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GETTING PROPERTY RIGHT: “INFORMAL” MORTGAGES IN THE JAPANESE COURTS

Frank G. Bennett, Jr.[†]

Abstract: In Japan’s civil law property system, courts recognize a form of extra-statutory security, the *jōto tanpo* or “title-transfer security interest,” that is created by conveying legal title to the creditor, with a promise to restore it to the debtor upon repayment. Although best known today as a means to providing security in movables, *jōto tanpo* was originally an alternative means of mortgaging real estate, and this latter use of the interest is the subject of this Article.

The two early attractions of the *jōto tanpo* interest to creditors were 1) the ability to avoid inefficient procedures for the enforcement of the Code-defined security interests, and 2) the possibility of enjoying a forfeiture of the collateral upon default. In the 1960s and 1970s, courts and the legislature sought to control lender overreaching in connection with several “non-Code” forms of security relating to immoveable property. The *jōto tanpo* has survived efforts at reform, and remains as a potential strong-arm device in high-interest lending and high-pressure debt collection. The two factors that this Article identifies as inhibiting effective judicial discipline of this category of transactions today include 1) limitations in Japan’s system of registered title and 2) procedural lacunae that open the possibility of enforcement arbitrage.

I. INTRODUCTION

*We worked through Spring and Winter, through Summer and through Fall
But the mortgage worked the hardest and the steadiest of us all
It worked on nights and Sundays, it worked each holiday
Settled down among us and it never went away
~American Traditional Ballad¹*

Among Japan’s so-called “non-Code” security interests,² *jōto tanpo* claims pride of place as one of the oldest and most finely tuned judicial accretions to that nation’s civil law. Commonly translated as “title-transfer

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¹ RY CODDER, *Taxes on the Farmer Feeds Us All, on INTO THE PURPLE VALLEY* (Reprise Records 1972). Will Carleton is the original author of this ballad. See NEBRASKA FOLKLORE (BOOK TWO) 7-8 (Robert E. Carlsen ed., 1940), available at <http://www.nebraskahistory.org/museum/teachers/material/nebdata/book2.pdf> (attributing authorship to Will Carleton circa 1890 and titling the song “But the Mortgage Worked the Hardest”). See also FEDERAL WRITERS’ PROJECT, NEBRASKA FOLKLORE PAMPHLETS NO. 16 (1937-1940) (titling the song “The Mortgage Worked the Hardest”); Irwin Silber & Earl Robinson, SONGS OF THE GREAT AMERICAN WEST 236-39 (1995) (titling the song “The Farmer is the Man”).

² The descriptive Japanese phrase for security interests not specified in the Civil Code is *hi-tenkei tanpo*.

security,”³ the practice of offering bare legal title as collateral to secure debt is a long-standing practice in Japan; it has been used to enable transactions not contemplated by the literal text of the Civil Code since before its enactment.⁴ Both movable and immovable property can be the subject of a *jōto tanpo* interest.⁵ In the latter case, with which this Article will be concerned, it offers an alternative to other, more orthodox devices, and is typically chosen for the considerable procedural advantages that it gives to the secured party.

With respect to real estate in particular, *jōto tanpo* is an island of tradition in an area awash with reform. In recent years, legislators and the courts have engaged in a tag-team effort to rein in high-risk, high-interest lending, much to the cost of that industry.⁶ Rate caps have been stiffened,⁷ marketing efforts restricted,⁸ and debt collectors criminalized.⁹ Lenders have even been denied the freedom to take out suicide insurance on their debtors.¹⁰ Judicial decisions that prefaced successive waves of legislation in this line have attracted some overseas criticism, as evidence of an unhealthy

³ See, e.g., Hideo Morii, *Secured Transactions: Title-Transfer Security (Jōto Tanpo)*, in 3-5 DOING BUSINESS IN JAPAN §§ 5.01-5.05 (Zentaro Kitagawa, ed. 1980, updated twice/year) [hereinafter Hideo Morii, *Title-Transfer Security*].

⁴ TADAKA HIROTAKE, *TANPO HŌ TAIKEI NO ARATA NA TENKAI: JŌTO TANPO O CHŪSHIN TOSHITE* [NEW DIRECTIONS IN THE LAW OF SECURED CLAIMS: WITH SPECIAL REFERENCE TO JŌTO TANPO] 121-22 (1996).

⁵ John O. Haley, *The Preliminary Contract for Substitute Performance: A Reflection of the Japanese Judicial Approach*, 7 LAW IN JAPAN 133, 138 (1974).

⁶ Andrew Pardieck, *Japan and the Moneylenders: Activist Courts and Substantive Justice*, 17 PAC. RIM L. & POL'Y J. 529, 580-81 (2008).

⁷ See *Risoku seigen hō* [Interest Rate Limitation Act], Law No. 100 of 1954, art. 4, as amended by *Kashikingyō no kisei tō ni kansuru hōritsu no ichibu o kaisei suru hōritsu* [Act Amending in Part the Lending Business Regulation Act], Law No. 155 of 1999, art. 3 [hereinafter *Amending Act of 1999*]; *Shusshi no ukeire, azukarikin oyobi kinri tō no torishimari ni kansuru hōritsu* [Investment Receipt, Deposits and Interest Rate Regulation Act], Law No. 195 of 1954, art. 5, as amended by *Amending Act of 1999*, *supra* note 7, art. 2, also as amended by *Kashikingyō no kisei tō ni kansuru hōritsu no ichibu o kaisei suru hōritsu* [Act Amending in Part the Lending Business Regulation Act], Law No. 115 of 2006, art. 6 [hereinafter *Amending Act of 2006*]. For a detailed account of recent developments in the law relating to consumer lending, see Pardieck, *supra* note 6, at 564-65, 571-80.

⁸ See *Kashikingyō no kisei tō ni kansuru hōritsu* [Lending Business Regulation Act], Law No. 32 of 1983, art. 11(2), 15(1), 15(2), 16, 20, 21, 24/6, 48(3), 49(2), 49(5), 49(6), as amended by *Kashikingyō no kisei tō ni kansuru hōritsu oyobi shusshi no ukeire, azukarikin oyobi kinri tō no torishimari ni kansuru hōritsu no ichibu o kaisei suru hōritsu* [Act Amending in Part the Lending Business Regulation Act and the Investment Receipt, Deposits and Interest Oversight Act], Law No. 136 of 2003 (cited subarticles contained in the amendments) [hereinafter *Amending Act of 2003*]; Pardieck, *supra* note 6, at 564.

⁹ See *Kashikingyō no kisei tō ni kansuru hōritsu* [Lending Business Regulation Act], Law No. 32 of 1983, secs. 21(1), 21(2), 49(8), as amended by *Amending Act of 2003*, *supra* note 8, art. 47, also amended by *Amending Act of 2006*, *supra* note 7, art. 1; *Shusshi no ukeire, azukarikin oyobi kinri tō no torishimari ni kansuru hōritsu* [Investments, Deposits and Interest Rate Regulation Act], Law no. 195 of 1954, art. 5(3), as amended by *Amending Act of 2006*, *supra* note 7, art. 6.

¹⁰ *Kashikingyō no kisei tō ni kansuru hōritsu* [Lending Business Regulation Act], Law No. 32 of 1983, art. 12 § 7, as amended by *Amending Act of 2006*, *supra* note 7, art. 2.

judicial activism in the field of commercial relations.¹¹ At the same time, the doctrine underpinning *jōto tanpo* against real estate—a security and collection device favored by lenders of last resort¹²—remains untouched, despite a well-deserved reputation for severity, and a potential for capricious abuse.¹³

A *jōto tanpo* mortgage is a simple transaction, in which the ownership of collateral is transferred directly to the lender, with a promise to reconvey upon repayment.¹⁴ Japanese courts are exceptionally permissive toward such an arrangement. German law recognizes a like transaction with respect to real property but encumbered with such formalities, fees, and tax burdens that creditors do not use it.¹⁵ The classic English mortgage has a similar formal structure, but is encased in elaborate foreclosure proceedings that are not found in Japan.¹⁶ In the United States, the contract for deed closely resembles *jōto tanpo* in many respects, but is only available for purchase money transactions, and is subject to statutory restrictions at the state level¹⁷ (beyond which, it has been described by a Reporter of the Restatement of Property as having “no place in a modern land financing system”).¹⁸ There are practical limitations to the use of *jōto tanpo*,¹⁹ but for better or for worse, it does not suffer from such legal encumbrances.²⁰

This Article will argue that three factors determine the characteristics of *jōto tanpo*: 1) the pressure of commercial custom; 2) limitations in Japan’s title registration system; and 3) opportunities for enforcement arbitrage. These factors are stable for the present, but will not necessarily remain so. Japan is in the midst of an ambitious program of commercial law reform,²¹ in which there is extensive academic participation.²² Proposed

¹¹ Pardieck, *supra* note 6, at 380-81 (citing Yuka Hayashi, *Japan’s Lending Crackdown May Hurt Foreign Consumer-Finance Investors*, WALL ST. J., Dec. 13, 2006, at C1).

¹² See YOSHIDA MASUMI, *JŌTO TANPO* 231 (1979).

¹³ See TADAKA HIROTAKA, *supra* note 4, at 215.

¹⁴ See, e.g., *Imai v. Takachi*, 48 MINSHŪ 414, 422 (Sup. Ct., Feb. 22, 1994) (describing such a transaction).

¹⁵ TADAKA HIROTAKA, *supra* note 4, at 14-15.

¹⁶ FREDERICK POLLOCK, *THE LAND LAWS*, 132-138 (3d ed. 1896).

¹⁷ Grant Nelson, *The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, 1998 BYU L. REV. 1111, 1117.

¹⁸ *Id.* at 1115-16.

¹⁹ See *infra* Part IV.

²⁰ John. O. Haley has written that the *jōto tanpo* “corresponds to a common law mortgage”. Haley, *supra* note 5, at 134-35. This should be taken as a loose characterization only. As discussed below in this Article, collateral under a *jōto tanpo* differs from mortgaged property in that it can be sold at will immediately upon default, is exposed to the risk of attachment by creditors of the lender, and is not subject to the restraining force of a persistent equity of redemption.

²¹ See, e.g., Hideki Kanda, *Securitization in Japan*, 8 DUKE J. COMP. & INT’L L. 359, 360 (1998) (“In November 1995, Prime Minister Hashimoto announced a drastic reform plan of financial regulation known

revisions to the Civil Code, spanning property law and the law of obligations, were presented at the annual meeting of the Japan Private Law Association²³ in October 2008.²⁴ The contemplated scope of this revision does not extend to law of secured claims,²⁵ but there are certainly indications of eventual movement in this direction.²⁶

Like the English law of mortgage, the current state of judicially fashioned rules for *jōto tanpo* transactions in land—and, by extension, in movables—cannot be understood without some sense of its historical foundations. This Article attempts to provide that background, with a view to improved overseas engagement in this evolving area of Japanese commercial law.²⁷ Beyond this narrow objective, review of the evolutionary interaction of procedure and substantive law in this niche of the Japanese property system may serve as a useful referent for ongoing reform efforts in countries that have recently expanded the role of property markets in their domestic economies.

Part I of this Article examines this early period of legal development, leading up to the adoption of a formal doctrine to justify recognition of *jōto tanpo* claims. Part II provides an overview of procedural flaws in the

as Japan's Big Bang." (citation omitted)); Peter Lawley, *Panacea or Placebo? An Empirical Analysis of the Effect of the Japanese Committee System Corporate Governance Law Reform*, 9 ASIAN-PAC. L. & POL'Y J. 105, 111 (2007) ("In May 2002, the National Diet of Japan passed legislation amending the Commercial Code to allow for the committee system corporate governance structure."); CURTIS J. MILHAUPT & MARK D. WEST, ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES 9, 22 (2004) (analyzing the effects of a reduction in the filing fee for shareholder derivative suits); Daniel H. Foote, *Introduction and Overview: Japanese Law at a Turning Point*, in LAW IN JAPAN: A TURNING POINT, at xx (Daniel H. Foote ed., 2007) ("The extent of change in the legal realm is exemplified, above all, by one set of events: the Justice System Reform Council of 1999-2001 . . . and the reforms resulting from that council's recommendations. Several chapters in this volume describe specific aspects of the Reform Council's recommendations and resulting reforms."); Shōzō Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561 (2001) (providing an account of the drafting process and context of the Code of Civil Procedure of 1996, with reflections on its likely effects).

²² See Katō Masanobu, '*Nihon minpō kaisei shian' no kihon wakugumi* [*The Basic Framework of a Japanese Civil Code Revision Proposal*], 1362 JURISUTO 2, 3 (2008); Tsubaki Toshio, *Hashigaki: honshō tanjō no yurai o chūshin ni* [*Preface: Concerning the Origin of This Volume*], in MINPŌ KAISEI O KANGAERU [CIVIL CODE REVISION VOICES], (Hōritsu jihō zōkan [Hōritsu jihō Special Issue], Tsubaki Toshio et al. eds., 2008).

²³ The Japanese name for this organization is Nihon Shihō Gakkai.

²⁴ See Katō Masanobu, *supra* note 22, at 2-4.

²⁵ *Id.* at 3.

²⁶ *Id.*; see, e.g., Okino Masami, *UNCITRAL tanpo torihiki rippō gaido no sakutei* [*Finalization of the UNCITRAL Legislative Guide on Secured Transactions*], 1842 KINYŪ HŌMU JIJŌ 14 (2008) (describing the plans of the United Nations Commission on International Trade Law regarding secured transactions).

²⁷ To the best of the author's knowledge, the following is a comprehensive list of publications in English that touch on this area: HISASHI TANIKAWA ET AL., CREDIT AND SECURITY IN JAPAN: THE LEGAL PROBLEMS OF DEVELOPMENT FINANCE 120-137 (Univ. of Queensland Press 1973) (containing a chapter on "Security Transfers"); Haley, *supra* note 5; HIROSHI ODA, JAPANESE LAW 167-168 (1999) (containing a chapter on "Atypical Real Security Rights"); Morii Hideo, *Title-Transfer Security*, *supra* note 3.

enforcement of civil judgments that became apparent during Japan's period of rapid economic growth. This is an important foundation for understanding developments in case law. The difficulty of realizing collateral on default, as well as shortcomings in the substantive law of real security itself, induced reliance on so-called non-Code security interests,²⁸ including *jōto tanpo*. Part III covers the important judicial and legislative effort in the 1970s to curb the anachronistic remedy of forfeiture, originally embraced in the early century's heyday of laissez-faire ideology. Part IV examines three recent cases of the Japanese Supreme Court involving *jōto tanpo*, setting their holdings against functionally similar rules in common law jurisdictions. This comparison reveals the differing procedural constraints under which Japanese courts operate, as well as tensions between transactional efficiency and the *jōto tanpo* interest. The utility of *jōto tanpo* as a real estate security device, and the potential for curtailing its use, is the subject of Part V. The conclusion attempts to relate this discussion to recent scholarship touching on Japanese property law.

A. *Jōto Tanpo Was an Unplanned Byproduct of Japan's Nineteenth Century Legal Transition*

One of the most important transformative measures taken by the Meiji-era reform government after ousting the Tokugawa Shogunate, in 1868, was the settlement of ownership deeds to land.²⁹ In the previous era, farmers were bound to their holdings in principle³⁰ and transfers of land were possible only under narrowly circumscribed conditions.³¹ The issuance of land deeds undermined the old order by making land freely alienable.³² However, the government's more immediate objective was fiscal; the ownership scheme provided a platform for the implementation of an annual cash tax on land, needed by the young government to cover the significant costs of co-opting stakeholders in the preexisting regime such as the samurai

²⁸ See 4 SHIN HANREI KOMENTĀRU MINPŌ [COMMENTARIES ON CIVIL CODE PRECEDENT] 91-92 (Shinozuka Shōji & Maeda Tatsuaki eds. 1991) [hereinafter COMMENTARIES ON CIVIL CODE PRECEDENT].

²⁹ See ISHII RYŌSUKE, JAPANESE CULTURE IN THE MEIJI ERA: LEGISLATION IN THE MEIJI ERA 180 (William Chambliss trans., 1958).

³⁰ See LAW AND JUSTICE IN TOKUGAWA JAPAN: INTRODUCTION 12-13 (John Henry Wigmore ed., 1969); LAW AND JUSTICE IN TOKUGAWA JAPAN: CIVIL CUSTOMARY LAW 11 (John Henry Wigmore ed., 1967).

³¹ See Fujiwara Akihisa, *Meiji shoki ni okeru tochi tanpo hō no keisei* [The Formation of Mortgage Law in the Early Meiji Period], 24 KOBE HŌGAKU ZASSHI 203, 214-15 (1974) [hereinafter Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*].

³² See ISHII RYŌSUKE, *supra* note 29, at 180.

(whose stipends were cashed out by the new government).³³ An ordinance promulgated on July 28, 1873 ultimately established this tax and ownership system.³⁴ The rules of ownership that underpinned this ordinance emerged in a flurry of orders issued over the course of the preceding year.

The foundation order removing restraints on alienation was given by the Grand Council of State on February 15, 1872.³⁵ The first order on the issuance of land deeds was made by the Ministry of Finance on February 24, 1872,³⁶ but was replaced by a revising order on July 4 of the same year.³⁷ Neither of the two implementing orders specified which party to a mortgage should receive the land deed issued by the state, despite the fact that such arrangements were common at the village level in Tokugawa Japan.³⁸ In response to consternation at the local level, an interim memorandum on mortgages was sent out to local officials on June 18, 1872.³⁹ This was replaced by a regulation issued by the Grand Council of State in the following year, on January 17, 1873,⁴⁰ and was clarified by a further order on February 14, 1873.⁴¹ As this progression of events illustrates, reformers were forced to adapt the emergent system of marketable title and security to the contours of preexisting feudal interests.

B. *Prior Law Distinguished True Security Arrangements from Fictional Foreclosures*

Mortgages at the end of the Tokugawa period were of two types, each associated with a distinctive procedure and enforcement mechanism.⁴² Interests which were subject to a closely circumscribed and recorded “main suit” procedure were enforced through a forfeiture of the borrower’s interest

³³ See Stephen Vlastos, *Opposition Movements in Early Meiji, 1868-1885*, in THE CAMBRIDGE HISTORY OF JAPAN: THE NINETEENTH CENTURY 367, 373-74 (Marius B. Jansen & John Whitney Hall eds., 1989).

³⁴ Chiso kaisei jōrei [Land Reform Ordinance], Dajōkan Ordinance No. 272 of 1873.

³⁵ Jisho eidai baibai o yurusu [Permanent Sales of Estates to be Permitted], Dajōkan Ordinance No. 50 of 1872.

³⁶ Jisho baibai jōto ni tsuki chiken watashikata kisoku [Regulation on the Provision of Deeds for the Conveyance of Estates], Ministry of Finance Regulation No. 25 of 1872.

³⁷ Ministry of Finance Regulation No. 83 of 1872.

³⁸ Fujiwara Akihisa, *Chiso kaisei ni okeru shichichi kannkei no shobun* [On the Disposition of Security Relationships in the Process of the Land-Tax Reform], 25 KOBE HŌGAKU ZASSHI 1, 2-3 (1975) [hereinafter Fujiwara Akihisa, *Disposition of Security Relationships*].

³⁹ Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 215.

⁴⁰ Jisho shichiire kakiire kisoku [Rules for the Mortgage and Pledge of Estates], Dajōkan Ordinance No. 18 of 1873.

⁴¹ See Dajōkan Ordinance No. 51 of 1873. See Fujiwara Akihisa, *Disposition of Security Relationships*, *supra* note 38, at 4-5.

⁴² See Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 204.

in the land by a form of absolute foreclosure.⁴³ Such agreements were often collusive; the lender typically went into possession at the time the loan was made, and used a later claim for direct foreclosure to circumvent the general ban on land transfers.⁴⁴ In such transactions, the period under the “loan” might be characterized in modern terms as a protracted escrow, because the true intention of the parties was to transfer title, and ultimate proprietorship was ambiguous before the transfer was finalized. Mortgages not in this category were enforceable through a less closely regulated “money suit” procedure,⁴⁵ where the remedy was to extract payment through an auction of the collateral, with the residue being restored to the debtor.⁴⁶ These latter were genuine lending arrangements, in which the debtor remained in possession during the term of the loan.⁴⁷

The initial rules on the settlement of deeds were found lacking on two issues. First, the settlement of title itself demanded resolution of the competing claims of would-be “main suit” lenders and their debtors.⁴⁸ Second, it was necessary to clarify the respective remedy or remedies (i.e. sale by auction or direct foreclosure) to be applied to security arrangements entered into before, and after, the watershed date of February 15, 1872 (the point at which restraints on alienation were lifted).⁴⁹ The memorandum of June 1872 and the string of regulations issuing from January 1873 addressed these issues.

The first memorandum of June 1872, issued by the Ministry of Finance, provided, in effect, that the rules set forth in the formal law of the Tokugawa (*kujikata osadamegaki*)⁵⁰ be applied uniformly to all mortgage arrangements, including lender-in-possession cases in which the underlying

⁴³ See *id.* at 223-24; Fujiwara Akihisa, *Shichichi kosaku no hōteki kōzō to jinushisei* [The Legal Structure of Tenancy Pledges and Its Relation to the Landholder System], 22 KOBE HŌGAKU ZASSHI Nos. 3 & 4, at 1, 19-21 (1973) [hereinafter Fujiwara Akihisa, *Tenancy Pledges*].

⁴⁴ See Ōmi Kōji, *Wagakuni ni okeru jōto tanpo no seiritsu katei: nihon tanpo hō shi ni okeru jōto tanpo no ichizuke (I)* [The Establishment of Jōto Tanpo in the Law of Our Nation: The Posture of Jōto Tanpo in Japanese Legal History (I)], 27 WASEDA HŌGAKKAISHI 159, 165-66, 171-72 (1976).

⁴⁵ *Id.* at 173.

⁴⁶ *Id.*

⁴⁷ See generally Fujiwara Akihisa, *Disposition of Security Relationships*, *supra* note 38 (providing a detailed account of difficulties that arose at the prefectural level in implementing national rules that treated all pledgors as legal title holders, when in fact some were genuine borrowers and remained in possession, and some entered into the lending transaction intending to surrender their interest, and had ceded possession to the lender).

⁴⁸ See Fujiwara Akihisa, *Disposition of Security Relationships*, *supra* note 38, at 4.

⁴⁹ See *id.*

⁵⁰ See OSADAMEGAKI GEKAN [OSAKAMEGAKI, BOOK 2], TOKUGAWA KINREIKŌ BEKKAN [PROHIBITIONS OF THE TOKUGAWA, SUPPLEMENT], sec. 31 at 72-74 (Ishii Ryōsuke ed., 1961), translated in 41 TRANSACTIONS OF THE ASIATIC SOC'Y OF JAPAN 683, 717-21 (John Carey Hall trans., 1913).

loan was (arguably) a legal fiction.⁵¹ This simplified the settling of title; the deed for any property subject to mortgage, of whatever type, was to be issued to the mortgagor.⁵² After issuance, where the lender was in possession, the deed was to be delivered to him (voluntarily), to be held during the term of the loan arrangement.⁵³ This memorandum was but a stopgap measure. The bifurcation of “main suit” and “money suit” procedures had been, in effect, a system of strict pleading with two streams.⁵⁴ More detailed guidance would be required to give the new national rules the same scope of coverage as preexisting practice.

C. *Legal Uncertainty Drove Parties to Adopt Ad Hoc Solutions*

The regulation of January 17, 1873 attempted to establish a more complete set of rules for the creation and enforcement of mortgage claims. This instrument was initially drafted in the Ministry of Finance (“MOF”), with input from the Ministry of Justice (“MOJ”) before promulgation.⁵⁵ The remedial provisions introduced by the MOJ reveal differing policy preferences within government.⁵⁶ The regulation defined two separate forms of security in land, both created by endorsement of the title deed: a land pledge in which the lender entered into possession (*shichiire*), and a land charge in which he did not (*kakiire*).⁵⁷ For interests created after the watershed date of February 15, 1872, the remedy for default in both land pledge and land charge agreements was specified, following the MOJ position, to be a public sale, with the residue to be returned to the debtor.⁵⁸

The MOF favored the remedy of direct foreclosure, although it lost the policy debate in the short term. This differing stance of the two institutions appears to have been driven by their respective levels of exposure to and sympathy for foreign law. The MOJ was in the process of studying the French Civil Code.⁵⁹ The view at the MOJ was that direct foreclosure, abhorrent to French law, had existed in the previous era solely

⁵¹ See Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 215; Ōmi Kōji, *supra* note 44, at 163.

⁵² See Fujiwara Akihisa, *Disposition of Security Relationships*, *supra* note 38, at 3-4.

⁵³ *Id.*

⁵⁴ See Ōmi Kōji, *supra* note 44, at 165.

⁵⁵ See *id.* at 164-65; Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 216-24.

⁵⁶ See Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 216-24.

⁵⁷ See Ōmi Kōji, *supra* note 44, at 165-66, 171-72; Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 215.

⁵⁸ See Ōmi Kōji, *supra* note 44, at 164-66.

⁵⁹ See Fujiwara Akihisa, *Mortgage Law in the Early Meiji Period*, *supra* note 31, at 233-34.

as a means of circumventing the ban on sales of land.⁶⁰ Accordingly, it was appropriate under both types of security arrangement to require that the debtor’s equity in the collateral be respected.⁶¹ The MOF sought a closer adherence to the formalities of prior law and retention of the remedy of direct foreclosure, but the MOJ position became the governing rule in the pre-Civil Code period.⁶²

Even after the pronouncement of January 17 and its sister regulations, officials struggled to apply this newly fashioned secured lending framework to the varied tapestry of preexisting regional law and local practice.⁶³ In response to this uncertainty, parties at the local level sought more stable ways of backing up their promises. A frequently adopted solution was to create a rough equivalent to a mortgage by deposit of title deeds (i.e. signing the deed to the land serving as collateral over to the lender), in the expectation that it be returned upon repayment of the underlying loan.⁶⁴ This arrangement had the advantage of a kind of brutal clarity; because the lender had title to the land, he could enforce his interest by evicting the borrower, working a forfeiture. Because of its procedural advantages, and because direct foreclosure had obvious economic attractions to lenders, mortgages of this form appear to have been common, and the practice persisted to the promulgation of the January 17 regulation, through the first steps toward title registration in 1880, and beyond.⁶⁵

II. PROCEDURAL CONSTRAINTS AND ECONOMIC IDEOLOGY DISSUADED MEIJI COURTS FROM POLICING THE TERMS OF *JŌTO TANPO* TRANSACTIONS

Simplicity and certainty of enforcement were important attractions of “title-transfer security”;⁶⁶ although in its simplest form, as a sale coupled

⁶⁰ See Ōmi Kōji, *supra* note 44, at 165.

⁶¹ *See id.*

⁶² *See id.*

⁶³ See generally Fujiwara Akihisa, *Disposition of Security Relationships*, *supra* note 38 (relating in detail difficulties at the prefectural level in implementing early rules on mortgage transactions).

⁶⁴ See Ōmi Kōji, *supra* note 44, at 173-77; *id.* at 187 (citing relevant cases).

⁶⁵ *See id.* at 169-71. Registration of real estate was introduced by degrees, beginning with a simple transaction record at the local level. See Tochi baibai jōto kisoku [Land Sale and Transfer Regulation], Dajōkan Public Order No. 52 of 1880, § 1; Tōki hō [Registration Act], Law No. 1 of 1886; Tochi daichō kisoku [Land Register Regulation], Imperial Edict No. 39 of 1889; Fudōsan tōki hō [Real Estate Registration Act], Law No. 24 of 1899.

⁶⁶ TSUBAKI TOSHIO, DAIBUTSU BENSAN YOHAKU NO KENKYŪ 314 (1975) (relating a jesting exchange around the table at a meeting of the *Hōsei shingikai* [Judicial Reform Committee] that Osaka saw more cases of *jōto tanpo* than Tokyo because “persons of bad character”—persons more aggressive about collections—were more plentiful in the Kansai area; and also indicating the obligation of registry officials

with a conditional reconveyance, such a transaction exposes the debtor to a risk of loss disproportionate to the value of the underlying loan. For transactions entered into before the promulgation of the Civil Code, courts routinely invalidated such sales for failing to comply with the formalities required to form a security interest.⁶⁷ The complete invalidation of one party's interest in an intended security arrangement is a fairly drastic instrument of judicial discipline. A hint of its likely cause may be gleaned from the respective histories of Japanese and English property law.

A. *The English Mortgage Also Began As a Simple Transfer of Bare Title By Way of Security*

In American legal discourse today, the term “forfeiture” embodies two distinct concepts: 1) a (relatively) expeditious enforcement procedure; and 2) a creditor's right to seize collateral of greater value than the outstanding obligation.⁶⁸ Their conflation reflects the fact that the English law of mortgage, as originally fashioned in the seventeenth century, operated—like *jōto tanpo*—by manipulating the core concept of title itself.⁶⁹ In common law jurisdictions, the extended foreclosure proceeding, which recognizes a lingering equity of redemption beyond the compulsory disposition of the debtor's paper title, is the procedural means of assuring that conclusive title cannot move without giving the debtor an opportunity to salvage his remaining interest in the collateral. Although this ultimate objective is straightforward,⁷⁰ treating title itself as the foundation of the secured claim has forced common law legal doctrine through some severe contortions. As Sir Frederick Pollock wrote in 1883:

The power and practice of making a debtor's property, and especially immovable property, a security to the creditor for the payment of his debt, are well-nigh as old as the legal recognition and enforcement of any rights of property

to accept applications for transfers of ownership based on valid documentation, whatever the intention of the parties might be).

⁶⁷ See, e.g., Abe v. Memezawa, 7 DAIHAN MINROKU 65 (Issue 11) (Grand Ct. Jud., Dec. 20, 1901); Shime v. Hayada, 12 DAIHAN MINROKU 1232 (Grand Ct. Jud., Oct. 10, 1906); Takejima v. Takejima, 17 DAIHAN MINROKU 205 (Grand Ct. Jud., Apr. 11, 1911); Sakuma v. Saitō, 17 DAIHAN MINROKU 221 (Grand Ct. Jud., Apr. 15, 1911).

⁶⁸ See, e.g., Nelson, *supra* note 17, at 1113; Marshall Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 606 (1999). In this Article, the term “forfeiture” is used in the latter sense, unless otherwise indicated.

⁶⁹ POLLOCK, *supra* note 16, at 133-34.

⁷⁰ *Thornborough v. Baker* (1675) 3 Swanst. 628, 630, cited in W. HOLDSWORTH, 6 A HISTORY OF ENGLISH LAW 663 (1924) (“In natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money,” *per* Lord Nottingham).

whatever . . . The forms, however, in which English law has given effect to this all but universal practice have been singularly ill chosen.⁷¹

Built on civil law foundations, Japanese law was initially well positioned to avoid such difficulties. In the earliest appellate judgments of the Great Court of Judicature⁷² involving pre-Code transactions, the Court repeatedly struck down “title-transfer security” agreements as based on a misrepresentation of intent on the register.⁷³ This position changed dramatically when the Court came to consider transactions governed by the Civil Code, resulting in a doctrinal cocktail that can fairly be described as novel, both from a comparative perspective and for Japan at that time.

B. *Drafters of the Civil Code Favored Recognition of Agreements for Abandonment of the Debtor’s Equity upon Default*

In contrast to English law, and in keeping with its civil law foundations, the Japanese Civil Code of 1898 provided a single, special-purpose security interest for real estate: the hypothec.⁷⁴ This interest is a simple registered lien which entitles the secured party to initiate a judicial auction of the target property upon default, and to satisfy its claim out of the proceeds of sale.⁷⁵ Technically, the creditor’s remedy is not limited to this procedure. In contrast to the French-influenced rules of Japan’s first generation property system,⁷⁶ and following the contemporary fashion for laissez-faire economics and freedom of contract,⁷⁷ the Code also permitted parties to agree that the debtor’s entire interest should be forfeited upon

⁷¹ POLLOCK, *supra* note 16, at 132-33.

⁷² Established in 1875, the *Daishin’in* became the highest national court of appellate jurisdiction upon the establishment of the unified national judiciary in 1890. Ministry of Justice, Public Order No. 4 of 1875; Saibansho kōsei hō [Courts Establishment Act], Law No. 6 of 1890.

⁷³ See Ōmi Kōji, *supra* note 44, at 187.

⁷⁴ See MINPŌ arts. 369-98 (1898). Note that the term translated here as “hypothec” (*teitōken*) has been rendered in various forms in English translations of Japanese laws over the years. Naming conventions aside, the author hopes to gain the reader’s indulgence with the observation that “hypothec” here refers to a registered claim that permits its holder, following appropriate attachment proceedings, to a priority share in the proceeds of a judicial auction.

⁷⁵ See MINPŌ arts. 369, 387.

⁷⁶ See Takayanagi Kenzō, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 15, 27-28 (Arthur Taylor von Mehren ed., 1963).

⁷⁷ See, e.g., ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776). An abridged translation of *The Wealth of Nations* was published as early as 1881. The full work became available in Japanese between 1883 and 1888. Cf. ADAM SMITH, *HŌKOKU FUKOKURON [THE WEALTH OF NATIONS]* (Kurashin-mura, Shizuoka Prefecture, Okada Ryōichirō trans., 1881); ADAM SMITH, *HŌKOKU FUKOKURON [THE WEALTH OF NATIONS]* (Keizaizasshisha, Tokyo, Ishikawa Eisaku et al. trans., 1883-88).

default.⁷⁸ There was (and is) a single catch: such a contract is not registrable and, as a result, cannot be set up against attachment creditors and other third parties.⁷⁹ This practical restriction on forfeiture clauses would soon be subjected to collateral attack, via the interest that is the subject of this Article.

While the Civil Code was under consideration in the National Diet, the desirability of allowing forfeiture clauses in pledge transactions (where the creditor takes physical possession of the collateral) was called into question. Legislators inserted a provision at Section 349 restricting the claim of a pledge holder (such a pawnbroker) to the amount due on the underlying obligation.⁸⁰ In commentaries published after promulgation of the Code, two of the Civil Code drafters attacked this amendment, characterizing it as a “wasteful measure” restraining freedom of contract.⁸¹ Raising the specter of tight credit and economic stagnation, the drafters forcefully argued that, in any case, a “title-transfer security” agreement differed from a pledge, and so should not be held subject to this restriction, whatever the target collateral might be.⁸²

This introduction of “title-transfer security” as a gloss on the Civil Code opened a path to contracts for forfeiture, despite the absence of corresponding enforcement procedures tailored to the needs of such a lending transaction. As will become clear in the discussion below, this procedural shortcoming gave rise to difficulties, as courts attempted to refine their disposition of secured claims over the course of time. In fact, very similar problems were confronted by the English courts as early as the late seventeenth century.⁸³ The classic English foreclosure proceeding is a useful point of comparison to highlight the issues raised by “title-transfer security” under the Japanese Civil Code.

⁷⁸ See, e.g., *Hashimoto v. Saitō*, 14 DAIHAN MINROKU 313 (Grand Ct. Jud, Mar. 20, 1908) (holding that, under the Civil Code, a hypothec may provide for forfeiture of the collateral in the event of default); see also Ōmi Kōji, *supra* note 44, at 180, 184 n.8.

⁷⁹ See MINPŌ art. 369 (stating that a hypothec is a non-possessory means of security for a specific debt owed); *Fudōsan tōki hō* [Real Estate Registration Act], Law No. 24 of 1899, arts. 1, 117 (listing registrable interests and the registrable elements of a hypothec, respectively).

⁸⁰ See Ōmi Kōji, *supra* note 44, at 179-80, 187-89.

⁸¹ See ŪME KENJIRŌ, MINPŌ YŌGI SONO NI BUKKEN HEN [ESSENTIAL CIVIL CODE, PART 2: RIGHTS IN REM] 404-08 (1896); TOMII MASAOKI, MINPŌ GENRON DAI NI KAN BUKKEN [PRINCIPLES OF THE CIVIL CODE, VOL. 2: RIGHTS IN REM] 483-85 (1914).

⁸² *Id.*

⁸³ See POLLOCK, *supra* note 16, at 132-35.

C. *A Judicial Foreclosure Proceeding Opens an Opportunity to Impose Mandatory Rules On an Otherwise Purely Contractual Relationship*

By the nineteenth century, a typical English mortgage was drafted as a transfer of the borrower's ownership interest to the lender, conditioned on the repayment of the loan within a very short period.⁸⁴ When (as expected) the borrower did not repay on the date specified (the "law day"), the lender acquired a legal right to eject the borrower and enter into immediate possession.⁸⁵ He was restrained from doing so, however, by severe duties to care for the property and account to the debtor, and by the debtor's "equity of redemption," under which he could reclaim the property from the lender by paying the sums due under the loan.⁸⁶ Critically, the debtor's right of redemption could not be defeated by selling the property to a third party.⁸⁷ A procedure was available for foreclosing the debtor's interest, but this was purposefully structured to be time-consuming, expensive, and uncertain.⁸⁸

Because the English mortgage was essentially a special form of contract, it was open to lenders to attempt evasion of procedural barriers to forfeiture through creative drafting. Courts responded by declaring that "clogs and fetters" on the equity of redemption were not to be tolerated.⁸⁹ Under the maxim "once a mortgage, always a mortgage," the Court of Chancery came to apply the above procedures to any agreement that functioned as security for debt, regardless of its form.⁹⁰ To avoid the bilateral monopoly into which this tangled web of legal restrictions would otherwise force them, lenders developed the practice of including in their contracts a provision for sale of the property on default, satisfaction of the debt out of the proceeds, and restoration of the residue to the debtor.⁹¹ Lenders were induced to be chary of the debtor's interest because the law had made it procedurally costly to do otherwise.

⁸⁴ *Id.* at 134 ("The terms of the transaction were—as they still appear to be—that the debtor must pay his money to get back the land . . . at a stated time, generally six months after the date of the agreement, or it would become the creditor's absolute property.").

⁸⁵ *Id.*

⁸⁶ *Id.* at 134-35.

⁸⁷ *Id.*

⁸⁸ *Id.* at 135.

⁸⁹ *See, e.g.,* Howard v. Harris, (1683) Eng. Rep. 609, [1558-1774] All. E.R. 609 (Lord Keeper's Court); Santley v. Wilde, [1895-1899] All. E.R. 1338, 2 Ch. 747 (A.C.) (1899); *see also* Tracht, *supra* note 68, at 600.

⁹⁰ *See, e.g.,* Seton v. Slade, (1802) Eng. Rep. 163, [1775-1802] All. E.R. 163 (Lord Chancellor's Court).

⁹¹ POLLOCK, *supra* note 16, at 135.

D. *Trust Concepts Enabled Meiji Courts to Embrace Contractualism and Avoid the Need to Evaluate Security Agreements*

Such elaborate judicial protections did not exist in the Meiji era's youthful property system and, as a result, the procedural landscape under the Civil Code was slanted in precisely the opposite direction. The Code provided a standard, registrable security interest in land, as a hypothec, or *teitō-ken*.⁹² The procedure for enforcing such a claim upon default required a judicially mandated sale of the property, conducted by licensed officers operating on a contract basis outside the premises of the court.⁹³ The slack in this added layer of procedure, together with exceptional protections for certain short-term leases,⁹⁴ exposed the sale process to corruption and obstructive behavior that undermined the value of the security. These risks could be circumvented through crude eviction proceedings pursuant to "title-transfer security," with the added benefit of a possible windfall at the expense of the unfortunate borrower's general creditors.⁹⁵ As a result, judicial risks notwithstanding, it is not surprising that lenders persisted in extracting "title-transfer security," whether as a primary form of collateral or as a backup to a mainstream hypothec interest.

Returning to the speculative question posed earlier: why, in the pre-Code period, did the Great Court of Judicature not do what the English courts had done, and simply impose the same standard procedure on all agreements, rather than invalidating "title transfer security" transactions entirely? The reason may lie in the differing procedural contexts within which the respective court systems confronted this problem. The maxim "once a mortgage, always a mortgage" emerged in English jurisprudence long before the eventual introduction of registered title in the twentieth century.⁹⁶ Until that time, the entire substance of interests asserted by the parties was contained in privately drafted documents.⁹⁷ The Meiji courts showed themselves to be perfectly capable of imposing judicial readings on

⁹² See MINPŌ arts. 369-98.

⁹³ See Frank G. Bennett, Jr., *Civil Execution in Japan: The Legal Economics of Perfect Honesty*, 177 HŌSEI RONSHŪ 1, 4-10 (1999) [hereinafter Bennett, *Civil Execution*] (concerning the history and status of the current bailiff system in Japan).

⁹⁴ See generally Frank G. Bennett, Jr., *Clash of the Titles: Japan's Secured Lenders Meet Civil Code Section 395*, 38 NETHERLANDS INT'L L. REV. 281 (1991) [hereinafter Bennett, *Clash of Titles*].

⁹⁵ Ōmi Kōji, *supra* note 44, at 170.

⁹⁶ *Seton v. Slade*, (1802) Eng. Rep. 163, [1775-1802] All E.R. 163 (Lord Chancellor's Court) (U.K.); Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20 (U.K.).

⁹⁷ See TIM MURPHY, SIMON ROBERTS & TATIANA FLESSAS, *UNDERSTANDING PROPERTY LAW* 203-04 (4th ed. 2004).

private contracts.⁹⁸ However, the decisions on “title-transfer security” referred to above arose after the introduction of formal title registration in 1886⁹⁹ and, as such, were based on *registered* transfers of title. To recast these transactions in an entirely different form would have required retroactive rectification of statements on the registers. Without authority to issue such an order, the scope for judicial innovation in the Japanese context was thus severely compartmentalized, with the result that judges in these early cases were constrained to declare winners and losers, without attempting to craft alternative remedies.

Whatever chilling effect early judgments might have had on attempts at forfeiture in commercial practice, there was a thaw after the promulgation of the Civil Code. In 1902 and 1906, the Court handed down successive judgments upholding “title-transfer security”; and the 1906 decision was the first recorded judgment to involve movable property.¹⁰⁰

In later cases, German trust concepts were drawn upon to support this result with the elegance of theory.¹⁰¹ Introduced into Japanese academic discourse by Professor Okamatsu Santarō in an article published in 1902,¹⁰² trust concepts from contemporary German legal doctrine attracted gathering interest until 1911 when, with nearly a single voice, the courts began referring to “title-transfer security” as a “declaration of trust” (*shintaku kōi*).¹⁰³ Adding an implied trust layer to the analysis permitted a distinction to be made between “inner relations” (i.e., as between the parties) and “outer relations” (i.e., vis-à-vis third parties).¹⁰⁴ This served as a doctrinal work-around against the lurking objection that such transactions constituted a “false declaration of intention” (*kyōgi no ishi hyōji*) under Section 94 of the Civil Code.¹⁰⁵ Into the bargain, it gave judges a degree of freedom within

⁹⁸ See, e.g., Hozumi Tadao, *Hōritsu kōi no “kaishaku” no kōzō to kinō (II)*, 78 HŌGAKU KYŌKAI ZASSHI 27-71 (1961), translated in *The Structure and Function of the “Interpretation” of Juristic Acts, Part II*, 5 L. JAPAN 132 (John O. Haley trans., 1972).

⁹⁹ See Ōmi Kōji, *supra* note 44, at 169-71; see also Tochi baibai jōto kisoku [Land Sale and Transfer Regulation], Dajōkan Public Order No. 52 of 1880, sec. 1; Tōki hō [Registration Act], Law No. 1 of 1886; Tochi daichō kisoku [Land Register Regulation], Imperial Edict No. 39 of 1889; Fudōsan tōki hō [Real Estate Registration Act], Law No. 24 of 1899.

¹⁰⁰ See, e.g., *Uriwatashi teitō no hōritsu kankei*, 91 HŌRITSU SHINBUN 16, 16 (June 16, 1902) (reporting the case of *Andō v. Sano*, Grand Ct. Jud. May 24, 1902); *Jōno v. Higashi*, 12 DAIHAN MINROKU 1172. (Grand Ct. Jud., Oct. 5, 1906).

¹⁰¹ See TADAKA HIROTAKA, *supra* note 4, at 126.

¹⁰² Okamatsu Santarō, *Shintaku kōi no kōryoku ni kansuru gakusetsu o hihyōsu* [Critical Appraisal of Academic Theory on the Effect of a Declaration of Trust], NAI-GAI RONSŌ, Vol. 1, Nos. 1-4 (1902).

¹⁰³ See Ōmi Kōji, *Jōto tanpo rironshi (1)* [History of jōto tanpo Theory, Part I], 63 WASEDA HŌGAKU 35, 45 (1987) (Issue 1).

¹⁰⁴ See TADAKA HIROTAKA, *supra* note 4, at 128, 136-37.

¹⁰⁵ MINPŌ art. 94. Article 94 provides as follows: (1) A false declaration of intention made to the other party is ineffective . . . (2) The ineffectiveness of a declaration of intention, as referred to in the

the “inner relations” zone to discipline overreaching by the lender in pre-Code contracts, to which restrictions on forfeiture still arguably applied.¹⁰⁶ With this doctrinal framework in place, “title-transfer security” became recognizable in its modern form, which we may henceforth refer to by its proper name of *jōto tanpo*.¹⁰⁷

In the course of the century that separates the present day from the early *jōto tanpo* decisions, the initial thin trust framework has been superseded by numerous theories attempting to clarify and regulate this device.¹⁰⁸ For better or for worse, however, the essentials remain unchanged. The law governing these transactions continues to subsist as a judicial construct beyond the four corners of the Civil Code; the risk of forfeiture has been reduced but not eliminated; and *jōto tanpo* continues to be thought of and explained in trust-like terms—thereby separating this field of judge-made law from a Civil Code that would reject it entire, as based on a false declaration of intention.¹⁰⁹

E. Enforcement of Mainstream Security Interests Was Problematic through Most of Japan’s Period of High Growth

The value of security naturally depends on the ease and certainty with which it can be realized by the creditor¹¹⁰ and, as noted above, one of the important initial incentives for using *jōto tanpo* against real property was the relative ease with which it could be enforced. The civil execution procedures that Japan carried into the period of rapid growth in the 1960s and 1970s had a number of flaws¹¹¹ that affected both lender strategies and the development of case law,¹¹² including the law of *jōto tanpo*. A review of policy-driven changes made to the law since that time helps reveal the depth of the problems, and why *jōto tanpo* and other non-Code interests were pursued vigorously in business circles during that period.

subsection above, cannot be asserted against a third party. *Id.* (author’s translation); see also TADAKA HIROTAKA, *supra* note 4, at 122-24, 126-27, 154-55.

¹⁰⁶ Abe v. Memezawa, 7 DAIHAN MINROKU 65 (Issue 11) (Grand Ct. Jud., Dec. 20, 1901); Shime v. Hayada, 12 DAIHAN MINROKU 1232 (Grand Ct. Jud., Oct. 10, 1906); Takejima v. Takejima, 17 DAIHAN MINROKU 205 (Grand Ct. Jud., Apr. 11, 1911); Sakuma v. Saitō, 17 DAIHAN MINROKU 221 (Grand Ct. Jud., Apr. 15, 1911).

¹⁰⁷ SHIN HÖRITSUGAKU JITEN [NEW LEGAL DICTIONARY] 733 (3d ed. 1989).

¹⁰⁸ TADAKA HIROTAKA, *supra* note 4, at 120-60.

¹⁰⁹ *Id.*; MINPŌ art. 94.

¹¹⁰ Kondo Takao, *Keibai fudōsan no baikyakuritsu ni tsuite* [Concerning the Rate of Successful Sales in Real Estate Auctions], 38 JIYŪ TO SEIGI 77, 77 (Issue 13) (1987).

¹¹¹ See Bennett, *Clash of Titles*, *supra* note 94, at 295; Bennett, *Civil Execution*, *supra* note 93, at 18-27.

¹¹² Haley, *supra* note 5, at 137-38.

To begin with, then as now, the only compulsory remedy available under a standard Civil Code hypothec was a judicial sale, managed by a licensed bailiff.¹¹³ Originally, most such sales were conducted as face-to-face auctions, and until 1966, bailiffs operated from their own offices, separate from the court. This situation fostered collusion between bidders and the corruption of auction officials, reducing the value of the hypothec interest.¹¹⁴ In 1966, a reform measure raised the qualifications for newly appointed bailiffs, elevated their status by making them public officers, and placed them inside the premises of the court, thus providing for closer supervision.¹¹⁵

There were further opportunities for entrepreneurial obstructionism, however. The holder of a hypothec has a priority lien in the collateral, but does not have a right to vacant possession of the property; in principle, any action for eviction must be carried out by the purchaser.¹¹⁶ In Japan, buildings and land are treated as separate items of property.¹¹⁷ A late-coming lender can conspire with the debtor to exploit this awkward fragmentation of ownership, by permitting the lender to construct a minimal structure on hypothecated land, in exchange for a final desperate advance.¹¹⁸ Because the building is a discrete, registrable item of immovable property, this introduces an additional layer of issues that must be addressed in litigation.¹¹⁹ Taken together, these two factors (sale with occupants in

¹¹³ See *supra* Part II(B).

¹¹⁴ SHIKKŌRI SEIDO KAIZEN IN KANSURU IKENSŪ 85 (Ministry of Justice 1955) (response of Meiji University Faculty of Law, referring to the impact of "unsavoury individuals" on the civil execution process); SHIHŌ KENSŪJŌ [LEGAL RESEARCH AND TRAINING INSTITUTE], CHŌSA SŌSHO [INVESTIGATIVE REPORT SERIES] NO. 7, SHIKKŌ HŌ NI KANSURU SHOMONDAI [ISSUES IN THE LAW OF CIVIL EXECUTION] 319-22 (1961) (discussing the merits and demerits of clearance prices as a means of obtaining better results from judicial auctions, and making the point that "when ordinary bidders freely participate in an auction, and it emerges that no bids have been made, this indicates that the auction property is not attractive to bidders at the stated clearance price, and it is sufficient to set a new auction date and to lower the price. But when the auction proceedings are controlled by one segment of 'brokers' who are intentionally obstructing their progress, and a new auction is inappropriately forced due to a lack of bids, adopting the normal practice of lowering the auction price will only result in delay of the auction proceedings and artificially depress the auction price."); see generally Bennett, *Civil Execution*, *supra* note 93 (providing an account of the background to the 1966 reform of the bailiff system).

¹¹⁵ See Bennett, *Civil Execution*, *supra* note 93. In a related reform, in 1979, the Civil Execution Act was amended to promote auction by sealed bids submitted by post. See Bennett, *Clash of Titles*, *supra* note 94, at 295; Minji shikkō hō [Civil Execution Act], Law No. 4 of 1979, art. 64.

¹¹⁶ See *Binyū v. Kokumin kin'yū kōko*, 53 MINSHŪ 1899 (Sup. Ct., Grand Bench, Nov. 24, 1999).

¹¹⁷ See Frank G. Bennett, Jr., *Building Ownership in Modern Japanese Law: Origins of the Immobile Home*, 26 L. JAPAN 75, 75 (2000) [hereinafter Bennett, *Building Ownership*].

¹¹⁸ See, e.g., *Ōsenchikku K.K. v. Goyō kensetsu K.K.*, 59 MINSHŪ 356 (Sup. Ct., First Petty Bench, Mar. 10, 2005).

¹¹⁹ See, e.g., MINPŌ arts. 388 & 389 (providing for the disposition of an unencumbered building standing on hypothecated land subjected to auction proceedings, where the building was constructed before and after the attachment of the hypothec respectively); *Tōyō bussan K.K. v. Fukutoku Ginkō K.K.*, 48

possession and the separate ownership of buildings) can give rise to adverse selection problems (because of the *possibility* that such a claim might exist), depressing the purchase price of all properties.¹²⁰ A 1979 reform sought to limit the damage caused by this and other forms of guerrilla security by providing the result of an onsite bailiff's inspection to bidders.¹²¹

Another difficulty arose from the special treatment of certain leases. Until 2003, Civil Code section 395 gave short-term leasees a super-priority over pre-existing hypothecs.¹²² This legal toehold could be used by a late-coming lender to stall proceedings for the realization of collateral, with a view to negotiating a settlement with the first-priority secured party.¹²³ Obstructive leases of this kind, in contrast to ordinary leases for occupation, were invariably registered against the land or building to which they applied.¹²⁴ Registration of a lease requires the specific consent of the property owner,¹²⁵ and a solvent property owner bargaining at arm's length will not ordinarily permit registration.¹²⁶ When a lease is used to obstruct the realization of collateral, however, the owner has no real stake in the property, and registration provides documentary proof to the lessee in his

MINSHŪ 1005 (Sup. Ct., First Petty Bench, May 12, 1994) (concerning an eviction proceeding against an illegal structure standing on hypothecated land). The impact of the separate settlement of land and building ownership interests extends beyond the field of secured claims. *See, e.g.*, Risai toshi shakuchi shakuya rinji shori hō [Land Lease and Building Lease Urban Disaster Interim Response Act], Law No. 13 of 1946 (including the establishment of special framework procedures to encourage and support bargaining between landowners and the owners of buildings destroyed by natural disasters and other causes of mass destruction). This feature of the Japanese property system may be characterized as an "anti-commons" as defined in Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

¹²⁰ *See generally* George Akerloff, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (providing an account of adverse selection behavior in markets characterized by asymmetric information).

¹²¹ Minji shikkō hō [Civil Execution Act], Law No. 4 of 1979, art. 57; *see* Bennett, *Clash of Titles*, *supra* note 94, at 295, 301-04.

¹²² MINPŌ arts. 395, 602, *as revised by* Tanpo bukken oyobi minji shikkō seido no kaizen no tame no minpōtō no ichibu o kaisei suru hōritsu [Act to Partially Amend the Civil Code and Other Laws for the Purpose of Improving Secured Claims and Civil Enforcement], Law No. 156 of 2003, art. 1 [hereinafter Civil Code Leases Revision] (before amendment, leases of up to 3 years with respect to a building, and 5 years with respect to land, were protected against a subsequently registered hypothec for the remaining term of the lease).

¹²³ *See* Bennett, *Clash of Titles*, *supra* note 94, at 288-92.

¹²⁴ Watahiki Mariko, "Keibaiya", "sen'yūya", *taiji wa seikō shita ka?* [Has the Extermination of the "Auction Racketeer" and "Occupation Racketeer" Pests Been Successful?], 927 JURISUTO 64, 64-65 (1989).

¹²⁵ Nakao v. Shioda, 27 DAIHAN MINROKU 1378 (Grand Ct. Jud., July 11, 1921).

¹²⁶ Note that land lease interests are an exceptional case, because they are logically necessary to support the separate ownership of buildings, a peculiar feature of the Japanese property system. *See infra* notes 119-120 and accompanying text; *see generally* Bennett, *Building Ownership*, *supra* note 117 (providing an account of the historical development of separate ownership of buildings under Japanese law and of the role played by leases in that context).

challenge to the rights of the secured party.¹²⁷ Registered Section 395 leases have been used as a legal strategy for obstructing the realization of collateral since the inception of the Civil Code.¹²⁸

Opportunistic use of short-term leases became a significant issue for the finance community during Japan’s recent period of rapid growth.¹²⁹ But embedded as this protection was in the property provisions of the Civil Code, it took several decades for the courts to formulate a telling remedial response to the Section 395 super-priority.¹³⁰ It was finally abolished by statute, in a revision to the Civil Code passed in 2003.¹³¹

The availability of numerous *ex post* strategies for the frustration of enforcement efforts, particularly in the period before the Civil Execution Act of 1979, had a substantial impact on the value of collateral under a Civil Code hypothec.¹³² During the period of rapid economic growth, this prompted transactional innovation by lenders seeking more reliable forms of security (a development reflected in contemporary scholarship).¹³³ These efforts were met with judicial and legislative responses aimed at stabilizing the commercial environment, by curbing creditor opportunism—specifically contractual forfeiture—in the real estate sector.¹³⁴ But the first type of transaction to go through this cycle of innovation and reform, discussed below, was driven by frustration over the terms of the Civil Code property rules themselves, quite apart from difficulties in enforcement.

¹²⁷ Watahiki Mariko, *supra* note 124, at 64.

¹²⁸ See UCHIDA TAKESHI, TEITŌKEN TO RIYŌKEN [HYPOTHECS AND THE RIGHT OF USE] 108-10 (1983).

¹²⁹ See generally Bennett, *Clash of Titles*, *supra* note 94 (providing an account of the abusive use of Section 395, and of judicial and legislative efforts to control it). Cf. UCHIDA TAKESHI, *supra* note 128 (providing Uchida Takeshi’s published doctoral thesis).

¹³⁰ *Binyū v. Kokumin kin’yū kōko*, 53 MINSHŪ 1899 (Sup. Ct., Grand Bench, Nov. 24, 1999) (in a case of illegal occupation under an invalid lease, holding that a hypothecated lender may sue in his own name and interest, in advance of judicial sale, for the eviction of persons who are in occupation for the purpose of obstructing the realization of security).

¹³¹ Civil Code Leases Revision, *supra* note 122, art. 1.

¹³² See Watahiki Mariko, *supra* note 124.

¹³³ See, e.g., TSUBAKI TOSHIO, *supra* note 66; YONEKURA AKIRA, JŌTO TANPO NO KENKYŪ [A STUDY OF JŌTO TANPO] (1976); YONEKURA AKIRA, JŌTO TANPO (1978); YOSHIDA MASAMI, JŌTO TANPO (1979).

¹³⁴ See Takuchi tatemono torihikigyō hō [Real Estate Brokerage Act], Law No. 176 of 1952, art. 43(2) (prohibiting licensed real estate brokers from taking ownership as security where more than 30% of the purchase price has been paid).

III. INNOVATIVE REVOLVING CREDIT TRANSACTIONS CHALLENGED THE DEBTOR'S EQUITY BY AVOIDING MAINSTREAM ENFORCEMENT PROCEDURES FOR SECURED CLAIMS

As originally drafted, the Civil Code provides a single non-possessory security interest applicable to real estate, in the form of the hypothec, defined in Sections 369 through 398.¹³⁵ This interest is intended to support a single advance of funds and cover the principle outstanding plus a maximum of two years' accrued interest; it cannot be used to cover future advances to the debtor.¹³⁶ Accordingly, the hypothec is unsuitable for backing a revolving credit arrangement, in which the creditor makes periodic advances to the borrower under a series of promissory notes. To fill this common need, the commercial community resorted to a complex transaction, the name of which translates literally as provisional registration of a "preliminary contract for substitute performance subject to a suspensive condition."¹³⁷ As this name may suggest to those trained in the common law, it is an attempt to fashion something resembling a defeasible fee, using the Japanese property registers and contract provisions of the Civil Code as raw materials.¹³⁸ Because of this similarity in conceptual structure, this interest will be referred to in the discussion below as a "mortgage by registration."

The mechanics of a typical transaction of this kind operated roughly as follows. In support of the loan agreement, the debtor put his seal to a contract for the conveyance of real estate to the creditor, with a provision that the conveyance would become final upon the failure of the debtor to pay sums due to the creditor. Together with other documents required to complete a transfer of ownership, this contract of conveyance was used as the basis for a "provisional registration" (*kari tōki*) on the property register. The debtor retained ownership of the property, but the creditor's claim was now protected against subsequent interests that might attach to it. In the event of default, the creditor filed suit to establish the fact of nonpayment and obtained an attachment order, which he could then use to convert the "provisional registration" to a final registration, establishing full ownership.¹³⁹

¹³⁵ MINPŌ arts. 369-398.

¹³⁶ MINPŌ arts. 369, 375; see COMMENTARIES ON CIVIL CODE PRECEDENT, *supra* note 28.

¹³⁷ Haley, *supra* note 5, at 133 (providing translation).

¹³⁸ See generally Haley, *supra* note 5 (providing an account of the preliminary contract for substitute performance subject to a suspensive condition).

¹³⁹ For a detailed description of the mechanics of the transaction, see *id.* at 138-39. For the specific registration requirements, see SHIHŌ-SHOSHI SETSUREI & ZUKAISHIKI "MIRUDAKE" FUDŌSAN TŌKI

Like the *jōto tanpo*, the terms of a mortgage by registration were fixed by the contract between the parties and could thus be extended to cover multiple obligations arising over time, including notes acquired from other creditors.¹⁴⁰ Recognition of these arrangements in the courts brought about a surge in their use.¹⁴¹ While this filled the immediate need for a means of securing revolving lines of credit, the structure of the mortgage by registration positively encouraged creditor overreaching.

Because it took the form of a contract of sale, a mortgage by registration did not provide a means of stating the value to be secured on the register.¹⁴² While the parties could in theory negotiate a formula for calculating the extent of the creditor’s claim (an anti-forfeiture clause) between themselves, in practice there was little incentive for them to do so. Negotiation over mortgage terms is premised on the risk of insolvency. Other potential lenders would normally assume that a mortgage by registration had no ceiling and contained no anti-forfeiture clause, because there was no systematic means of disclosing either.¹⁴³ An anti-forfeiture clause (or even a ceiling on the extent of the security) would therefore have no value to the borrower as a means of reserving equity in the property to support advances by other lenders. The sole benefit to the borrower of any such limitation (in this specific case of mortgages by registration) would be its value to himself in the event of his own insolvency—which would of course be zero, since the borrower would expect any remaining equity to be seized by attachment creditors in that event.

Accordingly, borrowers beyond a certain risk threshold willingly signed on to revolving credit agreements that did not provide protection against forfeiture, and in a large number of transactions seen by the courts, the value of the collateral upon default significantly exceeded the amount owing to the secured creditor (i.e. the mortgagee by registration).¹⁴⁴ In response, the courts adopted a policy of denying enforcement of the

SHOSHIKI-SHŪ (GE) [CONVEYANCING AGENT PRECEDENTS AND ILLUSTRATIONS “AT A GLANCE”, REAL ESTATE REGISTRATION FORMS (PART 2)] 440-442 (2007) [hereinafter CONVEYANCING FORMS].

¹⁴⁰ Suzuki Rokuya, *Karitōki tanpo hō zakkō* [Reflections on the Mortgage by Registration], 880 KIN’YŪ HŌMU JIJŌ 29 (1979) (discussing the viability of rotating credit security arrangements cast as mortgages by registration following the passage of the Mortgages Act 1978).

¹⁴¹ TSUBAKI TOSHIO, *supra* note 66, at 326 (indicating that 22 cases involving mortgages by registration were decided by the courts between the first judgment characterizing the arrangement as a security interest, and the most recent data available to the author of the work at the time of writing, in 1973—including 4 further decisions by the Supreme Court).

¹⁴² For sample register entries, see CONVEYANCING FORMS, *supra* note 139.

¹⁴³ See generally Ackerloff, *supra* note 120 (providing an account of adverse selection behavior in markets characterized by asymmetric information).

¹⁴⁴ See TADAKA HIROTAKE, *supra* note 4, at 163-64.

creditor's interest where the disparity between the debt owed and the value of the collateral was extreme, on the grounds of "public order and morality" (*kō no chitsujo mata wa zenryo no fūzoku*).¹⁴⁵

A. *Legislation Sought to Impose Mainstream Enforcement Procedures on Revolving Credit Arrangements*

In an attempt to address these issues, the Diet intervened, adding an entire subsection to the Civil Code with specific provisions covering a new "root hypothec" interest.¹⁴⁶ This registrable interest provides umbrella security for miscellaneous obligations, including promissory notes and other rights to payment acquired by assignment, up to the point of an act of bankruptcy.¹⁴⁷ To permit the borrower to signal the extent of the security to third parties, the maximum amount to be covered is specified at the time of registration.¹⁴⁸ At the back end, the root hypothec interest relies on the same procedures for judicial auction and distribution of proceeds as the standard Civil Code hypothec.¹⁴⁹

This carefully crafted reform was enacted by the Diet in 1971,¹⁵⁰ but it did not achieve the degree of adoption hoped for by its drafters; many businesses continued to use the mortgage by registration that the root hypothec was intended to replace.¹⁵¹ One reason for this was then-existing obstacles to the realization of hypothec claims.¹⁵² Despite the risk of forfeiture, and apart from its utility in securing future advances, the mortgage by registration had significant advantages for borrowers. Compared with the standard Civil Code hypothec, it allowed borrowers to make a credible commitment not to obstruct collection efforts in the event of default; and as compared with *jōto tanpo*, it exposed the borrower to less risk during the term of the loan, because he retained legal title to the collateral until the instant of enforcement. However, the forfeiture and

¹⁴⁵ MINPŌ art. 90. Article 90 provides as follows: Legal acts for purposes that conflict with public order and morality are void. *Id.* (author's translation); see also TADAKA HIROTAKA, *supra* note 4, at 163-64.

¹⁴⁶ Minpō no ichibu o kaisei suru hōritsu [Act to Partially Revise the Civil Code], Law No. 99 of 1971.

¹⁴⁷ MINPŌ art. 398-2.

¹⁴⁸ *Id.* art 398-2, para. 1.

¹⁴⁹ See MINPŌ arts. 369, 398-2; Minji shikkō hō [Civil Execution Act], Law No. 4 of 1979, arts. 43-92, 181.

¹⁵⁰ Minpō no ichibu o kaisei suru hōritsu [Act to Partially Revise the Civil Code], Law No. 99 of 1971.

¹⁵¹ See Suzuki Rokuya, *supra* note 140, at 30.

¹⁵² See Haley, *supra* note 5, at 138-39 (providing a contemporary description of obstacles to the realization of hypothecated collateral).

signaling problems were also inherent to its structure, and these were naturally unaffected by the 1971 legislation.¹⁵³

B. Opportunism Persisted, and Courts Strove to Protect the Debtor's Equity Through Ground-Breaking Precedent

In an effort to address the most glaring result of bargaining failure (i.e. mismatches between the value of collateral and the sums owed to the creditor), in 1967 the Supreme Court signaled approval of lower court efforts to restrict the forfeiture remedy,¹⁵⁴ leading to a later definitive judgment of the Grand Bench, handed down on October 23, 1974.¹⁵⁵ The 1974 decision outlined two alternative remedial tracks: execution by sale and direct execution. In execution by sale, the borrower's right to redeem would be extinguished by sale to a third party, but he would then have recourse to the lender for a share of the proceeds.¹⁵⁶ In direct execution, the borrower could withhold his consent to conversion on the register until the creditor offered up a reasonable accounting of the borrower's equity.¹⁵⁷ In the latter case only, the debtor's right to recover his property was, as in English law, protected up to the instant of foreclosure by treating the accounting and the transfer of ownership as reciprocal, or "simultaneous," obligations.¹⁵⁸

C. Non-Code Revolving Credit Arrangements Were Eliminated By Statute by Imposing a Special Judicial Foreclosure Proceeding

The Supreme Court decision of 1967 established the borrower's right to an accounting. The Diet subsequently adopted and extended this judicial framework, with the passage of the Act Concerning Provisional Registration

¹⁵³ In effect, the new legislation forced parties to choose one advantage (a bargained-for limitation on the extent of security) but abandon another (reliable enforcement procedures).

¹⁵⁴ Decision of the Supreme Court, 21 MINSHŪ 2430, (First Petty Bench, Nov. 16, 1967). The early phase of this series of cases was the subject of an article published by Professor Haley in 1972. Haley, *supra* note 5 (providing an account of contemporary case law concerning the "preliminary contract for substitute performance subject to a suspensive condition", or "mortgage by registration", as it is referred to in the main text of this Article).

¹⁵⁵ Mikami v. Kobayashi, 28 MINSHŪ 1473 (Sup. Ct., Grand Bench, Oct. 23, 1974).

¹⁵⁶ *Id.* at 1482.

¹⁵⁷ *Id.*

¹⁵⁸ Haley describes public auction as the favoured means of disposition. Haley, *supra* note 5, at 145-46. While this was the case in 1972, the courts later concluded that direct foreclosure provided them with a better capacity to assure a fair accounting of the debtor's interest. See TAKAGI ET AL., MINPŌ KŌZA 3: TANPO BUKKEN [COURSE IN THE CIVIL CODE, VOLUME 3, SECURITY INTERESTS] 295-96 (revised ed. 1980).

Security Contracts in 1978 (“Mortgages Act 1978”).¹⁵⁹ To assure that the borrower’s equity in the collateral is protected, the Act requires the lender to notify the debtor of his intention to foreclose, together with a statement of the proposed accounting, two months before converting his provisional registration of ownership to a main registration entry.¹⁶⁰ The right to foreclosure arises two months after this notice,¹⁶¹ thereby providing the debtor with an opportunity to object and open negotiations if the proposed accounting amount is unacceptable. The Act also introduces an explicit requirement that the mortgagee obtain the consent of holders of subordinate interests, if any, as a precondition of asserting a right to title.¹⁶² Without such consent, the mortgagee’s remedy is limited to a judicial auction and accounting.

The Mortgages Act 1978 has virtually eliminated mortgages by registration from the transactional universe, largely because the legislation, in a parting shot at a recalcitrant industry, specifically excludes revolving credit arrangements from the scope of perfection.¹⁶³ Encumbered with additional procedural requirements, with significantly reduced flexibility, and stripped of the possibility of forfeiture, mortgage by registration lost its lustre. Lenders turned either to one of the forms of hypothec defined in the Civil Code or to *jōto tanpo*, which was not affected by the restrictions imposed by this legislation.

IV. JUDICIAL PROTECTION OF THE DEBTOR’S EQUITY IN *JŌTO TANPO* TRANSACTION REMAINS PROBLEMATIC

The *jōto tanpo* against real property is the oldest of Japan’s non-Code security interests. It offers a simplified means of enforcing security, through a direct claim to title in the collateral. It must be said that the scope for its use is narrower today than it once was. As discussed above,¹⁶⁴ since the introduction of the root hypothec, it has been possible to support revolving credit arrangements without resorting to non-Code security interests; and improvements to judicial auction procedures have increased the utility of the mainstream interests. The Civil Code interests offer greater flexibility;

¹⁵⁹ Kari-tōki tanpo keiyakutō ni kansuru hōritsu [Act Concerning Provisional Registration Security Contracts], Law No. 78 of 1978 [hereinafter Mortgages Act 1978].

¹⁶⁰ *Id.* art. 2.

¹⁶¹ Proof of the notice and its content can be made by use of “contents proven post”, under which the Post Office retains a true copy of the correspondence, coupled with certified delivery. See Yūbin hō [Postal Act], Law No. 165 of 1947, arts. 62 & 63.

¹⁶² Mortgages Act 1978, *supra* note 159, art. 4.

¹⁶³ *Id.* art. 14. See COMMENTARIES ON CIVIL CODE PRECEDENT, *supra* note 28, at 270.

¹⁶⁴ See *supra* Part III.

because *jōto tanpo* operates against bare title (as a nominal transfer of ownership) the property must be free of other liens at the time of creation—a scenario uncommon among the failing debtors most likely to expose themselves to the risks associated with *jōto tanpo*. Nonetheless, insofar as *jōto tanpo* remains a recognized security device, is found in commerce, and continues to generate litigation, it continues to absorb limited judicial resources, and remains a potential target for further statutory reform.

As noted above, the foundation of security arrangements in common law jurisdictions originally lay in paper drafted by the parties.¹⁶⁵ Bearing in mind the differing procedural contexts, comparison of holdings relating to *jōto tanpo* with judicial experience in common law jurisdictions can help both to highlight the constraints facing Japanese courts and to raise the possibility of an alternative approach to these transactions. Below, following a brief overview of the modern rules relating to *jōto tanpo* in real property, this Article will discuss three Supreme Court cases relating, respectively, to third-party dispositions, mortgagees in possession, and an analogue to the common law “clogs and fetters” doctrine.¹⁶⁶

One procedural point that should be noted at the outset is that the “equity of redemption”¹⁶⁷ does not exist (or at least has a very different meaning) in the Japanese context. Properly speaking, the term signifies the postponement, by the court, of a valid transfer of title made with the intention of offering it as security. This postponement is imposed by forcing all transactions that the court deems to constitute security arrangements (mortgages) through mandatory foreclosure proceedings.¹⁶⁸ Courts in Japan do not have the power to impose a comprehensive procedure in this way. As in other civil law jurisdictions, the remedies available for a given secured claim are attached to the specific formal character of the interest at stake. In the case of attachment or the exercise of a hypothec, collateral is realized by judicial auction,¹⁶⁹ while in a case of illegal occupation, the owner’s remedy is an immediate action for eviction.¹⁷⁰ For this reason, many of the familiar equitable pronouncements by common law courts in respect of the equity of

¹⁶⁵ See MURPHY, ROBERTS & FLESSAS, *supra* note 97, at 203-04; *see also* note 97 and accompanying text.

¹⁶⁶ *See, e.g.*, Howard v. Harris, (1683) Eng. Rep. 609, [1558-1774] All. E.R. 609 (Lord Keeper’s Court); Santley v. Wilde, [1895-1899] All. E.R. 1338, 2 Ch. 747 (A.C.) (1899); *see also* Tracht, *supra* note 68, at 600.

¹⁶⁷ BLACK’S LAW DICTIONARY 541 (6th ed. 1990).

¹⁶⁸ *See, e.g.*, Stevens v. Theatres Ltd., (1903) 1 Ch. 857 (U.K.).

¹⁶⁹ Minji shikkō hō arts. 43-92.

¹⁷⁰ *Id.* arts. 168-70.

redemption have no context in Japan.¹⁷¹ This procedural difference is an important factor in the use and impact of *jōto tanpo* and other non-Code interests within the transactional system.

Under current law, the real property *jōto tanpo* transaction takes the same form that it did in 1899. A promise to reconvey the property to the borrower upon repayment is recited as part of a contract of sale, and this is used as the basis for registering ownership in the lender.¹⁷² The contract of sale must indicate the “cause of registration” (*tōki no gen'in*), which must also be recited in the power of attorney offered by the owner.¹⁷³ In an orthodox transaction negotiated at arm’s length, the cause of registration will be listed as “*jōto tanpo*.”¹⁷⁴ The obligation to restore the property upon repayment is discoverable on the face of the register in this case, but there is no means of registering the specific terms of the reconveyance undertaking. The creditor becomes the legal owner, and the collateral is vulnerable both to third party claims arising from bankruptcy of the lender and to attachment proceedings against him.¹⁷⁵ Upon default by the borrower, the lender is legally entitled to realize the collateral, either by claiming it directly or by selling to a third party.¹⁷⁶

Supreme Court decisions handed down in 1968 (foreclosure by sale contracts) and 1971 (direct foreclosure contracts) have established the well-intentioned principle that the debtor in a *jōto tanpo* arrangement is entitled to demand an accounting from the creditor if the collateral is worth more than the amount in default.¹⁷⁷ Depending on one’s favored legal theory, the *jōto tanpo*-secured lender might be said to hold title on trust,¹⁷⁸ or subject to

¹⁷¹ See, e.g., *Batty v Snook*, 5 Mich 231, 239-240 (1858) (“The mortgagor may release equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear on him for that purpose by the creditor. But it cannot be done by a contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in the contract, without an abandonment by the court of those equitable principals it has ever acted on in relieving against penalties and forfeitures.”)

¹⁷² See FUDŌSAN TŌKI JITSUMU [REGISTRATION PRACTICE] 389-91 (3d ed., Ministry of Just. Civ. Div. ed., 1978).

¹⁷³ See *id.*

¹⁷⁴ There are cases in which the *jōto tanpo* is not visible on the register. See, e.g., *Imai v. Takechi*, 48 MINSHŪ 414 (Sup. Ct., Third Petty Bench, Feb. 22, 1994).

¹⁷⁵ See, e.g., [name undisclosed] K.K. v. *Seiri kaishū kikō K.K.*, 1225 HANREI TAIMUZU 187 (2007) (Sup. Ct., Second Petty Bench, Oct. 20, 2006).

¹⁷⁶ The permissible means of realizing the collateral may be limited in the contract between the parties, although this does not affect the secured party’s legal power of disposition.

¹⁷⁷ *Izumi v. Kanai*, 22 MINSHŪ 509 (Sup. Ct., First Petty Bench, 1968); *Shinkai v. Takahashi*, 25 MINSHŪ 208 (Sup. Ct., First Petty Bench, 1971). The accounting requirement replaced the previous rule, under which security agreements were voided entirely where the disparity between the value of the collateral and the debt owed was excessively great.

¹⁷⁸ See *TADAKA HIROTAKA*, *supra* note 4, at 126-32.

publicity,¹⁷⁹ or as a façade,¹⁸⁰ or in common with the debtor,¹⁸¹ or subject to the debtor’s expectation interest.¹⁸² Unfortunately, of course, none of these elaborate concepts are visible on the register; the secured party is shown simply as “owner” of the property. If the creditor transfers his interest to a third party before settling accounts with the debtor, the practical question arises whether the debtor’s right to redeem can be asserted against a transferee taking with notice. This is the subject of the following case.

A. *Imai v. Takechi: A Third-Party Purchaser from the Jōto Tanpo Mortgagee Takes Good Title Regardless of Notice, if the Transfer is Supported By Registration*

The case of *Imai v. Takechi*¹⁸³ turns on a tangled and long-burning family dispute involving siblings and spouses of two sisters Imai.¹⁸⁴ In 1957, Takechi Kazuo, husband to Hanako (née Imai), borrowed 520,000 yen from Wada Tsuneo, the husband of Hanako’s younger sister.¹⁸⁵ The loan was to be repaid in interest-free monthly installments of 5,000 yen over a period of eight years and seven months.¹⁸⁶ The loan supported the purchase of land and a house, and Takechi secured his promise to repay by immediately transferring ownership of the property to Wada, with a reciprocal undertaking that ownership would be restored upon full repayment.¹⁸⁷ This conveyance was duly registered, with “gift” as the cause of registration.¹⁸⁸ For reasons not given in the judgment, in May of 1963, eldest brother Imai Ken’ichiro and the mother of the Imai clan moved into the property with Takechi and Hanako.¹⁸⁹ The two families did not get along. Takechi moved out, ceasing payment on the loan from Wada (husband of Hanako’s younger sister), and leaving some 150,000 yen outstanding on the loan.¹⁹⁰

Over a decade later, in 1977, Takechi filed suit seeking the eviction of Imai Ken’ichiro from the property and restoration of ownership to his own name.¹⁹¹ The court refused to remove Wada Tsuneo’s ownership from the

¹⁷⁹ See *id.* at 140-41 (citing the work of Ishida Bunjirō).

¹⁸⁰ See *id.* at 141-42 (citing the work of Hamagami Norio).

¹⁸¹ See *id.* at 146 (citing the work of Suzuki Rokuya).

¹⁸² See *id.* at 146-47 (citing the work of Takeuchi Toshio).

¹⁸³ *Imai v. Takechi*, 48 MINSHŪ 414 (Sup. Ct., Third Petty Bench, Feb. 22, 1994).

¹⁸⁴ See *id.* at 421.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 421-22.

¹⁸⁸ *Id.* at 422.

¹⁸⁹ *Id.* at 423.

¹⁹⁰ See *id.* at 435.

¹⁹¹ *Id.* at 424.

register, on the grounds that the original loan was still outstanding; nevertheless, the court acknowledged that Takechi was entitled to the eviction order as the equitable owner under a *jōto tanpo*.¹⁹² The court issued the order, removing Imai Ken'ichiro from the premises; Takechi resumed occupation.¹⁹³

Two more years passed, and on May 10, 1979, after Imai Ken'ichiro prevailed upon Wada Tsuneo for assistance against his other brother-in-law, the latter sent a notice to Takechi, by contents proven post,¹⁹⁴ of his intention to settle accounts and foreclose Takechi's interest in the property.¹⁹⁵ The letter was returned undelivered, but on August 29, 1979, Wada Tsuneo proceeded to transfer his ownership interest in the house and land (still occupied by Takechi) to Imai Ken'ichiro.¹⁹⁶ This transaction was entered on the register as a "gift" two days later.¹⁹⁷ No accounting was made to Takechi following the transfer, but Takechi evidently caught wind of these machinations: on August 20, 1981, he paid the arrears under the loan (which with statutory interest had more than doubled to a sum of 383,013 yen) into court escrow as his redemption payment.¹⁹⁸ In response, Imai Ken'ichiro sued Takechi for eviction on the grounds that, as registered transferee, Imai Ken'ichiro had acquired ownership of the property free of Takechi's right of redemption.¹⁹⁹

I. The Borrower, Not the Lender, is Vulnerable to Third Party Transfers in a Jōto Tanpo Relationship

As the two acts of registration in this case illustrate, a *jōto tanpo* agreement conveys an alienable ownership interest to the lender. It resembles an equitable mortgage in common law jurisdictions—but with the "equitable" and "legal" positions reversed. Rather than an equitable right in the lender that may be vulnerable to third-party claims,²⁰⁰ under *jōto tanpo* it is the borrower who holds an uncertain, "equitable" claim for reconveyance. Modeling the *jōto tanpo* structure in these terms, the lender would be said to hold the legal estate in the land on trust for the borrower. Upon disposition

¹⁹² *Id.*

¹⁹³ *Id.* While this lawsuit must obviously have been a cause of considerable stress within the family, it is not clear whether Takechi's marriage to Hanako fell apart before or after it was filed.

¹⁹⁴ See *supra* note 161; see also Yūbin hō [Postal Act], Law No. 165 of 1947, arts. 62 & 65.

¹⁹⁵ Imai v. Takechi, 48 MINSHŪ 414, 426 (Sup. Ct., Third Petty Bench, Feb. 22, 1994).

¹⁹⁶ *Id.* at 426-27.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 436.

¹⁹⁹ *Id.* at 421-22.

²⁰⁰ See *Stevens v. Theatres Ltd.*, (1903) 1 Ch. 857, 863-64 (U.K.)

by the trustee of the legal estate to a third party, the borrower, as beneficiary, would be entitled to defeat the third party's title and exercise his right to redeem.²⁰¹ Under equitable principles familiar in common law jurisdictions, purchasers for value without notice of the trust would be protected, but in this case, the plaintiff Imai Ken'ichiro took with notice (and was not a purchaser, to boot).²⁰²

2. *Foreclosure Proceedings and the Doctrine of Notice Are Complementary Instruments of Judicial Discipline*

Secured transactions of this precise form are not a feature of the English conveyancing environment. However, prior to England's Law of Property Act 1925, a similar posture could arise in the context of foreclosure proceedings.²⁰³ *Stevens v. Theatres, Ltd.*²⁰⁴ represents such a case. Classic foreclosure proceeds in three phases: 1) the lender first petitions the court for foreclosure unless the borrower pays all sums due by a particular date; 2) if the borrower fails to pay, the court then issues an order of *foreclosure nisi*, which confirms the failure to pay and places the property under the court's jurisdiction; and 3) if at the end of this interval (typically six months) payment is still not forthcoming, the mortgagee may obtain an order of *foreclosure absolute*, which in principle entirely severs the interest of the borrower. As had become common practice by the time of the *Stevens* decision, the mortgage in that case gave the mortgagee an explicit, contractual power of sale.²⁰⁵ The sole issue in the case was whether, in the administrative interval between *foreclosure nisi* and *foreclosure absolute*,²⁰⁶ the mortgagee had authority to sell the property without leave of the court. The court held that while the mortgagee had the legal power to dispose of the mortgage, this was subject to an equitable requirement to obtain leave of the court before sale.²⁰⁷ The conveyance was permitted to stand, on the condition that it be shown that the purchaser took without notice of the still-pending foreclosure proceeding.²⁰⁸ Only when that was confirmed would

²⁰¹ See, e.g., *id.*

²⁰² See, e.g., JILL E. MARTIN, HANBURY & MARTIN: MODERN EQUITY 18 (15th ed. 1997).

²⁰³ Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, §§ 101 & 103 (U.K.).

²⁰⁴ *Stevens v. Theatres Ltd.*, (1903) 1 Ch. 857 (U.K.).

²⁰⁵ KEVIN GRAY, ELEMENTS OF LAND LAW 629-30 (1987).

²⁰⁶ Both in the original English judicial design, and in the statutory form found in many of the American states, this interval has been explained as providing a breathing space within which the parties can attempt to resolve information asymmetries and restructure their commercial relationship. See generally Tracht, *supra* note 68.

²⁰⁷ *Stevens v. Theatres, Ltd.* (1903) 1 Ch. 857, 863-64 (U.K.).

²⁰⁸ *Id.*

the purchaser receive good title, and the mortgagor a money claim against the mortgagee for any surplus.²⁰⁹

3. *The Supreme Court's Holding: Registration Determines All*

If the doctrine of notice used in *Stevens* were applied to a case like *Imai v. Takechi*, the right to redemption enjoyed by the borrower (Takechi) would be protected against third parties taking with notice of the interest. In the event, however, the trial court judge ignored Imai's evident knowledge of the unregistered security interest, reasoned that the attempted communication of May 10, 1979 was sufficient to cut off Takechi's legal right to the property, and held for Imai.²¹⁰ The Takamatsu High Court applied the doctrine of notice and reversed, ordering that title be settled on Takechi.²¹¹ The Supreme Court again reversed, holding that Takechi's claim to the property was conclusively severed when Imai Ken'ichiro took the transfer from Wada as registered owner, regardless of knowledge.²¹² This case firmly establishes that actual notice is irrelevant in a *jōto tanpo* transaction; the title of a third-party transferee, if taken in reliance on the register, is unassailable.

The court gives two reasons for this judgment: "Not only would a contrary holding destabilize the chain of title, but it would give rise to the risk that a creditor, who may not be in a position to identify a *mala fide* transferee with notice, will suffer an unforeseeable loss."²¹³ This holding has been the target of criticism.²¹⁴ It is indeed difficult to see how limiting the right of redemption to third-party transferees with *actual* notice would unduly destabilize the chain of title, because such transferees can easily protect themselves by foregoing the purchase. Furthermore, because the debtor's challenge to the transfer is premised on the tender of monies due, the creditor would not be exposed to financial risk. The required adjustments would, at worst, be an inconvenience to the creditor, but would also reduce the burden of litigation by eliminating the need for a second action—such as a suit by Takechi against Wada to recover the value of his equity in the property.

²⁰⁹ *Id.* ("That the mortgagee could not exercise his power of sale without the leave of the Court so as to give a good title to any one other than a purchaser for value without notice. But this is not to preclude the mortgagee from setting up any other equity he may have in any action brought by the mortgagor.")

²¹⁰ *Imai v. Takechi*, 48 MINSHŪ 414, 420-28 (Sup. Ct., Third Petty Bench, Feb. 22, 1994).

²¹¹ *Id.* at 428-40.

²¹² *Id.* at 414-20.

²¹³ *Id.* at 416 (author's translation).

²¹⁴ *Imai v. Takechi*, 48 MINSHŪ at 420-28, *reprinted with commentary* in 888 HANREI TAIMUZU 114 (1995).

4. *Protecting Registered Transfers by the Jōto Tanpo Mortgagee Increases the Risk of Creditor Opportunism*

Japan’s limited form of title registration provides a firmer justification for the rule in this case. In jurisdictions such as Australia (since 1858),²¹⁵ Japan (since 1899),²¹⁶ and England (since 1925),²¹⁷ the equitable niceties of off-register transactions conflict with the objectives of registered title.²¹⁸ The guiding principles of such a system are commonly articulated to be three: 1) the *mirror principle* (entries on the register should provide a complete and correct view of legal interests); 2) the *curtain principle* (equitable interests should not affect the title acquired by the purchaser); and 3) the *insurance principle* (the state guarantees the accuracy of the register to the purchaser).²¹⁹

These principles are aimed at lowering the cost of conveyancing, by allowing buyers to evaluate the title of real estate by simply examining the register.²²⁰ The Japanese registration system has all of these characteristics except for the third. It is worth noting that the holding in *Imai v. Takechi*—that title received from a registered owner is never affected by an off-register *jōto tanpo* interest—reduces the demand for insurance by making transactions safer for the purchaser. It does so, however, only by shifting the risk to the borrower.

In England, courts have refused to recognize the mortgage by deposit of title deeds against registered land, on the grounds that to do so would violate the mirror principle.²²¹ This has effectively eliminated the equitable mortgage by deposit of title deeds from the registered conveyancing landscape in England and Wales.²²² In Japan’s *jōto tanpo*, as indicated above, the equitable and legal positions of borrower and secured party are reversed. The result is that the same strict adherence to the register has an

²¹⁵ Real Property Act, 1858, n. 15 (S. AUSTL. STAT.).

²¹⁶ Fudōsan tōki hō [Real Estate Registration Act], Law No. 24 of 1899.

²¹⁷ Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20 §§ 101, 103 (U.K.).

²¹⁸ See Pamela O’Connor, *Registration of Title in England and Australia: A Theoretical and Comparative Analysis*, in 2 MODERN STUDIES IN PROPERTY LAW 81, 94-95 (Elizabeth Cooke, ed., 2003).

²¹⁹ See, e.g., Katy Barnett, *The Mirror of Title Crack’d From Side to Side? The Amazing Half-Life of the Equitable Mortgage*, 14 AUSTL. PROP. L.J. 1, 2 (2007).

²²⁰ *Id.*

²²¹ *United Bank of Kuwait PLC v. Sahib*, [1997] Ch. 107 (1996) (U.K.). Such mortgages are recognized under Australian law. See Barnett, *supra* note 219, at 5-6.

²²² Jonathan Ross, *Solicitor’s Liability to Third Parties*, 151 NEW L.J. 960 (2001) (citing *Dean v. Allin & Watts*, [2001] All ER (D) 288 (2001) (U.K.)) (defendant law firm that recommended deposit of title deeds as means of security to an unrepresented lender in a loan transaction were held liable in negligence for the failure of the security, on the grounds that its ineffectiveness had been widely publicized).

opposite effect in Japan.²²³ The unrestricted power of sale sustains *jōto tanpo* as a viable non-Code, off-register security device, while the contrary rule (i.e. applying the doctrine of notice) would have marginally undermined the transaction, making the realization of collateral under *jōto tanpo* less certain.²²⁴

Thus, both English and Japanese courts favor strict adherence to a bright-line rule with respect to “off-register” interests, but with opposite effect. Due to differing commercial customs in the two jurisdictions, strict respect for the register in one case eliminates the off-register transaction, but in the other case it positively encourages it. Unfortunately, this offers considerable scope for opportunism, as illustrated by the following case.

B. Nakano v. Okamura: The Mortgages Act 1978 Foreclosure Procedure is Not To Be Applied to Analogous Transactions

On April 8, 1994, Nakano Kōju took a short-term loan in the amount of 33,000,000 yen from Okamura Shōhei.²²⁵ Their agreement provided for payment of interest at the rate of 2.5% per month, with a due date of June 7, 1994, plus a penalty of 40.004% per year in the event of late payment.²²⁶ The loan was secured by a root hypothec to the amount of 70,000,000 yen against land owned by Nakano, which Okamura duly registered.²²⁷ Nakano did not meet the contract deadline for repayment, but over time made payments totaling 4,856,000 yen, the last on January 31, 1995.²²⁸ At a meeting on May 2, 1995, Nakano implored Okamura not to initiate auction proceedings based on the hypothec.²²⁹ The two settled upon a forbearance until May 25, and Nakano provided Okamura with documents necessary to effect a transfer of the property into Okamura’s name on that date, with leave to sell to third parties, if timely payment was not made.²³⁰ Nakano again defaulted, and on May 26, Okamura registered the conveyance of the property, giving “substitute performance” as the cause of registration.²³¹

²²³ See *supra* Part IV(A)(1).

²²⁴ In effect, the Supreme Court decision in *Imai v. Takechi* provides the creditor with a certain means of exiting the bilateral monopoly in which he would otherwise be locked under the security arrangement.

²²⁵ Nakano v. Okamura, 1106 HANREI TAIMUZU 81, 83 (Jan. 15, 2003) (Sup. Ct. First Petty Bench, Sep. 12, 2002).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

After completing this transfer of legal ownership, Okamura again pressed Nakano for repayment of the loan, and on June 8, Okamura notified Nakano that he was willing to reconvey the property to him if payment were made by June 16.²³² In exchange for this one-week postponement, Nakano put his seal to a declaration waiving his equity in the property in the event of further default.²³³ Nakano defaulted again, but made a partial payment of 10,000,000 yen on September 15, which Okamura accepted.²³⁴

On December 24, 1995, Okamura made a final demand: payment of the total sum due under the loan (41,272,600 yen) by January 26, 1996, including a stipulation that the property would be immediately sold upon default.²³⁵ Nakano did not respond. On July 19, 1996, Okamura sold the property to a third party, Sano Nobuichi, who promptly registered his interest.²³⁶ Having lost his property, Nakano sued to avoid both the original transfer to Okamura and the Okamura-Sano sale and, in the alternative, for 100,000,000 yen as compensation for Nakano’s equitable interest in the property.²³⁷

This case turns on the characterization of the conveyance that Okamura registered on May 26, 1995. If the stated purpose for the registration of the transfer of title—“substitute performance”—is accepted, then the conveyance satisfied Nakano’s obligations under the loan, and Nakano had at that point surrendered all rights in the property.²³⁸ However, in the case, both parties subsequently behaved as if the loan obligation continued, and as if Okamura held title only as security. If the Nakano-Okamura transfer is treated as a *jōto tanpo*, the final sale to third party Sano is final, and Nakano’s only claim should be against Okamura for an accounting (assuming Nakano’s waiver of his equity to be invalid, as it appears to be).²³⁹

1. *The Mortgagor Sought to Impose Special Foreclosure Proceedings*

At trial, *neither* party characterized the transaction as *jōto tanpo*. Okamura relied on the documentation, claiming the original transfer was a

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 83-84.

²³⁶ *Id.* at 84.

²³⁷ *Id.*

²³⁸ MINPŌ art. 482. See Haley, *supra* note 5, at 135.

²³⁹ Izumi v. Kanai, 22 MINSHŪ 509 (Sup. Ct., First Petty Bench, 1968).

substitute performance for sums due.²⁴⁰ Nakano, for his part, argued that the documents for the original transfer, which were worded to take effect twenty-three days from the date of delivery, constituted a mortgage by registration (although it did not satisfy the formalities for that interest, and was not so registered).²⁴¹ On the theory that the Mortgages Act 1978 should be applied to the transaction, Nakano petitioned to set aside the original transfer, because Okamura had not given formal notice of an intention to exercise his interest two months before it was registered as a final transfer, as required by Section 2 of that Act.²⁴²

2. *The Form of a Jōto Tanpo Transaction Invites Ex Post Characterization of Its Function*

The facts of this case illustrate the exotic attraction of *jōto tanpo* in real estate as a tool for collections. In the interval between May 25 and September 15, 1995, the character of the transaction was truly ambiguous. Had Okamura sold the property during this period, evidence for treating the sale as a true substitute performance would be strong. The subsequent tender by Nakano, and its acceptance by Okamura, implies on the contrary that the agreement is a security arrangement. The potential for the lender in such an arrangement to play the market at the expense of the debtor is clear. The appeal to the Mortgages Act 1978 by Nakano's counsel reflects a proposal by some scholars that it be used to instilling a greater degree of formal discipline on *jōto tanpo* transactions.²⁴³ Unfortunately, this would not resolve ambiguities in the contractual paper, which is the potential source of opportunism illustrated by this case.

In the pleadings, it is difficult to be fully sympathetic toward the claim of either party. Okamura's claim is clearly disingenuous, given the clear evidence that he resumed collection efforts after the "transfer." For Nakano's part, his attempt to avoid the two transfers of ownership registered in the wake of his default appears to have little more than nuisance value. The Civil Code hypothec securing the original loan was extinguished by merger when Okamura took title, but this would be revived if the transfers to Okamura and to Sano were found to be void.²⁴⁴ If the hypothec remains

²⁴⁰ Nakano v. Okamura, 1106 HANREI TAIMUZU 81, 84 (Jan. 15, 2003) (Sup. Ct. First Petty Bench, Sep. 12, 2002).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ TADAKA HIROTAKA, *supra* note 4, at 313-15.

²⁴⁴ *Id.* at 85.

valid, the primary effect of Nakano’s petition would be to inconvenience the third party purchaser Sano, by invalidating his title.

The Tokyo High Court accepted Nakano’s position, and declared both transfers to be void.²⁴⁵ On appeal, the Supreme Court reversed. Classifying the original transfer as a *jōto tanpo*, the Court declared the sale to Sano effective and final, and remanded the case for further hearings on the accounting of Nakano’s remaining equity interest, if any.²⁴⁶

3. *The Supreme Court Declined the Invitation to Impose Special Foreclosure Proceedings on Jōto Tanpo Transactions*

This precedent prevents either party from using the Court as a tool for inflicting gratuitous damage on the other. On the other hand, the facts of this case do seem to invite the application of the Mortgages Act 1978 to *jōto tanpo* transactions. This would resolve the problem, separate from the transactional ambiguity referred to above, of disconnect between the realization of the collateral and the accounting made of the debtor’s interest. Despite the impact on Sano, adopting this approach could have a beneficial impact. As common law courts learned from long experience with unregistered mortgage practice, denying title to transferees is an effective means of chasing transactions under the protective umbrella of an orderly foreclosure procedure, where overreaching can be more effectively controlled.²⁴⁷ This is the aim of the analogous common law “clogs and fetters” doctrine, which imposes the formal foreclosure process on any transaction found to have the effect of creating a security interest in real estate.²⁴⁸ By refusing to apply the Mortgages Act 1978 by analogy even when no other viable option was contained in the pleadings, the Supreme Court pointedly closed the door on this pathway to a “clogs and fetters” doctrine based on existing procedural structures.

As in the case of *Imai v. Takechi*, the Supreme Court judgment in *Okamura v. Nakano* reflects the Court’s recognition of the constraints of the registration system. Holding *jōto tanpo* creditors to the procedural requirements of a statutory mortgage by registration would require abandonment of the curtain principle, a cost that the Court is unwilling to incur. Given that imperative, and given the persistence of *jōto tanpo*

²⁴⁵ *Id.* at 84. The official report of the case does not mention the trial court result.

²⁴⁶ *Id.*

²⁴⁷ See *supra* Part II(A) & (C).

²⁴⁸ See Tracht, *supra* note 68, at 600.

transactions in business custom, the scope for judicial control of creditor overreaching is limited.

The third and final case discussed below concerns another distinctive feature of Japanese *jōto tanpo* doctrine: the relationship between the parties after default, but in advance of an accounting or sale.

C. Sumimoto v. Asano's Estate: *Mortgagees in Possession Do Not Have an Obligation to Maximize the Value of the Mortgagor's Interest*

The case of *Sumimoto v. Asano's Estate* arose during Japan's "Bubble Economy," the frenzied period of rapid asset inflation that came to a close in the early 1990s.²⁴⁹ Asano Shinpo owned *Bito Shōji* (Beautiful Metropolis Trading).²⁵⁰ He set his sights on a potential development property that was tied up by tenants with long-term land and building leases.²⁵¹ He judged that the total cost of the property, including purchase money and "departure money" needed to buy out the lessees, would total roughly 200 million yen.²⁵² The steps in Asano's simple plan—to purchase the land, to arrange by some means for surrender by the tenants, and to cover these costs through a sale—were a common pattern in the overheated market of the time.²⁵³ On March 28, 1984, Asano borrowed 180 million yen from Sumimoto Takeichi, a grey-market lender.²⁵⁴ The loan was secured by a *jōto tanpo* in favor of Sumimoto, specifying direct foreclosure (i.e. an accounting to cut off the borrower's right of redemption) as the sole means of realizing the security.²⁵⁵ Sumimoto registered the transfer of ownership the following day, on March 29.²⁵⁶

Success in this transaction would have required that Asano find a buyer willing to go forward with a purchase. However, he was unable to do so. At the end of the loan term, on May 25, Asano paid four weeks' advance

²⁴⁹ The "Bubble Economy" refers to the severe asset price inflation that afflicted the Japanese economy in the late 1980s, the collapse of which is thought to mark the end of Japan's long period of rapid economic growth. See, e.g., Shigenori Shiratsuka, *Asset Price Bubble in Japan in the 1980s: Lessons for Financial and Macroeconomic Stability* 1-3 (Inst. for Monetary and Econ. Stud., Discussion Paper No. 2003-E-15, 2003), available at <http://www.imes.boj.or.jp/english/publication/edps/2003/03-E-15.pdf>.

²⁵⁰ *Sumimoto v. Asano's Estate*, 50 MINSHŪ 2702, 2731 (Sup. Ct., Second Petty Bench, Nov. 22, 1996).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See Curtis Milhaupt & Mark West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 68-69 (2000).

²⁵⁴ *Sumimoto v. Asano's Estate*, 50 MINSHŪ at 2702, 2731. In the text, "grey-market" lender refers to those operating on the fringes of the law, with respect to interest charges or, as in this case, enforcement strategies. See generally Pardieck, *supra* note 6 (discussing lending in Japan).

²⁵⁵ *Sumimoto*, 50 MINSHŪ at 2703, 2731.

²⁵⁶ *Id.* at 2731.

interest on the principle sum of 180,000,000 yen at four percent per month, and renewed the loan for that period.²⁵⁷ This process was repeated on June 22, July 20, August 17, and September 14, each extension supported by a replacement promissory note exchanged with Sumimoto.²⁵⁸ Asano continued to seek a buyer, and in July he was on the verge of concluding a sale; however, that sale fell through at the last minute, nothing further materialized, and on September 29, 1984, beset by his creditors, Asano Shinpo took his own life.²⁵⁹

1. *Mortgagee Went into Possession, Mortgagor Sought to Impose an Accounting*

Around October of 1986,²⁶⁰ Sumimoto began operating a parking service on the property, which continued until the end of November 1991.²⁶¹ During this interval, the heirs of Asano's estate attempted to waive their rights in the collateral and demand an accounting.²⁶² Sumimoto refused to comply, and the heirs filed suit to compel the settlement of accounts in 1992.²⁶³

In the time between the loan to Asano and the lawsuit by his heirs, Japan's Bubble Economy peaked, and then crashed,²⁶⁴ dragging down the value of collateral. For purposes of the plaintiffs' claim, the value of the property on July 5, 1988 (the date of the plaintiffs' demand for an accounting) was determined to be 327,265,000 yen.²⁶⁵ After adjusting the rate of interest to bring it within the legal limit, the amount outstanding on the loan at the same point in time was fixed at 250,700,780 yen.²⁶⁶ Plaintiffs sought to recover the difference between those two sums.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 2732.

²⁶⁰ The trial court judgment indicates that Sumimoto's possession began "after the suicide of Asano on September 29, 1984, and no later than December of 1986." *Id.* at 2738.

²⁶¹ *Id.*

²⁶² *Id.* at 2728-29.

²⁶³ *Id.*

²⁶⁴ The property concerned in this case is located in Honchō, Kadoma City, Osaka. Survey data on the value of a residential property located nearby, derived from the Land Price Survey of the Ministry of Land, Infrastructure and Transport, is available online at <http://landprice.m47.jp/datak-20712.html> (viewed on Aug. 23, 2009).

²⁶⁵ Sumimoto v. Asano's Estate, 50 MINSHŪ 2702, 2730 (Sup. Ct., Second Petty Bench, Nov. 22, 1996).

²⁶⁶ *Id.* at 2737.

2. *Evidence of Forgery in the Record Highlights the Potential for Mortgage Opportunism*

Sumimoto presented two core claims in defense. The first depended on a second contract of conveyance dated April 26, 1984, which included an option to repurchase the property for 212,654,000 yen, expiring on August 26, 1984. Sumimoto asserted that this conveyance had terminated the *jōto tanpo* agreement four months before Asano's death.²⁶⁷ To bolster this claim, at the third trial court hearing in the case, Sumimoto's counsel proffered a document bearing Asano's seal, which purported to agree to a final settlement of the *jōto tanpo* by offering the collateral as substitute performance of his obligations under the loan.²⁶⁸ On the date of this document (April 26), the land had an appraised value of 134,250,000 yen,²⁶⁹ which would have meant that Sumimoto agreed at that point to take a loss on the transaction. Counsel proposed that this completed the loan agreement.²⁷⁰ The court was not persuaded. The trial judge found the memorandum of consent to be a forgery and refused to treat the second contract as a genuine sale, in light of Asano's subsequent payments of interest on the full amount of the loan, the absence of any evidence that Sumimoto had given notice of any accounting settlement, and the failure of Sumimoto to register the second contract in the full month between the expiration of the option and Asano's suicide.²⁷¹ The trial court held that, like the first agreement, the second contract created an executory *jōto tanpo* between Asano and Sumimoto, under which Asano retained an equitable interest in the property.²⁷²

3. *Granting Mortgagor the Power to Demand an Accounting Would Deny the Mortgagee Control over the Timing of a Sale*

In the alternative, Sumimoto asserted that the debtor in a *jōto tanpo* relationship cannot compel the creditor to complete an accounting and terminate the relationship until the creditor signals his intention to realize the collateral.²⁷³ Under existing precedent, this condition would be satisfied by one of three events: 1) sale to a third party; 2) notice of intent to claim unencumbered ownership; or 3) notice that the obligation exceeds the value

²⁶⁷ *Id.* at 2730.

²⁶⁸ *Id.* at 2733-34.

²⁶⁹ *Id.* at 2721.

²⁷⁰ *Id.* at 2730.

²⁷¹ *Id.* at 2733-37.

²⁷² *Id.* at 2733-34.

²⁷³ *Id.* at 2730.

of the property.²⁷⁴ Because none of these events transpired, and because Asano's heirs had no interest in redeeming the property (after 1990 it had declined greatly in value), counsel for Sumimoto maintained that the duty to account never arose.²⁷⁵

Both the Osaka District Court and the Osaka High Court held for Asano's heirs, and ordered that an accounting be made.²⁷⁶ The Supreme Court reversed, adopting Sumimoto's conditional accounting argument in its judgment, reasoning that the contrary rule would permit speculation by the debtor and deny the secured lender the value of its security.²⁷⁷

4. *Irrelevance of Mortgagee Entry into Possession*

Setting aside the matter of forgery, this result makes sense but for one fact: the entry into possession by the mortgagee. Given that his claim was limited to sums due, a mortgagee in possession of property with a value that significantly exceeds the sums it secures has little incentive to put the collateral to productive use. Taking the *Sumimoto v. Asano's Estate* case as an example, the value of the property would have increased substantially during the three years between October 1986 and the collapse of the Bubble Economy in 1990; it is questionable whether its highest and best use was as a parking lot. English law addresses the moral hazard that arises under these conditions by affixing a mortgagee in possession with an affirmative duty to maximize the income derived from the property for the benefit of the debtor.²⁷⁸ This is one of the reasons that mortgagees in England generally seek possession only with a view to an immediate sale.²⁷⁹

5. *The Judgment in Sumimoto v. Asano's Estate Is Grounded in Doctrinal Formalism*

The Supreme Court's indifference to the state of possession speaks to the historical origins of the *jōto tanpo* interest. As related above, both possessory and non-possessory pledges of land were known to Tokugawa

²⁷⁴ *Id.* at 2704, 2709-10.

²⁷⁵ The same holds true under English law, with a narrow exception for properties with negative equity. *Cf. Palk and Another v. Mortgage Services Funding PLC*, [1993] Ch. 330 (1992) (U.K.).

²⁷⁶ See *Sumimoto v. Asano's Estate*, 50 MINSHŪ 2702, 2738 (Sup. Ct., Second Petty Bench, Nov. 22, 1996).

²⁷⁷ *Id.* at 2702-2705.

²⁷⁸ W.S. HOLDSWORTH, 6 A HISTORY OF ENGLISH LAW 664 n. 1 (Methuen, 1924) (citing *Fulthorpe v. Foster* (1687) 1 Vern. 476); see ALISON CLARKE & PAUL KOHLER, PROPERTY LAW: COMMENTARY AND MATERIALS 686 (2005); Note, *Rights and Duties of a Mortgagee in Possession*, 35 COLUM. L. REV. 1248, 1255-1261 (1935).

²⁷⁹ GRAY, *supra* note 205, at 609-10.

land practice, and both persisted into the early Meiji era.²⁸⁰ With the introduction of the Civil Code, the informal practice of “title-transfer security” was championed by the Code’s drafters on the grounds of contractual freedom.²⁸¹ To support this view, the courts applied what might be described as a “thin trust” concept to these transactions, under which mandatory provisions of the Civil Code and the register continued to determine property relations with third parties, while the “inner relationship”²⁸² between mortgagor and mortgagee was entirely governed by agreement between the parties.²⁸³ Because the primary doctrinal objective was to insulate these transactions from the terms of the Civil Code, courts did not interpret the “trust” or “trust-like” verbiage to impose special duties on the trustee; therefore, the state of possession was treated as a term for the parties to settle between themselves. As the *Sumimoto* decision illustrates, the Supreme Court has remained true to these roots, favoring the preservation of a narrow doctrinal integrity over commercial fairness and efficiency.

In argument before the Supreme Court, counsel for Sumimoto stressed that Asano’s heirs were pursuing a selfish gain in attempting to obtain an accounting during the boom phase of the market.²⁸⁴ While this is certainly the case, Sumimoto also kept his options open. The second contract, for sale with an option to repurchase, is inherently ambiguous and invites opportunism by the lender: modeled as a *jōto tanpo*, it leaves the lender (in a falling market) free to pursue the borrower for sums due; if modeled as a sale, the lender (in a rising market) is free to stand on the option and retain interest payments made in the interim. From the fact findings in the case, it appears that Sumimoto attempted to remove the speculative ambiguity of the transaction after the fact through forgery.

D. Under Current Precedent, Mortgagee Opportunism Within the Jōto Tanpo Relationship Is Not Susceptible to Judicial Discipline

As the cases above illustrate, inefficiencies arise from the potential for ambiguity in contract paper and the limitations of the registration system; but the core of the inflexibility of judicial treatment lies in the “thin trust”

²⁸⁰ See *supra* Part I(B) & (C).

²⁸¹ See *supra* Part II(B).

²⁸² The phrase “inner relationship” is a direct translation of the term used in Japanese discourse to refer to the obligation owed directly by the debtor to the creditor with respect to the collateral. See TADAKA HIROTAKA, *supra* note 4, at 126-29.

²⁸³ See *supra* Part II(D).

²⁸⁴ *Sumimoto v. Asano’s Estate*, 50 MINSHŪ 2702, 2712, 2722 (Sup. Ct., Second Petty Bench, Nov. 22, 1996).

concept that underpins the *jōto tanpo* interest. Where a security arrangement is identified on the facts, the doctrinal separation of “inner relations” and “outer relations” under a thin trust dictates that preference must be given to the register. The same thin-trust framework inhibits the courts from policing creditor opportunism within the scope of “inner relations” between the original parties to the transaction. Given these consequences of the thin-trust concept, opportunism within the *jōto tanpo* relationship cannot be fully controlled through the further refinement of judicial doctrine. This series of unfortunate circumstances gives pause to consider whether sustaining *jōto tanpo* as a viable security interest is an appropriate objective. If *jōto tanpo* performs no function that is not equally well served by the orthodox hypothec and root hypothec interests, it may be appropriate to reverse the policy of sustaining its value.

V. ON THE POSSIBILITY OF LEGISLATIVE REFORM

The historical role of *jōto tanpo* was to help creditors and debtors skirt inadequacies in Japan’s system for enforcing secured claims in real property; but a *jōto tanpo* in real estate, by its very nature, creates an off-register interest that raises problems of information asymmetry. As a result, *jōto tanpo* arrangements have always been afflicted by problems of strategic bargaining and opportunism. Nonetheless, when the enforcement system was particularly broken—and during a period of particularly rapid economic expansion—*jōto tanpo* helped to support the transactions that other security interests could not reach.²⁸⁵ Today, the terrain has shifted. Japan has greatly reformed its civil enforcement system and, by most accounts, the system is now performing well.²⁸⁶ This has changed creditor behavior and, accordingly, the role played by *jōto tanpo* in real estate transactions. Its use has declined, and the latter two of the three cases discussed above illustrate the niche that it fills today: a halfway house between default and execution, favored by lenders whose business model does not depend on a reputation for patient equanimity.

The litigation environment has also changed substantially since the heyday of non-Code security interests in real estate. The Japanese courts

²⁸⁵ See *supra* Parts III, III(A), & III(B).

²⁸⁶ Ōsawa Akira, *Minkan keibai dōnyū no kanōsei* [*The Possibility of Introducing Private Auctions*], 1774 JUNKAN KIN’YŪ HŌMU JIJŌ 1 (June 25, 2006) (citing a 98% rate of successful clearance at judicial auctions in Tokyo—and similarly strong performances by the current civil execution system in other regions of the country—as a leading reason for lack of interest in a proposal to introduce U.S.-style private mortgage auction procedures in Japan.).

processed more than four times the number of cases in 2005 than 1975.²⁸⁷ Over the same period, the total staff contingent of the court system has grown by less than four percent.²⁸⁸ Benefits of office automation notwithstanding, the pressures on judicial time are far greater today than in the past. Therefore, it is not surprising that in the progressive refinement of *jōto tanpo* rules, the Japanese Supreme Court has (to borrow a phrase from Professor Carol Rose) preferred “crystals” to “mud,”²⁸⁹ formalism over flexibility.

This is evident in the treatment of third-party transfers, where the Court has held firmly to a rule that can be applied on the face of the register, with a minimum of supplementary fact-finding. By ruling the doctrine of notice inapplicable to third-party transfers, courts are able to evaluate transfers without looking behind them. This rule contributes to the faster disposition of cases, but it is also an example of legal hypertrophy—insistence on the ever more exacting adherence to a principle that actually aggravates an underlying problem.²⁹⁰

Certain inefficiencies are inherent in the *jōto tanpo* form in the current state of the law, including the ambiguous foundation of the relationship itself, the temptations to forgery, the impossibility of imposing a comprehensive foreclosure action, and the possibility of attachment in the hands of the lender. These inefficiencies dictate that such transactions will continue to be an engine of litigation. In the modern environment, a root hypothec provides adequate security for the lender, without these risks and inefficiencies. As Professor Grant Nelson has argued with respect to the analogous contract for deed in the United States,²⁹¹ it would be preferable to normalize the *jōto tanpo* and bring it within the mainstream framework—now well tested—for realizing security.

A. *Foreign Examples, Although a Useful Reference, Are Not Directly Applicable to the Japanese Context*

As the case of *Nakano v. Okamura* illustrates, *jōto tanpo* presents a special difficulty for Japan’s system of title registration because the lender

²⁸⁷ See JAPAN STATISTICAL YEARBOOK 632 tbl.459 (1978) (reporting 127,558 ordinary civil cases received in 1975); JAPAN STATISTICAL YEARBOOK 779 tbl.25-11 (2008) (reporting 534,891 ordinary civil cases received in 2005).

²⁸⁸ See JAPAN STATISTICAL YEARBOOK 616 tbl.422 (1978) (reporting 24,391 court employees for 1975); JAPAN STATISTICAL YEARBOOK 761 tbl.24-3 (2008) (reporting 25,349 court employees for 2005).

²⁸⁹ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

²⁹⁰ For a similar argument concerning statutory precision and adversarial procedure in the United States, see PAUL CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998).

²⁹¹ See Nelson, *supra* note 17.

holds ostensible title to the collateral.²⁹² As indicated in the discussion of that case, the English courts have chosen to discourage equitable mortgages (in which the *borrower* is the ostensible owner, and the lender has only an equitable claim), simply by refusing to recognize that passing the certificate of title registration to the lender has any legal effect.²⁹³ The *jōto tanpo* transaction cannot be so easily discouraged. In the state of Louisiana, where the property system also has civil law roots, a security interest can be created in exactly the same way as a *jōto tanpo*, using an outright conveyance to the lender, accompanied by a counter-letter promising reconveyance to the borrower upon repayment.²⁹⁴ However, there is again an important difference from Japan: Louisiana conveyancing is supported by a system of recorded deeds,²⁹⁵ under which the borrower is able to protect his interest simply by filing the counter-letter that he receives from the creditor.²⁹⁶ Unlike Japan (with its system of registered title), in Louisiana there are no special formal restrictions on what may be filed; the document is simply added to the public record, for possible reference in case of future dispute. In the event that the creditor sells the collateral to a third party, the correct result for the court is straightforward: if the counter-letter has been filed, the borrower's interest is protected; if the counter-letter has not been filed, his interest is not.²⁹⁷ Because Japanese property registers are organized not as a deed recording system, but as a system of registered title, the borrower who once conveys title to his lender thereby loses access to the entry, and cannot register his (equitable) right to a reconveyance of the property.

When it comes to the *jōto tanpo* against real estate, Japanese judges are thus presented with an indigestible cocktail—a permissive contractual approach to security similar to that of Louisiana, backed up by a strict registration system similar to that of England. Strict application of the curtain principle (i.e. honoring all transactions that are based upon the content of the register) has the effect of encouraging *jōto tanpo* transactions, despite their inefficiency. Judicial precedent has very nearly reached its limit; a full resolution to this dilemma will require legislative intervention. As demonstrated by the Mortgages Act 1978, enhanced powers of judicial management can be a key to discouraging opportunistic use of an interest.

²⁹² See *supra* Part IV(B).

²⁹³ *United Bank of Kuwait PLC v. Sahib*, [1997] Ch. 107 (1996) (U.K.); see *supra* Part IV(A)(4).

²⁹⁴ See, e.g., *Livingstone's Executrix v. Story*, 36 U.S. 351 (1837).

²⁹⁵ See LA. CIV. CODE art. 3338.

²⁹⁶ See *State ex rel. Herbert v. Recorder of Mortgages*, 143 So. 15 (1932).

²⁹⁷ *Id.*

B. *The Special Character of Jōto Tanpo Against Real Estate Could Be Clarified By Explicit Statutory Recognition*

One of the doctrinal difficulties of current law is that *jōto tanpo* against both movables and immovables is sustained by the same thin-trust concept, using the same terminology.²⁹⁸ The bulk of *jōto tanpo* litigation relates to secured claims in movables, where it plays a vital economic role as the only available form of non-possessory security. Explicit statutory recognition of *jōto tanpo* in real estate as a discrete type of security interest would make it clear that these are separate threads of law and would support the independent development of rules appropriate to the physical and legal character of the respective assets involved.

Under current doctrine, both the stated cause of a transfer of ownership and the actual cause are ignored. As indicated by the Supreme Court in *Sumimoto v. Asano's Estate*, this is intended to reduce the transaction costs of conveyancing by encouraging purchasers to trust the content of the register.²⁹⁹ Paradoxically, this rule increases the fact-finding burden on courts by enabling and rewarding obfuscation of the true intention behind such transfers.

The cause of registration that ultimately appears on the register is drawn from a recitation in the contract of conveyance, which must accord with a similar recitation in the power of attorney that authorizes the change to the register. Both of these documents must bear the debtor's seal, and it is therefore within the debtor's power to negotiate over the published characterization of the transaction. However, the debtor has a much reduced incentive to do so, because neither actual nor constructive notice affect the power of the creditor to convey good title to a third party. The creditor, on the other hand, benefits in two ways from concealing the character of the transaction from the register. First, this preserves the possibility of speculation, as seen in *Nakano v. Okamura*.³⁰⁰ Second, because *jōto tanpo* is known to be both afflicted by legal ambiguity and associated with lenders who operate on the fringes of the law, risk-averse purchasers will discount or avoid properties with a *jōto tanpo* registration in the chain of title, reducing their sale value.

Application of the doctrine of notice would give the debtor an incentive to negotiate for the explicit characterization of *jōto tanpo* as the

²⁹⁸ See TADAKA HIROTAKE, *supra* note 4, *passim*.

²⁹⁹ *Sumimoto v. Asano's Estate*, 50 MINSHŪ 2702, 2712, 2722 (Sup. Ct., Second Petty Bench, Nov. 22, 1996).

³⁰⁰ See *supra* Part IV(B).

cause of registration. This would both reduce the burdens of fact finding in litigation, and provide a foundation for the more orderly disposition of collateral. Binding takers with actual notice of a *jōto tanpo* that has not been registered would reduce the potential for creditors to avoid this rule. The effect of the doctrine of notice would be to force the parties into a bilateral monopoly, which may result in deadlock if the parties cannot agree on a valuation of the collateral. Permitting conversion of a *jōto tanpo* interest to a root hypothec on petition by either party would cover this contingency, by providing an orderly exit path from the relationship. Finally, statutory recognition would open the path to affixing lenders in possession with an explicit duty to maximize the value of the collateral, whether through sale or through management of the property.

VI. CONCLUSION

The Japanese property system has undergone considerable elaboration and development since the release of restraints on alienation by the Meiji reformers. The *jōto tanpo* interest has played an important role in that transformation. This history and its outcomes provide important insight into the internal dynamics of a young property system undergoing change.

Each phase of legal development examined in this Article, from the watershed settlement of alienable rights of ownership onward, was shaped in important ways by experience with preexisting interests. Reformers at each stage have faced considerable pressure from contemporary stakeholders to cover, at minimum, the known transactional needs of the time. The successful adoption and development of the Japanese property system suggests that the rights it has deployed, in whatever form, have been sufficiently flexible to cover those transactional needs, and were consistently backed up, through whatever procedure, by adequate legal mechanisms for their enforcement.

This incremental narrative contrasts with the persistent view that Japan presents a hopeful sort of paradox: a market system that has succeeded despite systematic enforcement failure.³⁰¹ As a recent study put it, Japan's new property law was "not matched by the development of complementary enforcement mechanisms,"³⁰² a shortcoming overcome by spontaneous extra-legal factors such that "[t]his gap did not prove to be

³⁰¹ See generally John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978) (seminal article arguing that low litigation rates in Japan are caused by high litigation costs and difficulties in enforcing judgments).

³⁰² Milhaupt & West, *supra* note 253, at 53.

wholly problematic.”³⁰³ The above survey of the historical role of *jōto tanpo* in real estate transactions suggests that the first recourse for parties frustrated by inadequate enforcement mechanisms is to seek alternatives within the state-sponsored legal framework itself. If that is so, and if they find those alternatives—as they seem to have done in this instance—then the availability of enforcement may be more important than this view might otherwise suggest.

The *jōto tanpo* against real estate with an opportunity for forfeiture, as an adaptation of feudal-era practice, took root as a customary form of “mortgage,” in the early decades of the Japanese system of private ownership. Its subsequent recognition under the Civil Code was justified on the narrow ideological assumption that introducing contractual freedom into the core of property law would produce economic benefits. The interest served an important role as a tool for secured lending during the nation’s early period of industrialization. During the swell in economic activity in the second half of the twentieth century, however, its inefficiencies, which manifested themselves in the form of hardship on the debtor and rude surprises for his general creditors, attracted judicial intervention. Since that time, resort to this interest has been incrementally curtailed, until today, where it is primarily associated with collection efforts against debtors already in distress. The position of *jōto tanpo* within the universe of real estate transactions is thus not the result of enforcement failure, but of enforcement arbitrage.

Japan’s property system, on the contrary, can be said to have been afflicted by a surfeit of enforcement. During the period of rapid development, the entrepreneurial exercise of substantive legal rights to achieve inequitable results threatened the perceived legitimacy of legal institutions themselves. The restrictions on execution officers introduced by the Bailiffs Act of 1966³⁰⁴ were a response to this challenge. The same can be said of the root hypothec added to the Civil Code in 1969,³⁰⁵ of the Mortgages Act 1978,³⁰⁶ of the procedural reform of auction and attachment proceedings introduced in 1979,³⁰⁷ and of the removal of the super-priority for short-term leases in 2003.³⁰⁸ Each of these reforms reduced the relative attractiveness of the non-Code security devices, but the first of them—the

³⁰³ *Id.*

³⁰⁴ Shikkōkan hō [Bailiffs Act], Law No. 111 of 1966.

³⁰⁵ Minpō no ichibu o kaisei suru hōritsu [Act to Partially Revise the Civil Code], Law No. 99 of 1971.

³⁰⁶ Mortgages Act 1978, *supra* note 159.

³⁰⁷ Minji shikkō hō [Civil Execution Act], Law. No. 4 of 1979.

³⁰⁸ Civil Code Leases Revision, *supra* note 122.

Bailiffs Act of 1966—had the effect of weakening, not strengthening, the civil enforcement system.

Hemmed in by the constraints of the real estate registration system and the Civil Code, *jōto tanpo* has reached its natural limits as a judicial construct. The need to protect the integrity of registration, together with the pressures of judicial administration, have driven the courts to adopt a highly formalistic and inflexible approach to this ostensibly equitable transaction. It remains to be seen whether the current round of revisions to the property section of the Civil Code will touch the *jōto tanpo* in real estate; but it nonetheless seems inevitable that the inherent flaws of this transactional form will invite a response in due course. Time will tell what form it takes.