December 1933

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Recommended Citation
C. C. Williams Jr., Clogging the Equity of Redemption, 40 W. Va. L. Rev. (1933).
Available at: https://researchrepository.wvu.edu/wvlr/vol40/iss1/4

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CLOGGING THE EQUITY OF REDEMPTION

C. C. WILLIAMS, JR.*

It was early Greek philosophy that formulated the problem of becoming. In the Eleatic system, being was everything, — change was but phenomenal, — while Heraclitus, on the other hand, believed change was everything, and being, or permanence, could be only an illusion. Ultimately, a compromise view, that of the Pythagoreans, held both permanence and change existed: the philosopher found permanence in the beings, yet perpetual change in their relations. In the centuries that have followed, scholars have continued to wrestle with this question, without arriving at any universally-accepted solution.

So in the field of law, stability and progress often present diametrically-opposed concepts.¹ Legal reform must advance, even though traditional doctrines be abandoned: still, the general security should not be jeopardized by unwise attempts to tinker with precepts vital to the existent social order. One's approach to the suggestion of change thus seems partly a matter of disposition, partly of conviction: a certain ingredient of wishful thinking is always to be added, in an age when it is agreed that there is no absolute. Nevertheless, whatever be the fact, our legal tools do tend to wear out: methods of social engineering become outmoded, and rules have perforce to be abandoned after their purpose is no longer properly served by such instruments.² As ac-

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¹ Cf. the language of Jessel, M. R., In re Hallett's Estate, 13 Ch. D. 696, 710, 712 (1879). At p. 712, Jessel remarked: "... There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shown by our tribunals. Were it not for that our law would be in a most depressing state of uncertainty; and so strong has that been my view, that where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law. ..." Earlier in his opinion, at p. 710, he said: "... The rules of Courts of Equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time — and altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined, and improved. . . ."
CLOGGING THE EQUITY OF REDEMPTION

accepted theories gradually prove unworkable, a process of their rejection commences to operate, sometimes in almost unnoticed fashion."

"A provision or stipulation which will have the effect of clogging the equity of redemption is void." In simple language it is said, — "Once a mortgage, always a mortgage"." The mortgagee cannot "fetter" the claim of the mortgagor that the security be returned, when the obligation has been fully performed. While this is a judge-made precept, to be sure, no principle has in the past been more firmly established in the English court of chancery.8 However, assuming a distinction between what is necessary and what merely desirable, does the doctrine serve any useful purpose at the present time? Is it worth retention, if other phases of equity jurisdiction provide ample safeguard against hardship and forfeiture?

One must, for the purpose of criticism, study the equity idea of "clogs" in the most favorable setting possible. It was, no doubt, originally a flexible administrative standard, invented for the case of the "impecunious landowner in the toils of a crafty money-lender"? When equity varied according to the conscience of the Chancellor, — and to the length of the Chancellor's foot, be it long, short or indifferent, — no hard and fast law of the Medes was contemplated. Unfortunately, the fact became obscured that seventeenth and eighteenth century decisions had been given in particularly outrageous cases; and judges endeavored afterwards, not always successfully, to reduce them to a general rule.8 Like the later evolution in this country of the "'badges of

8 Pound, Liberty of Contract (1909) 18 Yale L. J. 454, 484: "... Just as in the natural body foreign substances are encysted and walled in and thus deprived of power for evil, the body of our case law has the faculty of encysting and walling in rules and doctrines at variance with the sound condition of the law."
8 Pound, The Theory of Judicial Decision (1923) 36 Harv. L. Rev. 641, 660: "Looking at law in this way we perceive at once how change takes place continually without our being aware of it."
8 Noakes & Co. v. Rice, (1900) 1 Ch. 213, (1900) 2 Ch. 445, (1902) A. C. 24, — per Lord Davey, (1902) A. C. 24, at 32.
8 Newcomb v. Bonham, 2 Ch. Cas. 55, 159; 1 Vern. 7, 8, 214 and 232 (1681, 1683).
8 Samuel v. Jarrah Timber & W. P. Corp., Ltd., (1902) 2 Ch. 479, (1903) 2 Ch. 1, (1904) A. C. 323, 327, per Lord Macnaghten.
8 Biggs v. Hoddinott, (1898) 2 Ch. 307, 323, per Collins, L. J. Cf. Browne v. Ryan, (1901) 2 Ir. R. 653, 658, per Kenny, J.: "... One is somewhat perplexed by the various combinations of circumstances that have been hold
fraud”, so the “clog on the equity of redemption” imperceptibly crystallized into an absolute law of property, quite independent of any circumstance of fraud or oppression.¹⁰ Chancery precedents ignored any notion of fair play, and seemed to run counter to ordinary business practice and convenience.¹⁰ In recent years, Lord Haldane¹¹ brought the doctrine once more within reasonable bounds, but its dangerous proclivities have by no means ended. Whether then the modern theory of the Kreglinger case, or the older practice of a capricious Lord Chancellor be taken as the true perspective, the enquiry should be simply, — is the doctrine sound under present-day conditions?

Various theories have been proposed as to its origin and historical development. According to Spence,¹² the source is to be sought in Roman law. By the lex commissoria,¹³ of the earlier classical period, foreclosure was valid under an agreement that the property should be the creditor’s, if debt were not paid by a certain day.¹⁴ Later, Constantine declared all such stipulations void, as originating in, or tending to oppression;¹⁵ this imperial legislation was preserved in Justinian’s Code, and was known and studied by the glossators in the medieval universities. To combat a prevalent practice of forfeiture on non-payment, the assembly of clergy at the Council of the Lateran, in 1179, decreed, (perhaps with general reference to the Code provision), that if the creditor had been paid his debt and expenses out of the profits, the pledged res should be restored to the debtor.¹⁶ Spence then

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²⁰ E. g., the agreement characterized by counsel, supra n. 7, (1902) 2 Ch. 479, 483, as “a perfectly fair commercial transaction between parties competent to deal”, was set aside by Kelkwich, J. Cf. Lindley, M. R., in Biggs v. Hoddinott, supra n. 8, at 321: “To say that such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man . . . .”
¹¹ In the Kreglinger case, supra n. 9. — Lord Haldane had been of counsel in the Noakes case, and was accordingly familiar with the evils of the doctrine.
¹²¹ Spence, Equitable Jurisdiction (1846) 599. See Hargrave and Butler’s note 96 to Coke on Littleton, § 332.
¹³ Buickland, op. cit. supra n. 13.
¹⁴ C. 8. 34. 3.
¹⁵ Matthew Paris, Historia Major (1684) 114-115: “Si quis ab aliquo, commodata pecunia, possessiones in pignus acceperit, si deductis eipennis
assumed" that, through the active influence of the Church in the courts of the early Chancellors, the ecclesiastical policy against forfeiture was imported into English equity, and became the important factor in the early protection of helpless mortgagors.Obviously, any such resort to Roman law has at least two hazards: first, the assumption that the analogous English practice cannot have developed independently, without regard to civil law doctrine, and, second, the tendency to overlook the necessity of proof of historical continuity. Until these hazards have been overcome, the possibility of Roman law origin must be disregarded.

A more commonly-accepted theory, during the last century, placed the starting point for at least part of the modern doctrine against "elogs" in the usury legislation of the Tudor monarchs. Medieval law courts had been sharply limited in the exercise of any discretion over mortgages, whether the litigation related to *vif gage* or *mort gage*; the creditor might be tempted into the sin of usury, yet take his illicit gain scot free, without let or hindrance. The first timid statutes prohibiting usury proceeded slowly in enactment; moreover, their provision was ridiculously inadequate, having regard to the existing order of things. At last, in 1545, there began a series of usury laws that continued in force more or less over a period of three hundred years. The statute of 37 Henry VIII, ch. 9, — the earliest mentioned by the Repealing Act of 1854, — forbade a return "in lucre or gains of the issues, above the sum of ten pounds in the hundred for one

*sortem suam repercitis et fructibus possessione,*" (the mortgage is assumed to be in possession and to pay himself out of rents and profits), — "*pignus restitutum debitori*," (Chron. Maj. ed. Luard 1874, Rolls series, vol. ii, 311).

1 SPENCE, op. cit. supra n. 12, at 603.

2 TURNER, THE EQUITY OF REDEMPTION (1931) 116, contra. Mr. Turner asserts that by the time the Chancellors began relieving mortgages, they had long ceased to be ecclesiastics brought up in the atmosphere of the civil law.

3 FALCONBRIDGE, LAW OF MORTGAGES (1919) 43-44.

4 HAZELTINE, DIE GESCHICHTE DES ENGLISCHEN PFANDRECHTS (No. 92 IN GIERRE'S UNTERSUCHUNGEN ZUR DEUTSCHEN STAATS UND RECHTSGESCHICHTE, Breslau) (1907) 201 at 249. Professor Hazeltine quotes from The Three Ladies of London (1584):

"O that vile usury! He lent my father a little money; and for breaking one day, He took the fee simple of his house and will quite away; And yet he borrowed not half a quarter as much as it cost; But I think if it had been a shilling it had been lost. So he killed my father with sorrow and undoest me quite."

5 The Stat. of 20 Henry III, c. 5 provided usury was not to run against the heirs; that of 3 Henry VII, c. 5, 6, made a twenty per cent. rate invalid, but was repealed by 11 Henry VII, c. 8.

6 Stat. 17 and 18 Vict., c. 90.
whole year”. Subsequent measures gradually reduced the legal rate of interest;\textsuperscript{23} and courts never thereafter hesitated to rebuke attempted evasion of the law by thinly-disguised efforts at usury.\textsuperscript{24} The mortgagee was entitled to his money and its statutory hire, — nothing more. Further compensation of any sort fell within the veto of collateral advantages, which might possibly clog the equity of redemption. Later judges fell into the same error of viewing conduct tending to usury on the part of the mortgagee as a “fetter”: thus, it was held that the mortgagee could not have more than principal and interest, even despite a mortgage stipulation that he should be paid for his trouble in receiving rents.\textsuperscript{25} This was merely a confusion of the limitations imposed by equity on the enormous power of the mortgagee or trustee in possession,\textsuperscript{26} with the vague notion that redemption could never be withheld for satisfaction of additional claims. Even Lord Eldon betrayed the same lack of clarity, in cautiously formulating the principle:

“... But this court considers it as tending to usury and oppression, and a collateral advantage which a man contracting for a loan may not make ...”\textsuperscript{27}

Nineteenth-century individualism eventually made short work of the usury statutes, yet the equitable prohibition of collateral advantage has steadily persisted even now, whenever the court has discerned a “fetter” on the equity of redemption.\textsuperscript{28} Hence, opinion has been divided as to the extent of the usury influence.\textsuperscript{29}

Another view holds that the traditional objection to collateral advantages, — the specific phase of the “clogging” rule claimed for the usury legislation, — grew out of the Chancellor’s determination to see that “the mortgagor was not unduly pressed, and did

\textsuperscript{23} Stat. 21 Jac. I, c. 17, fixed the rate at eight per cent.; that of 12 Car. II, c. 13, made the rate six per cent.; and the law of 12 Anne reduced it further to five.

\textsuperscript{24} Lord Brougham in Leith v. Irvine, 1 Myl. & K. 277, 281 (1833) said: “... No one seems ever to have supposed that a lender of money could in any way stipulate for a greater benefit of any kind, under whatsoever device or disguise, than the rate of interest allowed by law.”

\textsuperscript{25} French v. Baron, 2 Atk. 120 (1740).

\textsuperscript{26} See Bonithon v. Hockmore, 1 Vern. 316 (1685); Fullrope v. Foster, 1 Vern. 476 (1687); Godfrey v. Watson, 3 Atk. 518 (1747); Langstaffe v. Fenwick, 10 Ves. 405 (1805).

\textsuperscript{27} Chambers v. Goldwin, 9 Ves. 254, 271-2 (1802-4).

\textsuperscript{28} See infra nn. 101, 102, 103.

\textsuperscript{29} Turner, op. cit. supra n. 18, at 182. Mr. Turner holds that the view as to the usury source rests on very scant authority, and that accordingly the theory must be rejected. See Glenn, Oppressive Bargains (1933) 19 VA. L. Rev. 594, at 602 et seq.
not directly or indirectly contract out of his equity of redemption'. This determination formed simply a part of the peculiar jurisdiction of the court of chancery over all mortgage transactions, regardless apparently of the fairness of the bargain. While such a theory seems closer to the actual fact than either of the others, it tends somewhat to assume an established chancery authority over mortgages, more like the specialized foreclosure of the present-day jurisdiction. At the time when the doctrine was being invented, litigation came before the Chancellor only because some broad ground for the exercise of his discretion had been shown. "Clogging" was founded on a general theory of equity that there should not be oppression, rather than derived from some idea indigenous to the newly-found equity of redemption.

Some years ago, it was suggested that an answer as to the source of the doctrine might be found in the age-old relation of law and morals. The whole line of equity precedents constituted simply "one of the striking examples of the great truth that the ethical standard of our law is often higher than the average morality of the commercial community". A theory like this assumed an analogy between the obligation of most upright conduct enforced as against the oft-reluctant trustee, and the duty owed by the mortgagee, (whether or not he be mortgagee in possession). It is very doubtful whether any such ethical standard exists in the situation of mortgagor-mortgagee: certainly, apart from "clogging", the decisions scarcely bear out the contention. It was fairness between the parties which the Chancellor originally had in mind: his jurisdiction extended to rebuking agreements that worked penalty and forfeiture. He sought to avert hard bargains and to alleviate improvident contracts: considerations other than these were foreign to him.

In short, the origin of the doctrine is to be found in the early jurisdiction of equity to "relieve against oppression on the unconscionable bargain theory". The cases use the language "unreasonable or oppressive in these provisions", and "improper

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20 Turner, loc. cit. supra n. 29.
21 Turner, op. cit. supra n. 18, at 176.
22 Kreglinger v. New Patagonia Meat, etc., Co., Ltd., supra n. 9.
24 St. Germain, Doctor and Student (1518), (18th ed. 1815), Dial. L., c. xvi, 45.
26 Biggs v. Hoddinott, supra n. 8, and particularly argument of counsel at 309.
pressure or unfair dealing"; "a man will not be suffered in conscience to fetter himself." Even Jennings v. Ward, which established the rule that the mortgagor could not "clog the redemption with any by agreement", was derived upon this theory:

"... The Master of the Rolls decreed redemption without reference to a certain agreement which he considered unconscionable, and set aside as being 'unreasonable', as appears from the registrar's book... (Reg. Lib. 1705, fol. 495)..."

The "clogging" rule is based simply on the original policy of equity towards hard bargains.

It must not be thought that redemption was invariably decreed, as a matter of course, every time the complainant claimed there had been a loan upon security. Despite the oft-repeated rule that "a mortgage could not be made irredeemable", such a contingency frequently occurred. Equity judges looked not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive. Historically, it was always the practice of the courts of chancery to analyze obligations of this nature and, even where a mortgage was shown to exist, to ascertain the intention of the parties at the time of their bargain. Many early instances occur of findings of fact that security transactions had indeed been varied by express intent, so that the agreement in its essence ceased to operate as a mortgage. In the case of Newcomb v. Bonham, it was found that a mortgage deed, in fact, contemplated a settlement. Reversing Lord Nottingham, whose famous dictum, — "Once a mortgage, always a mortgage," has come down nevertheless unimpaired by the discrediting of his actual decision, the Lord Keeper North held, —

57 Mainland v. Upjohn, 41 Ch. D. 126 (1889), — Davey, Q. C., arguendo at 132.
58 Spurgeon v. Collier, 1 Eden 55, 59 (1758) per Lord Keeper Henley, (Lord Northington).
59 Jennings v. Ward, 2 Vern. 520 (1705).
60 Biggs v. Hoddinott, supra n. 8 at 322, per Chitty, L. J.
62 Falconbridge, op. cit., supra n. 19, at 41.
63 Newcomb v. Bonham, supra n. 5.
64 Reeve v. Lisle, (1902) 1 Ch. 53, (1902) A. C. 461: Buckley, J., remarked in the lower court (p. 61) that the Newcomb case seemed to mean the transaction was not "once a mortgage"; — at least, in result.
"That there ought to be no redemption in this case; and principally because it was proved in the cause that the intent and design of the mortgagor was to make a settlement by this mortgage..."

Howard v. Harris also contained a no less valuable dictum by the Lord Keeper, to the effect that if money had been borrowed by the mortgagor from his brother, and the former had agreed that in default of issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction included a family arrangement as well as a mortgage, was followed by later authorities.

"Where a court of law or equity find that the general and substantial intent of the parties was, that the estate should pass, they will construe deeds in support of that intention different from the formal nature of the deeds themselves."

An irredeemable security occasionally turned up also in other phases of mortgage law. Lord Haldane has pointed out that the old lawyers would never have recognized a mortgage for a term of years: it would have been deemed an attempt to "fetter". Yet nineteenth-century equity permitted a mortgagee to enforce a covenant for a perpetual rent charge, even after the mortgage was paid off. Redemption was impossible, all agreed, in these circumstances. Similarly, hypothecation of a patent of limited duration, on terms that the loan be paid back with a share of the royalties, was valid although the amount payable could not finally be ascertained until the expiration of the patent. The established practice of corporations to issue irredeemable debentures stood unchallenged, against all assaults from the "clog" doctrine. A common stipulation in redeemable debentures that these should be paid off at a premium never was thought of as

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1 Verm. 33 (1681).
4 Teevan v. Smith, 20 Ch. Div. 724, 729 (1882), per Jessel M. R. But see Morgan v. Jeffreys, (1910) 1 Ch. 620 and Fairdough v. Swan Brewery Co., Ltd., supra n. 41, where the term of years was held to be too long.
6 The example is suggested by counsel in Santley v. Wilde, (1899) 1 Ch. 747, 756.
7 Buckley on Companies (9th ed.) 245, 258; cf. City of London Brewery Co. v. Commissioners of Inland Revenue, (1899) 1 Q. B. 121.
an unfair collateral advantage. In other words, "Once a mortgage, always a mortgage," did not apply in cases where no separate equitable ground was available to assist the complaining mortgagor."

The rule of the early cases was further developed to meet modern needs. British courts held, in a long line of recent decisions, that in construction and enforcement of what were claimed to be security arrangements, equity lifted the mortgage veil to discover the reality behind. Refusing to overemphasize the pledge analogy, Lord Alverstone, in deciding London and Globe, etc., Corporation v. Montgomery, found as a fact that the transaction there was not essentially a mortgage transaction; accordingly he concluded that an option to purchase was not invalidated simply by inclusion in a money-lending bargain:

"In my opinion, the transaction between the plaintiffs and the defendants, which is embodied in the document referred to, cannot be properly regarded as a mortgage for the purpose of considering the point now raised. . . . This is . . . of a different kind, — namely, an advance, the price paid for that advance being the right to take the shares at an agreed price."

In a case not dissimilar in principle, Davies v. Chamberlain, the Court of Appeal pointedly observed that the mere interposition of a mortgage in an agreement of sale did not thereby obscure all the incidents of the vendor-purchaser relation.

Some years before, in Reeve v. Lisle, the House of Lords had seized upon the fortuitous circumstance of the lapse of several days between the mortgage agreement and another bargain, to decide that the transactions were separate in substance, contrary to an amount of evidence, and contrary to the findings of fact of the lower court judge. As separate and independent, the non-mortgage phases of the bargain could not be tainted by mortgage law limitations, as these then stood. This precedent was skilfully employed in the case of De Beers Consolidated Mines, Ltd. v. British South Africa Company, to sustain a reasonable mining

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44 Mainland v. Upjohn, supra n. 37.
45 Biggs v. Hoddinott, supra n. 8, at 321, Lindley, M. R.
46 18 T. L. R. 661, 662 (1902).
47 Ibid.
49 Supra n. 44; cf. Maxwell v. Tipping, (1903) 1 Q. B. 498.
contract, by holding the security phase of the transaction to be distinct, spatially and temporally. Overruling two lower courts, it was a result wholly unforeseen by counsel, and came as a shock to conservative legal opinion. Yet, with its decision, it was settled that business men had two avenues of escape from the rigors of then-prevalent theories as to the equity of redemption. The first was by tying the money-lending phase on to some other clearly-defined relation, as in Davies v. Chamberlain, — but this was a narrow exception, narrowly conceived and narrowly applied; the other was physical severance of the two phases of the same trans-
action by a brief margin of time.

The position thus stood when, in 1913, the case of Kreglinger v. New Patagonia Meat, etc., Company, Ltd., came up. The litigation had arisen over the refusal of a packing company to permit a firm of woolbrokers to exercise an exclusive option, for a fixed period of five years, over sheep-skins produced, or to pay to the brokers a commission on all sheep-skins sold by the company to other persons. The contract of option was contained in a mortgage instrument, in which it was provided that the loan might be paid off by the company, on giving one calendar month’s notice. Considering the single issue of the consequence of having inserted into the instrument signed, when the money was bor-
rowed, an ordinary commercial contract for the sale of skins, the House of Lords decided that (even despite the contemporaneous contract was contained in the same document as constituted the security) the sale was in substance independent of the mortgage. Analyzing the facts, Lord Parker of Waddington, said, —

"I doubt whether, even before the repeal of the usury laws, this perfectly fair and business-like transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. The only possible way of de-
ciding whether a transaction is a mortgage within any such rule or maxim is by reference to the intentions of the parties. It never was intended by the parties that if the defendant company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty, nor was it nor could it ever become inconsistent with or repugnant to any part of the real bargain within any such rule or maxim."

*Kreglinger v. New Patagonia Meat, etc., Co., Ltd., supra n. 9.

*(1914) A. C. 25, 61.*
To this Lord Mersey added, —

"Whether a transaction is, or is not, such a mortgage is a question of intention; and it seems that it has always been the practice of the Courts of Chancery to admit oral evidence to assist in solving the question."

Following the decision of the Kreglinger case, the law finally became fixed in England, that the lender might, at the moment of conclusion of an ordinary business arrangement, validly stipulate for performance by the other party of obligations which were in essence the purpose of the transaction, without such performance being impugned by reason of the contemporaneous mortgage. 4

Little authority is to be found in American jurisdictions covering the "substantially independent" issue. The absence of cases may perhaps be ascribed to the circumstance that it is not ordinarily the practice here to include, within corporate mortgages, independent and severable undertakings. 5 Yet in a few scattered instances of ordinary mortgages, the consideration has arisen on the facts. 6 The bargain has generally been upheld, although the reasoning of the court is seldom as clear as might be wished; yet the decision can only be supported on the ground of independent transaction. As sole American authority in any extent analogous to the Kreglinger situation, there are the Demko and Kraval cases, 7 in each of which the covenant between the brewery and a saloon-keeper for exclusive purchase of the former's beer, and of no other's, contained in an instrument of mortgage, and extending beyond the date of its repayment, was enforced by negative injunction. The judges passed over the beer covenant lightly, apparently indicating by their \textit{dicta} an impression of the substantially independent nature of that agreement.

Such then is the state of authorities in England and America.

\footnote{4} (1914) A. C. 25, 46.
\footnote{5} See Note (1914) 30 L. Q. Rev. 137.
\footnote{6} An exception is perhaps the provision found in convertible bond issues, extending to the bondholder an option to purchase stock in the issuing corporation. No question has ever been raised as to the validity of such provisions, since the matter is usually covered expressly by statute. \textit{Cf.} W. Va. Rev. Code (1931) c. 31, art. 1, § 24.
\footnote{7} Gleason's \textit{Admr.} v. Burke, 20 N. J. Eq. 300 (1869); Earp v. Boothe, 24 Gratt. (Va.) 368 (1874). \textit{See} Conway's \textit{Ex'r's} v. Alexander, 7 Cranch 218, 3 L. ed. 321 (1812); Turpie v. Lowe, 11 Ind. 37, at 52, 5 N. E. 834 (1887).
\footnote{8} Cleveland & S. Brewing Co. v. Demko, 9 Ohio C. C. N. S. 130, 29 Ohio Cir. Ct. 102 (1907); Cleveland & S. Brewing Co. v. Kraval, 36 Ohio Cir. Ct. 557 (1908), \textit{aff'd} without opinion 82 Ohio St. 295 (1910).
at present. No recent case has held that there could not be a separate transaction contemporaneously with, but in reality standing apart from, the mortgage, (even though actually contained in the same instrument), — a bargain providing for undertakings wholly foreign to the concept solely of security arrangement. In effect, the equitable maxim, "Once a mortgage,—" is no more certain now to effect redemption in every instance than it was in the time of Newcomb v. Bonham. 3

The true doctrine then of clogging the equity of redemption dates back to the ancient chancery practice of rebuking unconscionable agreements, when these happened to be involved in terms of hypothecation. Its historical development has paralleled the Chancellor's gradual extension of foreclosure jurisdiction in Year Book narrative. Originally, in early common law, according to the practice of the king's court, where there was a pledge of a chattel or of real estate, with express provision in the contract of defeasance that in event of non-payment on a certain day the thing pledged was to be forfeited, upon such default actually occurring later, the pledged res was absolutely forfeited. From the legal angle, a court of law could not do otherwise, if it were the ordinary mortgage of real estate. To avert this harsh unfairness, a more indulgent principle became established in equity: a stipulation made by the mortgagor, in the course of a simple loan affair, that he should for any reason lose his claim of redemption, was not only unenforceable, but void. 4

It was thus that the court of chancery came to exercise, at relatively an early date, jurisdiction in personam over mortgagees, in its essence only a special application of the more general power to relieve against penalties. The method was simple: the creditor by sub poena was brought in and compelled to use his legal title as a mere security. An illustrative case was that of Robert Bodenham v. John Halle, in 1456, arising out of the former's petition to the Archbishop of Canterbury, for relief against a common law suit on his bond for £300, where the amount of the mortgage had been but £80. It was adjudged that the plaintiff should pay the £80 into court, and the defendant reconvey the mortgaged land, the bond to be cancelled; nothing was said, however, as to interest

In that case, Lord Keeper North observed (1 Vern. 214, 233): "Now, when by a contingency it happens to be a good bargain, there is no reason to raise an equity from thence to take the estate from the mortgagees." 5

5Spence, op. cit. supra n. 12, at 603.
and costs. In yet another instance, the court, when molding over the mortgage agreement, apparently allowed the mortgagee to receive rents and profits by way of interest, (which, however, on the mortgagor's figures was shown to be at the rate of about seventy per cent.). The zeal with which chancery bestirred itself to reshape mortgage contracts prompted the contemporary comment, — "Laws covet to be ruled by equity."

With a long series of cases, exercise of equity jurisdiction to relieve against mortgage forfeiture became firmly rooted before the middle of the seventeenth century. In its essence, this relief had been theoretically founded on the unreasonable conduct of the mortgagee, but equity precedents were so far confined to barring penalties and rebuking deliberate fraud. For example, in Courtnam v. Conyers, the mortgagee was alleged purposely to have absented himself on the day fixed for redemption, in order to avoid receiving payment; the court acted at once and with vigor to decree redemption. Nevertheless, broader and more complex phases of the mortgage problem had not commended themselves to the Chancellors.

A few decades later, the doctrine thus confined wholly to the rescue of the equity of redemption from the merciless legal clause of defeasance, began to expand and take on a new aspect. The case of Jennings v. Ward was a landmark in this development. The lender had inserted in the mortgage transaction, though with separate deeds, a covenant permitting an option to acquire so much of the mortgaged estate as should be of the value of the money lent at twenty years' purchase. It seems to have become apparent that if a mortgagee could require in the original instrument some act or concession additional to payment of principal and interest, an easy evasion of the law against mortgage usury

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23 SELECT CAS. IN CHAN., (1896) Selden Soc., (vol. 10) case 141.
24 YEAR BOOK, 9 Edw. IV, 25 (1469).
25 ST. GERMAIN, op. cit. supra n. 34. — As to whether the equity of redemption is an equitable estate in the land see, Re Wells, (1832) 1 Ch. 380, per Farwell, J., with Note (1932) 48 L. Q. REV. 297; reversed in (1933) 1 Ch. 29, 44, per Lord Hanworth, M. R., with Note (1933) 49 L. Q. REV. 159.
27 See Emanuel College, Cambridge v. Evans, 1 Rep. in Ch. 18 (1625); Welden v. Rallison, 1 Rep. in Ch. 171 (1656); Bowen v. Edwards, 1 Rep. in Ch. 221 (1661); Clech v. Witherly, Rep. Temp. Finch 376 (1678); Jason v. Eyres, 2 Cas. in Ch. 33, 35 (1680); Exton v. Greaves, 1 Vern. 133 (1682); Talbot v. Braddil, 1 Vern. 153, 184, 394-395 (1683, 1686); Willett v. Winnell, 1 Vern. 488 (1687); Manlove v. Bale, 2 Vern. pt. I, 84 (1688); Price v. Perrie, 2 Freeman 258 (1702).
CLOGGING THE EQUITY OF REDEMPTION

would be countenanced. Sir John Trevor, M. R., accordingly set aside the covenant as "unconscionable", adding by way of dicta, —

"A man shall not have his interest for his money and a collateral advantage beside for the loan of it, or clog the redemption with any by agreement."

The learned judge thus formulated his opinion in such inexact language as to infer that even disregarding the usury consideration, every "collateral advantage" would serve to penalize redemption, within the concept of equity practice since the time of Henry VII. Curiously enough, this view soon became the established principle in suits for redemption.

It was left to eighteenth-century Chancellors, Lord Hardwicke and Lord Northington, to supply philosophical background for the new line of decisions. In Toomes v. Consett, the former explained that the court would not suffer in a deed of mortgage an agreement to prevail, that the estate become the absolute purchase in the mortgagor upon any event whatsoever:

"And the reason is, because it puts the borrower too much in the power of the lender, who being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender."

The natural law flavor became even more discernible in the opinions of Lord Northington:

"The policy of this court is not more complete in any part of it than in its protection of mortgages; and, as a general rule for that purpose, a mortgage once redeemable continues to be so till some act is done afresh by the mortgagor to extinguish the redemption; and a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. It would ruin the distressed and unwary, and give unconscionable advantage to greedy and designing persons."

"And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

7 Biggs v. Hoddinott, supra n. 40: Trevor, M. R., believed the agreement to be "unreasonable."
8 Atk. 261 (1745).
9 Spurgeon v. Collier, supra n. 38.
10 Vernon v. Bethell, 2 Eden 110, 113 (1762).
With this precise formulation of political economy in law, the
doctrine forbidding "clogs", originally designed to prevent op-
pression, came to extend over any and every stipulation in a
security transaction alien to the concept of debt repayment. It was
a triumph of natural law interference with "freedom of con-
tract".\textsuperscript{50}

The position of the law at the start of the last century was
carefully restated by Lord Eldon in Chambers \textit{v. Goldwin}.\textsuperscript{63}
Agreeing that the mortgagee cannot originally stipulate for a
collateral advantage, the Lord Chancellor conservatively
reasoned, —

"There is nothing unfair, or perhaps illegal in taking a
covenant originally, that if interest is not paid at the end of
the year, it shall be converted into principal . . . . But this
court will not permit that; as tending to usury; though it is
not usury."\textsuperscript{52}

Yet only a few years later, the first sharp limitation of the doc-
trine occurred, when it was decided that merchants in London,
mortgagees of West India plantations, might validly stipulate in
the mortgage agreement for employment as consignees in Eng-
land for all produce.\textsuperscript{64} It was simply a legalization of a practice
of West India mortgages that had long been in existence; the
arrangement was judicially recognized as having become an ex-
ception, and a most important one, to the rules which had for-
merly without any such exception guided the courts in dealing
with "clogs".\textsuperscript{65}

Repeal of the usury laws came into effect in 1854.\textsuperscript{66} A re-
examination of the doctrine against clogs followed, in immediate
consequence, — a somewhat halting process no doubt, yet one
bringing about a new orientation of judicial view. It comprised

\textsuperscript{50}Pound, \textit{op. cit. supra} n. 2, at 482: "... There never has been at com-
mon law any such freedom of contract as they postulate. From the time
that promises not under seal have been enforced at all, equity has inter-
fered with contracts in the interest of weak necessitous or unfortunate
promisors . . . ."

\textsuperscript{63}Chambers \textit{v. Goldwin}, \textit{supra} n. 27.

\textsuperscript{52}\textit{Ibid.}: Romilly, \textit{arguendo}; (at p. 260), had contended vigorously that the
transaction was usurious.

\textsuperscript{64}Bunbury \textit{v. Winter}, 1 Jac. & W. 255 (1820).

\textsuperscript{65}Lord Brougham in Leith \textit{v. Irvine}, \textit{supra} n. 24, at 283-284. — \textit{Cf.} Browne
\textit{v. O'Dea}, 1 Sch. & Lef. 115 (1803); Drew \textit{v. Power}, \textit{ibid.} 182; Gubbins \textit{v.}
Greed, 2 Sch. & Lef. 214 (1804).

\textsuperscript{66}\textit{Supra} n. 22: the Act of 1854 did away with a baker's dozen of usury
statutes, ranging from 37 Henry VIII, c. 9 down to 13 & 14 Vict. c. 56.
CLOGGING THE EQUITY OF REDEMPTION

the gradual victory by the fetish of freedom of contract,\textsuperscript{56} over conservative equity precedents. \textit{Potter v. Edwards}\textsuperscript{57} was the first bold advance into the new statutory void. The mortgagee there sought to enforce an agreement providing for redemption on payment of £1000, though but £700 had been lent. This collateral stipulation was upheld, Kindersley, V. C., deeming the extra £300 simply a reasonable bonus for risk and hazard. One should not conclude, however, that the change thereafter was complete, merely because a long line of decisions had lost their \textit{raison d' être}. A manifest unwillingness of chancery to abandon expectant heirs who became "necessitous borrowers" persisted,\textsuperscript{58} along with a vague idea centuries- old that the mortgagee in possession was likely to prove unscrupulous.\textsuperscript{59} Thus a score of cases followed slowly modifying previous law, while indicating that four types of collateral agreements, included within a mortgage demise, might still prove invalid:

(1) Agreements working penalty or forfeiture.\textsuperscript{60}
(2) Hard bargains of reversions and expectancies.\textsuperscript{61}
(3) Commissions for ordinary mortgagees in possession.\textsuperscript{62}
(4) Solicitor costs for the solicitor-mortgagee.\textsuperscript{63}

\textsuperscript{56}See the remarks of Jessel, M. R., in Printing, \textit{etc.}, Co. v. Sampson, L. R. 19 Eq. 462, 465 (1875); Albion Steel & Wire Co. v. Martin, 1 Ch. 550, 594 (1874); Wallis v. Smith, 21 Ch. D. 243, 256 (1882). See also Lindley, M. R., in E. Underwood & Son, Ltd. v. Barker, (1899) 1 Ch. 300, 305: "If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, \textit{primâ facie} at all events, contrary to the interests of any and every country."

\textsuperscript{57}26 L. J. Ch. 468 (1857).
\textsuperscript{58}Tyler v. Yates, L. R. 6 Ch. App. 665 (1871).
\textsuperscript{59}Barrett v. Hartley, L. R. 2 Eq. 789 (1866); cf. Ruffner v. Putney, 12 Gratt. 541 (Va. 1853) denying compensation to mortgagees in possession, where there was a family connection.
\textsuperscript{60}In re Edwards' Estate, 11 Ir. 307 (1861); Hopkinson v. Mortimer, Harley & Co., Ltd., (1917) 1 Ch. 646.
\textsuperscript{61}Miller v. Cook, L. R. 10 Eq. 641 (1870); Earl of Aylesford v. Morris, L. R. 8 Ch. App. 484 (1873); Clarkson v. Henderson, L. R. 14 Ch. D. 348 (1880). See comment of Lord Bramwell in Salt v. Marquess of Northampton, (1892) A. C. 1, at 18: 'Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of doctrines which do not mean what they say.'

\textsuperscript{62}Barrett v. Hartley, \textit{supra} n. 89.
\textsuperscript{63}Eyre v. Hughes, L. R. 2 Ch. D. 148 (1876); James v. Kerr, L. R. 40 Ch. D. 449 (1889); In re Roberts, L. R. 43 Ch. D. 52 (1889); Eyre v. Wyn-Mackenzie, (1894) 1 Ch. 218, 227; but see Mortgagees’ Legal Costs Act (1895) 58 & 59 Vict., c. 25.
Perhaps contracts only of the first sort might properly have been held to be within the seventeenth-century doctrine of "clogging", but the rule was applied inexact to include others as well. Otherwise, collateral advantages were sustained, be these debenture bonds sold at discount,\textsuperscript{4} special monthly commission,\textsuperscript{5} or bonus for investment on risky security.\textsuperscript{6} Finally, in 1898, Biggs v. Hoddinott,\textsuperscript{7} squarely overruling Jennings v. Ward,\textsuperscript{8} laid down the broad principle that a mortgagee could validly stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption were not thereby fettered,—if the bargain were a fair and reasonable one, entered into between the parties while on equal terms without any improper pressure, unfair dealing or undue influence. Litigation in the future was to turn on interpretation of the concept "fetter on redemption".

Meantime, an equitable theory had been prevalent in Irish decisions that usurious mortgage bargains constituted an independent jurisdiction of equity, unaffected by the Repeal of 1854. Collateral advantages were thus scrutinized with unusual jealousy by the Court of Chancery; and in Browne v. Ryan,\textsuperscript{9} an arrangement, which the Lord Chief Justice termed a "most ordinary, every-day transaction", was held invalid by the Court of Appeal, reversing the Queen's Bench Division, as a "clog on the equity of redemption". The result contrasted sharply with the finding of the English Court of Appeal, in Santley v. Wilde,\textsuperscript{10} that a mortgage stood as security, not only for repayment, but for continued performance of a collateral bargain after such repayment.

With three decisions by the House of Lords, at the start of the present century, the doctrine was phrased from a wholly new and illiberal aspect. Noakes & Co. Ltd. v. Rice,\textsuperscript{11} Bradley v. Carritt,\textsuperscript{12} and Samuel v. Jarrah Timber & Wood Paving Corp.,\textsuperscript{13} represented an attempt to harden equity practice into a crystal-

\textsuperscript{4} In re Anglo-Danubian S. N. & C. Co., L. R. 20 Eq. 339 (1875).
\textsuperscript{5} General Credit and Discount Co. v. Gegg, L. R. 22 Ch. D. 549 (1883).
\textsuperscript{6} Mainland v. Upjohn, supra n. 37.
\textsuperscript{7} Biggs v. Hoddinott, supra n. 8; see Note (1900) 13 Harv. L. Rev. 595.
\textsuperscript{8} Jennings v. Ward, supra n. 39.
\textsuperscript{9} L. R. (1901) 2 I. Q. B. 653, ff. In re Edwards' Estate, supra n. 90; Chapple v. Mahon, Ir. 5 Eq. 225 (1870); Comyns v. Comyns, Ir. 5 Eq. 583 (1871). Stuart, V. C., in Barrett v. Hartley, supra n. 89, hinted at this independent equitable jurisdiction.
\textsuperscript{10} Santley v. Wilde, supra n. 51.
\textsuperscript{11} Noakes & Co. v. Rice, supra n. 4; see Note (1902) 15 Harv. L. Rev. 661.
\textsuperscript{12} Bradley v. Carritt (1901) 2 K. B. 550, (1903) A. C. 253.
\textsuperscript{13} Samuel v. Jarrah Timber & W. P. Corp., Ltd., supra n. 7.
lized rule of property law, — not a principle of fairness, but a rule defeating intent. A mortgagee might indeed have his collateral advantage, but this could not under any circumstance extend its performance beyond the date of repayment of the loan: to hold otherwise would be, according to the court, to fetter the equity of redemption.

To a very considerable extent, the decisions were, in fact, explicable by purely local conditions. In the Noakes case, the publican received back his property, to be sure, but it was for the future to be a "tied" public-house.

"It is well known, what large profits are made by brewers out of tied houses, and it may be that a covenant of this kind will give the mortgagee the whole amount of his interest and principal by way of profits, and that is an unfair collateral advantage. . . .\(^\text{105}\)

"A lease or tenancy of property subject to taking the supply of beer from the lessor is less beneficial and less advantageous than one in which the lessee can take his beer from any person whom he pleases."\(^\text{106}\)

As to Bradley v. Carritt, the covenant was to run "always hereafter": on that single ground of remoteness and uncertainty, the opinions of the majority, in the three-to-two decision, are at least comprehensible. The Jarrah case arose over an effort to enforce an agreement to sell stock at forty per cent. of its value: equity does not ordinarily lend its courts to the enforcement of bargains at a disparity in price that seems unconscionable.\(^\text{107}\)

In any event, these results have been confined to their own peculiar facts by the express language of the court in the Kreglinger case.\(^\text{108}\) While the three decisions have not, of course, been expressly overruled, the dicta of Lord Haldane and Lord Parker have definitely settled that there is now no rule in equity that a

\(^{104}\) See Pound, *The Decadence of Equity* (1905) 5 Col. L. Rev. 20; *cf.* the application of the Rule in Shelley's Case, in Perrin v. Blake, 1 W. Bl. 672 (1769).

\(^{105}\) Biggs v. Hoddinott, *supra* n. 8, per Farwell, Q. C., *arguendo* at 310. Apart from the mortgage, the "tied" house covenant would have been enforceable, both in law and equity. Weaver v. Sessions, 6 Taunt. 153 (1815); Luker v. Dennis, 7 Ch. D. 227 (1877). *Cf.* John Bros. Abergarw Brewery Co. v. Holmes, (1901) 1 Ch. 188. See Note (1908) 2 Ill. L. Rev. 402.


\(^{108}\) (1914) A. C. 25, 42 et seq., *per* Lord Haldane, L. C.; (1914) A. O. 56 et seq., *per* Lord Parker of Waddington.
mortgagee cannot stipulate in the mortgage deed for a collateral advantage, provided such collateral advantage is not either,—

(1) Unfair or unconscionable;
(2) In the nature of a penalty; or
(3) Inconsistent with the right to redeem.

Equity finally returned like the prodigal to an original jurisdiction of rebuking forfeitures and relieving hardship, abandoning the vagaries of "clogging". Naturally, no sort of agreement could ever be tolerated providing for transfer of beneficial ownership over, in case of default: the claim of redemption in a true mortgage situation justifiably remained sacrosanct. Still the guiding thought thenceforth was to be fair play, in a surrounding of practical business convenience. Chancery authority, whether once achieved through "piety or the love of fees", had successfully adapted itself to meet new conditions of commercial intercourse, in which decreased value in the purchasing power of money made for social changes. Lord Haldane's vision prevented the court from continuing to apply the mechanical rule against collateral advantages, in such a wooden fashion.

In England and Ireland, courts have sanctioned, as collateral advantages, money bonuses, additional performance of service by the mortgagor, a part of the mortgage res, or its money equivalent, as bonus, on the happening of a contingency, while the bare circumstance that the concession is to be received after repayment of the actual money loan, will not impeach its validity in equity. Thus, the iron-clad rule of the Noakes case, denying performance of the advantage beyond the date of redemption, has been discarded. Similarly in the Dominions, collateral advantages have been held valid where there was a right of preemption over the mortgage res and in instances of large money bonuses in Canadian jurisdictions.
Almost no precedents are available in American jurisdictions, where there is not some sort of usury statute, covering the precise issue involved here. There have been *dicta*, even in usury law states, favoring fair stipulations for the borrower to do some act advantageous commercially to the lender. More often, the court has dwelt upon the fact that the collateral advantage if sustained might work improper evasion of a strong social policy against unreasonable interest. A decision in New York, not altogether satisfactory in its reasoning, upheld an agreement apparently collateral to the mortgage, deciding it was "not necessarily usurious, even if made as a condition of the loan". Broadly speaking, however, cases in the United States have ordinarily overlooked the consideration or gone off on grounds of mutuality. The equitable rule in this aspect seems to have been indigenous to British judges.

It must not be concluded from the sketch of its historical development that the doctrine against "clogging" has now been completely done away with, nor that courts do not occasionally resort to this worn-out tool in order to achieve their "just result". Not long ago, in *Mehrban Khan v. Makhna*, the Judicial Committee of the Privy Council had the whole problem raised anew. A mortgagor had required the borrower, as a condition of the advance, to include within the mortgage deed provisions conferring on the mortgagee, upon redemption, an interest in the mortgaged premises. The Privy Council seems to have viewed this conduct as oppressive on the part of the lender, while most improvident for the borrower. It was decided that the stipulation was "a clog or fetter on the equity of redemption", and accordingly void, not only as against the mortgagor, but also against the purchaser of his interest. The court went further to hold the clause inconsistent with the very nature and essence of a mortgage, whether or not the issue be resolved according to "the rule of justice,

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127 See Uhlfelder & Co. *v*. Carter's Adm'r., 64 Ala. 527, 533 (1879).
130 *E. g.*, in the Demko case, *supra* n. 67.
131 L. R. 57 Ind. App. 168 (P. C. 1930).
132 Curiously enough, there is relatively a paucity of authority on the issue of whether the defense of the "clogging" doctrine is available to the purchaser of the mortgagor's interest.
equity and good conscience". Curiously enough, Santley v. Wilde\textsuperscript{120} and the Kreglinger case\textsuperscript{121} were relied upon and properly applied by the Privy Council, though in each of these two authorities an opposite result was reached, upholding the collateral advantage. The distinction, however, was that pointed out by Lord Parker in the course of his elaborate \textit{dictum}\textsuperscript{125} as to the nature of a lending transaction; hence, the Mehrban decision achieved a correct solution, both on the facts and law.\textsuperscript{126}

"No juristic or judicial defining of fraud or of fiduciary duties has ever maintained itself.\textsuperscript{128} Though the court of chancery be no longer a court of conscience,\textsuperscript{129} it would seem that the doctrine against "clogs" has outlived its usefulness. Analytically, the rule protects unwary mortgagors against oppressive bargains: yet relief from improvident hardship is traditionally an independent exercise of equity jurisdiction, quite apart from mortgages, and can scarcely be deemed of merely incidental importance, so as to be caught within the meshes of an unskilful "clogging" net. If anything, it is the theory of Jennings v. Ward\textsuperscript{129} which is more truly the subordinate phase of equity. Historically, from an origin in this background of hardship, the "unfolding of the idea" progressed steadily into the cul-de-sac of Noakes & Co. Ltd. v. Rice.\textsuperscript{130} Hardly a decade afterwards, Lord Haldane had reshaped the theory according to its original plan. It must be borne in mind, too, that even in the heyday of the crystallized rule an equity of redemption might be curtailed: postponement for a reasonable time, or even indefinitely, where securing an annuity, was never rebuked. Assuming law must develop like language, the words of an equity court of the early part of this century would have been unintelligible to the early Chancellors, — perhaps to Lord Nottingham. Any method of defining "clogs" in terms of past equity experience, in order to govern in all future cases,\textsuperscript{130} would surely fail.

Philosophically, there has been a succession of ideals in this field. The early "impecunious landowner", the eighteenth-century

\begin{footnotesize}
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\item S. Santley v. Wilde, supra n. 51.
\item Kreglinger v. New Patagonia Meat, etc., Co., Ltd., supra n. 9.
\item (1914) A. C. 51, 52-53.
\item Cf. \textit{Strahan on Mortgages} (3d ed. 1913) 34.
\item Pound, \textit{op. cit. supra} n. 3, at 956-957.
\item \textit{In re Telescriptor Syndicate}, (1903) 2 Ch. 174, 195-196, \textit{per} Buckley, J.
\item Jennings v. Ward, supra n. 39.
\item Noakes & Co. v. Rice, supra n. 4.
\item Pound, \textit{op. cit. supra} n. 3, at 817.
\end{itemize}
\end{footnotesize}
"necessitous men" and the "utmost liberty of contracting" have each played an important role in the "intuitive application of the legal precept." Still no system of metaphysics has been able to obscure the vision of an equity judge, peering through complex mortgage provisions, to glimpse and to check the unconscious advantage. Yet, withal, how has the doctrine worked? On the whole, — divorced from the hard bargain side of equity, — the "clogs" theory has only pictured a phase of usury regulation in a setting of mortgage law. As such, it has tended to confuse, to mislead and to disturb a reasonable course of business negotiation. In the problem of relevancy, one asks, does the evidence weigh enough, — has it sufficient probative force? In equity jurisprudence, the doctrine against "clogs" has neither the weight nor the force, in and of itself, to justify its retention. 134

Nevertheless, a steady stream of recent cases, in British jurisdictions at least, would indicate that the doctrine is still a potent factor in mortgage litigation. 135 The Mehrban case might easily be twisted into a precedent that would bring new life into "clogging". The danger is, moreover, that the Noakes decision or one of its contemporaries will even at this late date be received over into American law, and serve to fasten down an archaic theory in the decadence of equity. Emergency conditions, with the moratorium legislation background, 136 offer fertile ground for theories old and new, to stave off foreclosure. To avert any such possibility, the whole artificial rule ought to be given up: courts of equity should cease their use of an ambiguous phrase, and confine efforts simply to relief against oppression. The flexible test of hardship will suffice to care for all present needs. If there be urged the difficulty of drawing the line in modern mortgage practice, — nothing is more common in life than to be unable to draw the line

123 Printing, etc., Co. v. Sampson, supra n. 86.
124 Pound, op. cit. supra n. 3, at 951.
125 Kreglinger v. New Patagonia Meat, etc., Co., Ltd., supra n. 9, per Lord Haldane at 44: "... Courts must not lose sight of the dominating principle underlying the reasons which originally influenced the terms of the rule, reasons which have, in certain cases, become modified as public policy has changed."
127 See Feller, Moratoriy Legislation: A Comparative Study (1933) 46 HARV. L. REV. 1081. Also see Note (1933) 18 IOWA L. REV. 106. — Possibly, statutes fixing a legislative definition of hardship, for use by chancellors in foreclosure proceedings, might be of service at this time. Surely equity
between two things.\textsuperscript{27} In any event, the greater gain will lie in abandonment of the specialized concept of "clogging."\textsuperscript{28}

"I have nothing to say about the doctrine itself," Lord Mersey remarked, in the \textit{Kreglinger} case.\textsuperscript{129} "It seems to me to be like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be. Its introduction . . . . would give effect to no equity and would defeat justice."  \textsuperscript{30}

\textsuperscript{27} Attorney General v. Brighton & Hove Coop. Sup. Ass'n, (1900) 1 Ch. 276, 282, \textit{per} Lindley, M. R. He added, "Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak tree is a plant and not an animal?" — If there be urged the perplexing question of difference of degree, see remarks of Holmes, J., in \textit{Le Roy Fibre Co. v. Chi., Mil. & St. P. Ry.}, 233 U. S. 340, 354, 54 S. Ct. 415 (1914).

\textsuperscript{28} The Pythagorean thinker might hold that there was permanence in the being, so far as the equitable jurisdiction in cases of hardship was involved, — yet perpetual change in the concept of "clogging", having regard to its genesis and later development. He could have no objection to eventual disappearance of this relational doctrine.

\textsuperscript{129} (1914) A. C. 25, 46.