

SUPPRESSIO VERI AND SUGGESTIO FALSI

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This title was the description applied by Maitland to the English mortgage deed.¹ What he had particularly in mind, of course, was that the traditional form of mortgage of land looked like a conveyance plus a contract, whereas in fact it was something much more. However, the particular element of deceptiveness to which he thus draws attention is not one which nowadays would be very likely to mislead the student. The fact that the mortgage by conveyance was transformed into a security by equity is one of the first things hammered into a student of this particular branch of real property law. No one who has lovingly conned the reports of such cases as *Salt v. Marquess of Northampton*² or *Noakes v. Rice*³ and contemplated the profundities of the maxim 'once a mortgage always a mortgage' is likely to underestimate the influence of equity on the English mortgage.

Yet it is still true that the accident that the mortgage in England took a particular form has caused the whole topic of mortgages and kindred securities to be surrounded by a fog of obscurity and unreality in which it is very difficult to see clearly. Writers when they enter this area seem to lose their powers of clear analysis. In one place they will represent the common law machinery of the mortgage as being of little importance; in other places they will make it the basis of important classifications. The bedevilment has spread to the courts; one manifestation in Australia has been the cases in which the point for decision has been whether some of the doctrines applicable to the common law mortgage, for instance the doctrine of consolidation, apply to the mortgage of Torrens title land. A necessary starting point for the clarification of such difficult points is an understanding of the nature of the general law mortgage, and in fact of the nature of mortgages in general. Such an understanding is not easy to gain.

The text-book writers are largely to blame. Hanbury and Waldock, who wrote what is in many respects an admirably clear book on the subject of mortgages, appear to go sadly astray in the preliminary question of classification. They divide securities over property (real securities) into the three classes of mortgage *stricto sensu*, possessory, security and charge. In the first class we are told that the creditor obtains proprietary rights, in the second he obtains only actual possession whilst in the case of the third (which in order to avoid

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¹ Maitland, *Equity* (revised ed. 1949), 182.

² [1892] A.C. 1.

³ [1902] A.C. 24.

ambiguities, it is better to call that of *hypothecation*), he obtains neither possession nor ownership (*sic*) but there is a simple appropriation of specific property to the satisfaction of the debt.⁴ This represents quite an orthodox classification,⁵ but the language in which it is phrased bristles with difficulties. It is obvious that the characterization of the first suggested class will not satisfy any searching test. It is not only the mortgage class of security that involves the transfer or creation of proprietary rights. Even under the pure hypothecation type of security the creditor obtains proprietary rights though not, it is true, full ownership rights. Thus if A grants an equitable charge over certain property in favour of B and then becomes bankrupt, B has not a mere claim *in personam* in common with the ordinary creditors of A; he has rights of a proprietary and not merely of a personal nature and can claim to be in the position of a secured creditor just as much as can a full mortgagee.

The threefold classification is based to a large extent upon the Roman law transactions of *fiducia*, *pignus* and *hypotheca*. The first of these three involved the notion of a full transfer of the *res* to the creditor with an obligation, which rested only on contract, to retransfer the *res* when repayment was effected. It seems that those who rely on *fiducia* as representing a fundamental class of security transaction regard a transfer of ownership as being of the essence and this seems to be assumed by Hanbury and Waldock in their emphasis on the hypothecation (or charge) as not involving any transfer of *ownership*. However, the security which takes the form of an out-and-out assignment does not necessarily transfer *full* ownership even when we look only at the strict common law position.⁶ A mortgage of a life estate in land is possible. Where the mortgage given is one of a leasehold estate, full legal ownership of the leasehold interest is given, but it is only a limited interest in the ultimate *fee simple*. It all depends on what is regarded as the *res*. However this last point is rather trifling and perhaps one may be doing the fullest possible justice to the concept of the mortgage type of security in the strict sense if one says that the fundamental element is the conveyance by the debtor to the creditor of *all* proprietary rights which happen to be initially vested in the former. The debtor strips himself of all proprietary rights and retains merely a contractual right to have them returned to or re-vested in him when he discharges the debt. Viewed in this light, a mortgage of a life estate or of a right of way

⁴ Hanbury and Waldock: *Law of Mortgages*, 4-5; Waldock (2nd ed. 1950), 4.

⁵ See Fisher and Lightwood: *Law of Mortgages*, 4, where, however, a fourth general class *viz.* *liens* is added.

⁶ It must be understood that references to the mortgage of land under the general law are to the English pre-1925 form of mortgage. The English Law of Property Act 1925 changed the form of mortgage without materially affecting the equitable principles applicable to it.

or of a rent charge, is just as much a mortgage as is one of a full fee simple estate.

On the basis that this is the only possible way in which to view the nature of mortgage securities in the strict sense as a distinctive class, one comes up, however, against the fundamental objection that there is no security known to English law which falls under this class. There is a number of securities the formal framework of which is that of a full assignment of proprietary rights, but it is precisely upon this type of security that equity brought its own peculiar principles to play. Common law, in the case of the mortgage of land, said that the mortgagee was full owner subject only to the contractual duty to reconvey which itself became extinguished when the contractual date for repayment was passed; equity said that the mortgagor remained equitable owner even after default and that the mortgagee's rights were merely of a security nature. The mortgagor's equity of redemption was a full equitable estate. Common law said that the mortgagee could enter into possession at any time; equity said that if he did he came under strict obligations to account to the mortgagor. At common law the mortgagee could sell the whole estate in the land merely because of the fact that he was legal owner, and an owner does not need an express power to be able to sell his own property; equity regarded rights of the mortgagee such as a power of sale or the power to appoint a receiver as things that existed only by virtue of special provision or by statute, and when they existed they existed over property which was really somebody else's, that is they were rights *in re aliena* not *in re propria*. All this, of course, is trite learning.

The orthodox classification also lacks reality in so far as the second class of security suggested thereby is concerned. This class of security is conceived as one whereby the debtor simply parts with factual possession. It would follow from this that the only rights which the creditor had would be those flowing from such factual possession, namely a right to retain possession until the debt was paid. Yet under the pledge, which is the best known form of possessory security, the pledgee has a right upon default to sell the article and pass a good title to a purchaser. Even the possessory liens have ceased to run true to type with the conferring by the legislature in certain cases of a power of sale.⁷

Reverting again to the suggested distinction between securities of the 'mortgage' type and those by way of hypothecation, it is useless to deny that there is a real distinction between those securities which *take the form* of an assignment of proprietary rights and those which

⁷ E.g. Workmens' Liens Act 1893-1936 (S.A.), s. 41; Possessory Liens Act 1942, (Qld.), s. 3.

do not. Let us take what is probably the commonest example of the hypothecation genus, namely the equitable charge. Here there is no immediate transfer of proprietary rights. The property is merely encumbered with the debt. Before default the chargee has no *exercisable* rights at all. On default he has a right of proceeding against the property, namely a right of approaching the court in its equitable jurisdiction and asking for a judicial sale.⁸ The hypothecation therefore involves the creation of a new proprietary right rather than the transfer of existing rights. Moreover the right is potential only. It slumbers until it is evoked by actual default. On the other hand the mortgage type of security does involve an immediate transfer of *some* rights. Although the concept of common law that the mortgagee was immediately made owner became illusory, the passing of legal title does have certain important and immediate practical results. The mortgagee, unless he is taken to have effected a redemise to the mortgagor,⁹ has an immediate right to take possession, and equity, notwithstanding its views on the nature of the transaction, would not interfere by injunction with the exercise of this right. Again the mortgagee, by force of his legal title, becomes the person entitled to sue strangers in any proceeding where the legal title to the property is involved. The mortgagee by virtue of the action for foreclosure can on default by the mortgagor place himself in the position where he frees himself of the mortgagor's equity of redemption and becomes full owner in equity as well as in law. This is a possibility not present in the case of the type of the pure hypothecation. Lastly the mere charge over chattels is not a registrable bill of sale under the Bills of Sale legislation because it is not an *assurance* of chattels.¹⁰

Now the fact that the mortgage of land in England took the form of a conveyance of the legal estate may have historically accounted for the emergence of these differences, but it is submitted that the bare fact of the transfer of the legal estate has ceased to be the sole, or even the major factor of importance. The differences to which we have adverted persist in varying degrees even when the mortgage is not of the legal estate. Mortgages may be equitable and in this connection the notion of the mortgage being some sort of an equitable conveyance has persisted.¹¹ There is a difference between the equitable mortgage and the equitable charge; the former carries with it the right to foreclosure,¹² the latter does not.¹³ Since the whole

⁸ *Matthews v. Goodday* (1861) 31 L.J. Ch. 282.

⁹ See *Wilkinson v. Hall* (1836) 3 Bing (N.C.) 508, (132 E.R. 506). *Doe d. Parsley v. Day* (1842) 2 Q.B. 147, (114 E.R. 58).

¹⁰ *Brown v. Bateman* (1876) L.R. 2 C.P. 272; *Re Slec* (1872) L.R. 15 Eq. 69.

¹¹ See Hanbury & Waldock: *op. cit.*, 4, 5, n.13, n. 18.

¹² This is so even in the case of the mortgage by mere deposit of title deeds—*Pryce v. Bury* (1854) L.R. 16 Eq. 153 (n); *Ryan v. O'Sullivan* [1956] V.L.R. 99.

¹³ *Re Owen* [1894] 3 Ch. 220; *Tennant v. Trenchard* L.R. 4 Ch. 537, 542.

tendency of equity was to emphasize that the English mortgage, even the legal mortgage, was substantially a charge, it is difficult to regard the equitable mortgage, which was equity's own child, as being a full assignment of the equitable estate in the same way that the legal mortgage was at common law a full assignment of the legal estate. Yet undoubtedly there is a reality of distinction. To the equitable mortgage equity applies its notions of a foreclosable equity of redemption, to the mere charge it does not. There is a realizable distinction between a mortgage by A of his equitable interest in Blackacre as *cestui que trust* under a trust instrument and a charge by him of the same interest. The one assigns; the other merely burdens. An equitable disposition in writing of chattels by way of mortgage is a registrable bill of sale because it is an equitable 'assurance';¹⁴ an equitable charge is not a bill of sale unless it is in terms made so by the Bills of Sale legislation.¹⁵

The existence or absence of a conveyance of the legal estate may then not be a conclusive factor in estimating the actual rules which may regulate the relations of debtor and secured creditor. It may be that many of the equitable rules evolved to meet the security operating by assignment will apply to other types of security either because of the intent of the parties or (more usually) the deducible intent of the legislature. It is submitted that some of the decisions on the mortgage of Torrens title land rely too much on the fact that the security is in structure a legal charge only.

The Torrens statutes commence by creating a 'mortgage' in the form of a statutory charge, emphasize that the transaction is not a transfer of ownership rights and that the mortgagee is merely in the position of a registered chargee.¹⁶ If the legislature had stopped there, probably the only remedy of the statutory mortgagee on default would have been an application to the court for a judicial sale, as that seems to be a residual remedy in cases not only of the equitable charge but of all charges created by statute, for instance statutory charges for local authority rates or for land tax.¹⁷ The legislature however, then proceeded to engraft a statutory power of sale, a power to enter into and sue for possession and also a power to obtain foreclosure, all exercisable on default. In one state, Queensland, there is no elucidation of the procedure in foreclosure and the courts have taken it that a curial proceeding on the traditional basis was contemplated by the legislature.¹⁸ In some of the state statutes there is a reference to a right to redeem, and to an equity of redemption.

¹⁴ *Jarvis v. Jarvis* (1893) 63 L.J. Ch. 10; *Edwards v. Edwards* (1876) 2 Ch. D. 291.

¹⁵ *Re Slee*, *supra*, n. 10.

¹⁶ *E.g. Transfer of Land Act 1928*, (Vic.) s. 146.

¹⁷ See Browning & Bluett: *Local Government Law and Practice* (3rd. ed.), 365.

¹⁸ *E.g. Castlemaine Brewery v. Spink* (1899), 9 Q.L.J. (N.C.) 120.

Though this cannot mean that the mortgagor can go to court through the medium of a suit for redemption and ask for an order for reconveyance, yet it seems that the mortgagor can ask for an order for accounts and for a direction that the mortgagee receive payment and execute an appropriate registrable instrument of discharge.¹⁹ Equity's traditional concession to the mortgagor, the recognition of a right to redeem even while a state of technical default under the mortgage instrument exists, obviously finds recognition under the Torrens system. The rule against 'clogging the equity' has been tacitly assumed to apply to the Torrens mortgage.²⁰ It seems reasonable to conclude that there is a general intent that the incidents surrounding the Torrens mortgage should approximate as closely as circumstances permit to those attaching to its general law counterpart.

'The general law mortgage was thus obviously very much in the draftsman's mind when the relevant sections were penned, and they are obviously addressed to a profession well acquainted with equity's contribution to the law of mortgage under the general law, and well able, where the Act was silent, to supply from that contribution a method of working out and adjusting the mutual rights of mortgagee and mortgagor'.²¹

Too much importance should therefore not be attached to the fact that the mortgage is not a transfer of the legal estate. Whilst it is true that the fact that the mortgagee does not take the legal estate of the mortgagor means that certain rights, for example the right to take possession, will not automatically vest in the mortgagee, such fact should not conclude the issue when the applicability of general equitable doctrine is in point.

From this point of view the decision in *Greig v. Watson*²² that the doctrine of consolidation is not applicable when the mortgage sought to be redeemed is one of land under the system seems open to severe criticism. The equitable doctrine of consolidation is based upon the position that the mortgagor of land under the general law who is in default and wishes to redeem has to invoke the special indulgence of equity and thereupon equity imposes as a term upon the exercise of its clemency the requirement that the mortgagor also pay off another mortgage held by the same mortgagee provided certain conditions have been fulfilled. In denying the existence of this doctrine where it is a Torrens mortgagor who is seeking to 'redeem', Stawell C.J. relied upon the view first that the mortgagor had a right to redeem at any time, and secondly that there was no question here of

¹⁹ See *National Bank of Australasia Ltd. v. United Hand in Hand &c. Society* (1879) 4 App. Cas. 391; *Perry v. Rolfe* [1948] V.L.R. 297; *Re Forrest Trust* [1953] V.L.R. 246.

²⁰ E.g. *Toohy v. Gunther* (1928) 41 C.L.R. 181.

²¹ *Re Forrest Trust* [1953] V.L.R. 246, 256, per Herring C.J.

²² (1881) 7 V.L.R. (E) 79.

any relief against forfeiture. There was therefore no such thing under the Torrens system as a redemption suit so that the mortgagor in seeking to secure a discharge of the mortgage was not really invoking the special jurisdiction of equity. In so far as the view that the mortgagor has a right to redeem at any time is concerned, the implication seems to be that the mortgagor, because his estate is legal, has a 'legal' right to redeem. This is explicitly brought out in *dicta* in the New South Wales case of *Browne v. Cranfield*²³ though that case dealt with a different point. This view, it is suggested, places an undue emphasis upon the fact of the retention by the mortgagor of his legal estate and, moreover, seems based upon a misunderstanding of the nature of the interest possessed by the general law mortgagor. The phrase 'equity of redemption' under the old law in fact has a twofold significance. It indicates the estate of the mortgagor in the land but it also indicates what may be termed the 'personal' right of the mortgagor to redeem notwithstanding the occurrence of default. It is true that the proprietary interest of the Torrens mortgagor remains a legal one, but this fact does not colour the personal right of the mortgagor to redeem after default. Whence can this right come if not from equity? It could be a 'legal' right only if it was in some way conferred by the terms of the contract between the parties, or was expressly given by the statute. Yet, from the premises, the contractual right expired the moment the mortgagor failed to repay on the named contractual date. Nor do the statutes at any point clearly give a right to redeem after default which is unassociated with equitable principles. Rather do they by their use of the phrase 'equity of redemption' point in the opposite direction. The personal right to secure a discharge, to receive back the property in an unencumbered condition can surely rest in equity only.²⁴

The decision in *Greig v. Watson* is indeed possibly justifiable on the other ground stated in the decision. The right to redeem after default given by equity to the general law mortgagor can be looked upon as an instance of equity's general jurisdiction to grant relief against a forfeiture. The attitude of common law was that once the named day of redemption passed the mortgagor irrevocably lost the possibility of regaining his ownership. This could be looked upon as involving a forfeiture, and equity traditionally looked upon such a situation as an occasion for giving relief.²⁵ Under the Torrens system there would be no forfeiture at law of any estate, actual or contingent,

²³ (1925) 25 S.R. (N.S.W.) 443, 448, 450.

²⁴ The attempt by Fullagar J. in *Perry v. Rolfe* [1948] V.L.R. 297, 302, to find a legal right to redeem after default is, it is submitted, unconvincing. See *Re Forrest Trust* [1953] V.L.R. 246, 256-257.

²⁵ See *Greig v. Watson* (1881) 7 V.L.R. (E) 79.

vested or to be vested in the mortgagor so that the circumstances would justify a different approach to the question of the exercise of the right of consolidation. Under this reasoning it would be possible to admit, though of course Stawell C.J. does not make the admission, that the right to redeem under a Torrens mortgage was equitable only, but yet to urge that consolidation, being a special product of the phenomenon which is peculiar to the general law mortgage, *viz.* automatic forfeiture of the mortgagor's estate on default, would not apply to the Torrens mortgage whereunder such a phenomenon is conspicuous by its absence. To this reasoning it could be replied that there is no strong evidence that the doctrine of consolidation is necessarily and solely linked up with relief against a forfeiture in the strict sense and that the Torrens mortgagor in default is at least invoking the special indulgences of equity. Certainly he incurs no forfeiture in the strict sense but he *is* placed in the position where he is in danger of losing his estate through the mortgagee obtaining a foreclosure order or exercising the statutory power of sale. In approaching the court he is in effect asking that the possibility of his losing his estate through such occurrences be removed. The price of special equitable indulgence might well be the imposition of the rule of consolidation. The mortgagor is still 'seeking equity'. The fact that the processes of sale or foreclosure could not be carried out without affording the mortgagor a last further opportunity to get back his estate is irrelevant for this purpose. He may then have lost the ability to do so. So would run the counter-argument.

However, the question whether the decision in *Greig v. Watson* can perhaps be justified on this second ground is beyond the scope of this article. It is submitted that the essentially wrong part of the decision was the holding that the right to redeem was a legal one.

Similar criticism, so far as the nature of the right to redeem is concerned, may well be directed at the more recent decision of *Perry v. Rolfe*²⁶ where it was held that the rule that the mortgagee is ordinarily entitled to his costs of a suit for redemption brought by the mortgagor did not apply to the proceeding whereby a Torrens title mortgagor takes action to secure the removal of the encumbrance. In this case there was a strong assertion by Fullagar J. that the action was not a redemption suit at all but a suit to enforce a legal right. The learned judge, however, was not clear whether the alleged legal right to redeem after default was conferred by contract or by statute.

To be contrasted with the attitudes revealed in the two cases above-mentioned is such a decision as *Re Forrest Trust*²⁷ where the court surmounted the existence of technical differences in holding that the

²⁶ [1948] V.L.R. 297.

²⁷ [1953] V.L.R. 246.

right of the Torrens mortgagor to compel the mortgagee to receive the mortgage money and execute a proper discharge was a suit to redeem the mortgage within the meaning of the Statutes of Limitations applicable primarily to the general law mortgage. It is thought that this decision can be reconciled with *Grieg v. Watson*²⁸ and *Perry v. Rolfe*²⁹ only by strained and tortuous reasoning.

It is not intended to assert that all equitable doctrines applicable to the general law mortgage are also part and parcel of the relationship set up by the Torrens title mortgage. Obviously neither the principle of tacking nor the rules expressed in the maxim 'redeem up, foreclose down' could be applicable. In such cases the absence of any conveyance of the legal estate obviously does make a difference. But this is not necessarily so in other instances.

The fact that the Torrens title mortgage does not follow the structural model of the general law mortgage does not therefore warrant us in immediately relegating it to the category of pure hypothecation and assuming that none of the traditional mortgage features apply to it. And if we move away from the particular instance of the Torrens title mortgage and consider the whole field of securities, the same approach holds good. As has been said before, it is useless to deny that there are considerable significant differences between the mortgage by assignment and the pure hypothecation, between, for instance, the bill of sale of physical chattels on the one hand and the maritime lien over a ship on the other. It is merely intended to enter a caveat against attributing too much importance to the transfer of the legal estate either as a basis for classification or for the determination of the rights of the parties. The significant line of division seems to be between pure hypothecations on the one hand and mixed hypothecations on the other. The mortgage of land under the general law is but a mixed hypothecation. The mortgagee has a mixed bag of rights and powers. In seeking to eject the mortgagor or an outsider he is claiming a right over something that is *suum*; in seeking to exercise a power of sale (in the equitable sense) or in invoking the machinery to have a receiver appointed he is claiming a right over something that is *alienum*. If we regard ownership of property as not a single right in itself but rather as an aggregation or assemblage of particular proprietary rights, it is obvious that where the mortgage takes the form of an assignment of the legal estate, what happens is not a complete transference over of full ownership but rather a division between the two parties of the rights which normally form part of the ownership aggregate. This may well however take place where the security takes another

²⁸ (1881) 7 V.L.R. (E) 79.

²⁹ [1948] V.L.R. 297.

form. Thus the possessory security so-called essentially involves another such division of ownership rights. The division here, however, is on a different basis, the creditor taking merely one of the significant ownership rights, namely the fact of possession and the right to possess.

The important distinction between those securities which do take the form of an assignment and those which, though not pure hypothecations, do not involve the form of assignment is that in the former case there are certain attitudes of the law which can be taken for granted. Thus one knows that there will be an equity of redemption in the debtor, that certain equitable doctrines will be applicable and that the mortgagee can on default eventually assert full *dominium* through the foreclosure remedy. In the latter case these characteristics do not exist unless they can be deduced from some statute which either creates or applies to the security and such deduction may be either from the express words of the statute or from its implied intendment, necessitating in many cases a close scrutiny of its terms.