On the Origin of the Mortgage
Part 1

This is the first in a series of articles on the mortgage. The series traces the essential history of the mortgage, delves into various aspects of the mortgage instrument itself – from the manifestly distinct to the more nuanced and arcane – and finishes with a speculative look towards the future of the mortgage. We begin with a look at the past.

Of all the legal innovations and advances in commerce over the millennia, few have roots as ancient as those of the mortgage, and perhaps none are as convoluted. On the one hand, the essence of the mortgage is straightforward: a lien on real property given to secure the timely payment or performance of an obligation. In this sense, the mortgage is not a unique instrument. Indeed at its core, the mortgage – even a modern mortgage with its equity of redemption and right to surplus proceeds – differs little from a pledge of land under Roman law. Tracing the history of the mortgage through the concept of a pledge leads back to even more remote antiquity. As Chaplin noted more than a century ago, the Norman word for pledge, the *gage*, was etymologically the same as the Roman word for pledge, the *vadium*. "This fact, of itself, at least suggests a community of ideas of immemorial antiquity."[1] I would go further. It is from the same conceptual root, centered at the core of this "community of ideas," that sprang seemingly dissimilar words like *wages* and *wed* – both of which share a common etymology with the word mortgage. It is no stretch to suggest that the mortgage shares an essential socio-economic nexus with other foundational concepts of civil society.[2]

The old French *gage* is not only a word in and of itself meaning "pledge," but is of course the second half of the word "mortgage." A *gage*, or pledge, of land as security for a debt was recognized in England soon after the Norman Conquest and was understood from that beginning as a mere pledge of legal title, whether or not – as was typically the case – that pledge of legal title was accompanied by a transfer of actual possession of the land. That is, whether or not actual possession of the land was given to the lender as part of the pledge, initially the form of the land financing was structured in a way that the ultimate ownership of the land remained with the pledgor throughout– provided, of course, that the debt was timely repayed.[3] If as part of the financing the ownership and possession of the land were separated, and possession of the land were given to the lender, the pledge was referred to as a "pawn"; if the owner instead retained possession of the land, the pledge was instead called an "hypothecation." The lender under an hypothecation of land could

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[1] Chaplin (1890), p. 5.

[2] Rousseau, for example, once wrote that the true founder of civil society was the individual who, enclosing a piece of land and saying, "this is mine," persuaded others to believe it was so. [*Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1755)] One wonders how long afterwards that same individual, pointing to the enclosure a second time and saying, "this is mine but will be yours if I do not repay you," persuaded others to finance it. In any case, this paper begins its look at the mortgage from the point of departure of the Norman Conquest.

[3] As discussed below, the evolution of the mortgage away from this initial structure to the form of an absolute conveyance of fee title to the lender, and its subsequent reinterpretation by courts as nonetheless being merely a security instrument, was the critical moment in the history of the mortgage – the point at which that instrument became what we recognize today as a mortgage.

"leave the pledgor in possession, and still be secure, by recording a written contract of pledge in the King's Court."[4] Recognizable in the hypothecation are not only the roots of the current universal practice of recording mortgages, but also the kernels of what would eventually become the lien theory of mortgages. The form of pledge that most directly resembles a modern mortgage under the title theory, in which ownership of the property was given to the lender and possession was retained by the mortgagor – the Roman pledge *in iure cessio cum fiducia* – was also available.[5] That was nearly 1,000 years ago, but the route the mortgage took from there to where it is today was anything but direct.

By the middle of the 12th Century, the form of land pledge in which the lender was given possession of the land – the pawn – came to dominate over the form in which the owner retained possession: the hypothecation. In the end, there was likely little contest between the two types of pledges, due in no small part to the evidentiary shortcomings attendant on the recording of an hypothecation.[6] That is, though possession of land does not necessarily imply its ownership, possession certainly must have helped the lender if it became necessary to plead in court that something akin to a pledge of land had been given to secure a contested debt.

From this arrangement, two forms of land pledges arose: the *vivum vadium*, or "living pledge" (in French, the *vif gage*), and the *mortuum vadium*, or "dead pledge" (in French, the *mort gage*),[7] which were so named in reference to how the proceeds and rents which the land generated were treated. In both cases possession of the pledged land was given to the lender for a definite term. Under a *vif gage*, "the proceeds and rents [would] in the meantime reduce the Debt," whereas under a *mort gage* "they [would] in no measure be so applied."[8] In other words, a lender in possession under a *mort gage* was under no obligation to account for the proceeds and rents to the owner who pledged the land. The pledge of land under a *mort gage* rendered the land financially "dead" to the owner until the pledge expired by repaying the debt to the lender. A *vif gage*, by contrast, would still bear living fruit, so to speak, for the benefit of the owner: the proceeds and rents which the land generated were kept or disposed of by the lender and credited against the outstanding debt. For this reason, the *vif gage* was considered "just and binding; the other, [the *mort gage*,] unjust and dishonest, [and while it] is not prohibited by the King's Court, [nonetheless] it considers such a pledge as a species of Usury."[9] This characterization of the *mort gage* as being both unjust and dishonest, and yet not legally prohibited, stemmed from a complex array of usury principles through which the *mortuum* aspects of the *mort gage* were viewed, though with the same sort of wink, more or less, that accompanied those principles elsewhere.[10] Regardless, the modern

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[4] See Chaplin, page 6 (citing Glanville).

[5] Briggs and Zuijderduijn, p. 5.

[6] Glanville, lib. X. chapter 8.

[7] Jones, Chapter I, §2.

[8] Glanville, lib. X. chapter 8.

[9] *Ibid*.

[10] Eventually the *mortuum vadium* was expressly prohibited by law, though not until after the mortgage had evolved into more or less its modern form. While the interaction of usury and mortgage principles over the centuries

mortgage is structured along the lines of a *vif gage*, yet it was the name of its "unjust and dishonest" sibling, the *mort gage*, that stuck. Perhaps a more precise characterization is that the modern mortgage, either directly or through an accompanying assignment of leases and rents, still grants the lender absolute title to the proceeds and rents of the land, with two limiting differences. First, there is generally a license back to the owner for so long as the mortgage is not in default, and second, the assignment is essentially limited by the amount necessary to repay the debt. In this sense, then, the modern mortgage could also be characterized as a *mort gage* with a heart.

Whether *vif gage* or *mort gage*, and whether the owner remained in possession or possession was granted to the lender, the nature of the land pledge was such that a failure to repay the debt in full on its stated due date immediately and automatically converted the lender's pledgee interest into fee title absolute. As Chaplin put it, "[t]he time being come and the money not paid, the foreclosure was automatic."[11] For all practical purposes, the only reason a lender would need to resort to the courts would be in circumstances where the owner had remained in possession as part of the pledge and, upon payment default, refused to vacate the land. Because the burden of proof was typically on the lender to establish the existence of the debt, it was in this sense that granting the lender possession as part of the land pledge went a long way toward overcoming the evidentiary shortcomings mentioned above. The circumstances giving rise to the equity of redemption awaited one final evolutionary change in the nature of the land pledge.

That evolutionary change took the form of a legal innovation called the "deed upon condition." As the name implies, the deed upon condition was an outright conveyance of fee title to the lender, subject only to the condition that if the debt was repaid on its due date (so-called "law day"), the conveyance would be deemed void. This seemingly subtle change, which came into widespread use by the 13th Century, turned the land pledge on its head. Failure to pay the debt no longer triggered the conveyance of title to the lender. Now the lender owned the land from the get-go, and a payment failure simply terminated what was essentially the borrower's repurchase option. The harshness of the deed upon condition was such that "[i]f for any reason the payment was not made on law day, the borrower forfeited all interest in [the land]. This was virtually an absolute rule, and applied even if the borrower was unable to find the lender to make payment."[12] Setting aside the perverse economic incentive, let alone the opportunity for outright fraud, that were built into such an absolute rule, the harshness of the rule was, not surprisingly, very soon recognized by the courts to be untenable.

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is no less fascinating than the socio-economic nexus mentioned above, that interaction is beyond the limited scope of this article.

[11] Chaplin, page 8.

[12] Restatement of the Law (Third) of Property – Mortgages, §3.1, Comment a.

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