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Getting Property Right: Informal Mortgages in the Japanese Courts

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Abstract

In Japan's civil law property system, courts recognize a form of extra-statutory security, the 稔譲 tanpo or “title-transfer security interest”, that is created by conveying legal title to the creditor, with a promise to restore title to the debtor upon repayment. This commercial practice pre-dates the deployment of the nation's modern system of alienable title, and as such its modern treatment in the courts provides an informative window on forces that shape a property system undergoing rapid change in the face of economic expansion. When the Civil Code was enacted at the end of the 19th century, recognition of “title-transfer security” was encouraged by the drafters, based on a narrow ideological assumption that it would be economically beneficial to extend freedom of contract into the core of secured claims in property (German legal doctrine was adopted to justify this decision at a much later point in time). The two features that would prove most important to the development of the 稔譲 tanpo interest were (a) the avoidance of inefficient procedures for the enforcement of Code-defined security interests, and (b) the possibility of forfeiture. The first of these features played an important role in facilitating innovative lending practices during Japan's rapid economic development in the latter half of the 20th century; but this economic stress also highlighted the inefficient and inequitable effects of the interest, including the potential for forfeiture. Judicial and legislative responses since the 1970's have sought to control lender overreaching, but these have reached an impasse, and today the 稔譲 tanpo interest continues to be a favoured tool of abuse in high-interest lending and high-pressure debt collection. The two factors that inhibit effective judicial discipline of these transactions today are identified to be limitations in Japan's system of registered title, and procedural lacunae that open the possibility of enforcement arbitrage.

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# Table of Contents

Getting Property Right: 'Informal' Mortgages in the Japanese Courts ................................................................. 1  
Abstract ................................................................................................................................................................. 1  
The genesis of jō to-tanpo .................................................................................................................................... 4  
Enforcement and secured claims .......................................................................................................................... 11  
The demise of forfeiture ........................................................................................................................................ 14  
The modern context of jō to tanpo ....................................................................................................................... 17  
  Case 1: third party transferees .......................................................................................................................... 18  
  Case 2: taking on “clogs and fetters” ................................................................................................................ 21  
  Case 3: mortgagees in possession ..................................................................................................................... 24  
Taking registration seriously ............................................................................................................................... 27  
Conclusion ......................................................................................................................................................... 30
Among Japan’s so-called “non-Code” security interests, jōto tanpo claims pride of place as one of the oldest, and most finely tuned accretions to that nation’s civil law. Sometimes translated “title-transfer estate,” the practice of offering bare legal title to collateral as a way of securing debt is a familiar practice in Japan, and has been used to enable transactions not contemplated by the literal text of the Civil Code since before its enactment. A versatile security device applicable to both movables and real estate, jō to tanpo owes its existence to judicial intervention. This is not to say, however, that the rules on which it depends are unstable. Quite the contrary.

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. Rate caps have been stiffened, marketing efforts restricted, and debt collectors criminalized. Lenders have been denied the freedom to take out suicide insurance on their debtors. Judicial decisions that prefaced successive waves of legislation in this line

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

3 E.g. Chapter 5: Title-Transfer Security (Jōto Tanpo) in 3-5 DOING BUSINESS IN JAPAN (Z. Kitagawa, ed.) (chapters undated, viewed online via Lexis service on August 18, 2008).


6 Risoku seigen hō [Interest Rate Limitation Act], Law no. 100, May 15, 1954, sec. 4, amended by Kashikingyō no kisei tō ni kansuru hōritsu no ichibu o kaisei suru hōritsu, Law No. 155, December 17, 1999, sec. 3; Shusshi no ukeire, azukarikin oyobi kinri tō no torishimagi ni kansuru hōritsu [Investments, Deposits and Interest Rate Regulation Act], Law no. 195, June 23, 1954, sec. 5, amended by Kashikingyō no kisei tō ni kansuru hōritsu no ichibu o kaisei suru hōritsu, Law No. 155, December 17, 1999, sec. 2, also amended by Kashikingyō no kisei tō ni kansuru hōritsu no ichibu o kaisei suru hōritsu, Law No. 115, Dec. 13, 2006, sec. 6. For a detailed account of recent developments in the law relating to consumer lending see Pardieck, supra note 5, at 564-65, 571-80.


have attracted a certain amount of overseas criticism, as evidence of an unhealthy judicial activism in the field of commercial relations. But at the same time, harsh doctrine underpinning j to tanpo against real estate – a security and collection device favoured by lenders of last resort – remains untouched, despite a well-deserved reputation for severity, and a potential for capricious abuse.

A j to 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. 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. The classic English mortgage operates in a similar way, but under the protective aegis of elaborate foreclosure proceedings that are not found in Japan. In the United States, the contract for deed has a similar structure, but is only available for purchase money transactions, is subject to state statutory restrictions, and has been described by a Reporter of the Restatement of Property as having “no place in a modern land financing system”. For better or for worse, the j to tanpo of Japan has none of these limitations.

This Article will argue that the characteristics of j to tanpo are determined by three factors: the pressure of commercial custom; limitations in Japan's title registration system; and opportunities for enforcement arbitrage. These factors are stable for the present, but may not remain so. As is well known, Japan is in the midst of an ambitious programme of commercial law reform. This has stimulated discussion in the community of legal scholars and the initial results of a major Civil Code revision effort spanning property and the law of obligations was presented at the annual meeting of the Japan Private Law Association in October of 2008. The contemplated scope of revision does not...
extend to the security interests, but there are some pressures in this direction,

and the field is ripe for change. Any reform will almost certainly affect the use made of the jōto tanpo interest that is the primary subject of this Article.

Like the English law of mortgage, the current state of judicially fashioned rules for j to tanpo transactions in land – and, by extension, in movables – cannot be grasped without some sense of their historical foundations. This Article is an attempt to provide that background, with a view to improved engagement overseas with this evolving area of Japanese commercial law. Beyond this narrow objective, review of the evolutionary interaction of procedure and substantive law in this important 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.

In the discussion below, the natural starting point is the development of “title-transfer security” against real property. The jōto tanpo interest, which underpins secured transactions in movables today, emerged initially with respect to immovable property, and grew out of practices that existed prior to the enactment of the Civil Code. This early period of legal development, leading to the adoption of a formal doctrine to justify recognition of jōto tanpo claims, is the subject of the first section of this Article. This is followed by an overview, in the second section, of flaws that existed in the procedures for the enforcement of civil judgements that became apparent during Japan’s period of rapid economic growth. This is important foundation for understanding developments in case law, as it was the difficulty of realizing collateral on default, as well as shortcomings in the substantive law of real security itself, that induced reliance on so-called non-Code security interests, including jōto tanpo. The third section covers the important judicial and legislative effort in the 1970’s to curb the anachronistic remedy of forfeiture, originally embraced in the heyday of laissez-faire ideology at the beginning of the century. Section four 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 helps to reveal 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 the fifth section. The conclusion attempts to relate this discussion to recent scholarship touching on Japanese property law.

The genesis of j to-tanpo

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. In the previous era, farmers had been bound to their holdings in principle, and transfers of land were

23 Id. at 3.
24 See, e.g. Okino Masami, UNCITRAL tanpo torihiki rippō gaido no sakutei [Finalization of the UNCITRAL Legislative Guide on Secured Transactions], 1842 KNYŪ HOMU IBÔ 14 (2008).
25 To the best of the author's knowledge, the following is a comprehensive list of publications in English that touch on this area: Chapter 8: Security Transfers in H. Tanikawa et al., CREDIT AND SECURITY IN JAPAN: THE LEGAL PROBLEMS OF DEVELOPMENT FINANCE 120-137 (University of Queensland Press, 1973); Haley, supra note 4; and Chapter 8, section 7: Atypical Real [sic] Security Rights in H. Oda, JAPANESE LAW 167-168 (1999); and Chapter 5: Title-Transfer Security (Joto Tanpo) in 3-5 DOING BUSINESS IN JAPAN (Z. Kitagawa, ed.) (chapters undated, viewed online via Lexis service on August 18, 2008).
The issuance of land deeds was to explode the old order, by making land freely alienable. 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 very significant costs of co-opting stakeholders in the pre-existing regime. This tax and ownership system would ultimately be established by an ordinance promulgated on July 28, 1873.

The rules of ownership that supported this policy emerged in a flurry of orders issued in the course of the preceding year. The order removing restraints on alienation was given by the Grand Council of State on February 15, 1872. The first order on the issuance of land deeds was made by the Ministry of Finance on February 24, 1872. This was replaced by a revising order on July 4 of the same year. Neither of these orders specified which party to a mortgage should receive the land deed issued by the state. This was a significant shortcoming, because such arrangements were common at the village level in Tokugawa Japan. In response to consternation at the local level, an interim memorandum on mortgages was sent out to local officials on June 18, 1872. This was replaced by a regulation issued by the Grand Council of State in the following year, on January 17, 1873. This in turn was subjected to clarification by an order issued on February 14, 1873. As this progression of events illustrates, reformers were forced to adapt the emergent system of marketable title and security to the contours of pre-existing feudal interests.

Mortgages at the end of the Tokugawa period could be classified into two broad categories, depending on the procedure through which each was enforced. Interests subjected to a closely circumscribed and recorded “main suit” procedure were enforced through a forfeiture of the borrower’s interest in the land (hereinafter “direct foreclosure”). Such agreements were often collusive; the lender typically went into possession at the point the loan was made, and a later claim for direct foreclosure served to work around the general ban on land transfers. In such transactions, the term spent under the “loan” might be characterized as a protracted escrow, during which ultimate proprietorship was ambiguous. Mortgages not in this category were enforceable through a less closely monitored “money suit” procedure, the remedy in which was to extract payment through an auction of the collateral, the

28 See generally Fujiwara Akihisa, Shichichi kosaku no hōteki kōzō to jinushisei [The Legal Structure of Tenancy Pledges and Its Relation to the Landholder System], 22 KOBE HÔGAKU ZASSHI nos. 3 & 4, p. 215 (1973).
29 See JAPANESE LEGISLATION IN THE MEIJI ERA, supra note 26.
31 Chiso kaisei jōrei [Land Reform Ordinance], Dajōkan Ordinance no. 272, July 23, 1873.
32 Jisho eidai baibai o yurusu [Permanent Sales of Estates to be Permitted], Dajōkan Ordinance no. 50, February 15, 1872.
33 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, February 24, 1872.
34 Ministry of Finance Regulation no. 83, July 4, 1872.
37 Jisho shichihire kakiire kisoku [Rules for the Mortgage and Pledge of Estates], Daj kan ordinance no. 18, January 17, 1873.
38 Dajōkan ordinance no. 51, February 14, 1873. See Fujiwara, supra note 35, at 4.
39 See Fujiwara, supra note 36.
40 See Fujiwara, supra note 36, at 204, 223-24; Fujiwara, supra note 28.
42 Id. at 173.
residue being restored to the debtor. These latter were genuine lending arrangements, in which the debtor remained in possession during the term of the loan.

The provincial response in the initial effort to settle deeds demanded that two issues be confronted. First, the settlement of title itself demanded resolution of the competing claims of would-be “main suit” lenders and their debtors. 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. Addressing these issues was the purpose of the memorandum of June 1872 and the string of regulations issuing from January 1873.

The first memorandum of June 1872 was issued by the Ministry of Finance, and essentially dictated that the rules set forth in the formal law of the Tokugawa (kujikata osadamegaki) be applied uniformly to all mortgage arrangements, including lender-in-possession cases in which the underlying loan was (arguably) a legal fiction. This simplified the settling of title; the deed for any property subject to mortgage, of whatever type, was to be issued to the mortgagor. After issuance, where the lender was in possession, the deed was to be delivered to him, to be held during the term of the loan arrangement. With respect to remedies, the memorandum was but a stop-gap measure. The bifurcation of “main suit” and “money suit” procedures had been in effect a system of strict pleading, in which the body of law, the kujikata osadamegaki, specified only the conditions for successful direct foreclosure in “main suit” proceedings. More detailed guidance was yet required to give the new national rules the same scope of coverage as pre-existing practice.

The regulation of January 17, 1873 was the first attempt to establish a full set of rules for the creation and enforcement of mortgage claims. This was initially drafted in the Ministry of Finance, with input from the Ministry of Justice before promulgation. The remedial provisions introduced by the MOJ orders reveal differing policy preferences within government. 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 possession (shichiire), and a land charge in which the borrower retained possession (kakiire). For interests created after the watershed date of February 15, 1872, the remedy for default in both land pledge and land charge was specified, following the Ministry of Justice position, to be a public sale, with the residue to be returned to the debtor.

The preference of the Ministry of Finance had been for preservation of the remedy of direct foreclosure. This difference between the two institutions appears to have been driven by their respective levels of exposure to and sympathy for foreign law. The Ministry of Justice was in the process of studying the French Civil Code. The view at the MOJ was that direct foreclosure, abhorrent to French law, had existed in the previous era solely as a means of circumventing the ban on

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43 Id.
44 See Fujiwara, supra note 35, at 4.
45 Id.
47 See Fujiwara, supra note 36, at 215; Ōmi, supra note 41, at 163.
48 See Fujiwara, supra 35, at 3-4.
49 Id.
50 See Ōmi, supra note 41, at 165.
51 See Ōmi, supra note 41, at 164-65; Fujiwara, supra note 36, at 216-24.
52 See Fujiwara, supra note 36, at 216-24.
53 See generally Ōmi, supra note 41, Fujiwara, supra note 36.
54 See Ōmi, supra note 41, at 164-66.
55 See Fujiwara, supra note 36, at 233-34.
sales of land. Accordingly, it was appropriate under both types of security arrangement for the debtor's equity to be respected through a public sale and accounting. The Ministry of Finance, for its part, sought a closer adherence to the formalities of prior law, retaining the remedy of direct foreclosure for land pledges.

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 pre-existing regional law and local practice. In response to this uncertainty, parties at the local level sought more stable ways of backing up their promises, and a frequently adopted solution was to create a rough equivalent to a mortgage by deposit of title deeds, 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. This arrangement had the advantage of a kind of brutal clarity; because the lender had title to the land, it could enforce its 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, the first introduction of title registration in 1880, and beyond.

Simplicity and certainty of enforcement were major attractions of “title-transfer security”. However, agreements also frequently exposed the debtor to a risk of loss disproportionate to the value of the underlying loan. The very severity of this remedy gave rise to a disconnect in incentives. Because the remedy is imposed only upon default, and because default in the face of such a catastrophic power of relief likely implies insolvency, a debtor's negotiated concession on this point affects less his own interest than that of his general creditors – who are not parties to and have no knowledge of the content of the underlying, undisclosed lending agreement.

In American legal discourse today, the term “forfeiture” embodies two distinct concepts: a (relatively) expeditious enforcement procedure; and a creditor's right to seize collateral of greater value than the outstanding obligation. Their conflation reflects the fact that the English law of mortgage, as originally fashioned in the 17th century, operated by manipulating the core concept of title itself.

56 See Ōmi, supra note 41, at 165.
57 Id. at 164-65.
58 See generally Fujiwara, supra note 35.
59 See Ōmi, supra note 41, at 173-77; also see cases cited in the same source at 187.
60 See Ōmi, supra note 41, 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, Nov. 30, 1880, sec. 1; Tōki hō [Registration Act], Law no. 1, Aug. 11, 1886; Tōchi daichō kisoku [Land Register Regulation], Imperial edict no. 39, Mar. 22, 1889; Fudōsan tōki hō [Real Estate Registration Act], Law no. 24, Feb. 24, 1899.
62 See, e.g. Nelson, supra note 16, 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.
63 Pollock, supra note 15, at 133-34.
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 an accounting to the debtor of his remaining interest in the collateral. Although this ultimate objective is straightforward, treating title itself as the foundation of the secured claim has forced common law legal doctrine through some rather 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 whatever. ... The forms, however, in which English law has given effect to this all but universal practice have been singularly ill chosen.

Built on civil law foundations, Japanese law was initially well positioned to avoid such difficulties. In the earliest appellate judgements of the Great Court of Judicature involving pre-Code transactions, the Court repeatedly struck down “title-transfer security” agreements as based on a misrepresentation of intent on the register. But this position would change dramatically when the Court came to consider transactions governed by the Civil Code, which come to incorporate a combination of features that can fairly be described as novel, both from a comparative perspective, and in the context of contemporary Japan.

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 is a simple registered lien, which entitles the secured party to initiate a judicial auction of the target property upon default, and satisfy its claim out of the proceeds of sale. 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, and following the contemporary fashion for laissez-faire economics and freedom of contract, the Code also permitted parties to agree that the debtor's entire interest should be forfeit upon default. There was (and is) but one catch; such a contract is not registrable, and as a result cannot be set up against attachment creditors and other third parties. This fact severely limits the practical significance of this freedom with respect to the hypothec interest.

While the Civil Code was under consideration in the national Diet, the desirability of forfeiture clauses under pledge transactions (in which 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. In commentaries published after promulgation of the Code, this amendment came under attack from two of the Civil Code drafters, who characterized it as a “wasteful measure” in restraint of freedom of contract.
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.

The consequent introduction of “title-transfer security” as a gloss on the Civil Code held open a means of contracting for a remedy of forfeiture. It did so by relying upon the core ownership interest, unsupported by specific procedures tailored to the needs of a lending transaction. As will become clear in discussion below, this procedural shortcoming would give rise to difficulties, as courts found it necessary to refine the doctrine of secured claims over the course of time. In fact, very similar problems had been confronted by the English courts as early as the late 17th century; and 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.

By the 19th century, a typical English mortgage was drafted as a transfer of the borrower's interest to the lender, conditioned on the repayment of the loan within a very short period. 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. 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. Critically, the debtor's right of redemption could not be defeated by selling the property to a third party. A procedure was available for foreclosing the debtor's interest, but this was purposefully structured to be time-consuming, expensive, and uncertain.

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. This was met in the courts by a declaration that “clogs and fetters” on the equity of redemption were not to be tolerated. 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. 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. Lenders were induced to be chary of the debtor's interest because the law had made it procedurally costly to do otherwise.

Such elaborate judicial protections did not exist in the youthful property system of the Meiji era, 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, in the hypothec, or \textit{teitô-ken}. The procedure for enforcing such a claim upon default required a judicially mandated sale of the property, 

\begin{itemize}
  \item See Pollock, \textit{supra} note 15, at 132-35.
  \item 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.”).
  \item Id. at 134-35.
  \item Id.
  \item Pollock, \textit{supra} note 15, at 134-35.
  \item Pollock, \textit{supra} note 15, at 135.
  \item Tracht, \textit{supra} note 62, at 600.
  \item Pollock, \textit{supra} note 15, at 135.
  \item \textit{Minpô} arts. 369-98.
\end{itemize}
conducted by licensed officers operating on a contract basis outside the premises of the court. The slack in this added layer of procedure, together with exceptional protections for certain short-term leases, exposed the sale process to corruption and obstructive behaviour that undermined the value of the security. These risks could be circumvented through crude eviction proceedings pursuant to a “title-transfer security”, with the added benefit of a possible windfall at the expense of the unfortunate borrower’s general creditors. As a result, judicial risks notwithstanding, it is not surprising that lenders persisted in extracting “title-transfer security”, whether as a primary form of security, or as a backup to a mainstream hypothec interest.

Returning to the speculative question posed earlier, why, in passing on pre-Code contracts, did the Great Court of Judicature not similarly impose the remedies set forth in Ministry of Justice orders on “title-transfer security” arrangements? 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 20th century. Until that time, the entire substance of interests asserted by the parties was contained in privately drafted documents. The Meiji courts showed themselves to be perfectly capable of imposing judicial readings on private contracts. However, the decisions on “title-transfer security” referred to above arose after the introduction of formal title registration in 1886, 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 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 the declaration of winners and losers, despite the existence of alternative remedies.

Whatever chilling effect early judgements might have had on attempts at forfeiture in commercial practice, it soon faded after the promulgation of the Civil Code. In 1902 and 1906, the Court handed down successive judgements upholding “title-transfer security”, the second being the first recorded decision to involve movable property. The elegance of theory to support these results was subsequently provided by German trust concepts. Introduced into Japanese academic discourse by Professor Okamatsu Santarō in an article published in 1902, their potential application in security arrangements 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). 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). This served as a doctrinal work-around

84 See Bennett, Civil Execution in Japan: the legal economics of perfect honesty, 177 Hōsei Ronshū 1, 4-12 (1999).
86 Ōmi, supra note 41, at 170.
87 Law of Property Act 1925.
88 See supra note 60.
91 See Ōmi, Jōto tanpo rironshi (1) [History of jōto tanpo theory, part 1], 63 Waseda Hōgaku 35, 45 (1987).
92 See Tadaka, supra note 11, at 128, 136-37.
against the lurking objection that such transactions constituted a “false declaration of intention” (kyogi no ishi hyōji) under section 94 of the Civil Code.\(^{95}\) Into the bargain, it gave judges a degree of freedom within the “inner relations” zone to discipline overreaching by the lender, in pre-Code contracts to which restrictions on forfeiture still arguably applied. 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.

**Enforcement and secured claims**

In the course of the century that separates the present day from the early jōto tanpo decisions, the initial “trust” framework has been superseded by numerous theories attempting to better explain and regulate this device.\(^{96}\) For better or worse, however, its essential features still persist. 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 the trust framework itself, although no longer the engine of doctrinal development, continues to serve a prophylactic role, separating this field of judge-made law from a Civil Code that would reject it entire, as based on a false declaration of intention.\(^{97}\)

The value of security naturally depends on the ease and certainty with which it can be realized by the creditor,\(^{98}\) and as noted above, one of the important initial incentives for the use of jōto tanpo against real property was the relative ease with which it could be enforced. The enforcement system that Japan carried into the period of rapid growth in the 1960's and 1970's had a number of flaws,\(^{99}\) that affected both lender strategies and the development of case law, including the law of jōto tanpo. The environment for execution has changed significantly since this early formative period, and a review of the differences will help explain why jōto tanpo and other non-Code interests were pursued so vigorously in business circles.

To begin with, then as now, the only reliable remedy available under a standard Civil Code hypothec is a sale by judicial auction.\(^{100}\) These sales are conducted by licensed bailiffs, and until 1966, they operated from their own offices separate from the court, a situation that invited collusion between bidders and the corruption of auction officials.\(^{101}\) In that year, a reform measure elevated bailiffs to the status of public officers, raised the qualifications for obtaining a license, and required bailiffs to locate their offices inside the court, allowing for closer supervision.\(^{102}\) Problems of bidder collusion persisted, and in 1979, the law on compulsory execution was changed to permit auction by sealed bids submitted

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95 Minpō sec. 94 provides as follows:

**Article 94** 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 subsection above, cannot be asserted against a third party.

*See also* Tadaka, supra note 11, at 122-24, 126-27, 154-55.

96 Id. at 120-60.

97 Id. Minpō sec. 94.

98 Kondo Takao, *Keibai fudōsan no baikyakuritsu ni tsuite* [Concerning sales rates in real estate auctions], 38 Jiyū to Seigi 77 (1988).

99 See Bennett, supra note 85, Bennett, supra note 84, Haley, supra note 4.

100 See discussion supra, text accompanying notes 68 to 70.

101 See generally Bennett, supra note 84.

102 Id.
in advance. Prior to these reforms, a lender's hypothec interest could be substantially reduced by the efforts of “unsavoury individuals” to capture the execution process itself.

There were, however, more tips to the iceberg. Until 2003, Civil Code section 395 gave short-term leases a super-priority over hypothecs created earlier in time. This legal toe-hold could be used by a late-coming lender to stall execution proceedings, with a view to negotiating a settlement with the first-priority secured party. In principle, the holder of a hypothec does not have a right to vacant possession of the property; his claim is limited to the satisfaction of his claim out of the proceeds of a judicial sale. Any action for eviction must be carried out by the purchaser of the property. This gave rise to adverse selection problems: the possibility that a tenant on short-term lease might be in any given property affected the value of most real estate subjected to judicial auction.

Obstructive leases of this kind had a common feature that distinguished them from ordinary leases for occupation; they were always registered against the land or building to which they applied. Registration of an ordinary lease requires the specific consent of the property owner. In an ordinary lease transaction, a solvent property owner bargaining at arm's length will not permit registration. When a lease is used to obstruct execution, registration provides a firm legal basis for challenging the secured party in court proceedings. Registered section 395 have been used as a legal strategy for resisting execution from the inception of the Civil Code.

Opportunistic use of short-term leases became a significant issue for the finance community during the period of rapid growth. The 1979 civil execution reform attempted to limit the extent of damage this caused to the auction system, by providing the result of an on-site bailiff's inspection to bidders. But embedded as it was in the property provisions of the Civil Code, it took several decades for the Diet, its Ministry draughtsmen, and the courts to overcome the section 395 super-priority itself through strained adjustments to judicial doctrine, and finally through legislation. In the aftermath of the Bubble Economy in the last decade of the 20th century, a Supreme Court decision of 1999 stretched to recognize a qualified power, in the holder of a hypothec, to petition for eviction in advance of judicial

103 See Bennett, supra note 85; Minji shikkō hō [Civil Execution Act], Law no. 4, March 30, 1979, sec. 57.
104 SHIKKŌRI SEIDO KAIZEN IN KANSURU IKENSHU 85 (Ministry of Justice 1955) (response of Meiji University Faculty of Law).
105 MINPÔ secs. 395 & 602, revised by Tanpo buken oyobi minji shikkō seido no kaizen no tame no minpō tō 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, Jul. 25, 2003 (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).
106 See Bennett, supra note 85.
107 See Binyû v. Kokumin kin'yū kōko, 53 MINSHŪ 1899 (Sup. Ct., Grand Bench, Nov. 24, 1999).
108 Watahiki Mariko, “Keibaiya”, “sen'yūya”, tajii wa seikō shita ka? [Has the extermination of the “auction racketeer” and “occupation racketeer” pests been successful?], 927 JURISUTO 64, 64-65 (1989).
110 Note that land lease interests are an exceptional case, because they provide critical support to the ownership interest in buildings. See discussion infra, text accompanying notes 118 to 120. See generally Frank Bennett, Building Ownership in Modern Japanese Law: Origins of the Immobile Home, 26 Law in Japan 75 (2000).
111 See Uchida Takeshi, TEITÔKEN TO RYÔKEN (1983).
112 See generally Bennett, supra note 85; See Uchida supra note 111.
113 Minji shikkō hō [Civil Execution Act], Law. no. 4, Mar. 30, 1979. See Bennett, supra note 85.
114 See Binyû v. Kokumin kin'yū kōko, 53 MINSHŪ 1899 (Sup. Ct., Grand Bench, Nov. 24, 1999).
115 Tanpo buken oyobi minji shikkō seido no kaizen no tame no minpō tō 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, Jul. 25, 2003.
Ultimately, the super-priority itself was eliminated altogether by a revision to the Civil Code passed in 2003. Beyond these procedural issues, a wrinkle in substantive property law itself presents additional challenges to the Japanese secured creditor. Under Japanese law, buildings and land are treated as separate items of property. This unusual infrastructure for fragmentation of benefit can be exploited to advantage by a failing debtor, by permitting a late-coming lender to put up a minimal structure on land targeted for execution, in exchange for a final desperate advance. Because a building is a discrete, registrable item of immovable property, this introduces an additional layer of issues that must be addressed in litigation, imposing further costs in such cases.

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. 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). 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. But the first type of transaction to go through this cycle of innovation and reform was one driven by frustration over the terms of the Civil Code property rules themselves, quite apart from difficulties in enforcement.

The demise of forfeiture

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. This interest is

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117 Tanpo buken oyobi minji shikkō seido no kaizen no tame no minpō tō 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, Jul. 25, 2003.
118 See Bennett, supra note 110.
120 See, e.g. MINPŌ secs. 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 MINSHŪ 1005 (Sup. Ct., First Petty Bench, May 12, 1994) (concerning an eviction proceeding against an illegal structure standing on hypothecated land).
121 See Watahiki, supra note 108. While the scale and variety of execution difficulties in this period were severe, liquidity issues hamper execution against real estate in other jurisdictions as well. See sources cited in Tracht, supra note 24.
122 See, e.g. Tsubaki Toshio, DAIBUTSU BENSUI YOYAKU NO KENKYŪ (1975); Yonekura Akira, JōTO TANPO NO KENKYŪ (1976); Yonekura Akira, JōTO TANPO (1978); Yoshida Masami, JōTO TANPO (1979).
123 See also Takuchi tatemono torihikigō hō [Real Estate Brokerage Act], Law no. 176, Jun. 10, 1952, sec. 43(2) (prohibiting licensed real estate brokers from taking ownership as security where more than 30% of the purchase price has been paid).
124 MINPŌ secs. 369-398.
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.\textsuperscript{125} It is thus
unsuitable for backing a revolving credit arrangement, in which the creditor makes periodic advances
to the borrower under a series of drafts or 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 suspensory condition”. As
this name may suggest to those trained in the common law, it is an attempt to fashion something
resembling a defeasible fee, but using the Japanese property registers and contract provisions of the
Civil Code as raw materials. 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 puts his seal to a contract for the conveyance of real estate to the creditor, with a
provision that the conveyance will 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 is used as the basis for a “provisional registration” (\textit{kari \text{"o}ki}) on the property register.
Debtor retains ownership of the property, but the creditor’s claim is now protected against subsequent
interests that might attach to it. In the event of default, the creditor files suit to establish the fact of
non-payment, and obtains an attachment order, which he may then use to convert the “provisional
registration” to a final registration entry establishing full ownership.\textsuperscript{126}

Like the \textit{j\={o}to 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.\textsuperscript{127} Recognition of these arrangements in the courts brought about a surge
in their use. While this filled the immediate need for a means of securing revolving lines of credit, the
mortgage by registration was susceptible to adverse selection problems, which ultimately manifested
themselves in glaring instances of forfeiture. Because it takes the form of a contract of sale, a mortgage
by registration does not provide a means of stating the maximum value to be secured on the register.\textsuperscript{128}
While the parties can negotiate such a limit between themselves, in the absence of a reliable disclosure
mechanism, third party creditors will assume that the mortgage covers the entire value of the collateral.
Unable to obtain immediate benefits from a limit on the amount secured (in the form of subordinate
loans obtained elsewhere), the borrower's position will be driven by its value to him in the event that he
becomes insolvent and the mortgage is foreclosed – which will be zero. The result was that the value
of the collateral upon default exceeded the amount owing to the secured creditor in many cases, and the
courts adopted a policy of denying enforcement of the 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

\begin{itemize}
\item \textsuperscript{125} Minpō secs. 369 & 375; See 4 Shin hanrei koment \textit{ru minpō} [Commentaries on Civil Code Precedent] 91-92
(Shinozuka Shōji & Maeda Tatsuaki eds. 1991) (hereinafter cited as “Commentaries on Civil Code Precedent”).
\item \textsuperscript{126} The mechanics of the transaction are described in detail in John Owen Haley, \textit{The Preliminary Contract for
the specific registration requirements, see \textit{Shihō-shoshi setsurei & zukashi “mirudake” fudōsan tōki shoshiki-shū (ge)}
[Conveyancing agent precedents and illustrations “at a glance”, Real Estate Registration Forms (Part 2)] 440-442 (\textit{DAI-X
sōken shihō- shoshi shiken taisaku purojekuto} [DAI-X Research, Conveyancing Agent Examination Study Preparation
\item \textsuperscript{127} Suzuki Rokuya, \textit{Kari\={o}ki tanpo hō zakkō} [Reflections on the Mortgage by Registration], 880 \textit{Kinyū hōmu jio} 29
(1979) (discussing the viability of rotating credit security arrangements cast as mortgages by registration following the
\item \textsuperscript{128} For sample register entries, see Conveyancing Forms, \textit{supra} note 126.
\end{itemize}
morality (kō no chitsujo mata wa zenryo no fūzoku).\textsuperscript{129}

In an attempt to address these issues, the Diet intervened, adding an entire subjection to the Civil Code with specific provisions covering a new “root hypothec” interest.\textsuperscript{130} 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.\textsuperscript{131} 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.\textsuperscript{132} 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.\textsuperscript{133}

This carefully crafted reform was enacted by the Diet in 1971,\textsuperscript{134} but it did not achieve the degree of adoption hoped for by its draughtsmen; many businesses continued to use the mortgage by registration that the root hypothec was intended to replace.\textsuperscript{135} One reason for this was the then-existing barriers to enforcement of hypothec interests.\textsuperscript{136} 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 signalling problems were also inherent to its structure, and these were naturally unaffected by the 1971 legislation.\textsuperscript{137}

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), the Supreme Court signalled approval of lower court efforts to restrict the forfeiture remedy in a judgement issued in 1967,\textsuperscript{138} leading to a later definitive judgement of the Grand Bench handed down on October 23, 1974.\textsuperscript{139} The 1974 decision outlined two remedial tracks, which could be fixed by contract. 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.\textsuperscript{140} 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.\textsuperscript{141} 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”

\textsuperscript{129} Minpō sec. 90 provides as follows:

\textit{Article 90} Legal acts for purposes that conflict with public order and morality are void.

\textit{See also} Tadaka, \textit{supra} note 11, at 163-64.

\textsuperscript{130} Minpō no ichibu o kaisei suru hōritsu [Act to Partially Revise the Civil Code], Law no. 99, Jun. 3, 1971.

\textsuperscript{131} Minpō sec. 398:2.

\textsuperscript{132} Id.

\textsuperscript{133} \textit{See} Minpō sec. 369 398:2; Minji shikkō hō secs. 43-92, 181.

\textsuperscript{134} Minpō no ichibu o kaisei suru hōritsu [Act to Partially Revise the Civil Code], Law no. 99, Jun. 3, 1971.

\textsuperscript{135} \textit{See} Suzuki, \textit{supra} note 127, at 30.

\textsuperscript{136} A contemporary description of enforcement limitations is given by Haley. \textit{See} Haley, \textit{supra} note 4, at 138-39.

\textsuperscript{137} In effect, the new legislation forced parties to choosing one advantage (a bargained-for limitation on the extent of security) to abandon another (reliable enforcement procedures).

\textsuperscript{138} Decision of the Supreme Court (First Petty Bench), Minshu v. 28, p. 2430, November 16, 1967. The early phase of this series of cases was the subject of an article published by Professor Haley in 1972.

\textsuperscript{139} Mikami v. Kobayashi, 28 Minsh 1473 (Sup. Ct., Grand Bench, Oct. 23, 1974).

\textsuperscript{140} Id. at 1482.

\textsuperscript{141} Id.
obligations.\textsuperscript{142}

This decision clearly established the borrower's right to an accounting. The Diet subsequently adopted and extended the judicially developed framework, with the passage of the Act Concerning Provisional Registration Security Contracts in 1978\textsuperscript{143} (hereinafter referred to as “Mortgages Act 1978”). To assure the borrower of end-to-end control over the equity in the collateral, 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. The right to foreclosure arises two months after this notice is received by the debtor,\textsuperscript{144} providing an opportunity to object and open negotiations if the proposed accounting amount is unacceptable. The Act also required consent from the holders of subordinate interests in the collateral, failing which the remedy is limited to a judicial auction and accounting.

The Mortgages Act 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.\textsuperscript{145} Encumbered with additional procedural requirements, with much 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 \textit{jōto tanpo} – which was not affected by the restrictions imposed by the Mortgages Act.

\textbf{The modern context of \textit{jōto tanpo}}

The \textit{jōto tanpo} against real property is the oldest of Japan's non-Code security interests; but with the development of more flexible statutory devices on the one hand, and improvements to the procedures for enforcement on the other, its field of utility has been considerably narrowed over time. Nonetheless, insofar as it remains a recognized security device, is found in commerce, and continues to generate litigation, it remains an issue in the courts, and 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.\textsuperscript{146} Bearing in mind the differing procedural context, comparison of holdings relating to \textit{jōto tanpo} with judicial experience in the United States and England 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 \textit{jōto tanpo} in real property, three Supreme Court cases will be discussed, relating respectively to third-party dispositions, mortgagees in possession, and an analogue to the common law “clogs and fetters” doctrine.

One procedural point that should be noted at the outset is that the “equity of redemption” does not exist (or at least has a very different meaning) in the Japanese context. This concept is associated with a

\begin{thebibliography}{9}
\bibitem{142} Haley describes public auction as the favoured means of disposition. Haley, \textit{supra} note 3 at 145-146. 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., \textit{MINPÔ KÔZA 3: TANPO BUKKEN} [Course in the Civil Code, Volume 3, Security Interests] 295-96 (revised edn. 1980).
\bibitem{143} Kari-t \textit{ki tanpo keiyaku t ni kansuru h ritsu [Mortgages Act]}, Law no. 78, June 20, 1978.
\bibitem{144} 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. \textit{See} Yübin hō, Law no. 165, Dec. 12, 1947, secs. 62 & 63.
\bibitem{145} Kari-t \textit{ki tanpo keiyaku t ni kansuru h ritsu [Mortgages Act]}, Law no. 78, June 20, 1978, sec. 14. See Commentaries on Civil Code Precedent, supra note 125, at 270.
\bibitem{146} \textit{See} Murphy & Roberts, \textit{supra} note 88 and accompanying text.
\end{thebibliography}
bridging interval of judicial oversight (foreclosure proceedings) between default and the final realization of collateral.\textsuperscript{147} 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 follow from the discrete legal definition of the interest at stake. In the case of attachment or the exercise of a hypothec, collateral is realized by judicial auction.\textsuperscript{148} The purchaser at auction becomes the legal owner, free of the debtor's former interest, and may petition immediately for eviction on that basis. For this reason, many of the familiar equitable pronouncements by common law courts in respect of the equity of redemption have no context in Japan.\textsuperscript{149} This procedural difference is an important factor in the use and impact of \textit{j to tanpo} and other non-Code interests within the transactional system.

Under current law, the real property \textit{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. The contract of sale must indicate the “cause of registration” (\textit{tōki no gen’in}), which must also be recited in the power of attorney offered by the owner.\textsuperscript{150} In an orthodox transaction negotiated at arm's length, the cause of registration will be listed as “\textit{jōto tanpo}”.\textsuperscript{151} The obligation to restore the property upon repayment is discoverable in this case, but the terms of the reconveyance undertaking are not subject to registration. The creditor becomes legal owner, and the collateral is vulnerable to third party claims arising from bankruptcy of the lender, and to attachment proceedings against him.\textsuperscript{152} Upon default by the borrower, the lender is legally entitled to realise the collateral, either by claiming it directly, or by selling to a third party.\textsuperscript{153}

A uniform requirement of an accounting to the debtor under a registered mortgage was extended to cover \textit{jōto tanpo}, by Supreme Court decisions handed down in 1968 (foreclosure by sale contracts) and 1971 (direct foreclosure contracts).\textsuperscript{154} Depending on one's favoured legal theory, the lender secured by a \textit{jōto tanpo} might be said to hold title on trust,\textsuperscript{155} or subject to publicity,\textsuperscript{156} or as a façade,\textsuperscript{157} or in common with the debtor,\textsuperscript{158} or subject to the debtor's expectation interest.\textsuperscript{159} 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.

\begin{itemize}
\item \textsuperscript{147} See, e.g. Stevens v. Theatres Ltd., [1903] Ch. 857 (1903).
\item \textsuperscript{148} MINJI SHIKKÔ HÔ secs. 43-92.
\item \textsuperscript{149} 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.”)
\item \textsuperscript{150} See \textit{FUÐOSAN TÔKI JITSUMU} [Registration Practice] 389-91 (3rd ed., Ministry of Justice Civil Division ed. 1978).
\item \textsuperscript{151} There are cases in which the \textit{j to tanpo} is not visible on the register. See, e.g., Imai v. Takechi, 48 MÌNSHÛ 414 (Sup. Ct., Third Petty Bench, Feb. 22, 1994).
\item \textsuperscript{153} 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.
\item \textsuperscript{154} Izumi v. Kanai, 22 MÌNSHÛ 509 (Sup. Ct., First Petty Bench, 1968); Shinkai v. Takahashi, 25 MÌNSHÛ 208 (1971).
\item 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.
\item \textsuperscript{155} See Tadaka, \textit{supra} note 11, at 126-32.
\item \textsuperscript{156} See Tadaka, \textit{supra} note 11, at 140-41 (citing the work of Ishida Bunjirô).
\item \textsuperscript{157} See Tadaka, \textit{supra} note 11, at 141-42 (citing the work of Hamagami Norio).
\item \textsuperscript{158} See Tadaka, \textit{supra} note 11, at 146 (citing the work of Suzuki Rokuya).
\item \textsuperscript{159} See Tadaka, \textit{supra} note 11, at 146-47 (citing the work of Takeuchi Toshio).
\end{itemize}
with the debtor, the practical question that arises is whether the debtor's right to redeem can be asserted against a transferee taking with notice. This is the subject of the following case.

**Case 1: third party transferees**

This case turns on a tangled and long-burning family dispute between an eldest brother and the husband of one of his younger sisters, over money lent to that brother-in-law by the husband of a second sister.\(^\text{160}\) Takechi Kazuo was the husband of Imai Hanako, one of two Imai sisters.\(^\text{161}\) In 1957, Takechi borrowed 520,000 yen from Wada Tsuneo, the husband of Hanako's younger sister.\(^\text{162}\) The loan was to be repaid in interest-free monthly instalments of 5,000 yen over a period of eight years and seven months.\(^\text{163}\) 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.\(^\text{164}\) This conveyance was duly registered, with “gift” as the cause of registration.\(^\text{165}\) For reasons not given in the judgement, in May of 1963, Imai Kenichiro and the mother of the Imai clan moved into the property with Takechi and Hanako.\(^\text{166}\) The two families did not get along, and Takechi moved out, ceasing payment on the loan from Wada (husband, as noted above, of Hanako's younger sister), leaving some 150,000 yen outstanding on the loan.\(^\text{167}\)

Over a decade later, in 1977, Takechi filed suit seeking the eviction of Imai Kenichiro from the property, and restoration of ownership to his own name.\(^\text{168}\) The court refused to remove Wada Tsuneo's ownership from the register, on the grounds that the original loan was still outstanding; but it acknowledged that Takechi was entitled to the eviction order as the equitable owner under a *jō to tanpo*. \(^\text{169}\) The order was issued, Imai Kenichiro was removed from the premises, and Takechi resumed occupation (this must obviously have been a cause of stress, but it is not clear whether Takechi's marriage to Hanako fell apart before, or after, this lawsuit).\(^\text{170}\)

Two more years passed, and on May 10 of 1979, after the slighted and evicted Imai Kenichiro prevailed upon him for assistance against their brother-in-law, Wada Tsuneo sent a notice to Takechi, by contents proven post, of his intention to settle accounts and foreclose his interest in the property.\(^\text{171}\) 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 Kenichiro.\(^\text{172}\) This transaction was entered on the register as a “gift” two days later.\(^\text{173}\) No accounting was made to Takechi following the transfer, but Takechi evidently eventually caught wind of the these machinations, and 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.\(^\text{174}\)

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161 See id. at 421.
162 Id.
163 Id.
164 Id. at 421, 422.
165 Id. at 422.
166 Id. at 423.
167 See id. at 435.
168 Id. at 424.
169 Id.
170 Id.
171 Id. at 426.
172 Id. at 426-27.
173 Id.
174 Id. at 436.
response, Imai Kenichiro sued Takechi for eviction, on the grounds that, as registered transferee, Imai Kenichiro had acquired ownership of the property free of Takechi's right of redemption.\footnote{175}{Id. at 421-22.}

As the two acts of registration in this case illustrate, a \textit{jō to tanpo} agreement operates by placing a fully functional ownership interest in the hands of the lender. It differs sharply from a common law mortgage, as practised under Torrens registration or under an American-style system of recorded deeds, in that the interest of one party cannot be discovered from the register. In this respect it resembles an equitable mortgage – but with the “equitable” and “legal” positions reversed; rather than an equitable right in the lender that is vulnerable to third-party claims,\footnote{176}{See \textit{e.g.}.} under \textit{jō to tanpo} it is the borrower who holds an equitable claim for reconveyance. Modelling the \textit{jō to 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 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. Purchasers for value without notice of the trust are an exception, but in this case, the plaintiff Imai Kenichiro has taken with notice (and is not a purchaser, to boot).

Secured transactions of this precise form simply do not happen in the English conveyancing environment. However, prior to the Law of Property Act 1925, a similar posture could arise in the context of foreclosure proceedings.\footnote{177}{Law of Property Act 1925 secs. 101 & 103.} Such a case was \textit{Stevens v. Theatres, Ltd.}\footnote{178}{\cite{178} Stevens v. Theatres Ltd., [1903] Ch. 857 (1903).} Classic foreclosure proceeds in three phases: the lender first petitions the court for foreclosure unless the borrower pays all sums due by a particular date; if the borrower fails to pay, the court then issues an order of \textit{foreclosure nisi}, which confirms the failure to pay, and places the property under the jurisdiction of the court. If at the end of this interval (typically six months) payment is still not forthcoming, the mortgagee may obtain an order of \textit{foreclosure absolute}, which in principle entirely severs the interest of the borrower. As had become common practice by that time, the mortgage in \textit{Stevens} contained a power of sale, and the issue in the case was whether, in the administrative interval between \textit{foreclosure nisi} and \textit{foreclosure absolute},\footnote{179}{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. Tracht, \textit{supra} note 62 \textit{passim}.} 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. The conveyance was permitted to stand – if it could be shown that the purchaser took without notice of the still-pending foreclosure proceeding.\footnote{180}{See, \textit{e.g.} \cite{180} Stevens v. Theatres, Ltd. (1903) 1 Ch 857.} In such a case, the court held, the mortgagor's claim would attach to the proceeds of sale received by the mortgagee in his capacity as trustee.

If the doctrine of notice used in \textit{Stevens} were similarly applied to the case of \textit{Imai v. Takechi}, Takechi's right of redemption would be protected against third parties taking with notice of his interest. In the event, the trial court judge held that the attempted notice of May 10, 1979 by itself was effective to foreclose Takechi's interest in the property, and held for Imai.\footnote{181}{\textit{Imai v. Takechi}, 48 MINSHÛ 414, 420-28 (Sup. Ct., Third Petty Bench, Feb. 22, 1994).} The Takamatsu High Court applied the doctrine of notice and reversed, ordering that title be settled on Takechi.\footnote{182}{Id. at 428-40.} The Supreme Court again reversed, holding that Takechi's interest in the property was conclusively severed when Imai Ken'ichiro took the transfer from Wada as registered owner, regardless of knowledge.\footnote{183}{Id. at 414-20.} This case
firmly establishes that actual notice is irrelevant in a j to tanpo transaction; the title of a third-party transferee is unassailable.

The court gives two reasons for this judgement: “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.” This holding has been the target of criticism, and it is in fact difficult to grasp the court’s reasoning. Limiting the right of redemption to third-party transferees with actual notice would not destabilize the chain of title, because such transferees can protect themselves by foregoing the purchase. Furthermore, the creditor would not be exposed to exceptional risk, because his obligation to make restitution to the third party purchaser has been preceded by the debtor’s tender of redemption, which covers his original claim. The required adjustments would, at worst, be an inconvenience – and save court time to boot, by eliminating the need for a second action by Takechi against Wada to recover the value of his equity in the property.

A firmer justification for the rule in this case would begin from the fact that Japan practices a limited form of title registration. In jurisdictions such as Australia since 1858, Japan since 1899, and England since 1925, the equitable niceties of off-register transactions conflict with the objectives of registered title. The guiding principles of such a system are commonly articulated to be three: the mirror principle (entries on the register should provide a complete and correct view of legal interests); the curtain principle (equitable interests should not affect the title acquired by the purchaser); and the insurance principle (the state provides guarantees the accuracy of the register to the purchaser). The first two principles are aimed at lowering the cost of conveyancing, by allowing buyers to evaluate the title of real estate by simply examining the register. The third principle, which reduces their risks in doing so, is not an administrative feature of the Japanese title registration system; but the holding in Imai v. Takechi serves much the same purpose.

Among the common law jurisdictions that have adopted systems of registered title, courts in England have completely refused to recognize the pre-existing practice of mortgage by deposit of title deeds in registered land (effected by depositing the title registration certificate with the lender), on the grounds that to do so would violate the mirror principle. This has effectively eliminated this practice from modern English conveyancing for land with registered title. Because, as noted above, the respective equitable and legal interests are reversed in j to tanpo, the same strict adherence to the register in Japan has an opposite effect. The unconditional power of sale sustains j to 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 j to tanpo less certain.

Thus, both English and Japanese courts favour strict adherence to a bright-line rule with respect to “off-
register” interests. This minimizes creditor uncertainty of disposition and reduces this aspect of risk, but due to differing commercial custom in the two jurisdictions, in one case the effect of certainty is to eliminate the off-register transaction, but the cost of clarity in the other is to encourage it. Unfortunately, this opens the door to considerable scope for opportunism, as shown by the following case.

**Case 2: taking on “clogs and fetters”**

On April 8, 1994, Nakano K ōju took a short-term loan in the amount of 33,000,000 yen from one Okamura Shōhei.192 Their agreement provided for payment of interest at the rate of 2.5% per month with a due date of June 7, 1994, and a penalty of 40.004% per year in the event of late payment.193 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.194 Nakano did not meet the contract deadline for repayment, but over time made payments totalling 4,856,000 yen, the last on January 31, 1995.195 At a meeting on May 2, 1995, Nakano prevailed upon Okamura not to initiate auction proceedings based on the hypothec.196 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 it on to third parties, if timely payment were not made.197 Nakano again defaulted, and on May 26, Okamura registered the conveyance of the property, giving “substitute performance” as the cause of registration.198

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 16.199 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.200 He did default again, but made a partial payment of 10,000,000 yen on September 15, which Okamura accepted.201

On December 24, 1995, Okamura made a final demand, for payment of the total sum due under the loan (41,272,600 yen) by January 26, 1996, stipulating that the property would be immediately sold if payment was not forthcoming.202 There was no response from Nakano. On July 19, 1996, Okamura sold the property to a third party, Sano Nobuichi, who promptly registered his interest.203 Having lost his property, Nakano sued to avoid both the original transfer to Okamura and the Okamura-Sano sale, and in the alternative for the payment of 100,000,000 yen as compensation for Nakano's equitable interest in the property.204

This case turns on the characterization of the conveyance that Okamura registered on May 26, 1995. If the purchase of registration given – “substitute performance” – is accepted, then Nakano's obligations
under the loan are at this point satisfied, the transfer of ownership is final, and Nakano no longer has a
claim to the property. However, both parties behave subsequently as if the loan obligation continues,
and as if Okamura holds title as security. If the Nakano-Okamura transfer is treated as a j to tanpo, the
final sale to Sano is final, and Nakano's only claim would be for against Okamura for an accounting
(assuming the waiver by Nakano of his equity to be invalid, as it would appear to be).

At trial, neither party characterized the transaction as a j to tanpo. Okamura stood on the
documentation, claiming the original transfer was substitute performance for sums due. Nakano, for
his part, argued that the documents for the original transfer, which were worded to take effect 23 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). On the theory that the Mortgages Act of 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 the Mortgages Act.

The facts of this case well illustrate the exotic attraction of j to tanpo in real estate as a tool for
collections. In the interval between May 25 and September 15, 1995, the character of the transaction is
truly ambiguous. Had Okamura taken the opportunity to sell the property during this period, the
evidence for treating the sale as a true substitute performance would be strong. It is the subsequent
tender by Nakano, and its acceptance by Okamura, that forces characterization of the agreement as 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 by Nakano's counsel reflects a
proposal by some scholars of its use as a means for instilling a greater degree of formal discipline on
j to tanpo transactions. (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. The primary effect of Nakano's petition
would therefore be to inconvenience the third party purchaser Sano, by invalidating his title.

The result in the trial court is not mentioned in the official report of the case. The Tokyo High Court
accepted Nakano's position, and declared both transfers to be void. On appeal, the Supreme Court
reversed. Classifying the original transfer as a j to tanpo, the Court declared the sale to Sano effective
and final, and remanded the case for further hearings on the accounting to be made on Nakano's
remaining equity interest, if any.

The Supreme Court's judgement has the satisfying effect of preventing either party from using the
Court as a tool for inflicting gratuitous damage on the other. On the other hand, given the state of the

205 MINPO art. 482. See Haley, supra note 4, at 135.
207 Nakano v. Okamura, Sup. Ct. First Petty Bench, Sep. 12, 2002, reported in 1106 HANREI TAIMUZU 81, 84 (Jan. 15,
2003).
208 Id.
209 Id.
210 Id. at 85.
211 Id. at 84.
212 Id.
pleadings, this is a very welcoming case for the analogous application of the Mortgages Act to *j to tanpo* transactions. This would resolve a problem separate from the transactional ambiguity referred to above, in the disconnect between realization of the collateral and the accounting made of the debtor's interest. Despite the impact on Sano, to have adopted this approach would not have been without its benefits. As common law courts have learned from extensive experience with contractual 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.  

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. By refusing to apply the Mortgages Act 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 judgement in *Okamura v. Nakano* reflects the Court's recognition of the constraints of the registration system. Holding *j to tanpo* creditors to the procedural requirements of a statutory mortgage by registration would require abandonment of the court principle, a cost that the Court is unwilling to incur. Given that imperative, and given the persistence of *j to tanpo* 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 *j to tanpo* doctrine, in the relationship between the parties following default, in advance of an accounting or sale.

### Case 3: mortgagees in possession

The case arose during Japan's “Bubble Economy”, the frenzied period of rapid asset inflation that came to a close in the early 1990's. Asano Shinpo was proprietor of *Bito Sh ji* (Beautiful Metropolis Trading). He set his sights on a potential development property that was tied up by sitting tenants on long-term land and building leases. He judged that the total cost of the property, including purchase money and “departure money” needed to buy out the lessees, would be some 200 million yen. The steps in his simple plan – to purchase the land, to arrange by some means for a surrender by the tenants, and to cover these costs through a sale – were a common pattern in the overheated market of the time.

On March 28, 1984, Asano borrowed 180 million yen from Sumimoto Takeichi, a grey-market lender. The loan was secured by a *j to tanpo* in favour 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. Sumimoto registered the transfer of ownership the following day, on March 29.

Success in this transaction would have required that Asano find a buyer willing to go forward with a purchase, but price movements were not sufficiently favourable, and this Asano was unable to do. At the end of the loan term, on May 25, he paid four weeks' advance interest on the principle sum of

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213 See discussion *supra*, text accompanying notes 62-65 & 75-82.
216 Id.
217 Id.
220 Id. at 2703, 2731.
221 Id. at 2731.
180,000,000 yen at 4% per month, and renewed the loan for that period.  This process was repeated on June 22, July 20, August 17, and September 14, each extension being supported by a replacement promissory note exchanged with Sumimoto. While Asano tried continuously to find a buyer, and in July was on the verge of concluding a sale that fell through at the last minute, nothing materialized, and on September 29, 1984, beset by his creditors, Asano Shinpo took his own life.

In or about October of 1986, Sumimoto began operating a parking service on the property, which he continued to do until the end of November in 1991. During this interval, the heirs of Asano's estate attempted to waive their rights in the collateral and demand an accounting. Sumimoto refused to comply, and the heirs filed suit to compel the settlement of accounts in 1992.

In between the loan to Asano and the lawsuit by his heirs, Japan's Bubble Economy peaked, and crashed, and 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. 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. Plaintiffs sought to recover the difference between these two sums.

Sumimoto presented two core claims in defence. 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 jō to tanpo agreement four months before Asano's death. 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 jō to tanpo, by offering the collateral as substitute performance of his obligations under the loan. On the date of this document (April 26), the land had an appraised value of 134,250,000 yen, which would have meant that Sumimoto agreed at that point to take a loss on the transaction. Counsel proposed that this constituted a completion of the loan agreement. The court was not impressed. On evidence, the trial judge found the memorandum of consent to be a forgery, and – 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 its 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 – refused to treat the second contract as a genuine sale.

The court held that, like the first agreement, this contract created an executory jō to tanpo between Asano and Sumimoto, under which Asano

222 Id.  
223 Id.  
224 Id. at 2732.  
225 The trial court judgement 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.  
226 Id.  
227 Id. at 2728-29.  
228 Id.  
229 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 Oct. 5, 2008).  
231 Id. at 2737.  
232 Id. at 2730.  
233 Id. at 2733-34.  
234 Id. at 2721.  
235 Id. at 2730.  
236 Id. at 2733-37.
In the alternative, Sumimoto asserted that the debtor in a *j to tanpo* relationship cannot compel the creditor to complete an accounting and terminate the relationship, until the creditor signals his intention to realize the collateral. Under existing precedent, this condition would be satisfied by one of three events: sale to a third party; notice of an intent to claim unencumbered ownership; or notice that the obligation exceeds the value of the property. None of these having transpired, and Asano's heirs having no interest in redeeming the property (after 1990 it had declined greatly in value), counsel for Sumimoto maintained that the duty to account did not arise.

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

Setting aside the small matter of forgery, this result makes sense but for one fact: the entry into possession by the mortgagee. Given the limitation of his claim 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 this particular 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, and it is questionable whether its highest and best use was as a parking lot. To address the moral hazard that arises under these conditions, a mortgagee in possession under English law is affixed with an affirmative duty to maximize the income derived from the property for the benefit of the debtor. For this reason, mortgagees in England generally seek possession only with a view to an immediate sale.

The indifference of the Supreme Court to the state of possession speaks of the historical origins of the *j to tanpo* interest. As related above, both possessory and non-possessory pledges of land were known to Tokugawa land practice, and both persisted into the early Meiji era. 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 freedom of contract. To support this view, the courts applied a “thin trust” concept to these transactions, under which the Civil Code and the register continued to determine property relations with third parties; while the “inner relationship” between mortgagor and mortgagee was entirely governed by contract. Because the primary doctrinal objective was to insulate these transactions from the terms of the Civil Code, the “trust” or “trust-like” verbiage as not taken to impose special duties on the trustee; and therefore, the state of possession is treated as a term for the parties to settle between themselves. As this decision illustrates, the Supreme Court has remained true to these roots, favouring the preservation of a narrow doctrinal integrity over commercial fairness and

237 Id. at 2733-34.
238 Id. at 2730.
239 Id. at 2704, 2709-10.
242 Id. at 2702-2705.
244 See discussion supra, text accompanying notes 39 to 60.
245 See discussion supra, text accompanying notes 72 and 73.
246 See discussion supra, text accompanying notes 91 to 95.
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. While this is certainly the case, Sumimoto has also kept his options open. The second contract, for sale with an option to repurchase, is inherently ambiguous, and invites opportunism by the lender: modelled as a *j to tanpo*, it leaves the lender (in a falling market) free to pursue the borrower for sums due; if modelled as a sale, the lender (in a rising market) is free to stand on the option and retain interest payments made in the interim. Sumimoto evidently attempted to remove the speculative ambiguity of the transaction through forgery.

As the above cases illustrate, inefficiencies arise from the potential for ambiguity in contract paper, and the limitations of the registration system; but the inflexibility of judicial treatment arises from the “thin trust” concept that underpins the *j to 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 *j to tanpo* relationship cannot be fully controlled through the further refinement of judicial doctrine. This unhappy equilibrium gives pause to consider whether sustaining *j to tanpo* as a viable security interest is an appropriate objective. If the *j to tanpo* performs no function that is not equally well served by the orthodox hypothec and root hypothec interests, reversing the policy of sustaining its value may be an appropriate response.

**Taking registration seriously**

The historical role of *j to tanpo* has been to help creditors and debtors to skirt around inadequacies in Japan's system for enforcing rights in real property. A *j to tanpo* in real estate, by its very nature, creates an off-register interest that raises problems of information asymmetry, and *j to 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 – *j to tanpo* helped to support the transactions that other security interests could not reach. Today, the terrain has shifted. The civil enforcement system has been greatly reformed in the light of hard experience, and to all accounts is now performing well. This has changed creditor behaviour, and with it the role played by *j to tanpo* in real estate transactions. Its use has declined, and the latter two cases discussed above well illustrate the niche that it fills today; a halfway house between default and execution, favoured 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 processed more than four times the number of cases in 2005 that they had done in 1975. Over the same period, the total staff contingent of the court system

248 See discussion supra, text accompanying notes 124 to 145.
249 See supra note 121.
250 See Table 459: Civil and Administrative Cases, 1960-76, JAPAN STATISTICAL YEARBOOK 632 (1978) (reporting 127,558 ordinary civil cases received for 1975); Table 25-11: Cases newly received and cases disposed of litigation cases and conciliation cases by type, 2000-05, JAPAN STATISTICAL YEARBOOK 779 (2008) (reporting 534,891 ordinary civil cases received in 2005).
has grown by less than 4%.Benefits of office automation notwithstanding, the pressures on judicial
time are far greater today than in the past. It is therefore not surprising that in the progressive
refinement of *j to tanpo* rules, the Japanese Supreme Court has, to borrow a phrase from Carol Rose,
preferred “crystals” to “mud”.

This is particularly true with respect to 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 fact-finding. By ruling the doctrine
of notice inapplicable to third-party transfers, courts are able to uphold transfers without looking
behind them. This rule contributes to the faster disposition of cases; but it is also an instance of legal
hypertrophy, insisting on exacting adherence to a principle that actually aggravates an underlying
problem.

The judicial inefficiencies of the *j to tanpo* form are inherent: the ambiguity of the relationship; the
temptations to forgery; the impossibility of a comprehensive foreclosure action, and the possibility of
attachment in the hands of the lender all 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 a Grant Nelson has argued with respect to the analogous
contract for deed in the United States, it would be preferable to normalize the *j to tanpo* and bring it
within the mainstream framework, now well tested, for realizing security.

As the second case discussed above illustrates, *j to tanpo* presents a special difficulty for Japan’s
system of title registration, because it is the lender that holds ostensible title to the collateral. Where
this allocation of legal and “equitable” rights is reversed, strict adherence to the curtain principle
effectively quells the off-register transaction. Such a case is England, where the traditional mortgage
by deposit of title deeds has been eliminated under the registered conveyancing system, by a holding
that a deposit of the certificate of title issued by the registrar does not create an equitable mortgage.

Alternatively, where publicity is based on recording rather than registration, the borrower’s interest can
be placed on an equal footing with the *j to tanpo* creditor. This is the treatment in the state of
Louisiana in the United States, where the property system also has civil law roots. In Louisiana a
security interest can be created in exactly the same way as a *j to tanpo*, through an outright conveyance
to the lender, accompanied a counter-letter promising reconveyance to the borrower upon repayment.
Louisiana conveyancing is supported by a system of recorded deeds, and the borrower can protect his
interest by filing. In the event that the creditor sells the collateral to a third party, the issue for the court
is straightforward: if the counter-letter has been filed, his interest is protected; if it has not, it is not.

The *j to tanpo* against real estate presents Japanese judges with an indigestible cocktail: a loose
conveyancing practice similar to that of Louisiana, encased in a strict registration system similar to that

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251 See Table 422: Fixed number of national government employees, 1955-78, JAPAN STATISTICAL YEARBOOK 616
(1978) (reporting 24,391 for 1975); Table 24-3: Budgetary fixed number of national government employees, 2000-07,
253 For a similar argument concerning statutory precision in the United States, see Paul Campos, *JURISMANIA: THE
254 Strict adherence to the curtain principle dictates that creditors are able to sell the property to third parties without
accounting to the debtor. In terms of Japanese jurisprudence, these two acts cannot be subjected to “simultaneous
performance” (*d jirik*).
255 See Nelson, * supra* note 16.
256 See * supra* note 190 and accompanying discussion.
257 See, e.g. Livingstone’s Executrix v. Story, 36 U.S. 351 (1837).
258 See * supra* note 190 and accompanying discussion.
of England. Strict application of the curtain principle has the effect of encouraging *j to tanpo* transactions, despite their inefficiency. Under these conditions, protecting the debtor’s interest through the doctrine of notice would undermine the registration system, but would not fully control for overreaching.\(^{260}\) Because this dilemma cannot be resolved through the refinement of judicial doctrine, resolving it would require legislative intervention. As was the case with the Mortgages Act of 1978, improving the infrastructure for judicial management is the key to discouraging opportunistic use of the interest.

The first, essential step would be to dignify the *j to tanpo* interest against real estate with explicit statutory recognition. One of the doctrinal difficulties of current law is that *j to tanpo* against both movables and immovables is sustained by the same thin trust concept, using the same terminology.\(^ {261}\) The bulk of *j to tanpo* litigation relates to secured claims in movables, where it plays a vital economic role as the only form of non-possessory security available to creditors. Statutory recognition of *j to tanpo* in real estate as a discrete type of security interest would clarify that these are separate threads of law, with rules appropriate to the physical and legal character of the respective assets involved.

A second issue is notice to third parties, and specifically the legal significance of *j to tanpo* as a cause of registration. Under current doctrine, both the stated cause of a transfer of ownership, as well as actual knowledge, are ignored. This is intended to reduce the transaction costs of conveyancing generally, by encouraging purchasers to trust the content of the register. Paradoxically, this rule increases the fact finding burden on courts, by discouraging the registered disclosure of the true intention of 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 his 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*.\(^{262}\) Second, because *j to tanpo* is known to be both afflicted by legal ambiguities, and associated with lenders who operate on the fringes of the law, risk averse purchasers will discount or avoid properties with a *j to tanpo* registration in the chain of title, reducing their sale value.

Application of the doctrine of notice would give the debtor in a workout an incentive to negotiate for the explicit characterization of *j to tanpo* as the 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 *j to tanpo* that has not been so 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 the *j to tanpo* 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 collateral.

\(^{260}\) As illustrated in the second case discussed in the main text, strict adherence to the curtain principle dictates that creditors are able to sell the property to third parties without accounting to the debtor. In terms of Japanese jurisprudence, these two acts cannot be subjected to “simultaneous performance” (*d ji rik*).

\(^{261}\) See *Tadaka*, supra note 11 passim.

\(^{262}\) See *supra* text accompanying notes 192 to 214.
Conclusion

The Japanese property system has undergone considerable elaboration and development since the release of restraints on alienation by the Meiji reformers; and the *jū to tanpo* interest has played an important role in that transformation. This history and its outcomes provide an important view of the internal dynamics of a young property system undergoing change. Individual entitlements within society are by their nature widely dispersed, a fact which makes it technically difficult and politically expensive to alter them, even in the absence of constitutional guarantees. Consequently, during a period of rapid reformation, policy makers formulate new rules in the face of considerable pressure from stakeholders in the existing order. Successful deployment of property rights is marked by the channelling of these forces toward the progressive refinement of both substantive law and enforcement mechanisms with a view to the long-term improvement of transactional efficiency.

In a widely cited article on the roots of organized crime published in 2000, Curtis Milhaupt and Mark West write of the Meiji-era property rights framework that it “was not matched by the development of complementary enforcement mechanisms”, an early fault of omission giving rise to what the authors euphemistically refer to as “transaction cost engineers” operating outside the boundaries of law. This is a point that can be pushed too far. While barriers to enforcement undeniably induce the pursuit of alternatives, as the shifting role of *jū to tanpo* in real estate transactions demonstrates, the first recourse of parties frustrated by inadequate enforcement mechanisms is to pursue alternatives within the state-sponsored legal framework itself.

The *jū to tanpo* against real estate with opportunity for forfeiture, as an adaptation of feudal-era practice, became established 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 contribute to economic efficiency. The interest served an important role as a tool for secured lending during the nation’s early period of industrialization; but during the swell in economic activity in the second half of the 20th century, 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 curtailed by degrees until today it is primarily associated with collection efforts against debtors already in distress. This downward progress in the position of *jū to tanpo* within the universe of real estate transactions has not been the result of enforcement failure, but of enforcement arbitrage.

Japan’s property system has thus been equally shaped 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 1966 were a response to this challenge. The same can be said of the root hypothec added to the Civil Code in 1969, of the Mortgages Act of 1978, of

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the procedural reform of auction and attachment proceedings introduced in 1979, 268 and of the removal of the super-priority for short-term leases in 2003. 269 Each of these reforms incidentally reduced the attractiveness of the non-Code security devices; but it is worthy of note that the first of these steps, in particular, operated by weakening, not by strengthening, the civil enforcement system.

Judicial doctrine has reached its limit for jō to tanpo as a creature of judicial construction, hemmed in as it is by the constraints of the real estate registration system and the Civil Code. The need to protect the integrity of registration, as well as the pressures of judicial administration, have driven the courts to adopt a highly formalistic and inflexible approach to a nominally “equitable” transaction. It remains to be seen whether the current round of revisions to the property section of the Civil Code will touch the j to tanpo in real estate; but it is certain that the inherent flaws of this transactional form will invite a response in due course. Time will tell what form it takes.

268 Minji shikkō hō [Civil Execution Act], Law. no. 4, Mar. 30, 1979.
269 Tanpo bukken oyobi minji shikkō seido no kaizen no tame no minpō tō 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, Jul. 25, 2003.