note 31, at 30.

[32] *See* BAKER, *supra* note 30, at 368.

[33] SIMPSON, *supra* note 30, at 136.

[34] PLUCKNETT, *supra* note 6, at 647–48; SIMPSON, *supra* note 30, at 143.

[35] SIMPSON, *supra* note 30, at 137.

the debtor could plead and swear *nil debet* (he/she owes nothing), and, upon swearing eleven other "compurgators" or "oath helpers" to his or her honesty, favorable judgment followed automatically.[36] By the end of the sixteenth century, wager of law was becoming a fiction: an officer of the court found compurgators on behalf of any defendant.[37] Debt *sur contract* was therefore not a particularly desirable action compared with debt *sur obligation*.

The instrument enabling creditors to proceed in debt *sur obligation* was the basic form of security: a sealed writing, called (largely interchangeably) a bond, specialty, obligation, or, particularly when written in English and unconditional, a bill.[38] Because it was under seal, an obligation was a deed that *ipso facto* gave rise to a debt.[39] Its basic form was a statement that A owed B a certain sum.[40] So identical with the debt was this deed that losing the deed meant losing the action; a creditor could not sue debt *sur contract* instead.[41]

Debt *sur obligation* was creditor friendly in several ways. Significantly, it did not admit of wager of law.[42] And it could be sued against a decedent's estate.[43] It also greatly eased a creditor's path to judgment by reducing the pleas available to a debtor. Because a deed could be contradicted only by another deed, a debtor could not plead payment without a sealed acquittance or defeasance.[44] Instead a debtor might challenge the validity of the deed itself by pleading *non est factum*—that the bond in question was someone else's bond, or not a bond at all, or was invalid due to incapacity such as infancy.[45] Relatedly, a debtor could plead that the bond had been tampered with after sealing.[46] Or a debtor could plead duress—that the debtor had been illegitimately forced to make the bond.[47] An illiterate debtor could plead that the terms of the bond had been improperly explained, but such a claim was of course unavailable to anyone who could read.[48] None of these pleas were terribly likely to fit the facts actually arising

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[36] BAKER, *supra* note 30, at 74, 322–23; EDWARD COKE, 1 INSTITUTES OF THE LAWS OF ENGLAND 295r (London, 1628) [hereinafter CO. LITT.]; SIMPSON, *supra* note 30, at 137–38.

[37] BAKER, *supra* note 30, at 74.

[38] SIMPSON, *supra* note 30, at 88; *see also Obligation*, JOHN COWELL, THE INTERPRETER (1607); 1 WILLIAM WEST, SYMBOLEOGRAPHY § 100 (London, 1615); T. F. T. Plucknett, *Deeds and Seals*, 32 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 141, 149 (1950). Regarding "obligation" versus "bill," West emphasizes that the former is in Latin and the latter in English: "A Bill or Obligation (which be all one, sauing that when it is in English, it is commonly called a Bill, and when it is in Latin, an Obligation) is a deed." WEST, *supra*. Sir Edward Coke said that the former was conditional and the latter single or simple: "'*Obligation*,' is a word of his owne nature of a large extent, but it is commonly taken in the Common Law, for a Bond containing a penaltie with condition for payment of money, or to do or suffer some act or thing, &c. and a Bill is most commonly taken for a single Bond without condition." CO. LITT., *supra* note 36, at 172a. Cowell quotes the relevant portion of West but glosses it with the substance of Coke's definition: "True it is that a Bill is obligatorie; but we commonly call that an obligation, which hath a condition annexed." COWELL, *supra*.

[39] PLUCKNETT, *supra* note 38, at 149.

[40] *See* WEST, *supra* note 38, at § 102 (transcription on file).

[41] SIMPSON, *supra* note 30, at 95–96; *see also* IBBETSON, *supra* note 31, at 20–21.

[42] CO. LITT., *supra* note 36, at 295r; Plucknett, *supra* note 38, at 149.

[43] SIMPSON, *supra* note 30, at 82–84.

[44] BAKER, *supra* note 30, at 324–25; SIMPSON, *supra* note 30, at 96, 99–101.

[45] BAKER, *supra* note 30, at 324.

[46] *Id.*

[47] *Id.*; SIMPSON, *supra* note 30, at 98–99; *see also* IBBETSON, *supra* note 31, at 71–73, 208.

[48] SIMPSON, *supra* note 30, at 98–99.

in the real world; they applied too narrowly. But essentially no other pleas could avoid judgment for a creditor.[49]

Most bonds, however, did admit of a more substantial plea. These were conditional bonds, a type of bond that stated A owed B a certain sum on its face, while providing on the back that the bond was void if A did a certain act. For instance, a bond upon a loan of £100 typically stated that the debtor owed £200, while the condition on the back rendered that obligation void upon payment of £100 by a certain time.[50] The sum of the bond thus represented a penalty that, in the language of the time, became forfeit upon failure to perform the condition. The condition represented what the debtor was really meant to do. The borrower of £100 was really meant to repay the £100; if the borrower failed, he or she owed £200. Because a condition was normally endorsed—written on the back—the seal of the obligation did not apply to it.[51] A debtor could therefore plead and introduce parol evidence—such as performance—in relation to it.[52] Conditional bonds thus often led to jury trial on the question of performance of the condition.[53] Despite having to go through a jury trial on a conditional bond, it still helped a creditor by eliminating the disadvantages of debt *sur contract*; this was the point of a bond as a security.

Once a creditor obtained judgment in debt whether *sur contract* or *sur obligation,* he or she was entitled to a threefold sum. First, and most obviously, the creditor was entitled to the principal debt itself—the "sum certain" stated both in the bond and the writ initiating the action.[54] Second, the creditor was entitled to damages for the detention of the principal debt.[55] Third, the creditor was entitled to costs of litigation.[56] In short, judgment in debt yielded the sum due plus compensation for failing to pay.

B. Execution of Damages Judgments

While the writ of debt and bonds have long been understood, remedies upon debt judgments have not. As Professor Ibbetson suggested, this is strange: bonds and writs are merely how a creditor obtains a court declaration of a right to a sum—a matter completely preliminary to the actual recovery of value.[57] Understanding remedies upon debt judgments therefore matters *per se* as the root of legal credit relations, in addition to its significance for the common-law mortgage. A judgment creditor could choose between four writs of execution, two supplied by common law and two supplied by statute, each of which gave a different remedy. It is worth noting these were the same remedies for anyone with a money judgment irrespective of the original cause of action,

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[49] *See* BAKER, *supra* note 30, at 324–25. One can never eliminate the possibility that available pleas might be used fictitiously simply to get the matter before a jury to allow them to do substantial justice irrespective of law.

[50] *Id.* at 324; SIMPSON, *supra* note 30, at 90.

[51] *See* BAKER, *supra* note 30, at 324.

[52] *Id.*

[53] SIMPSON, *supra* note 30, at 101–02; *see also* BAKER, *supra* note 30, at 324. For more detail see CO. LITT., *supra* note 36, at 207a.

[54] SIMPSON, *supra* note 30, at 61–62. The sums of the bond and writ had to be identical or the action was invalid. *See id.*; S. F. C. Milsom, *Sale of Goods in the Fifteenth Century*, 77 L. Q. REV. 257, 257–58 (1961).

[55] Ibbetson, *supra* note 28, at 128. In cases of jury trial, the jury assessed damages and costs, and the court made an additional award of costs that seems to have incorporated awareness of what the jury had awarded. *Id.* at 128–30.

[56] *Id.* at 128.

[57] *See id.* at 126.

whether sounding in what we would today classify as tort, contract, unjust enrichment, or something else.[58]

i. *Fieri Facias*

The most basic remedy was the common-law writ of *fieri facias*. It ordered a sheriff to "make to happen" satisfaction of the sum of the judgment from sale of a judgment debtor's goods and chattels.[59] A sheriff would seize and sell enough property to raise the relevant sum and then pay the money into court.[60] A sheriff could not simply deliver the property to the creditor,[61] nor keep it and deliver the money from his own funds; he had to sell it.[62]

As to what a sheriff could seize, it was said by Justice Holt (Chief Justice of the King's Bench 1689-1710) that "upon a *fieri facias* the sheriff may take anything but wearing clothes; nay if the party hath two gowns, he may take one of them."[63] There is no reason to believe that the same was not substantially true in our period (i.e. roughly 1580 to 1620).[64] Rent-charges qualified as saleable chattels under a *fieri facias*,[65] as did leases;[66] although leases could also be treated as lands for purposes of execution.[67] Whatever a debtor owned at the *teste* of the writ, that is the date that the writ issued, were charged for sale,[68] including any goods subsequently given away or sold *bona fide* by the debtor; the logic was that the writ altered the goods' property, rendering the debtor incapable of conveying good title.[69] Bankruptcy of the debtor after execution of a *fieri facias*, but before it was returned to court, did not alter this position.[70] If a debtor's chattels proved insufficient to make up the whole sum of a judgment, a creditor could subsequently sue another process of execution.[71]

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[58] *See* Foster v. Jackson (1615) 80 Eng. Rep. 201, 206; Hob. 57.

[59] CO. LITT., *supra* note 36, at 290v.

[60] *See* Goodyere v. Ince (1610) 79 Eng. Rep. 211; Cro. Jac. 246; Anon. (1579) 73 Eng. Rep. 815; 3 Dy. 363a.

[61] Thomson v. Clerk (1596) 78 Eng. Rep. 754; Cro. Eliz. 754.

[62] Waller v. Weedale (1604) 74 Eng. Rep. 1072; Noy 107.

[63] Hardistey v. Barney (1696) 90 Eng. Rep. 525; Comb. Rep. 356.

[64] *See supra* note 29 and accompanying text.

[65] *See* York v. Twine (1605) 79 Eng. Rep. 67; Cro. Jac. Rep. 79; 145 Eng. Rep. 228; Jenk. 312 (per Popham, C.J.K.B., Anderson, C.J.C.P., and Fleming, C.B.).

[66] *See* Manning's Case (1609) 77 Eng. Rep. 618, 623; 8 Co. Rep. 94b, 96b.

[67] Fleetwood's Case (1610) 77 Eng. Rep. 731; 8 Co. Rep. 171 a; PLUCKNETT, *supra* note 6, at 391.

[68] Parkes v. Mosse (1589) 78 Eng. Rep. 437; Cro. Eliz. 181 ("[F]or by the execution awarded, the goods are bound . . . .").

[69] *See, e.g.*, Boucher v. Wiseman (1595) 78 Eng. Rep. 680, 681; Cro. Eliz. 440, 440 (gift after *teste* ineffective against execution); Wangford v. Sexton (1580) 74 Eng. Rep. 277; 1 Leo. 305 (*bona fide* sale after *teste* ineffective against execution); Anon. (1590) 78 Eng. Rep. 431; Cro. Eliz. 174 (*bona fide* sale after *teste* ineffective against execution); *Fleetwood's Case*, 77 Eng. Rep. at 731; 8 Co. Rep. at 171a ("and a sale [] *bona fide* of chattels is good after judgment, but not [] after execution awarded"); Wilson v. Wormal (1610) 78 Eng. Rep. 98; Godb. 161 (holding sale of a lease after judgment but before execution was good);. Cf. Ayer v. Aden (1604–05) 80 Eng. Rep. 32; Yel 45 (K.B). *Contra* Ayre v. Aden (1605) 79 Eng. Rep. 62; Cro. Jac. 73. The Statute of Frauds 1677 later modified the rule because some creditors would take out successive writs of execution to prevent debtors from being able sell their property while not actually delivering the writs to the sheriff to be executed; the Statute of Frauds therefore provided that property was altered only in those goods held on the date that the writ was actually delivered to the sheriff. *See* (1677) 29 Car. 2, c. 3, § 15.

[70] Benson v. Flower (1629) 79 Eng. Rep. 754; Cro. Car. 176.

[71] Foster v. Jackson, (1615) 80 Eng. Rep. 201, 207–08; Hob. 52, 58–59; *see also* THE COMPLEAT SOLICITOR 72–73 (1668); *infra* texting accompanying note 114.

ii. *Levari Facias*

The second common-law writ of execution was *levari facias*. It ordered a sheriff to "do to levy" the sum of the judgment from both a debtor's chattels and the profits of his or her land and deliver the sum raised directly to the creditor.[72] Profits essentially meant crops, rents, and beasts.[73] Any beasts could be taken from a debtor's land if they were "levant and couchant", that is, had been on the land long enough to have lain down and stood up, normally a day and a night, at which point they were considered fruit of the land.[74] A debtor's lands were not to be delivered to a creditor upon a *levari facias* except in the case of a suit against an heir upon an obligation of an ancestor, in which case all the lands descended could be delivered to the creditor for the creditor to take the profits directly.[75] The point of *levari facias* was to seize the wealth generated by land, a significant type of wealth in a pre-manufacturing era. It is nevertheless a commonplace that *levari facias* fell largely into disuse after the creation of the third writ of execution, *elegit*.[76] It then became limited to pockets such as the writ, sometimes considered categorically distinct, of *levari facias de bonis ecclesiasticis* against clerics.[77]

iii. *Elegit*

The Statute of Westminster II (1285) created a third form of execution, called *elegit*, by providing:

> When Debt is recovered or knowledged in the King's Court, or Damages awarded, it shall be from henceforth in the Election of him that sueth for such Debt or Damages, [to have a Writ of Fieri facias unto the Sheriff for to levy the Debt] of the Lands and Goods; or that the Sheriff shall deliver to him all the Chattels of the Debtor, saving only his Oxen and Beasts of his Plough, and the one half of his Land, until the Debt be levied upon a reasonable Price or Extent.[78]

The option provided in contrast to *fieri facias* became known as *elegit* because the creditor had "elected" so to proceed.[79] It provided a two-pronged execution against both a debtor's goods and chattels (except oxen and beasts of the plough), and his or her land.

The lesser aspect of *elegit* was seizure of goods and chattels. Such seizure differed from *fieri facias* in two respects. First, oxen and beasts of the plough were excepted

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[72] *See, e.g.*, Coke's Case (1623) 78 Eng. Rep. 169, 170–71; Godb. 289, 291–93; Foster v. Jackson (1610) 123 Eng. Rep. 960, 963; 2 Brownl. 311, 316; Harbert's Case (1584) 76 Eng. Rep. 647, 654–55; 3 Co. Rep. 11 b, 12 a.

[73] *See* PLUCKNETT, *supra* note 6, at 390.

[74] *See* Henry Clare's Case (1610) 145 Eng. Rep. 329; Lane. 97; Stafford v. Bateman (1594) 78 Eng. Rep. 672; Cro. Eliz. 432; 75 Eng. Rep. 1050, 1050–51; Gould. 140–41. Note that later law was that even those oxen and beasts owned by a third party but levant and couchant on a debtor's land could be taken under a *levari facias*. GILES JACOB & J. MORGAN, A NEW LAW DICTIONARY, (10th ed. 1782) (defining "Levant and Couchant"); Britton v. Cole (1697) 91 Eng. Rep. 342; 1 Salk. 395.

[75] Davy v. Pepys (1573) 75 Eng. Rep. 658, 662; 2 Pl. Com. 438, 441.

[76] *See* Harbert's Case (1584) 76 Eng. Rep. 647, 654 n.C; 3 Co. Rep. 11 b, 12 a.

[77] *See id.*

[78] Statute of Westminster II 1285, 13 Edw. 1, c. 18.

[79] CO. LITT., *supra* note 36, at 289b.

from seizure. As mentioned below, this cohered with what was provided in respect of land. Second, rather than sold on the open market by a sheriff, chattels were appraised by a jury of inquest in a process known as "extent" and delivered directly to the creditor.[80]

The more important aspect of *elegit* was seizure and delivery to the creditor of a moiety (that is half) of a debtor's lands for the creditor to levy profits. A creditor was thus given something like a lease of a debtor's lands; although, unlike a lease, this special tenure, called a "tenancy by *elegit*," was in some cases of uncertain duration.[81] A debtor's lands were said to be "extended" because, just as with chattels, a jury assessed the land's extent to determine what a creditor should take.[82] The jury were to measure the full extent of a debtor's lands though only a moiety would be delivered to the creditor.[83] The exception from seizure for beasts of the plough allowed a debtor to continue productively to use his or her remaining moiety. If the jury overvalued the lands, meaning that a creditor would not in fact be recompensed in reasonable time, a creditor could do nothing about it;[84] this distinguished extent upon *elegit* from that upon a statute merchant or staple, discussed below.[85] If the jury undervalued the lands so that a creditor recovered excess, the undervaluation did not affect the creditor's tenancy.[86]

Lands chargeable under *elegit* were those held at the time of judgment. Time of judgment was deemed to mean either the date of trial at *nisi prius*, or the first day of term, whichever was earlier.[87] Lands alienated after judgment therefore remained subject to execution.[88] If, for instance, a debtor held Blackacre, Whiteacre, and Greenacre at judgment, and later sold Blackacre and Whiteacre, the creditor, at his or her election, could execute either upon the debtor's only remaining parcel, Greenacre, or against all three parcels; the creditor could not pick and choose amongst the land in the hands of alienees.[89] As mentioned above, leases could either be treated as chattels or extended as lands under *elegit*.[90] If a creditor extended a reversion—i.e. if a debtor

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[80] *See* Goodyere v. Ince (1610) 79 Eng. Rep. 211; Cro. Jac. 246; 123 Eng. Rep. 901; 2 Brownl. 209; *cf.* sub nom. Goodyer v. Junce, 80 Eng. Rep. 119; Yel. 179, 179–80.

[81] The basic length of tenure was set by the jury's assessment of value. But various events might extend the tenure to ensure full satisfaction. *See* Corbet's Case (1599) 76 Eng. Rep. 1058, 1059–61; 4 Co. Rep. 81 b, 81 b–83 a ("in the other cases of tenant by *elegit*, statute merchant, &c. and there is no term certain, but until such a sum be by them levied, and there it stands with such interest, that in some case he may hold over."); CO. LITT., *supra* note 36, at 42a ("And tenant by statute merchant, by statute staple, and by *elegit*, have incertaine interests in lands or tenements, and yet they have but chattels, and no freehold, whose estates are created by divers acts of parliament."). Whether tenancy by *elegit* or statute merchant or staple was of certain duration was a point of considerable legal difficulty. *See* Christopher McNall, *The Nature of the Tenancy by Statute Merchant*, 23 J. LEG. HIST. 37, 39–41 (2002).

[82] *See* Sparrow v. Mattersock (1633) 79 Eng. Rep. 878, 879; Cro. Car. 319, 320; *cf.* Garraway v. Harrington (1620) 79 Eng. Rep. 487; Cro. Jac. 569; *infra* text accompanying note 168.

[83] *Sparrow*, 79 Eng. Rep. at 878; Cro. Car. at 319.

[84] Anon. (1557) 73 Eng. Rep. 941 pl. 60; Benl. 15 pl. 60; CO. LITT., *supra* note 36, at 290a. *But see* Molineux v. Lacon (1602) 79 Eng. Rep. 11; Cro. Jac. 12.

[85] *See infra* text accompanying note 168.

[86] *See* R. v. Wall (1591) 78 Eng. Rep. 521; Cro. Eliz. 266.

[87] CO. LITT., *supra* note 36, at 102a.; 1 Rol. Abr. 891-92; Standford v. Cooper (1626) 79 Eng. Rep. 690; Cro. Car. 102; Anon. (1557) 73 Eng. Rep. 324; 2 Dy. 149 a; *see also* Springall v. Tuttersbury (1629) 124 Eng. Rep. 419; Het. 158; Walter v. Bould (1610) 80 Eng. Rep. 735, 736; 1 Bulst. 31, 32; Huys v. Wright (1603) 80 Eng. Rep. 26; Yel 35. The Statute of Frauds 1677 changed the time of judgment in respect of *bona fide* purchasers for value who were henceforth bound only by the date that an officer of the court signed a judgment, which date was entered in the margin of the judgment on the plea roll. (1677) 29 Car. II, c. 3, ss. 13-14.

[88] 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 395–96 (6th ed. 1642).

[89] *Id.*

[90] *See supra* notes 66–67 and accompanying text.

were a lessor with right of re-entry upon termination of a lease—the debtor's lessee would not be ousted, but would simply pay rent to the creditor instead of the debtor.[91] If a moiety of a debtor's lands were already in extent upon *elegit* and another *elegit* were sued, the second creditor received only a moiety of the remaining moiety, i.e., a quarter of the original lands, and so on for further *elegits*.[92] A debtor's copyhold lands were not subject to *elegit* because the lord's interest in such lands was considered too great to allow imposition of a new tenant by such a writ.[93] Putting detail to one side, it is important to emphasize how *elegit* rendered anyone's non-copyhold land subject to execution upon any damages judgment. No matter how a debt arose, once recognized in court, *elegit* let the judgment creditor reach the judgment debtor's land.

Selection of *elegit* theoretically prevented resort to other forms of execution "because upon the prayer to have an *elegit*, it is entred[sic] in the roll, *elegit sibi executionem per medietatem terrae*, so as he is estopped by the record to have another execution."[94] A similar logic restricted creditors to one type of execution at a time no matter which was selected.[95] But the limitation applied only so long as the execution was still outstanding: if the record reflected completion of the execution without satisfaction of the entire judgment, a creditor could sue alternate execution.[96] For instance, if a sheriff returned that a debtor had no property in his bailiwick (called a *nihil habet*), a creditor could sue out other execution; he or she had received no satisfaction.[97] Similarly, if a sheriff returned that a debtor's goods and chattels were insufficient to raise the judgment sum, and the debtor had no land in his bailiwick, an *elegit* was treated as being in the nature of a *fieri facias*, and alternate execution was available just as upon an insufficient *fieri facias*.[98] But if a sheriff returned an extent of any lands, no matter how small in value, such extent constituted full satisfaction: the creditor theoretically could hold for as long as necessary to levy the full judgment.[99]

A tenant by *elegit* had a statutory right to defend his or her possession by an action of novel disseisin.[100] Such protection was useful against interference with the land that qualified as the type of dispossession known as disseisin.[101] But before 1540, most creditors dispossessed in a manner not constituting a disseisin had no remedy. If more than a year and a day passed since judgment, which was probably true for most creditors, the Statute of Westminster II required, for any execution, suing a *scire facias*, which called a judgment debtor into court to "make to know" why the judgment

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[91] *See* Day v. Austin (1595) 78 Eng. Rep. 642; Cro. Eliz. 398; The Bishop of Bristow's Case (1584) 74 Eng. Rep. 575; 3 Leo. 113.

[92] *See* Huit v. Cogan, (1596) 78 Eng. Rep. 734; Cro. Eliz. 483.

[93] Rowden v. Maltster (1626) 79 Eng. Rep. 641, 642; Cro. Car 42, 43; Heydon's Case (1584) 76 Eng. Rep. 637, 642; 123 Eng. Rep. 1016; 3 Co. Rep. 7 a, 9 a.

[94] Cowley v. Legat (1613) 78 Eng. Rep. 150; Godb. 257; sub nom. Crawley v. Lidgeat, at 79 Eng. Rep. 288; Cro. Jac. 388; sub nom. Cowley v. Lydeot, at 80 Eng. Rep. 989; 2 Bulst. 97; sub nom. Cowley v. Lydiat, 81 Eng. Rep. 289; 1 Rolle 9; sub nom. Anon., 80 Eng. Rep. 152 pl. 3; Hob. 2; see *infra* 114 and accompanying text.

[95] *See* Foster v. Jackson (1615) 80 Eng. Rep. 201, 206–08; Hob. 52, 57–59.

[96] *Id.*

[97] *See id.*; Palmer v. Knowllis (1589) 74 Eng. Rep. 162, 163; Leo. 176, 177, *rev'd* sub nom. Knowles v. Palmer (1589) 78 Eng. Rep. 418, 418; Cro. Eliz. 161, 161.

[98] *See Foster*, 80 Eng. Rep. at 207–08; Hob. at 58–59; *see also* THE COMPLEAT SOLICITOR, *supra* note 71, at 72–73

[99] *Cowley*, 78 Eng. Rep. at 150; Godb. at 257; *Palmer*, 74 Eng. Rep. at 162; Leo. at 177; CO. LITT., *supra* note 36, at 289b; *cf.* Fulwood's Case (1591) 76 Eng. Rep. 1031, 1034–35; 4 Co. Rep. 64b, 66a–67a (discussing remedies for a conusee).

[100] Statute of Westminster II 1285, 13 Edw. 1, c. 18.

[101] *See* PLUCKNETT, *supra* note 6, at 358–60.

creditor should not have execution.[102] A dispossessed tenant by *elegit* had no basis to sue *scire facias* because the record reflected a completed execution.[103] In 1540, "An Act for Contentation[sic] of Debts upon Execution" made *scire facias* available to tenants by *elegit*.[104] But *scire facias* was unavailable if a tenant by *elegit* lost only part possession on the theory that he or she could make up the entire judgment by holding over on the remaining portion of the land.[105]

Aside from such complications in defending possession, a tenancy by *elegit* had other difficulties. A tenant by *elegit* was liable for waste to a debtor by writ of *venire facias ad computandum*.[106] And more prosaically, the tenant incurred the cost of raising profits from the land. Actual possession would ordinarily be impractical. A tenant by *elegit* might therefore sell the entire tenancy, as it was a chattel real—a form of property—after execution (being a mere chose in action before).[107] The alterative practice developed of leaving a debtor in possession of extended lands but extracting periodic payments much like a rent.[108]

iv. *Capias ad Satisfaciendum*

The final form of execution was different—and more notorious—than the other three. A writ of *capias ad satisfaciendum* ordered a sheriff to "seize until satisfaction" the body of a debtor. *Capias ad satisfaciendum* was, in other words, the means of sending someone to debtors' prison. At common law *capias* was available only in those private actions involving breach of the King's peace,[109] which did not include peaceful actions like debt. But a statute of 1352 extended *capias* to actions of debt.[110] *Capias* was a unique form of execution in that it had no proprietary effect: it affected only the body of a debtor, not his or her property. The debtor's body was taken as a "pledge" for satisfaction;[111] as Justice Houghton of the King's Bench put it: "*capias ad satisfaciendum*; is no satisfaction; the same is only *ad satisfaciendum*, but not *in satisfactione*."[112] Justice Dodderidge also of the King's Bench said: "a *capias* is a begun execution, but not the fruit and effect of law".[113] Despite its inconclusive effect, a creditor could have no further process of execution once a debtor was in custody upon *capias*.[114] The logic was the same as for *elegit*:

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[102] Statute of Westminster II 1285, 13 Edw. 1, c. 45; Harbert's Case (1584) 76 Eng. Rep. 647, 655; 3 Co. Rep. 11b, 12a; 2 COKE, *supra* note 89, at 469–72; JOHN RASTELL, *Scire Facias*, *in* TERMES DE LA LEY 283, 283 (London, 1624).

[103] *See Harbert's Case*, 76 Eng. Rep. at 655; 3 Co. Rep. at 12a.

[104] 32 Hen. 8 c. 5; CO. LITT., *supra* note 36, at 289b–90b.

[105] Fulwood's Case (1591) 76 Eng. Rep. 1031, 1034; 4 Co. Rep. 64b, 66a.

[106] RASTELL, *Elegit*, *in* TERMES DE LA LEY, *supra* note 102, at 165–66.

[107] *Id.* at 167; *see also* Underhill v. Devereux (1663) 85 Eng. Rep. 698, 702–03 n. 1; Wms. Saund. 68, 68 (explaining a tenancy by elegit as a chattel interest).

[108] BAKER, *supra* note 30, at 66–67; *see also Underhill* 85 Eng. Rep. at 708 n. 1.

[109] *See* Foster v. Jackson (1615) 80 Eng. Rep. 201, 206; Hob. 52, 57; Ognel v Paston (1589) 74 Eng. Rep. 377, 378–79; Leo. 84, 85–86.

[110] 25 Edw. 3, st. 5, c. 17; PLUCKNETT, *supra* note 6, at 389; SIMPSON, *supra* note 30, at 87, 588–89; *cf.* BAKER, *supra* note 30, at 64 & n.62.

[111] Crawley v. Lidgeat (1613) 79 Eng. Rep. 288, 289; Cro. Jac. 338, 339; *see* cases cited *supra* note 94.

[112] Cowleya v. Lydeot (1613) 80 Eng. Rep. 989; Bulst. 97.

[113] *Id.* at 992; *see* cases cited *supra* note 94.

[114] *Foster*, 80 Eng. Rep. at 209; Hob. at 60 ("[T]he capias executed, and the body taken, stops, as against him all other executions but itself, and the consequence of it, which is the action of debt, or action upon the case upon the escape."); *see* cases cited *supra* note 94.

> [I]mplied in taking the *capias ad satisfaciendum* is an election of that for his execution, now election implies rejection of the rest . . . .
>
> For where the law gives three or four kinds of executions, not all together, but by way of choice, whereof the *capias ad satisfaciend[um]* is one; and when the body is taken, it is a full execution, and cannot be for part (as a *fieri fac[ias]* may be) it is an election of it self[sic] of that kind of execution, and so a renouncing of the rest as well as an *elegit*, though it use not the very word . . . . For if the defendant had lands and goods, when the plaintiff took the body; he made a plain preferment of that execution before the other. And if they came after, he prevented his choice by haste, which expedition alone is a great advantage in execution.[115]

A consequence of such logic was that, for most of our period, the better opinion held that the death of a debtor in custody upon *capias ad satisfaciendum* discharged the debt. The creditor had elected his or her execution in taking the body, and it had succeeded; further execution was unavailable.[116] Coke's opinion was contrary, and one of his reports claimed that law was with him.[117] But both Lord Chancellor Ellesmere and Justice Hutton of the Common Pleas explicitly noted that Coke misrepresented the law in his report.[118] A statute of 1623 declared that the issue had been "much doubted and questioned".[119] It recited that various debtors had "obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities," because of discharge.[120] The statute specifically allowed new process of execution to issue against property of a debtor who had died in custody.[121]

In a similar vein, escape of a debtor in custody upon *capias ad satisfaciendum* effectively worked a discharge: the record reflected satisfaction through the writ and the sheriff's return that he had the debtor. In such a case, a creditor had to proceed against the sheriff for allowing the escape.[122] The rule was not all bad for creditors as a sheriff, usually a substantial member of the provincial gentry, might very well be worth more than an imprisoned debtor. But by the end of our period the rule was changed so that a creditor could proceed against either a sheriff or an escaped debtor, as later opinion recognized that allowing an escaped debtor to avoid further execution improperly rewarded the escape.[123]

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[115] *Foster*, 80 Eng. Rep. at 206, 208; Hob. at 57, 59.

[116] *Id.*; Williams v. Cutteris (1601) 79 Eng. Rep. 118, 119; Cro. Jac. 136, 137; *cf.* Shaw v. Cutteris (1599) 78 Eng. Rep. 1076; Cro. Eliz. 851 (addressing debtor dying in gaol on a *capias utlegatum* rather than a *capias ad satisfaciendum*); *cf.* Linacre v. Rhode (1589) 74 Eng. Rep. 387, 388; Leo. 96, 97 (addressing death of a debtor in gaol on a statute).

[117] Blumfield's Case (1596) 77 Eng. Rep. 185, 186; 5 Co. Rep. 86a, 87a.

[118] Cave v. Fleetwood (1629) 124 Eng. Rep. 420; Het. 159; Thomas Egerton, *The Lord Chancellor Egertons Observacions vpon ye Lord Cookes Reportes*, *in* LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND 297, 313–14 (1977).

[119] An Act for the relief of Creditors against such persons as die in Execution 1623, 21 Jac. 1, c. 24.

[120] *Id.*

[121] *Id.*

[122] Sheriff of Essex's Case (ca. 1613–25) 80 Eng. Rep. 349; Hob. 203; Linacre v. Rhode (1589) 74 Eng. Rep. 387, 388; Leo. 96, 97 (noting a difference between *capias ad satisfaciendum* and debtor apprehended on a statute); *cf.* Foster v. Jackson (1615) 80 Eng. Rep. 201, 206; Hob. 52, 57. A creditor had to proceed against the sheriff even if *capias* were improperly awarded by the court. Bushe's Case (1590) 78 Eng. Rep. 444; Cro. Eliz. 188; *cf.* case cited *infra* note 147. A sheriff's liability had origins in the Statute of Westminster II's provision that he should answer the debt of any prisoner held upon a writ of account but released. SIMPSON, *supra* note 30, at 74–75. The Statute of Merchants 1285, passed the same year as Westminster II, also made sheriffs and gaolers liable for escapes of prisoners on statutes merchant. 13 Edw. 1. st. 3 ("And let the Keeper of the Prison take heed, that he must answer for the Body or for the Debt."); *see also infra* notes 158–187 and accompanying text.

[123] Mounson v. Cleyton (1630) 79 Eng. Rep. 810; Cro. Car. 240.

The point of *capias* was to work a kind of state-sanctioned extortion. It held a debtor to ransom from family, friends, and perhaps business networks. Professor Craig Muldrew has richly described the economy in our period as an interpersonal affair in which many local households mutually depended upon one another with much admixture of social and economic realities.[124] Imprisoning a debtor thus deeply affected many relationships, not only social but also economic. Such affects rippled to more distant degrees like disturbance of any networks. *Capias* distressed a debtor's entire socio-economic network, both socially, by exploiting the human pathos of imprisoning a loved one, and economically, by depriving it of a participant. In early-modern England's world of social credit, one effect intensified the other. It was exactly such distress that made *capias* work.

But just those factors that made *capias* effective made it dangerous. Imprisoning a debtor was arguably a necessarily uncharitable course. One anonymous author wrote as much, and more, in a polemic against debtors' prison published in 1641.[125] He wrote that either the debtor had assets, in which case it was more reasonable to take them rather than precious liberty; or the debtor had none, in which case *capias* represented an indefinite sentence.[126] Extortion of third parties was the only possible object of such execution:

> Some have not to pay principall forfaiture or interest, and the Creditor knoweth or beleeveth it: yet because the Prisoner hath some able kinsman or friend, he will keep him miserably in Prisen 10 or 20 years, to try conclusions. And they are no small numbers that are case into, and now lye in Prison upon this project, who live and dye miserably for their able friends sake.[127]

A creditor might not like to risk appearing the heartless scrooge, with consequent cost to the creditor's own credit, by use of such execution. An interesting question therefore arises about the frequency and conditions in which creditor resorted to *capias ad satisfaciendum*. In certain times and places, especially during economic downturns, imprisoning debtors may have assumed a degree of normality.[128] But otherwise one gets the impression that *capias* might be called a "nuclear option", and was not a first resort of creditors.

v. The Role of the Sheriff

It is worth noting the significance of the sheriff to all the forms of execution of civil judgments described above. All writs required proper action by a sheriff. Sometimes the law put substantive limitations upon what a sheriff could do. In executing a *fieri facias*, for instance, a sheriff was not allowed to break into a primary residence in search

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[124] CRAIG MULDREW, THE ECONOMY OF OBLIGATION: THE CULTURE OF CREDIT AND SOCIAL RELATIONS IN EARLY MODERN ENGLAND 95–157 (1998); *see also* D.P. Waddilove, *Why the Equity of Redemption?*, *in* LAND AND CREDIT: MORTGAGES AND ANNUITIES IN THE MEDIEVAL AND EARLY MODERN EUROPEAN COUNTRYSIDE 117, 132–33 (C. Briggs & J. Zuijderduijn eds., 2018).

[125] IMPRISONMENT OF MENS BODYES FOR DEBT (1641).

[126] *Id.*

[127] *Id.* at 13.

[128] *See* CHRISTOPHER W. BROOKS, LAW, POLITICS AND SOCIETY IN EARLY MODERN ENGLAND 321 (2008); *see also* JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND VOLUME VI 1483–1558, 383–84 (2003) (implying that *capias ad satisfaciendum* was routine, but Professor Baker told this author in conversation that he meant only to indicate the legal regularity of the writ rather comment on its social standing or frequency of use).

of chattels: Coke reported that it was said that "the house of every one is to him as [] his castle and fortress," and thus protected from such intrusion.[129] But if a sheriff improperly broke down a door to a primary residence, the execution remained valid and the sheriff became liable to the debtor in trespass.[130] If a sheriff gained access to a primary residence because the door was open, he could enter, and, moreover, was then under a duty to break interior doors into other chambers as well as chests to recover chattels.[131] Outbuildings were not protected against intrusion like a primary residence.[132]

Ensuring proper conduct of a sheriff was essentially a matter of private law. An affected party had to take legal action as he or she may. So, as mentioned, a debtor subject to improper execution of a *fieri facias* had to sue a sheriff in trespass. Sometimes appropriate action was administrative, such as when a creditor would sue out a writ of *venditioni exponas*, which ordered a sheriff to sell any goods seized under a writ but not yet sold.[133] Often it was judicial, such as when a creditor would sue a sheriff in debt. Debt would lie against a sheriff where, for instance, he raised money but never paid it over; the logic in such a case was that a debtor was discharged by surrender of property to a sheriff and the latter then owed the value to the creditor.[134] A sheriff was, as mentioned above, similarly liable to a creditor in debt if he culpably allowed a defendant in an action of debt to escape.[135] Indeed, relatively complicated law developed regarding when sheriffs became indebted to judgment creditors in the course of their duties.[136] But sheriffs were personally unlikely to be the cause of any difficulty: it was bailiffs, the sheriff's underlings, who were more likely to cause trouble. As one of Coke's reports put it, "although the sheriff be an officer of great authority and trust, yet it appears by experience, that the King's writs are served by bailiffs, persons of little or no value."[137] Another report describes some questionable bailiffs as "gaol-birds."[138] Such were the problems with bailiffs that the doctrine of *respondeat superior* originated in a statute relating to bailiffs and sheriffs.[139] Affected parties thus bore responsibility for oversight of a sheriff's execution through the ordinary mechanisms of civil administration and litigation.

C. Methods of Secured Lending beyond Bonds

Beyond bonds were several main methods of secured lending. They all operated in concert with the scheme of execution outlined above, ensuring creditors could reach

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[129] Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91a, 91b; *cf.* Seyman v. Gresham, (argued inconclusively 1602; adjudged 1604) 78 Eng. Rep. 1131 Cro. Eliz. 909 (per curiam); Semayne v. Gresham (1602) 80 Eng. Rep. 21 Yelverton, 29; *see also* BROOKS, *supra* note 128, at 357.

[130] *Semayne's Case*, 77 Eng. Rep. at 194, 198; 5 Co. Rep. at 91a, 93a.

[131] Anon. (1602) 123 Eng. Rep. 658; 1 Brownl. 50.

[132] Penton v. Browne, (1664) 82 Eng. Rep. 1047; 1 Sid. 186.

[133] *See* "Venditioni exponas" *in* COWELL, *supra* note 38. Perhaps a better example is the writ of *levari facias quando vicomes returnavit quod non habuit emptores:* "a writ commanding the Sheriffe to sell the goods of the debtor, which hee hath already taken, and returned that he could not sell them, and as much more of the debtors goods, as will satisfie the whole debt." *Id.*

[134] Speake v. Richards (1617) 80 Eng. Rep. 353; Hob., 207.

[135] *See supra* note 122 and accompanying text.

[136] *See, e.g.*, Parkinson v. Gilford (1639) 79 Eng. Rep. 1064, 1065; Cro. Car. 539, 540; Sly v. Finch (1618) 79 Eng. Rep. 439, 440; Cro. Jac. 514, 515; 78 Eng. Rep. 161; Godb. 276; *Speake*, 80 Eng. Rep. at 353; Hob., 207.

[137] *See* Semayne's Case (1604) 77 Eng. Rep. 194, 198; 5 Co. Rep. 91a, 93a.

[138] Waterhouse v. Saltmarsh (1619) 80 Eng. Rep. 409, 409; Hob. 264, 264.

[139] PLUCKNETT, *supra* note 6, at 475.

particular property. As will be seen, these methods of secured lending fit into a rough hierarchy of increasing security for creditors with the mortgage arguably at the peak.

i. Recognizances

1. Plain Recognizances

A recognizance was a security that combined elements of a bond and an action of debt. Like a bond, a recognizance was a sealed writing attesting to a debt.[140] Like an action of debt, a recognizance involved a judgment recorded in court.[141] A recognizance was made when a debtor recognized, or in contemporary parlance "knowledged", a debt in court.[142] Such a debtor was consequently called a "cognizor", often modified to "conusor", and the corresponding creditor a "cognizee" or "conusee". Acknowledgement of the debt was enrolled in the court's record and constituted a judgment.[143] A creditor took a sealed writing reflecting the enrollment. Recognizances had begun as collusive debt actions,[144] but had developed into a distinct entity.

A recognizance was even better security than a bond, but not because it had a distinct form of execution. Execution upon a plain recognizance was essentially the same as upon an ordinary debt judgment. The words of Westminster II relating to *fieri facias* and *elegit* applied "when Debt is recovered *or knowledged* in the King's Court".[145] *Levari facias* was also available upon recognizances by common law.[146] *Capias* was a different matter. There was a serious question whether *capias* was available upon a recognizance in Chancery.[147] If a conusee waived the advantages of the recognizance by simply treating it as a bond upon which to sue in debt (which could be done before or after a year), *capias* was definitely available; otherwise there was uncertainty.[148] But irrespective of legal theory, common practice in Chancery was to issue writs of *capias* upon recognizances in our period.[149] All of the remedies available upon debt judgments were therefore available *de facto* upon recognizances in our period, if not *de jure*.

What made a recognizance better security than a bond was that, while a bond eased a creditor's path to judgment, a recognizance already was a judgment.[150] This gave recognizances two major advantages.

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[140] *See* SIMPSON, *supra* note 30, at 126–27.

[141] *Id.*

[142] *Id.*

[143] 2 POLLOCK & MAITLAND, *supra* note 4, at 203–04; PLUCKNETT, *supra* note 6, at 391–92.

[144] *See* SIMPSON, *supra* note 30, at 126.

[145] Statute of Westminster II 1285, 13 Edw.1, c. 18 (emphasis added).

[146] *See* Hall v. Winckfeild (1616) 123 Eng. Rep. 671; 1 Brownl.. 69. The question arose at least where the conusee had proceeded, as was usually necessary, upon a *scire facias*. *See infra* note 152 and accompanying text.

[147] Weaver v. Clifford (1613) 80 Eng. Rep. 960, 962; 2 Bulst., 62, 65; 80 Eng. Rep. 30; Yel., 41; 79 Eng. Rep. 2, 3; Cro. Jac. 3, 4; Ognell v. Paston (1589) 78 Eng. Rep. 422, 423; Cro. Eliz. 165, 166; sub nom. Ugnoll v. Paston, 72 Eng. Rep. 576, 577; Moore, 273, 275; sub nom. Ognel v. Paston, 74 Eng. Rep. 377, 381; 2 Leo., 84, 88; Paine v. Puttenham (1570) 73 Eng. Rep. 690, 691; 3 Dy., 306a, 306b.

[148] *Paine*, 73 Eng. Rep. at 691; 3 Dy., at 306b.

[149] *See, e.g.*, Harris v. Colliton (1658) 145 Eng. Rep. 411, 412; Hardres 121, 123 ("There are a thousand presidents for a *capias* upon a recognizance in Chancery; but a thousand more cannot make it to be law." (per Finch for the defendant)); The Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 488; 1 Chan. Rep. 13; *Weaver*, 79 Eng. Rep. at 2, 3; Cro. Jac. at 2, 4.

[150] *See supra* note 143 and accompanying text.

First, a conusee had a superior procedural posture. Because they had judgment some conusees could proceed straight to execution; that put the burden of litigating the validity of a recognizance debt on the conusor who had to sue a writ of *audita querela*.[151] In many cases, however, conusees still bore the burden of litigation. Many loans lasted for a year, and judgment was technically obtained upon acknowledgment of a recognizance. Conusees consequently often fell within the requirement of the Statute of Westminster II to sue a *scire facias* for execution upon any judgment obtained more than a year previously.[152] But under *scire facias* conusees still had the benefit that the burden of proof regarding why a creditor should not have execution fall on the debtor.[153]

Second, and perhaps more importantly, a recognizance charged a conusor's land for purposes of execution from the date of acknowledgement.[154] A conusee still reached land by *elegit* like any other creditor, but because *elegit* charged land from the date of judgment,[155] and because a recognizance was a judgment from the date of acknowledgment,[156] a conusee knew exactly which lands he or she could reach—from day one. A conusee thus had greater security than a bond creditor.

2. *Statutes*

Parliament created special forms of recognizance by statute, which were therefore themselves commonly called "statutes." They came in two varieties: statutes merchant and statutes staple.[157] The Statute of Acton Burnell (1283), amended two years later in light of experience by the Statute Merchant (1285), established statutes merchant.[158] The Ordinance of the Staples (1353) established statutes staple.[159] As recognizances, statutes had all their benefits. But as special instruments, they had certain further advantages—most importantly, a particularly creditor-friendly form of execution.

I. Statutes Merchant

Statutes merchant were acknowledged "before the Mayor of London, or before some Warden of a City or of another good Town, where the King shall appoint," or before merchants appointed for the same function in fairs, or those deputized by any of the aforesaid.[160] Officials recorded the debt on two rolls, and gave an exemplification

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[151] PLUCKNETT, *supra* note 6, at 393-94; *see also* T. F. T. PLUCKNETT, LEGISLATION OF EDWARD I 145–46 (1949).

[152] *See supra* note 102 and accompanying text. Coke's opinion was that Westminster II required *scire facias* not a year after acknowledgment but only after the date upon which the debt was due; yet he also seemed to recognize that this was not the law. COKE, *supra* note 89, at 470.

[153] *See supra* note 102 and accompanying text.

[154] Hall v. Winckfeild (1616) 80 Eng. Rep. 342, 343; Hob., 195, 196; 123 Eng. Rep. 671; 1 Brownl. 69. Recognizances bound lands from the date of acknowledgment even if enrolment was later. The Statute of Frauds 1677 changed this so that lands were bound only from the date of enrolment on the rationale that only from that date did the public have notice of the charge. *See* (1677) 29 Car. II, c. 3, s. 17.

[155] *See supra* note 87 and accompanying text.

[156] *See supra* note 143 and accompanying text.

[157] *See* PLUCKNETT, *supra* note 6, at 392–93.

[158] Statute of Acton Burnell 1283, 11 Edw. 1; The Statute of Merchants 1285, 13 Edw. 1, st. 3. The two statutes together are sometimes called the "statutes merchant." SIMPSON, *supra* note 30, at 126–27.

[159] The Ordinance of the Staples 1353, 27 Edw. 3, st. 2, c. 9.

[160] The Statute of Merchants 1285, 13 Edw. 1, st. 3. In practice, clerks deputized to take statutes merchant came to dominate their administration. A later statute provided: "That every Clerk which shall be deputed to receive Recognizances in Cities and Boroughs, according to the Statute Merchant, shall abide in proper

to the creditor sealed with special seals.[161] The fee for a statute merchant was one penny per pound sterling of obligation if acknowledged in a town, or one penny halfpenny if acknowledged in a fair.[162] A statute of 1584 required that, in order to remain valid against a *bona fide* purchaser of charged land, any statute of whatever nature had to be certified to the Clerk of the Recognizances in Chancery within four months of acknowledgement, and the clerk actually had to enroll it within six months.[163] If the formalities of making a statute merchant failed, the deed might still qualify as a bond.[164] Although originally designed for use by foreign merchants, statutes merchant came to be widely used even by non-merchants.[165]

The key advantage of statutes was their pro-creditor form of execution. Such execution was severe enough that the Statute of Merchants itself required explanation to a debtor "so that after he cannot say, that any did put another Penalty than that whereto he bound himself."[166] A statute gave a conusee the same advantageous procedural posture as upon a plain recognizance. But execution upon a statute had two other, major advantages over a plain recognizance.

First, a statute conusee could proceed concurrently against a debtor's chattels, lands, and body.[167] Every other form of execution required choices. *Fieri facias* was a choice for goods and chattels instead of land or body. *Elegit* was a choice for property—both realty (land) and personalty (goods and chattels)—instead of the body. *Capias ad satisfaciendum* was a choice for only a debtor's body instead of property. A statute allowed a creditor to have it all. No other form of security allowed concurrent process against a debtor's person and property.

Second, a statute allowed a conusee to seize *all* of a debtor's lands, not merely a moiety as under *elegit*.[168] The significance of reaching twice as much land for security is self-explanatory. The process of such seizure was extent just like that under *elegit*

Person to do his Office, according as is contained in the Statute of Acton Burnel; and that he have Lands sufficient in the same County, whereof he may answer to all Persons if he offend; if any other be in the same Office, he shall be removed, and another convenient set in his Place." 1340, 14 Edw. 3, st. 1, c. 11.

[161] SIMPSON, *supra* note 30, at 127.

[162] Statute Merchant 1285, 13 Edw. 1, st. 3.

[163] Statute of Fraudulent Conveyances 1584, 27 Eliz. 1, c. 4, §§ 5–7 (made perpetual 39 Eliz. 1, c. 18). Recognizances in the nature of a statute staple, discussed below, had been required to be enrolled since their creation in 1532. 23 Hen. 8, c. 6; *see also infra* note 197 and accompanying text.

[164] Ascue v. Hollingworth (1596) 78 Eng. Rep. 744, 745; Cro. Eliz. 494, 495; 78 Eng. Rep. 791; Cro. Eliz. 545; Fulshaw v. Ascue (1594) 78 Eng. Rep. 569; Cro. Eliz. 320; *cf.* Bothomley v. Lord Fairfax (1717) 23 Eng. Rep. 1090, 1091; 2. Vern. 749, 751 (comparing statutes merchant and plain recognizances). The same was not true of a statute staple. A. W. B. Simpson, *The Penal Bond with Conditional Defeasance*, 82 L. Q. Rev. 392, 394 n.8 (1966), *reprinted in* A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 111, 113 n.8 (1987).

[165] *See* PLUCKNETT, *supra* note 151, at 136–42; Christopher McNall, *The Business of Statutory Debt Registries, 1283-1307*, *in* CREDIT AND DEBT IN MEDIEVAL ENGLAND C.1180-C.1350 77–78 (P.R. Schofield & N.J. Mayhew eds., 2002); *but cf.* SIMPSON, *supra* note 30, at 127; WILLIAMS, *supra* note 108, at 708–09.

[166] The Statute of Merchants 1285, 13 Edw. 1.; *see also* SIMPSON, *supra* note 30, at 127.

[167] *See* notes 94, 115 and accompanying text.

[168] The Statute of Merchants 1285, 13 Edw. 1. Professor Plucknett wrote that a statute conusee "could reach [a debtor's] land by the writ of *elegit*." PLUCKNETT, *supra* note 6, at 608. This is probably technically true because once the statute was certified into Chancery, it was a recognizance that ought to yield process, including *elegit*, like any other recognizance. But no sensible statute conusee would use *elegit*. The distinct statutory mechanism of execution upon statutes had every benefit of *elegit*, plus allowed execution upon twice as much land, and had not offsetting detriments. Professor Plucknett's link between statutes and *elegit* is therefore unlikely to reflect actual practice. Elsewhere, Professor Plucknett seemed to avoid such confusion. *Id.* at 393. Another scholar put it, perhaps slightly exaggeratedly: "This interest taken by the [statute] creditor, exclusively a creature of statute, was known as the 'tenancy by statute merchant.'" Christopher McNall, *The Nature of the Tenancy by Statute Merchant*, 23 J. LEG. HIST. 37, 37–38 (2002).

with one exception: oxen and beasts of the plough had no exemption from seizure because, unlike under *elegit*, the debtor retained no moiety of land upon which to use them.[169] A statute conusee could also seize and sell—not just seize for a term—a debtor's burgage tenements (i.e., land within a town).[170]

A statute, just like a plain recognizance, charged a debtor's land from the date of acknowledgement.[171] A statute conusee therefore had certainty as to what lands he or she could reach. A statute also allowed seizure of personalty, although there was some risk that another creditor might reach it first; at least one contemporary report noted that land was one thing but it was "otherwise in case of goods, for therein first come first served."[172]

Once apprehended, a conusor had a three-month grace period during which to make satisfaction as he or she chose, but was held in prison during that time at his or her own cost.[173] After the grace period, process issued against the debtor's property, and the creditor had to provide the imprisoned debtor bread and water.[174] The officials charged with execution were those of the market town where the statute was acknowledged if a conusor were within their jurisdiction.[175] If a conusor were elsewhere, town officials certified the debt into the Chancery for execution by a sheriff.[176] First process to a sheriff was a writ of *capias si laicus* to apprehend the debtor if a layman.[177] If a sheriff returned that he could not find a conusor (*non est inventus*) or that such debtor was dead (*mortuus est*), the creditor could move straight to execution upon the debtor's property.[178]

Execution upon a statute had several other, minor benefits. First, extent under a statute, unlike *elegit*, also gave a creditor a remedy if the jury of inquest over-valued the property so that the tenancy would not yield the full debt.[179] The Statute of Acton Burnell provided: "[F]or if they do set an over high Price . . . then shall the Thing so praised be delivered unto themselves at such Price as they have limited, and they shall be forthwith answerable unto the Creditor for his Debt."[180] If the creditor accepted overvalued lands, however, he was bound by his choice.[181] Such a rule created an unambiguous incentive for jurors to undervalue property lest they be forced to take it on disadvantageous terms; but whether this in practice resulted in the bias that one might expect is unknown. What is known is that Lord Chancellor Ellesmere resisted assisting debtors in Chancery whose lands had been undervalued: he was reported to

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[169] *See supra* Section 0; *see also* McNall, *supra* note 168, at 37–38 (explaining that if a shortfall remained after delivery of a debtor's chattels to a creditor, all the debtors lands were to be delivered to the creditor).

[170] Statute of Acton Burnell 1283, 11 Edw. 1; PLUCKNETT, *supra* note 151, at 138.

[171] *See* JACOB & MORGAN, *supra* note 74, (defining "Statute Merchant").

[172] Anon. (between 1569—1625) 123 Eng. Rep. 650; 1 Brownl. 38. For the date of reports in Brownlow & Goldsborough, see 5 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 360 (1925).

[173] The Statute of Merchants 1285, 13 Edw. 1

[174] *Id.*

[175] *Id.*

[176] Statute of Acton Burnell 1283, 11 Edw. 1.; The Statute of Merchants 1285, 13 Edw. 1.

[177] ANTHONY FITZHERBERT, THE NEW NATURA BREVIUM OF THE MOST REVEREND JUDGE MR. ANTHONY FITZ-HERBERT 130r–v (9th ed. 1794). Writs to a bishop, e.g., a writ still extant in the twenty-first century, the *fieri facias de bonis ecclesiasticis*, issued against a beneficed cleric.

[178] The Statute of Merchants 1285, 13 Edw. 1.

[179] *See supra* note 84–85 and accompanying text.

[180] Statute of Acton Burnell 1283, 11 Edw.1.; *see also* Whitton v. Weston (1628) 82 Eng. Rep. 96, 100; Jones, W. 181, 188; Partridge v. Strange (1552) 75 Eng. Rep. 123, 131; 1 Pl. Com. 78, 83; CO. LITT., *supra* note 36, at 290r.

[181] Foster v. Jackson (1610) 123 Eng. Rep. 960, 963; 2 Brownl. 311, 316 (per Warburton, J.).

have said "that no remedy is to be given in Chancery, for extending over low, except there be fraud or practise."[182] One imagines adequate remedy at law existed for such debtors by writ of account or debt. Second, a statute conusee could recover extra damages for expenses in holding lands by extent, which was not available upon *elegit*.[183] Such damages were not pre-determined, and the conusor had the burden of suing a *scire facias* to show that they had been satisfied.[184] Third, statutes also made execution against the body of a Lord of Parliament available, which was not necessarily the case upon an ordinary debt judgment.[185] Finally, although a statute conusor remained in prison until a debt was satisfied,[186] because execution was against the body and property concurrently, even before the statute of 1623, the death of a statute conusor in prison did not discharge the debt;[187] property remained an object of execution after death just as it had been before.

Overall, execution upon a statute was uniquely extreme: it allowed both imprisonment of a debtor and seizure of land and personal property. The only thing a debtor retained was not even his or her freedom. But, in an important exception to total asset stripping, a debtor retained a remainder in his or her lands after satisfaction of the debt. That is to say, a statute conusor got his or her lands back when the debt was satisfied, just like upon termination of a lease. But until satisfaction, a statute conusor lost all present possessory right in his or her property and remained imprisoned.

II. Statutes Staple

Statutes staple were nearly the same as statutes merchant. Not designed for every type of merchant, they were originally for merchants of staple goods, meaning at least "Wools, Leather, Woolfels [i.e. woolskins], and Lead",[188] and possibly other basic items such as cloth and tin.[189] The special markets in which these goods were traded were also called staples.[190] Statutes staple were acknowledged before the Mayor of a staple and at least one of its two constables.[191] They were cheaper than statutes merchant, costing only a halfpenny per pound under one-hundred pounds and only a farthing per pound for sums thereabove.[192] It was said that the creditor at least must be a merchant of the staple, and a good argument existed that both parties had to be staplers.[193] But in practice members of the general public came to use statutes staple as well.[194] A statute of 1532, which declared retrospectively that statutes merchant were permitted only "betwixte m[er]chaunt and m[er]chaunt of the same Stapull", provided that staple officials taking acknowledgment of statutes with a non-stapler party were

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[182] Ossley's Case (1604) 21 Eng. Rep. 74; Choyce Cases 121; *contra* Cockes v. Wheler (21 June 1592) PRO C33/84, f. 716v. (transcription on file).

[183] Fulwood's Case (1591) 76 Eng. Rep. 1031, 1036; 4 Co. Rep. 64 b, 67 b.

[184] *Id.*

[185] *See* Harris v. Lord Mountjoy (1587) 74 Eng. Rep. 453, 453-54; 2 Leo. 173, 173-74.

[186] PLUCKNETT, *supra* note 165, at 141.

[187] 21 Jac. 1, c. 24; Linacre v. Rhode (1589) 74 Eng. Rep. 387; 2 Leo. 95.

[188] The Ordinance of the Staples 1353, 27 Edw. 3, st. 2, c. 1.

[189] *See, e.g., Staple*, JOHN COWELL, THE INTERPRETER (1607).

[190] The Ordinance of the Staples 1353, 27 Edw. 3, st. 2, c. 1. Staples were located in at least Newcastle upon Tyne, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, and Bristol; for Wales, at Carmarthen; and for Ireland at Dublin, Waterford, Cork, and Droghda. *Id.*

[191] *Id.* at c. 9.

[192] *Id.*

[193] SIMPSON, *supra* note 30, at 129; WILLIAMS, *supra* note 108, at 709.

[194] SIMPSON, *supra* note 30, at 129.

liable to the considerable fine of £40.[195] The same statute also created a new type of statute for the population at large, practically identical to a regular statute staple, and cumbersomely known as a "recognizance in the nature of a statute staple."[196]

Recognizances in the nature of a statute staple differed only slightly from regular statutes staple, and then only in form of creation. Instead of being acknowledged before officials of a staple, these recognizances were acknowledged during term before the chief justice of the King's Bench or Common Pleas, or in the vacation before both the mayor of the staple of Westminster and the recorder of London.[197] Such rules had the practical effect of restricting these instruments to London; all relevant officials had to be in London during their respective periods of authority to take acknowledgement. The statute of 1532 even went so far as to provide that clerks who enrolled such recognizances were to be "dwelling or abiding in the said Citie of London" under penalty of the also considerable fine of £10 for an absence of two days.[198] Enrollment was duplicate, on one roll for the major official before whom it was acknowledged and the other roll for the clerk.[199] From the time of their establishment in 1532, recognizances in the nature of a statute staple had to be certified into Chancery within four months and enrolled within six months to remain valid, the same requirement imposed on statutes merchant and ordinary statutes staple in 1584.[200] The cost of a recognizance in the nature of a statute staple was a flat fee of 3 shillings 4 pence to the major official(s) before whom it was acknowledged, the same again to the clerk, and 20 pence to a certify the statute to the Chancery.[201] The statute itself was to be sealed with the seal of the debtor, the king, and the official(s) before whom it was acknowledged. Execution upon a recognizance in the nature of a statute staple was identical to that upon a regular statute staple.

Other than in the details of their creation, statutes staple (including recognizances in the nature of a statute staple) differed from statutes merchant only in one meaningful way. Upon a statute staple: "the debtor [shall] have no advantage of the Quarter of a Year which is contained in the said Statute-merchant".[202] In other words, a debtor had no three-month grace period during which a creditor could not seize his or her property. First process of execution upon a statute staple was therefore a writ of *capias et extendi facias* to take a debtor's body, chattels, and lands, all immediately.[203] There was no quarter for staple debtors.

Two other, insignificant differences also existed between execution upon statutes merchant and staple. First, upon a statute staple a sheriff might elect to sell a debtor's goods and deliver the value instead of delivering the goods themselves to the creditor.[204] Second, to obtain delivery of a debtor's chattels and lands after return of the extent, a statute-staple conusee had to sue a writ of *liberate* to the sheriff;[205] the

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[195] 23 Hen. 8, c. 6.

[196] SIMPSON, *supra* note 30, at 129.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *See supra* note 163 and accompanying text.

[201] 23 Hen. 8, c. 6.

[202] The Ordinance of the Staples 1353, 27 Edw. 3, st. 2, c. 9.

[203] *See* Foster v. Jackson (1615) 80 Eng. Rep. 201, 209; Hob. 52, 60; Linacre v. Rhode (1588) 74 Eng. Rep. 387, 388 (C.P.); 2 Leo. 95, 97; Anon. (1519) 145 Eng. Rep. 105 case X; Jenk. 163; WILLIAMS, *supra* note 108, at 711.

[204] The Ordinance of the Staples 1353, 27 Edw. 3, st. 2, c. 9.

[205] FITZHERBERT, *supra* note 177, at 131, 132; WILLIAMS, *supra* note 108, at 711; THE COMPLEAT SOLICITOR, *supra* note 71, at 72–73.

same writ was later held unnecessary upon a statute merchant.[206] Apart from these differences, even elements of the Statute of Acton Burnell, such as the right to force a jury of extendors to take over-valued property, applied to subsequent forms of statutes.[207] And execution was otherwise identical upon statutes merchant and staple.

3. *Quasi-Recognizances: Collusive Debt Actions*

By our period, recognizances were sufficiently distinct from their origins in collusive debt actions that the latter had re-emerged as a distinct form of security.[208] Such security involved a debtor confessing, either directly or by warrant of attorney, a debt action brought by a creditor.[209] Collusive debt actions had few obvious advantages over traditional recognizances, except perhaps a greater certainty as to the availability of *capias*. Some creditors may nevertheless have derived psychological comfort from knowing that they had a truly identical procedural posture, with concomitant record, to that of someone who had fully litigated an actual suit in debt.

ii. Sureties

Another widespread form of security, often coupled with other security, was the binding of one or more sureties with a debtor.[210] A surety was an individual who stood liable for another's debt. Sureties were liable in *assumpsit*,[211] but were typically bound in an obligation, either independent of the principal debtor, or, more usually, as a co-obligor with a principal in one bond, recognizance, or statute. Such liability was typically joint and several, rendering a surety a co-principal at law. A creditor was therefore not required at law to proceed against a principal first. When jointly and severally liable, a creditor could sue the same or different sorts of execution against principal and surety.[212] Any co-liable parties still in execution were discharged by full satisfaction of a judgment, and full satisfaction meant either receipt of the full judgment sum upon *fieri facias* or receipt of any lands in extent on an *elegit*; but apprehension of only one debtor upon *capias ad satisfaciendum* where two or more were liable was not considered satisfaction.[213]

Sureties were different from all other forms of security in an obvious way: they involved a third party. All other securities involved only the creditor and debtor (*capias ad satisfaciendum* practically involved third parties but did not legally involve them). Third-party involvement accounted for the only significant disadvantages to sureties as a form of security. A creditor incurred the cost not only of assessing the

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[206] Anon. (between 1689-1712) 91 Eng. Rep. 751; 3 Salk. 91; Anon. (1669) 86 Eng. Rep. 29, 30; 1 Vent. 41, 42.

[207] CO. LITT., *supra* note 36, at 290a; *see also* Whitton v. Weston (ca. 1625) 123 Eng. Rep. 1179, 1181; Bridg. J. 33, 35.

[208] *See* BROOKS, *supra* note 128, at 312; CHRISTOPHER W. BROOKS ET AL., NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION 81 (1991).

[209] For descriptions of examples see Moyle v. Knighton (6 December 1616) PRO C33/131, f. 226v (transcription on file); Robinson v. Downes (19 October 1616) PRO C33/131, f. 33 (transcription on file); Bowtwell v. Webbe (8 November 1587) PRO C33/75, f. 132v (transcription on file)..

[210] For more detail on the following part, see D.P. Waddilove, *Credit before Banks: Suretyship in Early-Modern England* (working paper on file with author).

[211] BAKER, *supra* note 128, at 384.

[212] Foster v. Jackson (1615) 80 Eng. Rep. 201, 208; Hob. 52, 59.; Cowley v. Legat (1613) 78 Eng. Rep. 150; Godb. 257; Anon. (1584) 74 Eng. Rep. 262; 1 Leo. Rep. 288; Anon. (1584) 74 Eng. Rep. 818, 818–19; 4 Leo. 197; *but cf.* Rosser v. Welch (1613) 78 Eng. Rep. 126; Godb. 208 (C.P.).

[213] *Cf.* Whiteacres v. Hamkinson (1627) 79 Eng. Rep. 666; Cro. Car. 75; cases cited *supra* note 94.

creditworthiness of his debtor, but also of his surety. And in the interpersonal economy of our period described above,[214] suing someone who had never had the benefit of the credit in the first place might cause both social and/or economic difficulty for a creditor. Putting such difficulties aside, a surety was otherwise excellent security.

iii. Mortgages and their Value-Preservative Function

The final form of security available in our period was the mortgage. As mentioned above, the classical common-law mortgage was a conditional grant.[215] A debtor conveyed title to land[216] to a creditor upon origination of a debt. This conveyance was subject to a proviso that if the debtor repaid the debt by a certain day, the conveyance would be void.[217] By repaying, a debtor redeemed the mortgage, causing title to return to him or her. By failing to repay, the debtor lost all right to the property leaving title forever in the creditor.[218] The conditional grant was itself the mortgage; it was a pledge against default. As the active giver of the mortgage pledge, the debtor was called a "mortgagor;" as the passive recipient of the pledge, the creditor was called a "mortgagee."

The structure of the mortgage meant that the mortgagee technically owned the property even before default. By holding legal title while the debt was outstanding, the mortgagee was owner in the eyes of the law. But as everyone knows, a mortgagee's true entitlement to the property began only upon default. A mortgagor thus normally retained possession of the property.[219] On its face, this looks like the parties were ignoring their legal rights. But going deeper shows this was rarely the case.

Mortgages normally provided explicitly that a mortgagor should maintain possession by one of a number of means.[220] A mortgagee might covenant and/or give a bond to a mortgagor to secure his or her possession.[221] Or, even clearer, a mortgagee might lease the premises back to a mortgagor for the duration of the mortgage.[222] Such a "lease-back" left the parties each with a legal right corresponding exactly to the intent of the mortgage: a mortgagor had legal possession until the day the debt was due, at which point the lease would expire, giving the mortgagee legal right to possession.[223]

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[214] *See supra* note 124 and accompanying text.

[215] *See supra* note 12–13 and accompanying text.

[216] Chattel mortgages also existed, but were typically called pawns. They differed little from mortgages in most respects; indeed, the terms pawn and mortgage were sometimes confused in our period. *See, e.g.*, "Mortgage" *in* COWELL, *supra* note 38 (defining "mortgage" as "a pawn of land or tenements, or any thing[sic] moveable").

[217] WEST, *supra* note 38, at §§ 409–10, 413–15, 417–419, 427–28. Sections 409 and 419, in addition to providing a condition subsequent, also provide for shifting uses; section 417 combines a condition subsequent and a covenant to reconvey.

[218] THOMAS LITTLETON, THE NEW TENURES § 332 (London, 1481); *see also id.* at 205a note 1.); WEST, *supra* note 38, at §§ 409–10, 413–15, 417–419, 427–28.

[219] *See* R.W. TURNER, THE EQUITY OF REDEMPTION 89–90 (1931). It seems that the practice of a mortgagor remaining in possession may have begun much earlier than Mr. Turner suggests. More work remains to be done before anything more definite can be said. For reasons why Turner's work must be treated with caution, see D.P. Waddilove, Emmanuel College v Evans (1626) *and the History of Mortgages*, 73 CAMBRIDGE L.J. 142, 146–48 (2014).

[220] *Cf. infra* note 281.

[221] *See, e.g.*, Loveden v. Hobbes (14 October 1616) PRO C33/131, f. 16 (transcription on file); WEST, *supra* note 38, at § 419.

[222] *See, e.g.*, Wolmer v. Marriell (2 December 1616) PRO C33/131, f. 215 (transcription on file); Bennell v. Style (31 October 1587) PRO C33/75, f. 109v (transcription on file). Upon a mortgage in fee, the mortgagee simply granted a lease. For a mortgage by long-lease, a mortgagee granted a shorter sub-demise.

[223] RICHARD A. LORD, WILLISTON ON CONTRACTS § 42:13 (4th ed. 2018).

But if a mortgagor repaid on this day, the mortgagee's interest was extinguished and a mortgagor had full title.[224] If a mortgagor failed to repay, both the lease and the mortgagor's right to redeem expired, leaving the mortgagee with absolute title.[225] So under a mortgage with a lease-back, legal title actually mirrored mortgage intent in all respects. The prevalence of lease-backs remains uncertain, but clauses preserving a mortgagor's possession were omnipresent.

Unlike other securities, a mortgage was a private transfer of property that took effect without official intervention either to form the security or to transfer property upon default. Of course judicial assistance might be necessary to obtain possession if a defaulting mortgagor refused to surrender a property. But legal title changed hands without court involvement. No other security had such automatic proprietary effect.

Also unlike other securities, a mortgage linked a debt with a specific asset; other securities created a categorical, sometimes floating, charge. The focus of a mortgage upon a specific asset had several benefits. It allowed a creditor to assess, *ex ante* and in detail, the capital value of the asset relative to the debt to ensure recovery of adequate value. Such assessment might be easier and so cheaper than assessment of a categorical charge; one servant in our period deposed about the difficulty he had in assessing a categorical charge: "[H]e hath had many weary Journeys concerning the said debt & very chargeable to the said complainant his master especially in finding out the lands liable to the said extent."[226] Focus on a particular property might also psychologically prepare a debtor to part with it, given its clear link to repayment of a specific debt, easing the process of recovery. A mortgage also theoretically allowed a creditor to recover more than the value of a debt. A mortgage absolutely linked the pledged asset to repayment of a particular debt irrespective of the underlying values. Other forms of security limited a creditor to recovery of the value of a judgment. Equity interfered with a mortgagee recovering too much,[227] but at least some scope existed for a mortgagee to do better than other types of creditors.

Finally, and crucially, because a mortgagor parted with legal title to property at origination of the debt, a mortgage disabled a mortgagor from affecting that title during the debt. A mortgagor thus could not sell, encumber, or otherwise alter the mortgaged title until the debt was repaid. This had the effect of preserving the value of the title from the time of the mortgage grant. Such value-preservative function is why a mortgage had to take the form of a grant at the *beginning* of a debt rather than only upon default. If the form were otherwise, the mortgagor could encumber the asset—either intentionally or accidentally—rendering its value uncertain. In short, the supposedly backwards quality of the transaction actually allowed it to do its job.

1. Risk of Encumbrances

The significance of the value-preservative function of mortgages in our period can hardly be overstated. The structure of the law created a pervasive risk of encumbrances to land that would diminish its value. As explained above, statutes, recognizances, and debt judgments all charged a debtor's property (both land and chattels) even if the debt were totally unrelated to the property. Land in Cornwall thus might be charged by a statute acknowledged in London for a debt related to business in Northumberland. And

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[224] *Id.*

[225] *Id.*

[226] Dep. of Nathaniel Attwood in Smyth v. Ewens, E 133/114/27, 21 November 1611.

[227] *See* Waddilove, *supra* note 124, at 126–28; *see also* authorities cited *infra* note 271.

there was no straightforward way to discover such encumbrances with certainty in an era before a land registry.[228] Parliament recognized and partially ameliorated this problem when it created the previously mentioned central registry of statutes in 1584.[229] But this still required travel to, or at least correspondence with, London to search the rolls. And under the 1584 statute, conusors still had four months in which to enroll their statutes,[230] during which time valid encumbrances might not be discoverable. The registry also covered only statutes. Bonds, with all their inherent likelihood of yielding a debt judgment, left no public record. Indeed, any debt—even one incurred by committing a tort—might yield a judgment at any moment that would encumber lands via *elegit*. Even once a debt was crystallized in a judgment, it was still likely undiscoverable: no known means of searching the records to determine whether a given individual had an outstanding judgment has come down to us.[231] Then there was the even-trickier encumbrance of dower—the right of a widow to a life estate in one third of her husband's freehold even if alienated during his lifetime—that attached any time a married man became seised of land or a man seised of land became married.[232] All this leaves aside voluntary, intentional forms of encumbrance such as grants of rent-charges or easements. These could be given without a trace of public record. Encumbrances thus inescapably stalked legal titles to land in our period.

The risk of encumbrances was no secret to contemporaries. Even in the medieval period a rhyme to aid purchasers of land in remembering their concerns included, amongst many other things, care that land "stond in no dangere off no womans dower," and consideration "whether it stond in statute bownd."[233] Awareness of the range and risk of encumbrances led to many proposals for reform. In 1604 a bill "For the Registring of Judgments, that may impeach Purchasers or Farmers of Lands" reached a third reading in the House of Commons.[234] But at that point the Prothonotaries of the Common Pleas presented evidence against the proposal—because it would negatively affect their take of fees—and the bill failed.[235] Lord Keeper Francis Bacon tried again in 1617 to establish an office of a general remembrancer who would create a registry of

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[228] *Cf.* C. Van Bochove et al., *Real Estate and Mortgage Finance in England and the Low Countries, 1300-1800*, 30 CONTINUITY & CHANGE 9, 9 ff. (2015) (incorrectly representing the Statute of Enrolments 1536, 27 Henry VIII, c.10, as an attempt to establish a land registry, but correctly arguing that England lacked a land registry or any other ready means of discovering encumbrances upon legal titles). On the actual purpose of the Statute of Enrolments, see J.M. Kaye, *A Note on the Statute of Enrolments*, 104 L. Q. REV. 617, 618 (1988).

[229] *See supra* note 163 and accompanying text.

[230] *See supra* note 163 and accompanying text.

[231] Searching the plea rolls for a particular defendant would be utterly impracticable without at least a good idea of when judgment might have been entered, and no indications of books that clerks might have kept to aid the process survive.

[232] *See* A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 564–65 (4th ed. 1958); Kaye, *supra* note 228, at 625.

[233] OXFORD, BALLIOL COLLEGE MS 354, p.206, http://image.ox.ac.uk/images/balliol/ms354/206.jpg [https://perma.cc/B4XY-83QK]. The Digital Index of Middle English Verse cites sixteen manuscript examples of the rhyme, of which the above is only one. THE DIGITAL INDEX OF MIDDLE ENGLISH VERSE, http://www.dimev.net/record.php?recID=6640#wit-6640-3 [https://perma.cc/A37K-HQBE]. I am grateful to Mr. Nicholas Le Poidevin QC for introducing me to the rhyme and providing a transcript of the version in Lincoln's Inn Library.

[234] 1 HC Jour. (22 May 1604) p. 222, col. 1.

[235] *Id.* ("The Bill much disputed, put to Question, and, upon Question, dashed, without one Yea."). The reasons recorded against the bill were self-contradictory: "A New Office: - An ill Precedent: - Needless: - A good Kalendar already: - Impossible, in respect of the Multitude of Judgment: - Unjust, in taking Fees from the Protonotaries, which belong unto them." *Id.* The bill could hardly be needless on account of a good calendar of judgments already existing when the task of registering judgments was also impossible!

all encumbrances; but the project was excessively ambitious and foundered for several reasons.[236] Even in the general populace such proposals appeared; for instance, in 1654 a disenchanted barrister proposed, amongst various reforms of the law of debt and credit, that: "That there [be] some place in every shire for Registering all Leases, Bargains, Conveyances, Statutes, Judgements, Recognizances, and the like, which any way concern the Lands in that Shire".[237] Indeed, another proposal in 1671 explicitly noted that:

> [I]f a publick Registry or remembrance of all Conveyances and Incumbrances on real estates were settled in each County all mischiefs and inconveniences whatsoever by precedent Grants and Incumbrances, would be prevented to Purchasers and Creditors unless it were by their own willful neglect..."[238]

But such proposals, numerous as they were, essentially never made any headway.[239]

Despite theoretical awareness of the risk of encumbrances parties were still often caught unawares by them. The point is vividly illustrated by a case in Chancery, *Bridge v. Carew* (1616), in which one of the easiest-to-discover encumbrances nevertheless surprised a purchaser.[240] William Bridge bought "one messuage and 80 acres of land in Chesterton in the County of Cambridge" from William Carew, paying £550 of the £650 purchase price and giving a bond of £200 to secure the outstanding £100.[241] At the time of sale, Carew "covenanted that the same [land] was discharged of all encumbrances done by him."[242] But in fact he "had in November before the purchase acknowledged a statute of 300^{li} to one Thomas Hobson[243] and never made [Bridge] acquainted therewith at the time of the purchase[,] which statute [became] forfeited by the non-payment of 100^{li} or thereabouts."[244] Hobson therefore extended Bridge's newly purchased lands under the statute. This forced Bridge to pay £40 to Hobson "for one year's value of the land so extended" to maintain possession.[245] Bridge, unsurprisingly, then did not pay the remaining £100 on the purchase price, causing Carew to sue on the

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[236] George William Sanders, *An Historical Account of the Progress of Registration in England So Far as Respects Assurances of Land, in* REGISTRATION AND CONVEYANCING COMMISSION, FIRST REPORT OF THE COMMISSIONERS 232-33 (1850); ANON., THE OFFICE OF GENERAL REMEMBRANCE (London, 1617). The scope of the patent Bacon proposed to create the office was enormous, and would have been illegal in the absence of supporting legislation.

[237] J.F., THE LAWS DISCOVERY 5 (1653). This short pamphlet purports to be an epitome by "J.F." or "a Well-wisher to his Countrey" of a longer treatise by a "Barrester, who partly through sickness, and partly for Conscience, deserted the Profession of our Laws as Epidemically evil; he spent diverse of his last years in supervising the defects thereof." *Id.* at 3. The pamphlet clearly demonstrates significant familiarity with contemporary law.

[238] NICHOLAS PHILLPOTT, REASONS & PROPOSALS FOR A REGISTRY OR REMEMBRANCER 1–2 (1671); *see also* WILLIAM LEACH, PROPOSITIONS FOR RECORDING AND REGISTERING OF DEEDS AND CONVEYANCES, JUDGMENTS, STATUTES, AND OTHER INCUMBRANCES UPON LANDS AND TENEMENTS (1651) (proposing a regional recording system for encumbrances in order to combat fraud.). For the view against reform see Fabian Philipps, THE REFORMING REGISTRY (1662).

[239] *See* Sanders, *supra* note 236, at 232–35. Only a few, limited, deed registries, applicable in only particular regions, ever came into being; *see* Jean Howell, *Deeds Registration in England: A Complete Failure?*, 58 CAMBRIDGE L.J. 366, 366–67 (1999).

[240] Bridge v. Carew (28 October 1616) PRO C33/131, f. 117v. (transcription on file).

[241] *Id.*

[242] *Id.*

[243] The Hobson in question was most likely the eponym of the famous choice. *See* THOMPSON COOPER & DORIAN GERHOLD, *Hobson, Thomas (1545–1631), in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, http://www.oxforddnb.com/view/article/13409 [https://perma.cc/E6UF-8WLN].

[244] Bridge v. Carew (28 October 1616) PRO C33/131, f. 117v (transcription on file).

[245] *Id.*

£200 bond securing that sum.[246] Bridge exhibited his bill in Chancery for relief from the bond suit alleging he was "both in danger to pay the money upon the bond and also to have his lands still to continue in extent for the defendant's debt;"[247] all of which the "Court conceived to be very hard dealing in the defendant."[248] The incident shows how a lurking encumbrance could unexpectedly affect a third party, and exemplifies how the risk of encumbrances could be realized.

The appropriate response to a known encumbrance was naturally to adjust the price of the title. Had Bridge known that the land was charged by Hobson's statute, he should have paid £100 less (or whatever the precise sum necessary to discharge Hobson's statute). Other Chancery cases illustrate the impact of encumbrances affecting the value of title. In *Ashebey v. Parramore* (1592), a debtor exhibited a bill in Chancery when his creditor allegedly improperly kept various obligations uncancelled:

> And by reason that the statutes[,] recognizances[,] and bonds before mentioned were remaining in the hands of the said defendant uncancelled and undefaced[,] the said complainant could not make sale of any part of the said manor to satisfy and discharge the said debt to the said defendant[,] for that those that would have bargained with the said complainant feared that the said manor and lands would be charged and liable to the said statutes and recognizances[;] By means whereof the said complainant was enforced to make default of payment.[249]

In *Dormer v. Calfield* (1592), the plaintiff alleged that:

> by reason of his being employed in her majesty's service [he] had been greatly indebted and had been thereby enforced to make sale of some of his lands for the payment of part of the same debt[;] And for the better assurance thereof stood bounden to diverse and sundry persons to whom he had made sale of the same lands in sundry recognizances and statues made for the warranties of the same lands sold[;] By reason whereof his other lands then remaining in his possession being subject to the said Recognizances and statutes were not so vendible as the said lands and tenements called newberrie hill were[,] for that by the rigor of the common law they [i.e. Newberry Hill] were not subject to the said encumbrances.[250]

Encumbrances could, in short, destroy the value of title to property, while the prevailing law of secured lending and execution of civil judgments created a pervasive risk of them. A robust and certain mechanism for defending against these easily accrued and difficult-to-discover impositions was thus necessary for title to function effectively as collateral security.

2. *Defense against Encumbrances*

The ability of the mortgage to defend against encumbrances was simple: without legal title, the mortgagor lacked capacity to encumber. The reason that Newberry Hill in *Dormer v. Calfield* (1592) was uncharged by recognizances, and hence more

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[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] Ashebey v. Parramore (26 Jan. 1592) PRO C78/74/14, membrane 48–49 (transcription on file).
[250] Dormer v. Califield (21 June 1592) PRO C78/74/10, membranes 33–34 (transcription on file).

"vendible," ultimately stemmed from its being mortgaged.[251] Two further Chancery cases exemplify mortgages' value-preservative function. In *Addams v. Crowther* (1604)[252] a certain Barnes had secured one of his sureties, Crowther, with a mortgage, and afterwards secured another surety, Addams, with a statute. Both sureties had to pay out, and in the ensuing contest over Barnes's assets, Addams sued Crowther in Chancery because only in equity could his statute even possibly charge the mortgaged lands:[253] the mortgage indisputably defended the property from such encumbrances at law.[254] In *Hill v. Hill* (1600) the Chancery allowed late (equitable) redemption of a mortgage.[255] But while the property had been mortgaged the mortgagor acknowledged a statute to the mortgagee, which statute could not charge the property because of the mortgage.[256] Both securities were therefore for the benefit of the same party, but the prior mortgage defended against the later statute. When the Chancery effectively stripped the creditor of his security interest in the mortgage by allowing equitable redemption, the court also ordered:

> the reassurances[sic] which is to be made of the said mortgaged lands shall be made to the [mortgagor] and his heirs and not to any other person to his use to the end it may be subject to a recognizance in the nature of a statute staple of sixteen hundred pounds knowledged by the [mortgagor] to the [mortgagee] for the security of the said lands by him purchased.[257]

Only that way could the statute charge the lands in light of the mortgage's ability to defend against encumbrances.

Parliament specifically preserved the value-preservative function of mortgages when it passed the previously mentioned statute of 1584 creating the central registry of statutes.[258] The primary purpose of that statute, called "An Act against covinous and fraudulent Conveyances", was to stop conveyances made solely to defeat creditors.[259] The statute explicitly exempted any "lawfull Mortgage, made or to be made bona fide and without Fraud or Covin upon good consideration" from its provisions.[260] It did so because such value-preservative function was legitimate in keeping property away from certain creditors, unlike the fraudulent conveyances that were its object of reform.

Indeed, the mortgage was so successful in defending against encumbrances that a popular title-holding structure developed from it. Holding by a "satisfied term", which became popular in the seventeenth century, saw a long lease granted by way of mortgage not simply nullified upon redemption, but instead kept "on foot" and conveyed to trustees to hold henceforth to the benefit of the mortgagor.[261] The owner's

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[251] *See id.* at membrane 33.

[252] sub nom. Crowther v. Addams (22 Oct. 1604) PRO C33/108, f. 88; (1 July 1601) PRO C38/4. (transcription on file).

[253] *Id.*

[254] A report suggests that Addams's argument in equity would have failed, Anon. (Undated) 21 Eng. Rep. 5, but the point proved moot because Addams had in fact already received adequate recompense from other of Barnes's assets. Crowther v. Addams (22 Oct. 1604) PRO C33/108, f. 88; (1 July 1601) PRO C38/4. (transcription on file).

[255] Hill v. Hill (17 December 1600) PRO C33/99, f. 244v. (transcription on file).

[256] *Id.*

[257] *Id.*

[258] Statute of Fraudulent Conveyances 1584, 27 Eliz. 1, c. 4, §§ 5–7 (made perpetual 39 Eliz. 1, c. 18).

[259] *Id.*

[260] *Id.* at § 4.

[261] *See* D.E.C. YALE, *Introduction: An Essay on Mortgages and Trusts and Allied Topics in Equity, in* 2 LORD NOTTINGHAM'S CHANCERY CASES 1, 150-160 (1961); Waddilove, *supra* note 219, at 152.

rights in the property thus took the form of a beneficial interest in a trust of a redeemed mortgage lease, combined with personally holding a reversion. This structure gave the owner a strong title in several ways. First, the present possessory title (the redeemed mortgage lease) had been effectively vouched for as a good title by a third party when the mortgagee, who had had a personal interest, had accepted it as his security. Second, from the date of the mortgage grant until redemption, the fact that the title had been in mortgage meant that it had been defended from further encumbrances. Third, the title was now defended from further encumbrances by being held in trust. The value-preservative function of the mortgage thus made a former mortgage lease an attractive title-holding device.

The ease with which encumbrances could accrue raises the question: why would a mortgagor be willing to part with a title that he or she would normally expect to regain and hold forever? Should a mortgagor not be at least as concerned as a mortgagee about encumbrances created by the opposite party during a mortgage? The answer is yes. And the ingenious form of the common-law mortgage had a solution to this problem as well. In our period the mortgage grant was normally subject to a condition subsequent for redemption.[262] And trigger of a condition subsequent allowed a grantor to re-enter as of his or her prior estate, thereby nullifying any mesne encumbrances by a mortgagee.[263] Covenants to reconvey, which lacked this effect at law, later became the dominant mechanism of redemption, but by that time equity seems to have intervened to eliminate encumbrances by a mortgagee.[264] The basic form of the common-law mortgage therefore allowed a mortgagor to hand over title with confidence the he or she could get it back unencumbered.

iv. The Hierarchy of Securities

The forms of security set out above: bonds, recognizances, statutes, sureties, and mortgages, constituted the basic range of securities available throughout much of English history. Their specifics arrange them in a rough hierarchy of increasing protection for creditors. It is worth setting out the hierarchy to emphasize the clear, and logically interrelated, place of the mortgage within the legal context of the day.

At the bottom of the hierarchy was the bond, which did little more than give a creditor a quicker and more certain path to judgment in debt. It did so by allowing the more advantageous type of suit of debt *sur obligation* rather than debt *sur contract*.[265] Bonds provided no certainty of assets charged because only at judgment were lands charged by *elegit*, and only at the *teste* of a *fieri facias* were chattels charged. Neither of these dates were certain *ex ante* because a creditor had to succeed in his or her action of debt first.

Recognizances were superior security because they functioned as a debt judgment from the time of acknowledgement.[266] They thus charged a debtor's property immediately, giving a creditor greater certainty regarding assets that he or she could reach. A recognizance conusee also had a better procedural posture than a bond obligee: either the burden of litigation, or at least the burden of proof, was upon the debtor to

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[262] *See supra* note 217 and accompanying text.
[263] CO. LITT., *supra* note 36, at 201-02a-b; *see also* 202b n.(2).
[264] PLUCKNETT, *supra* note 6, at 607.
[265] *See supra* Sections I.A, I.B.
[266] *See supra* Subsection I.C.1.

contest the debt, depending upon whether the recognizance had been acknowledged over a year previously.

Statutes Merchant were still better security.[267] In addition to functioning as a debt judgment like a plain recognizance, they allowed harsher execution. A statute conusee could proceed against the body, goods, and lands of a debtor concurrently. A statute conusee could also extend all of a debtor's lands, not merely a moiety as upon *elegit*, and could obtain damages for expenses in holding lands that a tenant by *elegit* could not. A statute conusee could also force a jury of extendors that overvalued lands to take them at the rate they had assigned and repay the debt directly, again unlike *elegit*. Statutes staple were particularly creditor friendly;[268] they did not require a three-month grace period before execution against a debtor's property like statutes merchant, and were cheaper to boot. The only disadvantage to statutes was not so much the security that they provided, but their relatively limited availability: statutes staple were available only to staplers in a staple town; recognizances in the nature of a statute staple were available to anyone, but only in London; and statutes merchant were available to anyone, but only in market towns.

Sureties were a categorically different form of security because they involved a third party.[269] But apart from the social difficulties of involving a third party, sureties provided good security because of the additional resources they exposed to execution. For this reason, sureties were usually combined with some other form of security, and thus stand somewhere parallel to the rest of the hierarchy of securities.

At the peak of the hierarchy of securities was the mortgage.[270] It did the most to eliminate a creditor's downside risk by giving a creditor the most direct means of recovering the value of a debt. A mortgage charged an asset from the time that a debt was incurred. And because a mortgage charged a particular asset, the cost of assessing its value *ex ante* was likely to be limited, and a debtor might be more psychologically prepared to part with it, reducing enforcement costs. Because the asset was simply taken by the mortgagee upon default, it could be sold to raise its full capital value or kept as desired, thus allowing both speed and a variety of options toward recompense. And no judicial involvement was necessarily required to effect such courses. Mortgages were also the only means by which a creditor could permanently seize a debtor's title to land; other securities allowed a creditor only to take possession for a term upon extent. Not only was a mortgage permanent and a tenancy by extent temporary, the latter involved valuation by a jury where a creditor could make his or her own valuation upon a mortgage. And that valuation might even theoretically allow a creditor to recover more than the original debt. Thus while other securities might, depending on the circumstances, charge a wider range of assets than a mortgage, a mortgage provided the clearest and simplest means to recover a given value compared with any other security in our period.

II. THE EFFECT OF EQUITY ON MORTGAGES

The common-law mortgage did not, however, remain the relatively straightforward security *cum* defense-against-encumbrances that it was as described above. Equity

[267] *See supra* Subsection I.C.1.b.(1).
[268] *See supra* Subsection I.C.1.b.(2).
[269] *See supra* Subsection I.C.2.
[270] *See supra* Subsection I.C.3.

intervened. This section shows what effect equity had upon mortgages from the sixteenth to nineteenth centuries.

Sometime from the late sixteenth through the mid seventeenth centuries the Court of Chancery developed the equity of redemption, a doctrine by which Chancery and equity came to dominate mortgages and establish an effectively exclusive jurisdiction over them.[271] But this was no mere transfer of jurisdiction between courts. The equity of redemption was an interventionist doctrine that radically altered the nature of mortgages. The common law gave literal effect to deeds, including mortgage deeds.[272] If a mortgage deed required repayment at a certain time on a certain day, the common law interpreted it strictly. If a mortgagor's horse went lame riding to repay and he or she arrived late, that was of no concern to the common law. The matter was simple: the property was forfeit. The equity of redemption, on the other hand, looked to what it deemed to be underlying substance of the mortgage agreement and gave effect to that over legal interpretation.[273] If a horse went lame, equity considered the underlying financial interest of the mortgagee unaffected; the mortgagor might still repay principal, with interest damages for delay, plus any costs incurred in litigation, leaving the mortgagee whole. Equity therefore allowed a mortgagor to redeem even in breach of the condition of redemption. The language of the deed was of secondary importance; the Chancery deemed the deed merely a representation of a true intent that it gave effect. This was a radical move. Professor Watt described the Chancery's maneuver thus:

> The equity of redemption does not bear the hallmarks of a restrained, considered Chancery. It is the product of a radical policy-driven Chancery . . . [I]t simply ignores the legal deed by which the mortgaged land is conveyed to the lender. Chancery's recognition and protection of the equity of redemption is a barefaced disavowal of the legal form.[274]

And Professor Simpson wrote, as mentioned above, that "the Chancery freely interfered with mortgage transactions with a complete indifference to the terms agreed by the parties; in no branch of the law was the sanctity of agreement less regarded."[275]

As mortgage parties recognized that the Chancery gave effect to something other than the express terms of mortgage deeds, over time they came to draft their mortgage deeds differently. Rather than simply stating what they intended, they drafted deeds as positioning devices to obtain desired results in equity. They did so in particular through a few standard clauses.

One such clause was the condition of redemption. Conditions subsequent disappeared and were replaced by personal covenants to reconvey.[276] A condition

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[271] *See* Waddilove, *supra* note 219, at 142-43; Waddilove, *supra* note 124, at 118-19 and works cited therein; SIMPSON, *supra* note 8, at 243–45; TURNER, *supra* note 219; YALE, *supra* note 261, at 31–32 ROBERT MEGARRY & WILLIAM WADE, THE LAW OF REAL PROPERTY 1117–18 (Charles Harpum et al. eds, 8th ed. 2012).

[272] *See* BAKER, *supra* note 30, at 313; PLUCKNETT, *supra* note 6, at 606; Edith G. Henderson, *Relief from Bonds in the English Chancery: Mid-Sixteenth Century*, 18 AM. J. LEG. HIST. 298, 300-01 (1974); Simpson, *supra* note 164, at 404; *see also* SIMPSON, *supra* note 30, at 93.

[273] *See* 1 W.H. BRYSON, CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550-1660, xxvii (2001); TURNER, *supra* note 219; Waddilove, *supra* note 124.

[274] Watt, *supra* note 10, at 80.

[275] SIMPSON, *supra* note 8, at 246.

[276] *See* Hazeltine, *supra* note 12, at xli, xliv; PLUCKNETT, *supra* note 6, at 607; 2 LEOPOLD GEORGE GORDON ROBBINS & FREDERICK TRENTHAM MAW, A TREATISE ON THE LAW OF MORTGAGES, PLEDGES, AND HYPOTHECATIONS: FOUNDED ON COOTE'S LAW OF MORTGAGES 128–29 (1897).

subsequent was a device of land law to alter an estate. A covenant to reconvey was a device of contract to create personal rights.[277] The former had a proprietary effect; the latter created a mere possibility of damages. A covenant to reconvey thus failed to reflect the intent of a mortgage to shift ownership of property. Why did mortgage parties do this? Two reasons. First—and it is difficult to disentangle the causal effects here—a covenant to reconvey cohered with the use, mentioned above, of "satisfied terms" as a title-holding mechanism.[278] To use a satisfied term one needed the particular title created through a mortgage by long lease, which a condition subsequent would destroy; because it lacked proprietary effect, a covenant to reconvey would preserve it. Second, and more importantly, parties knew that equity would give their arrangement *de-facto* proprietary effect. The Chancery made a covenant to reconvey specifically enforceable.[279] The Chancery also effectively eliminated mesne encumbrances that a mortgagee might incur during a mortgage as would a condition subsequent.[280] The personal obligation of a covenant to reconvey was also more consonant with the Chancery's reasoning and enforcement as a jurisdiction that operated *in personam*. Once mortgage parties knew that they would get everything they wanted in equity through a covenant to reconvey, they used it—despite the fact that it was at a remove from the proprietary effect of a condition subsequent that better reflected the true intent of a mortgage.

A stronger example of equity's effect in distancing the terms of the mortgage deed from the intent of the transaction related to the mortgagor's possession during the mortgage. Because of equity, all reference to a mortgagor's possession before default, be it by lease-back or other method, disappeared. *Coote's Treatise on the Law of Mortgages* explains the phenomenon. A revision between the between the fifth (1884) and sixth (1897) editions saw the insertion of this:

> It was formerly usual to insert in mortgage deeds an express proviso to the effect that it should be lawful for the mortgagor to retain possession, and receive the rents and profits, until default in payment of the principal and interest on the day fixed. But such provisoes[sic] are now generally omitted, for, having regard to the disadvantages attending the position of a mortgagee in possession, and that, apparently, the entry will entitle the mortgagor to redeem at once without notice or interest in lieu of notice, it is generally considered that the risk of a mortgagee entering within the period before default can be made, which is usually six months from the date of the deed, is one which, in practice, it is not necessary to guard against. The result is that a mortgagee at the present time can generally enter into possession whenever he thinks fit to do so.[281]

Equity made a mortgagee's possession so pointless that reference to a mortgagor's possession became redundant. Parties therefore again relied upon equity by not addressing the topic explicitly. In the absence of explicit provision to the contrary, a mortgage's grant of title therefore meant, at law, that "a mortgagee . . . can generally

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[277] SIMPSON, *supra* note 8, at 242.

[278] *See supra* text accompanying note 261.

[279] SIMPSON, *supra* note 8, at 242.

[280] *See supra* note 264 and accompanying text.

[281] 2 ROBBINS & MAW, *supra* note 276, at 796–97 (internal citations omitted); 2 RICHARD HOLMES COOTE, A TREATISE ON THE LAW OF MORTGAGE 789–90 (W. Wyllys Mackeson & H. Arthur Smith eds., 5th ed. 1884).

enter into possession whenever he thinks fit to do so."[282] Yet that was not, of course, what the mortgage parties intended.

A final, and still clearer, example of how equity drove separation of expression and intent in mortgage deeds was the redemption date. Expression of a genuine redemption date gave way to a clause typically requiring repayment in six months—irrespective of the intended term.[283] This seems to have been simply to allow a creditor to initiate the time-consuming procedure of foreclosure necessary in the equitable regime.[284] This six-month term was a lie; everyone knew it. But such lie was included in the deed in order to get a result—the possibility of eventually reaching foreclosure in a reasonable time—that the parties wanted under the interpretive regime of equity.

In each of these respects, because of equity, the mortgage became less direct, clear, or honest than it had been under the common law. A covenant to re-convey failed to reflect the intended automatic proprietary effect of redemption. A lack of provision for a mortgagor's possession made a mortgage deed seem to grant immediate possession to a mortgagee despite what everyone knew the parties intended. And the redemption date became a simple falsehood, stating a six-month date understood to be a lie. Because of equity the mortgage deed no longer said what it meant, but became a positioning device to obtain a desired result in Chancery. In sum, as Chancery judges altered the rules of contract from straightforward enforcement of plain meaning, parties responded; the result was a form of transaction that, at least in respect of the three clauses outlined above, could reasonably be called mendacious. But such mendacity was a product of interventionist equity, not an inherent characteristic of the common-law mortgage.

III. REASSESSING CRITICISMS OF THE COMMON-LAW MORTGAGE

In light of the above, we can now reassess the criticisms of the common-law mortgage presented at the beginning of this article. In doing so, this section shows that a combination of ignorance of both the legal context that explained the *prima-facie* oddity of mortgages, and the changes in mortgage deeds caused by equity, led the mortgage's critics to misinterpret it.

Given this article, some criticisms above are simply put to rest. Such is Professor Plucknett's claim: "The fact that the mortgage was not a very satisfactory institution is shown by the continued use of the mediaeval statutes merchant and staple."[285] The continued use of statutes says nothing of the satisfactoriness of mortgages. Statutes and mortgages were different instruments. Whereas statutes involved formalities by public officials and practical limitations on who could use them, mortgages could be concluded privately by anyone. Whereas statutes categorically charged lands and chattels, mortgages charged only specifically nominated property. Whereas statutes rendered a debtor liable to imprisonment, mortgages involved no such possibility. And most significantly, whereas statutes allowed a creditor to seize land only for a period to raise profits, mortgages allowed a creditor to take title to land permanently. In short, statutes and mortgages were different forms of security, created by different means,

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[282] 2 ROBBINS & MAW, *supra* note 276, at 797.

[283] MAITLAND, *supra* note 5, at 269–71; 2 ROBBINS & MAW, *supra* note 276, at 796–97. The practice has persisted in some places; *see* KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 718 (5th ed. 2009).

[284] MAITLAND, *supra* note 5, at 269–71.

[285] *See* PLUCKNETT, *supra* note 6, at 608.

with different results, which creditors and debtors might select in different circumstances as appropriate to their needs. Continued use of statutes therefore says nothing of the satisfactoriness of mortgages. Other scholars' similar confusions are also clarified.[286]

Also largely put to rest is Professor Rabinowitz's claim:

> The origin of this obviously artificial device, which does not correspond either to the true economic significance of the transaction or to the intention of the parties, has never been satisfactorily explained. Nor is the reason for it quite apparent. Why should a mortgage, given to secure a debt, take the form of an immediate and absolute conveyance of the mortgaged property, when what is intended is a forfeiture of the property to take effect in the future in the case of non-payment of the mortgage debt?[287]

Of course this article is not concerned with the origin of the mortgage as such, but it does show why the mortgage had the form of an immediate conveyance. Only by taking such form could a mortgage preserve the value of a mortgaged title—and thus effectively secure a creditor—in a legal setting that created a pervasive risk of encumbrances to legal titles. The mortgage's *prima-facie* backward form was therefore vital to achievement of its purpose. Realizing this suggests that other explanations for the form of the mortgage—such as response to usury laws,[288] copying Jewish or other foreign law,[289] or simply accidental response to unrelated developments in land law[290]—are either incorrect or incomplete. Any explanation of the form of the mortgage must take account of its value-preservative effect. Professor Rabinowitz's point is, in short, answered by the mortgage's value-preservative function.

To the extent that the content of this article is necessary to explain the mortgage's form, Lord Macnaghten's claim that "no one, I am sure, by the light of nature ever understood an English mortgage of real estate"[291] is thus in fact validated. The mere light of nature could not penetrate the fog of the mortgage's odd first appearance. But one can hardly expect every aspect of developed law to be so self-evident as not to require explanation. To admit Lord Macnaghten's claim is thus not to admit the frowardness of the common-law mortgage.

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[286] For instance, Professor Simpson was arguably even less accurate with his claim: "[S]tatutes were used fairly extensively (as was *elegit*) to create what were in fact mortgages of real property." SIMPSON, *supra* note 30, at 87–88. The differences between both statutes and *elegit* and mortgages is evident. And Professor M.M. Postan inaccurately claimed that the statute staple was a "handy instrument" for the "hypothecation of land." M.M. Postan, *Private Financial Instruments in Medieval England*, 23 VIERTELJAHRSCHRIFT FÜR SOZIAL- UND WIRTSCHAFTSGESCHICTE 26, 30–31 (1930).

[287] *See* Rabinowitz, *supra* note 11, at 180.

[288] *See* EDWARD F. COUSINS & IAN CLARKE, THE LAW OF MORTGAGES 17 (3d ed. 2010); BEN MCFARLANE ET AL., LAND LAW: TEXTS, CASES, AND MATERIALS 1067 (3d ed. 2015); NELSON, ET AL, *supra* note 15, at 134.

[289] J.J. POWELL, A TREATISE ON THE LAW OF MORTGAGES 1-2 (London, 1st ed. 1785) (noting a Jewish-origin theory, but preferring a Roman one); Rabinowitz, *supra* note 11. Powell's early and influential treatise affected the views of many subsequent authors.

[290] Accidental response to other developments is the implied cause of mortgage development in a descriptive account of the doctrinal development first articulated by Maitland and repeated by many legal historians since. 2 POLLOCK & MAITLAND, *supra* note 4, at 119–24; *see also* BAKER, *supra* note 30, at 311–12; 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 128–31 (3d ed. 1923); PLUCKNETT, *supra* note 6, at 603–07; SIMPSON, *supra* note 8, at 141–43.

[291] Samuel v. Jarrah Timber and Wood Paving Corp. Ltd. [1904] AC 323 (HL) 326 (appeal taken from Eng.); *see supra* note 2 and accompanying text.

The remaining criticisms of the common-law mortgage are all grounded in a singular idea that varies by degrees along a spectrum of intensity. It begins with the diffuse notion that there was something not quite right about a mortgage—mortgages were "clumsy"[292]—and intensifies to charges of mendacity, some strongly stated: mortgages "pretended . . . to be something which they are not;"[293] involved "a system of documents which do not mean what they say;"[294] "suffered from the incurable defect that they employed formulas which contradicted the true nature of the operation;"[295] were "mendacious;"[296] or were, in Maitland's crowning phrase, "one long *suppresio veri* and *suggestio falsi*."[297] The core sentiment is that the mortgage was really a charge upon property *sui generis* intended to allow a creditor to seize property upon default, but the mortgage did not take such form. To an extent this accusation cannot be denied: the common-law mortgage was not a pure hypothecary charge. But English law had no hypotheca as such. Does this mean that the common-law mortgage should be condemned or simply considered the English form of hypotheca? That depends on whether the peculiar characteristics of the common-law mortgage really were mendacious.

There are two ways in which the common-law mortgage might have been regarded as mendacious. First, and most obviously, there are particular clauses in a mortgage not intended for what they said. The quintessential example is the six-month redemption date: no one intended a mortgagor to redeem within six months and everyone knew as much.[298] But as explained in Part II, such clauses were not inherent characteristics of the common-law mortgage; rather, they were consequences of equity changing the rules of contract. Indeed, after explaining the standard six-month redemption date, Maitland himself acknowledged: "That is the worst of our mortgage deed—*owing to the action of Equity*, it is one long *suppresio veri* and *suggestio falsi*. It does not in the least explain the rights of the parties; it suggests that they are other than really they are."[299] But in such declaration Maitland rightly blamed the perversive effect of equitable intervention; he cast no aspersion on the pure common-law mortgage. Similarly Lord Bramwell attributed the "system of documents which do not mean what they say" to "those who administered equity."[300] The criticism that dissimulative clauses like the six-month redemption date were mendacious is therefore valid, but such criticism is properly directed at the effect of equitable intervention rather than the common-law mortgage itself.

Second, and this is very similar to the first, one might consider the grant that was the basic mechanism of the mortgage to be irretrievably mendacious: the backwardness of the mortgage was itself a lie. The root of this notion is the idea that there was dishonesty in the fact that a mortgage grant was not intended to take effect like other grants. It did not mean to convey possession. But a traditional common-law mortgage always made explicit that a mortgagor should retain possession, be it by lease-back, covenant, or some other mechanism; only after equity intervened did provisions to this

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[292] *See* 2 POLLOCK & MAITLAND, *supra* note 4, at 124;*supra* note 4 and accompanying text.

[293] *See* SIMPSON, *supra* note 8, at 242.

[294] Salt v. Marquess of Northampton, [1892] AC 1 (HL) 19 (appeal taken from Eng.); *supra* note 3 and accompanying text.

[295] *See* PLUCKNETT, *supra* note 6, at 606.

[296] *See* SIMPSON, *supra* note 8, at 247.

[297] *See* MAITLAND, *supra* note 5, at 269.

[298] *See id.* at 269–70.

[299] *Id.* at 269 (emphasis added).

[300] Salt v. Marquess of Northampton [1892] AC 1 (HL) 19 (appeal taken from Eng.); *supra* note 3 and accompanying text.

effect disappear. Anyone who actually read the relevant deeds of a traditional common-law mortgage would therefore understand exactly who was supposed to have possession. It would take an exceptionally rigid view of a grant to say that deeds openly declaring the rightful possessor were mendacious. In fact, necessary inseparability of legal title and actual possession is just too simplistic a concept to ground serious legal criticism. It had virtually always been possible to be seised of land without being possessed of it or to be possessed of land without being seised of it:[301] such division had been utterly routine even centuries prior to our period in land-holding structures based on feoffments to uses.[302] It was thus entirely straightforward to conceive of a mortgage grant as a granting of title—granting a reified legal concept—apart from possession.

Beyond defensive arguments that the common-law mortgage was not mendacious, a positive argument exists that it was specifically honest—at least in the period under consideration. In early-modern England there was a widely understood and intuitive analogue to the mortgage as a grant of title without possession. A pawn was and is the handing over of a chattel as security for a debt. While the history of pawnbroking before the modern period has been under-researched, indications are that pawns were extremely common;[303] everyone from the crown to peasants seems to have pawned to secure creditors.[304] Just as today, a pawn creditor takes delivery of the pawn because leaving it with the debtor creates an unreasonable risk to the pawn's value: a chattel might straightforwardly be lost, stolen, sold, given away, hidden, damaged, destroyed, or otherwise diminished in value. Despite taking it, a pawnee does not have full right to the chattel, and the limited nature of the grant is understood. A creditor can safely leave a debtor in possession of land: few if any of the same physical risks to a pawn threaten land. But the same was not true of *title* to land. As Part I explains, title to land was subject to a pervasive risk of encumbrances. So a creditor had to take delivery of title to land just like a chattel. A mortgage was therefore simply a pawn of title. Indeed, the analogy was physically embodied in our period. Mortgagors handed over title deeds – those physical objects representing title.[305] So common did the practice become that

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[301] Shifts in the meaning of "seisin" and "possession" could belie this literal statement at certain times, but the point remains that title and use of land had a long history of distinction.

[302] *See* BAKER, *supra* note 128, at 653–86; BAKER, *supra* note 30, at ch. 14; J. M. W. BEAN, THE DECLINE OF ENGLISH FEUDALISM 1215–1540 104–301 (1968); Joseph Biancalana, *Medieval Uses, in* ITINERA FIDUCIAE (R.H. Helmholz & Reinhard Zimmerman eds., 1998).

[303] One of the few sources to refer to pawnbroking in our period, although it does not treat the subject at length, assumes that it is common. R. H. Tawney, *Introduction, in* THOMAS WILSON, A DISCOURSE UPON USURY, 1, 22, 33–34, 92, 126-27 (R. H. Tawney ed., 1925); *cf.* An Act Against Brokers 1604, 1 Jac. 1, c. 21. One would expect significant treatment of pre-modern pawnbroking in ALFRED HARDAKER, A BRIEF HISTORY OF PAWNBROKING, 1–40 (1892), but it does not contain it;only the first 40 of its 367 pages address the period before 1800. And that treatment is both more popular than scholarly, and ranges sufficiently widely that it says very little about England in our period .

[304] *See, e.g.*, FOURTH REPORT OF THE ROYAL COMMISSION ON HISTORICAL MANUSCRIPTS, PART I 292 (London, 1874) (Letter from Thomas Gondrey to the Earl of Middlesex (Nov. 2, 1636) (referring to "Jewels pawned in the Low Countries" by the King); *id.* at 315 ("Draft of a letter to Lady Corbett about jewels &c., of the Earl of Somerset which were in pawn to her." Dated 7 June 1623); *id.* at 40 (a "Petition of the forty members of His Majesty's Chamber in ordinary" reciting that they have not been paid in a year "and have been put to such great expense for extraordinary services, that they have been enforced to pawn their goods" dated 15 January 1641); HARDAKER, *supra* note 303, at 13–15 (presenting examples of medieval pawns by the crown and other exhausted personages).

[305] Mortgages typically required return of title deeds upon redemption. *See, e.g.*, Biggen v. Holmesteed (Oct. 13, 1587) PRO C33/75 f. 25v (transcription on file); WEST, *supra* note 38, at §§ 416, 418. The Chancery also typically ordered mortgagees actually to return deeds. *See* Mason v. Wilmott (Nov. 15, 1600) PRO C33/99 f. 238v (transcription on file); Hayward v. Pawlett (1597), 1 Bryson 118.[231] (Ch.) 261; *Biggen*, PRO

a "mortgage by deposit of title deeds" later became an equitable form of mortgage lacking a written deed.[306] A mortgagee's inability to use title to take possession of land did not spoil the analogy: a pawnee also faced restrictions on what he or she could do with a chattel pawned.[307] A mortgage was thus nearly an exact analogue of a widespread transaction in ordinary use. What could be more honest than that? A very basic understanding of law and the relevant social context therefore clarifies the mortgage grant to such an extent that it can hardly be called mendacious.

IV. CONSEQUENCE FOR MODERN MORTGAGE LAW

Redeeming the common-law mortgage from unwarranted criticism not only makes for interesting legal history, it also demonstrates the need to reconsider basic mortgage theory in modern America. This section considers how the leading sources of modern mortgage law depend upon the criticisms debunked above, and it invites a fresh consideration of basic mortgage doctrine today.

Different states have different conceptual and doctrinal theories of mortgage. A "title-theory" state still operates with the common-law mortgage: a mortgagee holds legal title for the duration of a mortgage, to be redeemed by a mortgagor upon repayment of a debt.[308] A "lien-theory" state applies the Chancery's view of mortgages to an extreme: a mortgagee has neither legal nor equitable title—nor anything other than a purely financial security interest in mortgaged property. Such interest takes the form of a power of sale, by which the mortgagee can, after default, convey a mortgaged title to a third party—not keep it—and that only after completion of a foreclosure proceeding.[309] An "intermediate-theory" state takes a middle ground, viewing title as shifting to a mortgagee upon default, but not before.[310] "[I]n practice the intermediate theory seems to differ, little, if at all, from its title theory counterpart."[311] The main theories of mortgage are therefore effectively title and lien theories.

The leading position on modern mortgage theory rejects title theory in favor of lien theory. Professors Grant Nelson and Dale Whitman are the authors of the leading treatise on mortgages in America (joined in their sixth edition by Professors Wilson Freyermuth and Ann Burkhart).[312] Nelson and Whitman were also co-reporters on the current Restatement (Third) of Property: Mortgages, which entirely agrees with the treatise.[313] In neither work do they devote much attention to basic mortgage theory, but where they do, they reject title and intermediate theories in favor of lien theory. They

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C33/75 f. 25v (transcription on file). *But cf.*, Longford v. Earl of Shrewsbury (Jun. 15 1596) PRO C33/91 f. 157 (transcription on file), Tothill 132; 21 E.R. 145; 1 Bryson 118. [195], 257.

[306] *See* Russel v. Russel (1783) 28 Eng. Rep. 1121-22 (Ch.); 1 Bro. C. C. 269, 270; MEGARRY & WADE, *supra* note 271, at 1129.

[307] Relatively elaborate law developed regarding what a pawnee could do with a pawn before it was redeemed. *See* "Mortgage" *in* WILLIAM SHEPPARD, AN EPITOME OF ALL THE COMMON & STATUTE LAWS OF THE NATION 744–45 (London, 1656); *see also* Mores v. Conham (1609) 74 Eng. Rep. 946, 947; Ow. 123, 124; CO. LITT., *supra* note 36, at 89a.

[308] *See* NELSON ET AL., *supra* note 15, at 199; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 (AM. LAW. INST. 1997).

[309] *See* NELSON ET AL., *supra* note 15, at 202–03; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a(2) (AM. LAW. INST. 1997).

[310] *See* NELSON ET AL., *supra* note 15, at 208; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a(3) (AM. LAW. INST. 1997).

[311] RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a(3) (AM. LAW. INST. 1997).

[312] NELSON ET AL., *supra* note 15. STEVEN W. BENDER ET AL., THE LAW OF REAL ESTATE FINANCING (2018), also continues to be updated but effectively does not treat basic mortgage doctrine.

[313] RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 (AM. LAW. INST. 1997).

argue in their treatise: "[I]t probably makes little sense to advocate or perpetuate either the title or intermediate theories. The former, after all, is largely a vestigial remain of English usury law, while the latter . . . is conceptually indefensible."[314] The Restatement takes the same view; indeed, much of §4.1 comment a, which addresses basic doctrine, is taken directly from the treatise.[315]

Nelson and Whitman seem to come to their position in reliance upon a species of criticism debunked in this article. Neither their treatise nor the Restatement ever explicitly reasons against title theory other than by passing references to its antiquity and self-evident impropriety. Both works casually refer, for instance, to title theory's basis in "formalistic and conceptually problematic concepts of English history," and, as mentioned, call title theory a "vestigial remain of English usury law."[316] Little more than these off-hand dismissals ground their rejection of title theory. Their rejection of intermediate theory is equally sparsely supported. The Restatement simply treats intermediate theory as though it were no different than title theory,[317] while the treatise dismisses intermediate theory with the unexplained assertion that its foremost characteristic, shifting title upon default, combines "two utterly inconsistent theories."[318] Nelson and Whitman's argument can be fairly summarized as: it is obvious that the common-law mortgage was bad; mortgage theory is thus a choice among three alternatives, only one of which—lien theory—is viable. They thereby propound a species of the critical consensus against the common-law mortgage. And in so doing, they make a weak argument. Rather than clearly arguing against title theory and for lien theory on any sound normative basis of whatever sort, they rely upon the critical consensus that this article has shown does not withstand scrutiny.

A better argument therefore must be made to determine what modern mortgage theory should be. Many possibilities exist depending upon different normative methods. Law and economics can suggest the most appropriate utilitarian doctrinal structure, perhaps considering optimization of the secondary mortgage market. Critical legal theories can consider how mortgage law expresses power relations between various groups and how legal structures ought to be shaped in light thereof. Law and psychology can tell us ordinary people's expectations of mortgages and how the law should react to them. Traditional doctrinal analysis can help mortgage theory fit traditionally desirable characteristics of law, such as predictability, certainty, accessibility, fairness, and so on. But actually engaging in all of these analyses is beyond the scope of this article. It is content to suggest that, whatever else may be true, a reassessment of basic mortgage theory should take place.

CONCLUSION

When understood in the proper context, the common-law mortgage was a rather clever device. It took the basic concept of mortgage—if I do not satisfy my debt to you, you get my land—and instantiated it legally as it had to in light of the prevailing legal landscape. It took the form of an initial conditionally defeasible grant, thereby

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[314] NELSON ET AL., *supra* note 15, at 209.

[315] RESTATEMENT (THIRD) OF PROP.: MORTGAGES ch.4, intro. Note (AM. LAW. INST. 1997) ("A principal theme of this Chapter is that a mortgage creates only a security interest in real estate. This reflects the adoption of the "lien" theory and the rejection of the "title" and "intermediate" theories of mortgage law.").

[316] NELSON ET AL., *supra* note 15, at 209.

[317] *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a(3) (AM. LAW. INST. 1997).

[318] NELSON ET AL., *supra* note 15, at 209.

eliminating a pervasive risk of undiscoverable encumbrances that constantly threatened legal titles; and thereby preserving the value of the title that was the asset pledged against a debt. It did what was necessary for a creditor truly to be secured. Furthermore, this somewhat technical legal reality worked in practice as simply as it could: a debtor handed over title until he or she repaid. The process was symbolized by handing over title deeds, just like a pawn. Criticisms that this was a backward or mendacious arrangement are misplaced. The common-law mortgage was no more than private ordering of existing legal concepts to achieve a particular result that other legal systems have embodied in a specialized legal form. It was a clever and logical way to achieve the basic concept of mortgage as necessary in a particular legal system. There was nothing wrong with it.

Such an understanding is important both for its own sake and for its relevance to modern law. Given the great significance of mortgages to the economy, society, and law, both historically and in the present day, full appreciation of the basic nature of the common-law mortgage matters *per se*. In a more applied fashion, better understanding of the common-law mortgage re-frames thinking about the doctrinal basis of modern mortgage law. The leading view on basic mortgage theory presents an under-theorized preference for "lien theory" against "title theory" in a manner analogous to general bias against the common-law mortgage. Such prejudice should be rejected. Once it is, a serious question arises about what basic mortgage theory ought to be. It is therefore time for a re-thinking of the matter. While that re-thinking may be done according to any normative criteria, it should be done in light of the risk of repeating equity's problematic move in systematically discounting parties' agreements.

Within the rehabilitation of the common-law mortgage appears a cautionary case study of the effect of judges changing fundamental rules of contract. Systematic equitable intervention into mortgages had the unintended consequence of driving the true significance of such agreements underground, hidden beneath forms not openly expressing their meaning, but instead calculated to achieve a particular result when subjected to interpretative doctrinal machinery. Put differently, after equity took over mortgages, parties took the doctrinal landscape into account; they drafted their agreements in the shadow of what the Chancery would do. And this caused the mortgage to develop characteristics of dishonesty that this article has not tried to justify. Doctrine and practice were thus in a hydraulic relationship that thwarted well-intentioned Chancery innovations with bad side effects. One might reasonably assume that parties will always react to the legal landscape in attempts to get the agreements that they want. And to the extent that one might doubt the ability of doctrine to stay ahead of the ingenuity of sophisticated and well-advised parties, a cautionary tale appears for judicial ambitions of an interventionist nature in contract. Parties adapt quickly; contract law works better by creating a stable framework for private ordering than by intervening in response to content-specific trends.