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The Swinging Pendulum of Equity: How History and Custom Shaped the Development of the Receivership Statute in Illinois

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INTRODUCTION

> Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path.[1]
>
> – Justice Cardozo

In the fall of 2012, foreclosure filings in the United States fell to a five-year low as fewer homes seemed to be in the grasp of mortgage lenders.[2] This was the second consecutive monthly drop in filings, although there still remained a sharp deviation along state lines.[3] For example, in Illinois, third quarter reporting in 2012 revealed that home foreclosure activity rose thirty-one percent compared to the same period in 2011.[4] The same report found Illinois had 42,176 foreclosure filings from July through September 2012.[5] This figure represents 1 in every

1. Graf v. Hope Bldg. Corp., 171 N.E. 884, 888 (N.Y. 1930) (Cardozo, J., dissenting) (citing Griswold v. Hazard, 141 U.S. 260, 284 (1891)).

2. Marcy Gordon, *U.S. Foreclosure Filings Hit 5-Year Low in September*, HUFFINGTON POST (Oct. 11, 2012, 12:19 AM), http://www.huffingtonpost.com/2012/10/11/foreclosure-filings-2012_n_1956651.html.

3. *Id.*

4. *Illinois Q3 foreclosures Up 31 percent over 2011*, BLOOMBERG BUS. WEEK (Oct. 11, 2012), http://www.businessweek.com/ap/2012-10-11/illinois-q3-foreclosures-up-31-percent-over-2011.

5. Marcy Gordon, *U.S. Foreclosure Filings Fall, but Up 31 Percent in Illinois*, CHI. DAILY L. BULL., Oct. 11, 2012, at 1.

126 housing units, the fourth highest rate in the country.[6] A closer analysis of the number of foreclosures in Illinois reveals that in 2012, foreclosures steadily rose throughout the six counties of Cook, Will, Kane, Lake, McHenry, and DuPage.[7] The total number of home foreclosures in January for the counties combined was 5138;[8] in February, the total number jumped to 6168;[9] and in March, the number of foreclosures increased to 6442.[10] Overall, there was approximately a twenty-five percent increase from January to March of 2012. Over the last three years, the number of foreclosures in Cook County alone was higher than the other five northern Illinois counties combined.[11]

Despite efforts to modify and renegotiate loans, the number of residential foreclosures continues to rise, wreaking havoc across all social and economic lines. As Sarah Raskin of the Federal Reserve notes, "The wave of foreclosures is one of the factors hindering a rapid recovery in the economy. Traditionally, the housing sector . . . has played an important role in propelling economic recoveries."[12] Arguably, if there is a resolution to the foreclosure crisis, a recovery of the national economy should soon follow. The real estate market and the national economy are, without a doubt, closely intertwined.[13] Chairman Ben Bernanke of the Federal Reserve stated, "Declining house prices, delinquencies and foreclosures, and strains in mortgage markets are now symptoms as well as causes of our general financial and economic difficulties."[14] Thus, there is a strong correlation between losing one's job and losing one's home—without steady work, borrowers are left scrambling to make their mortgage payments.[15] As a

6. *Id.*

7. *Chicagoland Foreclosure Activity Soars in the 1st Quarter of 2012*, ILL. FORECLOSURE LISTING SERV. (May 7, 2012), http://ilfls.com/news/chicagoland-foreclosure-activity-soars-in-the-1st-quarter-of-2012. html.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Sarah Bloom Raskin, Member, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Association of American Law Schools' Annual Meeting, Washington, D.C.: Creating and Implementing an Enforcement Response to the Foreclosure Crisis 3 (Jan. 7, 2012), *available at* http://www.federalreserve.gov/newsevents/speech/raskin20120107a.htm.

13. ZURICH, LINGERING EFFECTS OF THE RECESSION ON THE COMMERCIAL REAL ESTATE MARKET 2 (2011), *available at* http://www.zurichna.com/internet/zna/sitecollectiondocuments/en/knowledge%20center/whitepapers/real%20estate/effects-of-recession-on-cre-market.pdf.

14. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Federal Reserve System Conference on Housing & Mortgage Markets, Washington, D.C.: Housing, Mortgage Markets, and Foreclosures 1 (Dec. 4, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20081204a.htm.

15. Andrew Martin, *For the Jobless, Little U.S. Help on Foreclosure*, N.Y. TIMES, June 4,

result, a significant portion of our communities' workforce, tax-base, homeowners, and consumers have been devastated by the foreclosure crisis.[16]

Since the inception of the 2008 financial crisis, the decline in the real estate market has also adversely affected businesses. In addition to the skyrocketing number of residential foreclosures, defaults by commercial real estate borrowers have also been steadily on the rise.[17] Thus, after years of unprecedented and uninterrupted growth, the commercial real estate market has stalled and is experiencing a free-fall spiral into the abyss of mortgage foreclosures.[18] In some instances, commercial loans have defaulted because the property is no longer generating income sufficient to pay the property's debt service and operating costs.[19] In other circumstances, the property may be able to cover current expenses, but the loan has matured with no new financing options on the horizon.[20] Regardless of the cause, commercial real estate foreclosures are becoming all too familiar in today's stricken economy.[21]

Similar to many other jurisdictions, the foreclosure of commercial real property in Illinois may take several months to more than a year to complete. In the Prairie State, the process of instituting and processing a commercial foreclosure action is set forth in the Illinois Mortgage Foreclosure Law (IMFL).[22] In order to protect and preserve the value of the property during the foreclosure process, many mortgagees seek the appointment of a receiver to manage and operate the property.[23] Many mortgagors challenge the appointment, arguing that it will cause harm to them and the property, inhibit their ability to market the property to prospective tenants, or that they are in a much better position to manage the property than a receiver. Thus, in this

2011, at A1.

16. *See generally* G. THOMAS KINGSLEY, ROBIN SMITH & DAVID PRICE, THE URBAN INST., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES 1–20 (May 2009), *available at* http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf (discussing the impact of foreclosures on families and communities).

17. Hui-yong Yu, *Office Vacancy Rate in U.S. Climbs to 17-Year High as Jobs Recovery Slows*, BLOOMBERG BUS. WK. (July 5, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-07-06/office-vacancy-rate-in-u-s-climbs-to-17-year-high-as-jobs-recovery-slows.html.

18. Alfred G. Adams, Jr. & Jason C. Kirkham, *The Real Estate Lender's Updated Guide to Single Asset Bankruptcy Reorganizations*, 8 DEPAUL BUS. & COM. L.J. 1, 1 (2009).

19. *Id.*

20. *Id.*

21. *Id.*

22. 735 ILL. COMP. STAT. 5/15-1101 to 5/15-1706 (2012).

23. TERRANCE J. EVANS, COMPLEX COMMERCIAL FORECLOSURE ISSUES: A REVIEW OF CALIFORNIA FORECLOSURE LAW REGARDING POSSESSION AND RECEIVERSHIP 56–57 (2011).

atmosphere of real estate and economic debacle, commercial mortgagees have increasingly resorted to pursuing their legal rights in court to protect their investments.[24]

Illustrative of this point is that in Cook County alone, there are nearly 80,000 pending foreclosure actions.[25] As a result of this volume of cases, a considerable amount of court time is occupied with the hearing and disposition of motions that arise incident to mortgage foreclosures. A significant number of these motions are related to the appointment of receivers. By far the most important question that surfaces during the course of a commercial foreclosure is whether a receiver should be appointed over the mortgaged property. The practical effect of such appointment is to take from the mortgagor his right of possession, as well as his rents and profits.

Courts regularly grant petitions for appointment of a receiver in commercial foreclosure cases. This tendency is due to a strong presumption in favor of the mortgagee, and the difficulty of the mortgagor to overcome this presumption. As commercial property foreclosures continue to disrupt economic progress, many questions remain as to the issue of receiverships in Illinois. For instance: How have the courts of Chancery dealt with this contemporary development? What form or shape does equity take in this modern dilemma of mortgage defaults? How does the chancellor equitably balance the conflicting interest of the mortgagee in the secured debt and the interest of the mortgagor in the property? If answers to these questions do not readily appear in the present day statute or case law, then perhaps the past will serve as an enlightened guide as to how to equitably resolve the modern day hardships befalling the parties in a commercial mortgage foreclosure cause of action.

Historically, the jurisdiction exercised in the appointment of receivers has been treated as a purely equitable one, and the remedy has generally been regarded as the most efficient and salutary of the extraordinary remedies known to courts of equity. Finding its origins in the English Court of Chancery, it was always regarded as one of its most efficient remedies, although granted with caution and only upon a satisfactory showing of the necessity for immediate court interposition.[26] An

24. *Id.* at 56.

25. HONORABLE TIMOTHY C. EVANS & HONORABLE MOSHE JACOBIUS, CIRCUIT COURT OF COOK CNTY., CHANCERY DIVISION MORTGAGE FORECLOSURE MEDIATION PROGRAM: PROGRESS REPORT 5 (June 27, 2012), *available at* http://www.cookcountycourt.org/Portals/0/Chancery%20Division/Forclosure%20Mediation/Foreclosure%20Mediation%20Progress%20Report%20June%202012%20(with%20Appendixes).pdf.

26. JAMES L. HIGH, A TREATISE ON THE LAW OF RECEIVERS 59–60 (4th ed. 1910).

American judge sitting in equity has strong ties to the procedures and the traditions of the English courts of Chancery. Thus, a preliminary examination of the development of equity jurisdiction and the appointment of receivers may be helpful to better understand the current doctrines and presumptions applicable today in Illinois courts of equity.

This historical reflection on our legal past may also provide some insight into why the appointment of a receiver is deemed one of the most revered and useful of the equitable remedies available in mortgage foreclosure matters. This reverence calls for an exploration and examination into the evolution of equity and the court from which the concept of receiverships derived. As this Article strives to articulate, equity and the application of justice in disputed matters is indeed a result of centuries of historical development. An appreciation of this history may prove helpful to better understand the reasoning and rationale behind a chancellor's decision-making process during receivership proceedings.

As Justice Oliver Wendell Holmes observed, "The life of the law has not been logic: it has been experience."[27] Hopefully, this insight into past experiences will provide a perch from which to view what may possibly lie ahead in this area of law. This Article, while attempting to be descriptive and informative, is not prescriptive, and certainly makes no pretense of being the final word on Illinois receivership law. Rather, it is offered as a framework for analyzing the development and current status of one of equity's most durable and evolving remedies: the appointment of a receiver.

I. THE ORIGINS OF THE COURTS OF CHANCERY

> Thus, in the midst of the mud and at the heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.[28]
>
> – Charles Dickens

A. Anglo-Saxon Influence on the Common Law

The Anglo-Saxon era is the period of English history spanning from 550 A.D. to the Norman Conquest in 1066.[29] Anglo-Saxon law generally refers to the legal system that prevailed in England for approximately five centuries before the Norman invasion.[30] English

27. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

28. CHARLES DICKENS, THE BLEAK HOUSE 4 (1853).

29. FRANK M. STENTON, ANGLO-SAXON ENGLAND viii, at 580 (3d ed. 1971).

30. Anthony D'Amato & Stephen B. Presser, *Anglo-Saxon Law*, *in* 1 THE GUIDE TO AMERICAN LAW: EVERYONE'S LEGAL ENCYCLOPEDIA 251, 251 (1st ed. 1983), *available at* http://anthonydamato.law.northwestern.edu/encyclopedia/anglo-saxon-law.pdf.

common law arose from a variety of influences, including Anglo-Saxon, Norman, and Roman law.[31] The term "common law," however, did not arise until the twelfth century, but the idea of a received body of customary case law dates back to the Anglo-Saxon period.[32] Since all existing common law nations derive their legal traditions from England, its historical legal development is of special interest to our understanding of American jurisprudence.[33]

Anglo-Saxon law was fundamentally customary in nature and evolved into a form which survives, in some respects, in English and American common law.[34] After the American Revolution, the American Colonies, as well as the Federal Government, modeled their constitutions after British common law.[35] Thus, many of the decisions rendered in the colonial and American courts were based on precedents established by the "Common Law" of England, which was derived from Anglo-Saxon law.[36]

The Anglo-Saxon society was predominantly rural and organized into tribes and clans. The society was a simple, agricultural one and, except for the merchant class, there was little trade or business.[37] The economic conditions of the period were not conducive to the development of a law of contracts.[38] Anglo-Saxon law, accordingly, was a tribal law, one of popular custom, rather than a law developed and interpreted by a technically trained class of jurists.[39] Early Anglo-Saxon law was quite simple, consisting mostly of a collection of punishments or damages prescribed for various offenses.[40] Alfred the Great compiled these prescribed judgments in his "dome-book," also known as the *Liber Judicalis*.[41] An examination of the Anglo-Saxon law provides little, if no, reference to a law of contracts.

There are significant differences of opinion among historians as to whether contract law existed during the Anglo-Saxon era.[42] Sir

31. Daniel J. Castellano, *Common Law and Civil Jurisprudence*, ARCANEKNOWLEDGE.ORG (2009), http://www.arcaneknowledge.org/histpoli/commoncivil.htm.

32. *Id.*

33. *Id.*

34. D'Amato & Presser, *supra* note 30, at 251.

35. THE OXFORD COMPANION TO THE SUPREME COURT OF THE U.S. 198 (Kermit Hall ed., 2005).

36. D'Amato & Presser, *supra* note 30, at 252.

37. 1 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 7, at 10 (1920).

38. *Id.*

39. *Id.*

40. Castellano, *supra* note 31.

41. *Id.*

42. Burton F. Brody, *Anglo-Saxon Contract Law: A Social Analysis*, 19 DEPAUL L. REV. 270, 270 (1969).

Fredrick Pollack and his colleague Frederic William Maitland assert that the Anglo-Saxon contract, if it existed at all, was extremely rudimentary.[43] Their conclusion is based upon the primitive economy of the period and the resultant lack of need for the means of commercial exchange.[44] Professor William Searle Holdsworth is equally certain there was no Anglo-Saxon contract law because of the unavailability of ways to enforce the law.[45] Professor Harold Hazeltine, however, is quite confident that pre-Norman England made use of the contract.[46] The codes did recognize the contract of sale, but they recognized it primarily for the purpose of indicating the means by which one could protect himself from personal liability in case he purchased stolen property.[47]

A change to Anglo-Saxon law took place when the Vikings occupied England during the early eleventh century, and as a result, some of the Danish laws were incorporated into the English legal system.[48] Among these was the sworn jury, composed of twelve nobles.[49] The jury only gathered facts and did not decide guilt or innocence.[50] Rather, the judgment was rendered through trial by ordeal,[51] as was the custom in the Anglo-Saxon system.[52] The Scandinavian control over the British Isles ended by 1042.[53]

Anglo-Saxon rule was restored under Edward the Confessor,[54] and he re-established the legal system implemented by Alfred the Great. Edward also incorporated much of Danish law in the Anglo-Saxon legal system, as Scandinavian jurisprudence was recognized and followed in

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. PAGE, *supra* note 37, § 8, at 11.
48. Castellano, *supra* note 31.
49. *Id.*
50. *Id.*
51. *The Trial by Ordeal*, UVU.EDU, http://research.uvu.edu/mcdonald/Anglo-Saxon/laws2/trial_ordeal.htm (last visited Jan. 30, 2013) ("In order for the Anglo-Saxons to determine if a person was guilty or not guilty, they had what was called a Trial by Ordeal. This meant that the accused had to prove that he was innocent, usually by a physical hardship."). It is interesting to note that one of the ways a trial by ordeal was conducted was "to place a stone in the bottom of a boiling bucket of water . . . [and have] [t]he accused . . . reach down into the water, grab the stone, and then bring his/her hand back out of the water." *Id.* After three days, if the hand was healing, the person was innocent, however, if the hand was infected or still damaged, the person was deemed guilty. *Id.*
52. Castellano, *supra* note 31.
53. *Id.*
54. *See id.* (noting that Edward the Confessor ruled from 1042 to 1066 A.D.).

Britain's eastern counties.[55] At the time when the Normans landed on the shores of England, there was a regular judiciary in place and an Anglo-Saxon law based on a system of courts: one being the "county court," which was held twice a year;[56] and the "hundred court," appointed to meet every four weeks.[57] These open-air forums were the courts where the people could appear to receive justice.[58] Regardless of one's stature in the Anglo-Saxon community—whether rich or poor—all had to come forth to assert a claim to have a wrong made right.[59]

The procedure of presenting a lawsuit in an Anglo-Saxon court was a highly formal affair. "Any mistake could result in the suit being lost."[60] The plaintiff in a lawsuit commenced the action by swearing an oath, making the accusation, and then having the defendant summoned to appear in court to answer the charges.[61] The court, however, would first determine whether the alleged offense warranted the court's time.[62] If the court accepted the validity of the plaintiff's claim, a date would be set on which the defendant would be scheduled to appear.[63] The basic principle of the law was that the "[d]enial was always considered stronger than the accusation," so in many instances the defendant would be allowed to bring forth an oath to prove his innocence.[64] "Oath-helpers" could also testify to the defendant's innocence. Interestingly, the oath-helpers were not required to give any evidence or information.[65] The court held that the oath-helpers would know the facts behind the case as well as anyone else, which is why there was no need for them to present evidence.[66] "The severity of the charge determined how many oath-helpers were needed to prove [the defendant's] innocence."[67] If the defendant's guilt was established then

55. *Id.*

56. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 47 (Liberty Fund reprint 2d ed., Cambridge Univ. Press 2010) (1898), *available at* http://files.libertyfund.org/files/2313/Pollock_1541-01_LFeBk.pdf.

57. *Id.*

58. *Id.* at 4.

59. *Id.* at 47.

60. *See* Ellen M. Amatangelo & Sarah L. Haggen, *Anglo Saxon Laws*, http://research.uvu.edu/mcdonald//Anglo-Saxon/laws.html (last visited Jan. 29, 2013).

61. *Id.* This oath was: "In the name of Almighty God, so I stand here by _____ in true witness, unbidden and unbought, as I saw with my eyes and heard with ears that which I pronounce with him." *Id.* The defendant would also swear an oath that stated: "By the Lord, I am guiltless both of deed and instigation of the crime with which _____ charges me." *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

a sentence would be imposed. Anglo-Saxon England did not have an organized system for incarceration.[68] Therefore, most punishments were in the form of a fine and the law codes often listed the amounts to be paid.[69] "Even killing someone could be covered by a fine if there were mitigating circumstances."[70] The court had lists indicating the worth of a person's life based upon his social status.[71] The offenses were treated as private wrongs or torts rather than as crimes.

Some crimes, however, were known as bootless crimes,[72] for which no compensation could be offered: arson, house-breaking, open theft, and treachery to one's lord were considered bootless. The only punishment was death and forfeiture of property to the king.[73] In some instances of forfeiture, the king would take the issues and distribute the land to his churches or to his nobles.[74] Thus, it appears that the Anglo-Saxon view of protecting and maintaining forfeited property was to arbitrarily seize the land without just consideration as to who was entitled to the property. As stated previously, the law of contracts was virtually nonexistent in Anglo-Saxon Britain and "the law of property depended principally upon possession."[75]

Traditionally, in Anglo-Saxon society, the law of property was not written, but rather carried out based on long-standing customs.[76] Anglo-Saxon customs and code did not deal with ownership.[77] Rather, possession was the leading conception for Anglo-Saxon law.[78] It was possession of the land that had to be "defended or recovered, and to [have possession] without dispute, or by judicial award after a dispute . . . [was] the only sure foundation of title and end of strife."[79] "A right to possess, distinct from actual possession, must be admitted if there is any rule of judicial redress at all; but it is only through the conception of that specific right that ownership finds any place in [Anglo-Saxon law]."[80] It is these views of possession, possessory rights, and remedies

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. JOYCE TALLY LIONARONS, THE HOMILETIC WRITINGS OF ARCHBISHOP WULFSTAN 171 (2010).
73. Ben Levick, *The Anglo-Saxon Fyrd 878–1066 A.D.*, REGIAANGLORUM (Mar. 31, 2003), http://www.regia.org/fyrd2.htm.
74. STENTON, *supra* note 29, at 499.
75. D'Amato & Presser, *supra* note 30, at 252.
76. POLLOCK & MAITLAND, *supra* note 56, at 63.
77. *Id.* at 55–56.
78. *Id.* at 56.
79. *Id.*
80. *Id.*

that are still part of our common law today.[81] Although American common law may have descended from the Anglo-Saxons, there is no evidence of Anglo-Saxon courts employing the legal concept of equity in relation to property rights.

Thus, before the Norman Conquest, there were no separate ecclesiastical courts in England to determine questions pertaining to usage and ownership of land.[82] Although there appears to be some evidence of forfeitures occurring in the English realm prior to the arrival of William the Conqueror, there was no organized structure in place to resolve these issues.[83] The arrival of the Normans had an enormous impact on the question of landholding in England.[84] "[A]t the time of the conquest in 1066, English law was already an amalgam of Anglo-Saxon, Dane, and canon law," which merged to become Anglo-Saxon law.[85] After the Battle of Hastings,[86] the combination of Anglo-Saxon and Norman law emerged as English common law and ultimately gave rise to the courts of Chancery and the concept of equity.

B. Norman Influence on English Law

Following the invasion of 1066, William the Conqueror began to establish control over England by creating a more centralized form of government.[87] As King of England, William became the head of the administration. In fact, the highest court in the land was the "curia regis," or king's court, where the king himself often heard causes and pronounced judgments.[88] William's direct involvement in the court's activities created a trend toward more royal control of the administration of justice.[89] His tendency to interfere more frequently, however, resulted in proactive instead of reactive changes to the law.[90] Although the Normans maintained the legal system with minor adjustments, they brought change in the area that mattered most to the

81. *Id.*

82. Sir Frederick Pollock, *English Law before The Norman Conquest*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907), *available at* http://oll.libertyfund.org/index.php?Itemid=284&id=1167&option=com_content&task=view.

83. POLLOCK & MAITLAND, *supra* note 56, at 51.

84. STENTON, *supra* note 29, at 499.

85. Castellano, *supra* note 31.

86. HUGH M. THOMAS, NORMAN CONQUEST: ENGLAND AFTER WILLIAM THE CONQUEROR 37 (Pub. Rowman and Littlefield Publishers, Inc., 2008).

87. 1 RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS, NORMAN INFLUENCE ON OLD ANGLO-SAXON LAW § 2 (3d ed. 1992).

88. *Id.*

89. THOMAS, *supra* note 86, at 86.

90. POLLOCK & MAITLAND, *supra* note 56, at 69.

new elites—issues pertaining to the control of the land.[91] The Normans, having replaced the governing Anglo-Saxon aristocracy and desiring to legitimize and consolidate their own rule, altered the landholding customs of England.[92] Initially, William's claim to the English throne was based on Edward the Confessor naming him his successor in 1051 (stemming from William's support of Edward's reclamation of the throne in 1042).[93] William's claim marked a departure from English custom, as the act of bequeathing the kingdom was without precedent in England.[94] The notion that all English lands belonged to William is evident in the landholding policies he chose to implement and enforce. This power allowed William to redistribute lands to his favored men, who then became tenants.[95] "As part of this redistribution[,] the men would negotiate their feudal obligations on a personal level with the king[,] who was now head of this tenurial hierarchy."[96] William "exercised this control to establish a largely Norman aristocracy."[97]

The Norman adherence to the ideals of feudalism played a significant role in land laws. Thus, the question of aristocratic landholding was an area of major importance to the Norman feudal lords. In time, their new landholding system and inheritance practices brought about greater changes to the administration of justice in England than they had originally intended.[98] British courts would eventually establish long-term variations in the administration of property law, stemming in large part from a progressive reliance on justice from the king.

C. The Development of Chancery in England

William, now reigning supreme as the head of all the English courts, proclaimed the law of England would pass under the domain of a system of writs from the royal Chancery.[99] Originally, the foremost tool for control and governance was the Chancery in England.[100] The

91. *Id.*

92. *Id.* at 86.

93. *Id.*

94. *Id.*

95. COURTNEY STANHOPE KENNY, THE HISTORY OF THE LAW OF PRIMOGENITURE IN ENGLAND AND ITS EFFECT UPON LANDED PROPERTY, RISE OF THE LAW OF PRIMOGENITURE IN ENGLAND AFTER THE NORMAN CONQUEST 9 (1878).

96. *Norman Conquest: Continuity or Change?*, TOTAL WAR CTR. (Mar. 7, 2011, 1:33 AM) http://www.twcenter.net/forums/showthread.php?t=431323.

97. *Id.*

98. THOMAS, *supra* note 86, at 87.

99. CLARK, *supra* note 87, § 2.

100. Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245, 246 (1996).

Chancellor was an officer of the government and a minister of the crown, and most of the men who held the post in the Middle Ages were bishops and archbishops.[101] The king's Chancellors were chosen from the king's court, which consisted mostly of ecclesiastics.[102] The Chancellor derived power from his custody of the great seal and from his preeminent position in the king's council.[103]

Although the Chancery was not originally a court, signs of judicial activity began to appear in several of its activities. Because the Chancery issued royal grants, any questions relating to them would be presented to the Chancellor. In establishing the rules of common law, the Chancery intended such rules to exist for time immemorial; therefore the procedure was inflexible and stringent.[104] The rigidity of common law remedies eventually led to the denial of justice on many occasions, prompting litigants to appeal to the king (who was deemed the source of all English justice) for additional relief. In his absence, the king entrusted these matters to his Chancellor. The early chancellors were preeminent churchmen—the most literate of medieval society.[105]

In time, a separate body of law evolved that was intended to represent the king's conscience and thus be more equitable and just than the common law. In fact, the extension of the Chancellor's jurisdiction resulted from the Chancellor being regarded as the "keeper of the king's conscience"—the king being the "fountain of justice."[106] The emergence of a separate court of equity was also the result of some inadequacies that existed in common law. For one, the law was void of any apparatus "to prevent wrongs, or to force a defendant to perform a contract or other obligation."[107] Furthermore, some of the rules administered in the common law courts were harsh and contrary to the notions of fairness. There was significant emphasis upon "formalism and ritual, particularly in the field of contracts and property law."[108] The courts tended "to insist upon a literal interpretation of anything in

101. David E. Cole, *Judicial Discretion and the "Sunk Costs" Strategy of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. 689, 702–03 (2003).

102. CLARK, *supra* note 87, § 3.

103. *Id.*

104. *Id.*

105. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 56–57 (1973).

106. Cole, *supra* note 101, at 704.

107. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 17 n.13(1) (3d ed. 1989).

108. *Id.* at 17 n.13(2).

writing."[109] The Chancery also controlled questions concerning the property rights of the crown. As the practice became more frequent, the Chancellor, and the Chancery office, acquired the characteristics of a court.[110]

The Chancellor did not have any clearly defined jurisdiction.[111] The Chancellor "exercise[ed] his equitable jurisdiction, [and was] not bound by precedent or formal rules."[112] Rather, he dispensed an extraordinary justice, a function for which he was well-qualified as he was commonly "well-versed" in both the civil and canon law.[113] In the absence of fixed principles, the early decisions largely depended on the Chancellor's personal notion of right and wrong.[114] The Chancellor's discretionary authority "to assert jurisdiction over cases previously decided by common law courts . . . was viewed by some as eviscerating English statutory and common law."[115]

The Chancellors, however, did not view equity as abrogating statutory law, but rather as simply expressing the exceptions that were implicit in the law under certain circumstances.[116] Yet, such articulations of the role of Chancery did not prevent people from arguing that the Chancery courts undermined the common law courts.[117] In light of these condemnations, the Chancellors created rules governing Chancery courts in the 1600s.[118]

Furthermore, by the early seventeenth century, Chancellors in Chancery quite regularly relied upon precedents (as recorded in the Chancery Register's Books) to guide their decisions in like cases. Though, in referencing prior decisions, Chancellors were usually looking for similar actions on similar facts and were not necessarily interested in the actual pronouncements of the earlier judges.[119]

The Chancellor's shift to a greater reliance on "uniformity and

109. *Id.*

110. *Id.* at 18.

111. *See* Cole, *supra* note 101, at 703–04 (noting that when a suit did not fall under the jurisdiction of the other courts, the Chancellor would have jurisdiction because the Chancellor's jurisdiction eventually extended to all matters of conscience).

112. *Id.* at 704.

113. *Id.* at 703.

114. JOHN SELDEN ET AL., THE TABLE-TALK OF JOHN SELDEN 43 (1927). This state of affairs in Chancery became less true as the principles of equity became more fixed. Over time, the Chancellor's jurisdiction expanded and the "High Court of Chancery came into being." Cole, *supra* note 101, at 704.

115. Cole, *supra* note 101, at 704–05.

116. *Id.* at 706.

117. *Id.*

118. *Id.* at 707.

119. W.H.D. Winder, *Precedent in Equity*, 57 L. Q. REV. 245, 245–79 (1941).

predictability in equity jurisprudence had the effect of severely binding the Chancellor's previously limitless discretion."[120] This transition also served to transform the jurisprudence of equity from an "ever-changing practice based in the almost absolute discretion of the Chancellor" to a "'controlled, constrained science of equity, ancillary to common-law.'"[121]

By 1758, the doctrines of equity had become so formalized that Blackstone observed that courts of Chancery and equity "interpreted statutes according to the same principles of reason and justice, and that the unlimited discretion that had previously been characteristic of courts of equity 'hath totally been disclaimed by their successors.'"[122] During this period of alteration and adaptation in English jurisprudence, "[s]ome well-settled doctrines of equity were incorporated into English common law and were used in common law courts."[123]

These transformative developments in England did not go unnoticed by legal professionals in the newly constituted colonies across the Atlantic. The settlers, in establishing the American legal system, inherited English jurisprudence and many of Britain's equitable doctrines, which serve to guide our courts in the exercise of their equitable jurisdiction.[124]

D. The Establishment of Chancery in America

The early English colonists who settled in America were very hesitant to establish Chancery courts or to create a Chancery jurisdiction within their new colonies.[125] This reluctance stemmed in part from their resentment of the crown and the crown's chief officer, the Chancellor.[126] Colonists did little to promote equity's popularity since "one of the most common grievances in the colonies was the arbitrary and capricious behavior of Crown officials."[127] Additionally, colonists with a "strong Puritanical heritage may have resisted any law-related

120. Cole, *supra* note 101, at 708.

121. *Id.* (quoting PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 20 (1990)).

122. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *430–33).

123. *Id.* at 708–09.

124. *Id.* at 711.

125. *See id.* (noting that some colonies had courts of equity, some had combined courts, and some allowed the governor's council to hear equity cases). During America's colonial period, there was no permanent Chancery Court in New England or Pennsylvania. And, although a court of Chancery was established in New York in 1701, it was so unpopular that it received very few matters to hear.

126. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 53–54 (1921).

127. Calvin Woodward, *Joseph Story and American Equity*, 45 WASH. & LEE L. REV. 623, 641 (1988).

institution purporting to probe the consciences of men, [as the courts of equity are apt to do]."[128] The belief among some colonialists was that these types of forums for a democratic society were not proper or safe because too much power was concentrated in one person.

The rationale for establishing the courts of Chancery among the American Colonies was far from consistent or unified. In some of the pre-American Revolution colonies, the power of equity lay with the governor or his designated council.[129] In these colonies, "the governors stood in the same relationship to the colon[ial] courts as did the king to the English courts."[130] In other colonies governed by legislative assemblies, the colonial court held equity authority, with little concern about how the court exercised its authority.[131] As a result, in the eighteenth century, the organization of the courts of equity was rather uneven across the several American colonies.[132] Some colonies had separate courts of equity;[133] some simply removed the distinction between common law and equity courts; and in other colonies the governor and the governor's council acted as the court of Chancery.[134] In colonies that had separate courts of equity, the English dictated the administration of such courts. This relationship created a close association between equity jurisdiction and the executive power of the King of England and English colonial policy.[135]

After the American Colonies secured their independence from England, the principles of the English Chancery courts continued to influence the applicability of equity jurisprudence. One of the leading Chancery lawyers of the period, Alexander Hamilton, was an outspoken proponent of equitable jurisdiction in the federal courts. In defending this jurisdictional proposal, Hamilton, using his pseudonym, "Publius," wrote in the *Federalist Papers*,

> It has also been asked, what need of the word "equity"? What equitable causes can grow out of the constitution and laws of the

128. *See id.* (noting that Puritans who had left England to avoid submitting their consciences to the Anglican church would not want to have their consciences scrutinized by any representative of the king).

129. Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 41 (1951).

130. *Id.*

131. *Id.*

132. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54 (2d. ed. 1985).

133. For instance, Delaware, Maryland, New Jersey, New York, South Carolina, and Virginia had separate courts of equity. *See* GEORGE TUCKER BISPHAM, PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 19 (11th ed. 1934).

134. FRIEDMAN, *supra* note 132, at 54.

135. *Id.* at 54–55.

> United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud*, *accident*, *trust*, or *hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states.[136]

Shortly after the Revolutionary War, many states' constitutions provided for the establishment of courts of Chancery, patterned after the High Court of Chancery in England.[137] Some northern states, however, such as Massachusetts and Maine, did not resolve the issue of equitable jurisdiction until the nineteenth century.[138] In an effort to avoid the complicated aspects of the early English bifurcated system of common law and Chancery, some American states experimented by merging law and equity into one court and providing for only one form of action.[139] In other words, as the young nation expanded beyond the boundaries of the original thirteen colonies, the development of equity in the United States was slow.

II. THE DEVELOPMENT OF MORTGAGE LAW AND THE RIGHT TO REDEEM

Before continuing on this journey through the origins of receiverships, we endeavor to take a detour to examine the development of mortgage law and how it directly influences the way receivers are appointed and how equity is administered. Although the mortgage has roots in both Roman law[140] and in early Anglo-Saxon England, its most significant developments can be seen in the English common law mortgage and the effects of the subsequent intervention of English equity courts on that mortgage. These developments would later have a substantial impact on American mortgage law.[141]

A. The Theory of Redemption in England

As the principle of equity was developing in England during the 1600s, the theory of redemption gradually began to emerge and evolve into a recognized practice in Chancery. At common law, a mortgage was a simple deed of land, which ran from the mortgagor to the mortgagee. The mortgage operated as a conditional conveyance of legal title to the property, thereby providing security for a debt. The

136. THE FEDERALIST PAPERS NO. 80, at 404 (Alexander Hamilton) (Ian Shapiro ed., 2009).

137. BISPHAM, *supra* note 133, at 26 (listing states, such as New York, New Jersey, Maryland, Delaware, and South Carolina).

138. Oleck, *supra* note 129, at 41.

139. WILLIAM Q. DEFUNIAK, HANDBOOK OF MODERN EQUITY 6–7 & n.21 (5th ed. 1956).

140. H.W. Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 5–8 (1890).

141. GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 1–7 (2d ed. 1970).

formal transfer of ownership actually occurred when the mortgage was made, at which time the mortgagee became the owner of the land. The mortgage document set forth in detail the agreement between the mortgagor and mortgagee, including a description of the debt it secured and the date payment was expected, otherwise known as "law day."[142] Payment made the mortgage null and void. A lack of compliance, however, could result in dire consequences for the mortgagor.

Prior to the advent of Chancery, the courts of law stringently enforced the mortgage as it was written. In the event the mortgagor failed to satisfy the debt on the precise date and for the exact amount as set forth in the mortgage agreement, the mortgagee became the unconditional owner of the land. In the event of a default, the mortgagor would irrevocably forfeit the land to the mortgagee. This rule was absolute; thus, time was of the essence. No foreclosure process existed and no other legal actions were necessary since the very nature of the original conveyance of title established the mortgagee as the owner of the property upon the mortgagor's default. In other words, regardless of the circumstances, failure to pay the mortgage debt when due extinguished all of the mortgagor's interest in the property and the mortgagee's interest in the estate became complete.[143] It was from this strict enforcement of the rule of forfeiture that the mortgagor sought judicial relief.

In time, the mortgagors who lost their land through default would petition the king for assistance. The petition would pray that the king order the mortgagee (the new owner of the land) to accept the late proffered funds and return the land to the mortgagor.[144] Initially, the relief granted to the mortgagor was based on a finding of extraordinary circumstances, such as fraud, accident, mistake, impossibility, or oppression.[145] Subsequent to a hearing, in many instances, the mortgagee was ordered to convey the property back to the mortgagor. In other words, even though the mortgagee's rights at law were fixed and absolute, the mortgagor who had the financial capability to tender the amount due and owing could retrieve the property after law day, so long as the failure to pay fell within one of the extraordinary circumstances. As the number of petitions increased, the king

142. Robert Kratovil, *Mortgages—Problems in Possession, Rents, and Mortgagee Liability*, 11 DEPAUL L. REV. 1, 2 (1961).

143. Under common law, there was no right to redemption or reinstatement. This outcome, however, ignores the true nature of the mortgagor-mortgagee relationship, which is one of lender-borrower. *Id.* at 1.

144. *Id.* at 2.

145. OSBORNE, *supra* note 141, § 6.

increasingly referred the petitions to his high official, the Lord Chancellor.[146] Because the king was the "fountain of all justice," it was the "Chancellor's duty to dispose of these petitions justly and equitably, according to good conscience."[147] By 1625, the king had completely delegated the hearing of all the petitions to his Lord Chancellor.[148] As a result, the mortgagors would directly present the petitions to the Chancellor who now presided as a jurist in Chancery. What started as an act of mercy by the king had quickly become an accepted practice within the realm.[149]

In 1615, in the cause of *Emanuel College v. Evans*, although a mortgagor failed to present any traditional equitable defenses, the court of Chancery granted relief to the mortgagor even though the debt had not been satisfied by law day.[150] Therefore, where any form of hardship prevented the mortgagor from satisfying the debt, the Chancellor would order the mortgagee to accept the late payment and convey the property back to the mortgagor.[151] By the seventeenth century, the granting of such equitable relief became more common.[152] Thus, the mortgagor was able, as a matter of course, to exercise the right to redeem the land from the mortgagee if the amount due was tendered within a reasonable time after law day.[153] Over time, mortgagors no longer needed to assert specific grounds for relief.[154] The mortgagee would be jailed for failing to comply with the Chancellor's order.[155] Under this new view of equity, the mortgagor's default would not automatically vest title in the mortgagee despite the language of the original conveyance.

The shift in equity that began to take hold was based on the Chancellor's awareness that the mortgagees had rights to the payment of the debt, but that their property was merely security for the indebtedness.[156] The courts of Chancery also came to realize that if a mortgagor was ready, willing, and able to pay, it would be forfeiture to allow mortgagees to keep the land solely because the mortgagor's

146. Kratovil, *supra* note 142, at 2.
147. *Id.*
148. *Id.*
149. *Id.*
150. Emanuel Coll. v. Evans, 21 Eng. Rep. 494, 495 (Ct. Ch. 1615).
151. Kratovil, *supra* note 142, at 2.
152. *Id.*
153. Andrew R. Berman, *"Once a Mortgage, Always a Mortgage"—The Use (and Misuse of) Mezzanine Loans and Preferred Equity Investments*, 11 STAN. J.L. BUS. & FIN. 76, 86 (2005).
154. OSBORNE, *supra* note 140, § 6.
155. Kratovil, *supra* note 142, at 2.
156. Berman, *supra* note 153, at 87.

payment was late.[157] This view signaled reluctance by the courts of Chancery to enforce forfeiture provisions.[158] Therefore, by permitting the defaulting mortgagor to satisfy the debt after the default and recover the property, Chancery courts established what became known as the equitable right of redemption, or the equity of redemption.[159]

The emergence of the equity of redemption clearly demonstrated Chancery's willingness to examine the true essence of the debt transaction rather than focusing exclusively on the formal structure of the secured loan. By examining "the intent rather than the form, the court protected the parties' reasonable expectations."[160] Clearly, the mortgagee "expected to be repaid the debt with interest in a reasonably timely manner, and the borrower expected to recover its mortgaged property upon payment of the outstanding debt."[161] The Chancellors recognized that after the mortgagor paid the mortgagee, the lender-borrower relationship ended, and the mortgagee no longer had any rights to the property or against the mortgagor.[162] Under this new concept, even though the mortgagee became the full owner of the land upon default, the mortgagor could re-acquire ownership by making redemption. In creating this new doctrine, the Chancellor provided equitable relief for the mortgagor attempting to cure the default rather than focusing exclusively on the language of the mortgage agreement.

The equity of redemption doctrine, though, did not gain prominence overnight.[163] Rather, it developed over time and "only as the result of a very long succession of decisions, in repeated instances."[164] The relief once rendered in exceptional circumstances had become the rule. Courts began following equity of redemption as a matter of course; the cases where a court granted no relief had become a rare exception.[165]

As the mortgagor's equitable right to redeem gained acceptance and became a recognized doctrine, mortgagees attempted to circumvent it by inserting clauses in mortgage agreements stating that the mortgagor waived and surrendered his right to exercise the equitable remedy. The Chancery courts, however, found such provisions to be void and having no effect—the rationale being that a needy and wanting mortgagor

157. *Id.* at 87–88.
158. *Id.* at 88.
159. Kratovil, *supra* note 142, at 2–3.
160. Berman, *supra* note 153, at 88.
161. *Id.*
162. *Id.*
163. *See id.* at 86 & n.47.
164. Chaplin, *supra* note 140, at 10.
165. Berman, *supra* note 153, at 86.

would sign anything, and it was incumbent upon the courts to protect the disadvantaged party in the transaction.[166] Any language in the mortgage purporting to terminate the mortgagor's interest in the property in the event of a default was deemed absolutely null and void.[167] As a result of this new concept, mortgagees began turning to the Chancery courts for relief.[168]

In some instances, this new equitable remedy intended to protect the interest of the defaulting mortgagor resulted in an uncertain timetable as to when the issue of ownership would be resolved. When a default occurred, the mortgagee became the owner of the property, but for a seemingly uncertain period given that the mortgagor might choose to redeem at any time. This new right allowed the mortgagor, in some cases, to pay the indebtedness months after the default.

The courts of Chancery soon recognized that the mortgagor's right to redeem could not be limitless.[169] These courts therefore established a new practice to create more certainty for the parties involved. Upon default, the mortgagee would be permitted to file a petition, and the Chancellor would grant a decree allowing the mortgagor to pay the debt within a reasonable amount of time.[170] If the mortgagor did not satisfy the debt within the time specified—usually six months or a year—the decree provided the mortgagor's equitable right of redemption was barred and foreclosed.[171] As a result, the foreclosure suit, which barred or terminated the equitable right of redemption, came into existence. The effect of this process would leave the mortgagee with good title in the mortgaged property.[172] However, if the value of the mortgaged property exceeded the amount owed, the mortgagee obtained a windfall.[173] The courts of Chancery, in realizing the inequity of this practice, sought to establish more equitable rights for mortgagors.[174]

In order to curb the potential inequitable windfall, Chancellors began completing the foreclosure process by way of a public sale.[175] If the property sold for more than the amount due under the debt, the

166. Kratovil, *supra* note 142, at 3.

167. *Id.*

168. *Id.* at 3–4. It is important to note that, since the equitable right to redemption was a creation of a court of equity rather than a court of law, the mortgagee had to bring the issue in a court of equity.

169. Berman, *supra* note 153, at 88 & n.60.

170. *Id.*

171. *Id.*

172. OSBORNE, *supra* note 141, § 6, at 12.

173. Berman, *supra* note 153, at 89.

174. *Id.*

175. *Id.*

mortgagee would then be compensated in full, and any surplus would allow the mortgagor to salvage the losses sustained as a result of the foreclosure. The foreclosure sale protected both the mortgagor's equity in the mortgaged property and the mortgagee's right to be repaid.[176] In due course, as foreclosure by sale became the accepted practice, a new perspective emerged: a mortgage was a lien on the land and not a deed of conveyance. Under this view, the mortgage lien permitted a public sale to raise funds to satisfy the mortgage debt. As a result, in the event of a mortgagor's default, the mortgagee would seek to safeguard and secure the investment—oftentimes through the appointment of receiver.[177] Such was the condition of the mortgage and the right to redeem when it came to America.

B. The Right to Redeem in Illinois

When a mortgagor becomes delinquent on the mortgage, one factor that affects the timeframe during which the mortgagee can foreclose is the redemption right.[178] A redemption right is the right of the mortgagor to redeem the property by satisfying the entire balance of the mortgage. A redemption period is the period of time during which the mortgagor may exercise redemption rights. In Illinois, the mortgagor's right to redeem throughout the years has been modified, altered, reduced, and in some respects, completely eradicated. These variations have had a considerable impact on the applicability of receiverships.

In 1841, the Illinois legislature passed the "Redemption by Defendant" Act.[179] The Act, which was subsequently amended in 1895, provided that a defendant may, within twelve months after the foreclosure sale, redeem the real estate sold by paying the purchaser the sum of money for which the premises was sold.[180] Pursuant to section 20 of the Act, any decree or judgment creditor was permitted to redeem, provided that such redemption was exercised after the expiration of twelve months and within fifteen months after the sale.[181] The early decisions pertaining to the appointment of a receiver held that during the period of redemption, the mortgagor was entitled to possession and the enjoyment of the income from the property, except for the purpose

176. *Id.*

177. *Id.*

178. Smith-Hurd, Illinois Revised Statutes, 1896, Judgments ch. 77, § 18, at 2353 (describing the details of the redemption process, including who may redeem, from whom, and the method of interest calculation).

179. *Id.*

180. *Id.*

181. *Id.* § 20, at 2358; Chi. Sav. Bank & Trust Co. v. Coleman, 119 N.E. 587, 588 (Ill. 1918).

of satisfying the deficiency judgment on the foreclosed mortgage.[182] Thus, during the redemption period, unless there was a deficiency judgment, a receivership after a foreclosure sale was improper except where the mortgagor was destroying the property.[183] As a result of this prevailing view, the receiver was not warranted in using the income for any other purpose—not even in paying property taxes.[184]

Under current Illinois law, the right of redemption is guaranteed for residential properties. In fact, the statutory language explicitly states that any attempt to waive this right for residential properties is void.[185] The same restriction is not available for commercial properties; and oftentimes, commercial mortgages contain an expressed provision that waives redemption rights.[186] Under the IMFL, courts are required to give full force and effect to a clear, express waiver provision.[187] This aspect of the IMFL lends greater certainty to the foreclosure process because a bidder at the judicial sale will no longer have to risk having the purchase defeated by an eleventh-hour mortgagor seeking to redeem the property.

C. Three Theories of Mortgage Law in Illinois

Illinois courts have recognized, at one time or another, one of three theories of mortgage law—title, lien, and intermediate. Under the title theory, legal "title" to the mortgaged property remains in the mortgagee until the mortgage debt is satisfied or foreclosed.[188] Under the lien theory, the mortgagee owns only a security interest in the property while both legal and equitable titles remain with the mortgagor until

182. *See, e.g.*, Haigh v. Carroll, 71 N.E. 317, 319 (Ill. 1904) ("The general rule under such circumstances is that the owner of the equity of redemption is entitled to the possession of the premises, and the rents and profits accruing therefrom, during the period of redemption . . . ."). The *Haigh* court based its restatement of this "general rule" on four prior Illinois Supreme Court decisions: *Davis v. Dale*, 37 N.E. 215 (Ill. 1894); *Stevens v. Hadfield*, 52 N.E. 875 (Ill. 1899); *Bogardus v. Moses*, 54 N.E. 984 (Ill. 1899); and *Lightcap v. Bradley*, 58 N.E. 221 (Ill. 1900).

183. *Davis*, 37 N.E. at 216.

184. *Hadfield*, 63 N.E. at 634.

185. 735 ILL. COMP. STAT. 5/15-1601(a) (2012).

186. *Id.* § 1601(b) (providing that the mortgagor "may waive [its] right of redemption . . . by express waiver stated in the mortgage" or "by any other waiver in writing which has been acknowledged by the mortgagor and recorded"). *But see id.* § 1601(a) (stating that a mortgagor of residential real estate may not waive this right, and any such waiver is deemed void).

187. Benjamin Franklin Fed. Sav. Ass'n v. Dwinn, No. 90 C 1076, 1990 WL 141451, at *2 (N.D. Ill. Sept. 20, 1990). *See also* Commercial Mortg. & Fin. Co. v. Woodcock Const. Co., 200 N.E.2d 923, 926 (Ill. App. Ct. 1964) (finding that the ability to waive the right of redemption is statutorily provided and must be honored).

188. *See In re Young*, 22 B.R. 620, 622 (Bankr. N.D. Ill. 1982) (describing how the contours of state law affect the application of 11 U.S.C. § 1322 and acknowledging and defining Illinois's adoption of the "title theory").

foreclosure. Under the intermediate theory, legal and equitable title remains with the mortgagor until a default, at which time legal title passes to the mortgagee. Each theory has influenced how courts of equity have dealt with the request for the appointment of a receiver.

Illinois courts originally followed the title theory of mortgages. Early cases recognized the common law precept that a mortgage was a conveyance of a legal estate vesting title to the property in the mortgagee.[189] Under this theory, the practical benefit to the mortgagee was the right to take possession of the property upon default through an action of ejectment.[190] Based on this then-prevailing principle in Illinois, the mortgagee could not have a receiver appointed on default by the mortgagor, since the mortgagee was then entitled to possession.[191] In following the title theory, Illinois courts of equity would enforce the equitable theory of mortgages. That is to say, while the law courts would give the mortgagee the right to take possession of the property at any time, the mortgagor could go into a court of equity and force the mortgagee to account for any income the mortgagee obtained while in possession of the property. This equitable accounting was enforced so strictly that there was little or no advantage to the mortgagee in taking possession from the mortgagor.[192] However, if the property were to come within the jurisdiction of a court of Chancery because of a bill to foreclose, the mortgagee could seek relief in equity. The appointment of a receiver, however, would not be allowed to aid the mortgagee in enforcing a common law right or remedy unless other equitable remedies had failed.[193]

In 1954, *Kling v. Ghilarducci* marked a shift in how Illinois courts viewed mortgage law. In *Kling*, the court held:

189. *See* Rohrer v. Deatherage, 168 N.E. 266, 268 (Ill. 1929) ("In this state a mortgagor is the legal owner of the mortgaged premises against all persons except the mortgagee and his assigns."); Lightcap v. Bradley, 58 N.E. 221, 223 (Ill. 1900) (describing the nature of mortgage in the English tradition as a transfer of title and noting Illinois's adoption of that conception).

190. CLARK, *supra* note 87, § 936(a), at 1704 ("After condition broken, ejectment may be maintained by the mortgagee against the mortgagor . . . ." (quoting Taylor v. Adams, 4 N.E. 837 (Ill. 1886))).

191. Altschuler v. Sandelman, 264 Ill. App. 106, 114 (1931). In *Sandelman*, the Illinois Supreme Court stated,

> "If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then, if the prior mortgagee is not in possession, the other may have a receiver, without prejudice to his taking possession[] . . . ."

Id. at 115 (quoting *Berney v. Sewell*, (1820) 37 Eng. Rep. 515 (H.C. Ch.) 515; 1 Jac. & W. 647, 648) (emphasis omitted).

192. WILLIAM A. CHASE, SAMUEL MACCLINTOCK & HENRY P. WILLIS, HIGHER ACCOUNTANCY, PRINCIPLES & PRACTICE: BUSINESS LAW § 2, at 292 (1911).

193. Schack v. McKay, 97 Ill. App. 460, 465 (1901).

> In Illinois the giving of a mortgage is not a separation of title, for the holder of the mortgage takes only a lien there under. After foreclosure of a mortgage until delivery of the master's deed under the foreclosure sale, purchaser acquires no title to the land either legal or equitable. Title in the land sold under mortgage foreclosure remains in the mortgagor . . . until the expiration of the redemption period and conveyance by the master's deed.[194]

As a result, Illinois mortgages and deeds of trust conveyed only a qualified title to the mortgagee as security for the loan during the existence of the debt. The mortgagor remained the owner of the mortgaged property for all beneficial purposes, subject to the lien created by the mortgage or deed of trust. The qualified title held by the mortgagee was subject to the defeasance clause,[195] which stipulated that such title must be fully conveyed, or released back to the mortgagor at the time the debt is satisfied in full. Following the decision in *Kling*, Illinois moved from being a title theory state to an intermediate theory state until the mid-1980s.

By 1984, Illinois courts completed their transition from title theory to lien theory. In *Harms v. Sprague*, the court deemed the execution of a mortgage as a mere lien.[196] Following *Harms*, the second district appellate court in *Kelley/Lehr & Associates, Inc. v. O'Brien* stated, "[T]he State of Illinois has recently adopted the 'lien theory of mortgages,' and a mortgagee is not deemed to own the title of the property but only a mere lien."[197] In the decades following *Harms* and *O'Brien*, the existing "theory" of mortgage law has influenced what standards Illinois courts apply to issues pertaining to the appointment of a receiver.

III. DEVELOPMENT OF RECEIVERSHIPS

> Law must be stable, and yet it cannot stand still.[198]
>
> – Roscoe Pound

194. Kling v. Ghilarducci, 121 N.E.2d 752, 756 (Ill. 1954).

195. A defeasance clause is "[a] mortgage provision indicating that the borrower will be given the title to the property once all mortgage terms are met." *Defeasance Clause*, INVESTOPEDIA (last visited Sept. 30, 2012), http://www.investopedia.com/terms/d/defeasance-clause.asp#axzz2JV1GZxyK. "The defeasance clause is not required in states using property liens as collateral for a mortgage . . . . In this sense, the clause is a substitute for collateral." *Id.*

196. Harms v. Sprague, 473 N.E.2d 930, 933 (Ill. 1984).

197. Kelley/Lehr & Assocs. v. O'Brien, 551 N.E.2d 419, 423 (Ill. App. Ct. 1990).

198. Dean Marshall McKusick, *Uniformity of Law and Its Practical Application in the Negotiable Instruments Act*, 9 MARQ. L. REV. 217, 217 (1925).

A. Origins of Receivers in England

It is difficult to determine when the first court appointment of a receiver occurred in Britain. There is some evidence of the Chancery courts granting injunctions to preserve property and prevent its misuse during the reign of Queen Elizabeth I.[199] Although this practice was first instituted to correct the mishandling of land, it was questionable whether the remedy of enjoining the party in possession from committing waste or doing harm to the property was a sufficient protection.[200] If the court's injunction order was not observed, the disobeying party might be punished, but this remedy often did not restore damaged or depleted property.[201] Because the court itself could not physically care for the property, an officer of the court was appointed to act on the court's behalf. The receiver collected rents and profits associated with the land on behalf of the court, but he did not always take possession of the property in question. The appointment of receivers for the purpose of collecting rents and profits became an accepted practice during the reign of Elizabeth I.[202]

The early procedural practice of Chancery in England was that a court did not appoint a receiver until after the defendant had submitted its answer to the plaintiff's complaint. This procedure provided courts with an opportunity to weigh the claims of each party to the suit. Although this practice was subsequently modified, courts stringently required a special reason for the appointment of a receiver before the defendant filed an answer, such as immediate danger to the property.[203] In England, the appointment of receivers was confined to the courts of Chancery,[204] an equitable concept many of the early English settlers carried across the Atlantic to the newly formed American Colonies.[205]

B. Receiverships in Illinois

> [N]o organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor any document of

199. TODD C. KAZLOW & BRUCE C. KING, THE LAW OF MISCELLANEOUS AND COMMERCIAL SURETY BONDS 78 (2001).

200. CLARK, *supra* note 87, § 4, at 4.

201. *Id.*

202. 1 GEORGE SPENCE, EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 673 (1846).

203. Frank v. Siegel, 263 Ill. App. 316, 323 (1931).

204. CLARK, *supra* note 87, § 4, at 5 (stating that this practice continued until the enactment of the Judicature Act of 1878, which extended the jurisdiction to appoint a receiver to every inferior court with equity jurisdiction).

205. *Id.*

> reasonable length contain express provisions for all possible questions.[206]
>
> – Abraham Lincoln

On December 3, 1818, Illinois became the twenty-first state to join the union. Previously part of the vast Northwest Territory, Illinois would become the fifth most populous state and home to Chicago, the third largest city in the nation.[207] Louis Jolliet, the French explorer who discovered Illinois, wrote that the region appeared "to be the most beautiful and most easily settled."[208] Drawn to the richness of the new land, settlers soon followed Jolliet to establish (as much as possible) "a duplicate of the community they had left behind."[209] The Illinois prairie was conquered and settled by both pioneers and plows. Residents of the Land of Lincoln eventually migrated en masse from the prairie, to the city, and on to the suburbs.[210] Illinois residents' desire to acquire and possess land remained prevalent during the state's early years. It is in this backdrop that Illinois courts of equity evolved and developed the law pertaining to receiverships, and courts of Chancery would endeavor to address the issues arising from the appointment of a mortgage foreclosure receiver.

Prior to 1879, "power of sale" mortgages were valid and enforceable in Illinois.[211] In essence, the power provision in a mortgage allowed the mortgagee, upon a default, to sell the property at a public sale without any court proceedings. In 1879, the Illinois legislature abolished the power of sale mortgages and provided that all real estate mortgages in Illinois could be foreclosed at law or in Chancery.[212] Thus, the Act of 1879 required all real estate mortgages in Illinois to be foreclosed through a judicial proceeding. In time, these proceedings would have an effect on the law of mortgages in the Prairie State.

1. Early Chancery Decisions

The first court case on foreclosure receivers in Illinois was not

206. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *available at* http://www.bartleby.com/124/pres31.html.

207. *See generally* ROBERT P. HOWARD, ILLINOIS: A HISTORY OF THE PRAIRIE STATE (1979) (tracing the history as well as its entrance and importance to the union).

208. *Id.*

209. *Id.* at 128.

210. *Id.*

211. LEONARD A. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY 684 (1904).

212. Smith-Hurd, Illinois Revised Statutes, 1899, Mortgages, ch. 95, §§ 13, 17, at 2766, 2770.

reported until 1878,[213] which is an indication that receivers were not requested during the State's early formative years. Thereafter, Illinois developed a considerable amount of reported cases on the appointment of a receiver. In fact, until 1987, all of the court decisions pertaining to the appointment of a receiver were based on case law rather than on statutory interpretation, as no statute yet governed receivers or their appointment. The only statutory mention of receivership prior to 1987 was to non-mortgage provisions of the Code of Civil Procedure (and its predecessor, the Civil Practice Act).[214]

Initially in Illinois, a receiver, as an officer of the court, was appointed in certain cases to preserve and manage property that came into the court's custody.[215] Because the appointment of a receiver would divest the owner of the property before a final hearing, the party seeking the remedy had to clearly demonstrate to the court that irreparable loss would otherwise result.[216] Thus, the appointment of a receiver was viewed as an extraordinary remedy to be utilized only when the property was in immediate danger of being wasted or "milked" by its possessor, and only when no other remedy could accomplish the desired result.[217] Unless the land provided inadequate security for the mortgage, the appointment of a receiver was deemed an unnecessary annoyance and hardship.[218] Furthermore, courts always maintained discretion in appointing receivers, even when authorized by statute[219] or in the face of a written agreement between the parties. In other words, a court of equity would not appoint a receiver simply because such an appointment was stipulated to in the mortgage.[220]

In the words of Justice Stone of the Illinois Supreme Court, appointing a receiver is:

> [A] high and extraordinary remedy. The power is not arbitrary and should be exercised with caution and only where the court is satisfied there is imminent danger of loss if it is not exercised. The general rule

213. Haas v. Chi. Bldg. Soc'y, 89 Ill. 498 (1878).

214. Homer Carey & John W. Brabner-Smith, *Studies in Realty Mortgage Foreclosures: III. Receiverships*, 27 ILL. L. REV. 717, 719 (1933). It should also be noted that as late as 1933, the only statutory reference to the appointment of a receiver pertains to the foreclosure of a mechanic's lien. ILL. REV. STAT. ch. 82, § 12 (1931) permitted appointment of a receiver in the foreclosure of a mechanic's lien.

215. Carey & Brabner-Smith, *supra* note 214, at 718–19.

216. *Id.* at 719.

217. *Id.*

218. Brick v. Hornbeck, 43 N.Y.S. 301, 301 (1897).

219. Carey & Brabner-Smith, *supra* note 214, at 719. Thus, even though the mortgage contained a clause to mortgage the rents and profits, this was not a sufficient requirement for the court to appoint a receiver in a foreclosure action.

220. Bagley v. Ill. Trust & Sav. Bank, 64 N.E. 1085, 1086 (Ill. 1902).

> is that the applicant must show . . . that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct or insolvency.[221]

Courts of equity always have the power to appoint a receiver when the debtor is insolvent, the mortgaged property provides insufficient security for the debt, and there is good cause to believe the property will be wasted or deteriorated in the hands of the mortgagor.[222] In *Haas v. Chicago Building Society*, the earliest recorded Illinois Supreme Court case addressing the issue of appointing a receiver, the court stated:

> [T]he court of chancery may, where the security is inadequate and the mortgagor unable to pay the deficiency, and a foreclosure proceeding is pending, appoint a receiver, if there are circumstances of fraud or bad faith on the part of the mortgagor, or other facts involved which would render a denial of the relief sought inequitable and unjust.[223]

The power is not arbitrary, should be exercised with caution, and exercised only where the court is satisfied there is imminent danger of loss to the mortgagor.

> The general rule is that the applicant must show, first, that he has either a clear right to the property itself or has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and second, that the possession of the property by the defendant was obtained by fraud, or that the property itself or the income arising from it, is in danger of loss from neglect, waste, misconduct, or insolvency.[224]

The early view was that the court only had temporary custody of the property, such that the receiver could only make such temporary repairs as were necessary for operation of the property rather than permanent improvements or radical changes.[225] In balancing the interests of the parties, courts asked whether the good a receiver would accomplish outweighed the harm a receiver would cause to the property owner, the bondholders, or other interested parties.[226] If the court determined the harm outweighed the benefit, then it would not appoint a receiver. Early courts of Chancery attached great importance to the factor of waste in determining whether to appoint a receiver, and less importance on the insolvency of the mortgagor and the inadequacy of the security.

221. Frank v. Siegel, 263 Ill. App. 316, 323 (1931).
222. Omaha Hotel Co., v. Kountze, 107 U.S. 378, 395 (1883).
223. 89 Ill. 498, 504 (1878).
224. Bagdonas v. Liberty Land & Inv. Co., 140 N.E. 49, 52 (Ill. 1923).
225. Carey & Brabner-Smith, *supra* note 214, at 719.
226. *Id.*

2. Changes in the Early Twentieth Century

The process by which Illinois courts appointed receivers began to shift during the early twentieth century and continued into the Great Depression. The Chancery courts began allowing extensions to the early customary limitations on the appointment of receivers. A mortgagee, after filing a bill to foreclose a mortgage, was not entitled to a receiver unless it appeared to the court that the mortgagor was insolvent and that the security was inadequate.[227] The inquiry by courts now pertained to whether the owner in possession would pay over the rents collected.[228] Courts no longer were interested in whether the mortgaged property was in immediate danger of being dissipated by the mortgagor.[229]

A provision in a mortgage that a receiver shall be appointed was deemed to have no effect on the court's decision-making process, since the parties could not force the burden of administering the property upon a court.[230] In *Frank v. Siegel*, the court held:

> [E]ven though the trust deed conveys the rents and profits as security and provides that a receiver of the premises may be appointed upon default in the payment of any of the indebtedness, a receiver should not be appointed solely upon the allegations of a bill to foreclose that there is such a default and a general allegation that the security is scant.[231]

In *Siegel*, the bill alleged generally that the security was inadequate. Nevertheless, the court ruled that in order to justify the appointment of a receiver, it was incumbent on the complainant to present facts from which the court could reasonably determine that the appointment was equitably necessary.[232] As Illinois law evolved, courts attached great importance to the insolvency of the mortgagor and the inadequacy of the security when determining whether to appoint a receiver. Illinois courts soon used circumstances and rulings to justify the intervention of equity on the issue of receivership.

C. Creating the Receivership Provision in the Illinois Mortgage Foreclosure Statute

> In the construction of a law, the judge considers the intention of the law giver as his true guide, and gives to all the parts and expressions

227. Cross v. Will Cnty. Nat'l Bank, 52 N.E. 322, 323 (Ill. 1898).
228. *Id.* at 323–24.
229. *Id.* at 324.
230. First Nat'l Bank of Joliet v. Ill. Steel Co., 51 N.E. 200, 202 (Ill. 1898).
231. 263 Ill. App. 316, 324–25 (1931) (Gridley, J. et al., concurring).
232. *Id.* at 323.

> of the law, the meaning which will effect, instead of defeating, its intention.[233]
>
> – Thomas Jefferson

In 1987, the Illinois legislature passed the IMFL, which altered the process, procedures, presumptions, and practice applicable to the appointment of mortgage foreclosure receivers. The new statute was largely intended to clarify foreclosure law and serve as a procedural guide for Illinois courts.[234] Yet, the new enactment soon changed the substantive rights for the parties of interest, in many circumstances expanded the role of the court-appointed receiver, and impacted the discretionary authority of the courts of Chancery.

Although Chancery courts exercising general equity jurisdiction have the inherent power to appoint a receiver, the IMFL codified the usage and rules of equity pertaining to such appointment.[235] The IMFL was intended to integrate the law of mortgage foreclosure into one statute.[236] Prior to the IMFL, Illinois foreclosure laws were spread out through various sections of statutory law.[237] Further, these earlier laws did not take into account many court decisions on mortgage foreclosures.[238] Therefore, the IMFL attempted to integrate all of the laws pertaining to mortgages and foreclosures into one statutory body.[239]

233. Letter from Thomas Jefferson to Governor William H. Cabell (Aug. 11, 1807) (on file with the Library of Congress).

234. Jack H. Tibbetts, *Personal Observations of 20 Years with the Illinois Mortgage Foreclosure Law*, ISBA REAL PROPERTY NEWSLETTER 9 (Ill. State Bar Assoc., Springfield, Ill., Jan. 2009)

235. 735 ILL. COMP. STAT. 5/15-1701(c) (2012).

236. Steven C. Lindberg & Wayne Bender, *The Illinois Mortgage Foreclosure Law*, 76 ILL. B.J. 800, 800 (1987).

237. *Id.*

238. *Id.*

239. *Id.* It should be noted that the IMFL's drafters considered allowing for a non-judicial power of sale for commercial real estate, which had mortgages of several millions of dollars. The proposed provision therein would have permitted sophisticated, business-savvy parties to adopt a power of sale procedure when drafting a mortgage. Therefore, the parties in the commercial setting could have provided in the mortgage that, in the event of a default, a remedy could be judicial or non-judicial. Other considerations dealt with whether other courts, such as a bankruptcy court, would challenge the non-judicial mortgage foreclosure decisions. This aspect of the IMFL, however, was excluded from the law. The view seemed to be that the commercial borrower still needed the protection of the judicial procedures. These same procedures could provide possible protection to third parties as well. Tibbetts, *supra* note 234, at 9.

IV. MODERN DAY RECEIVERS IN ILLINOIS

A. General Overview

When the underlying real estate is generating cash, a commercial lender almost invariably seeks to have a receiver appointed shortly after it commences foreclosure proceedings. A professional receiver will collect rent and pay bills consistent with the statutory scheme established under the IMFL.[240] Mortgagees typically will incur the expense of a receiver in exchange for the benefits a receiver provides, including making sure that certain bills are paid and choking off cash flow to the borrower who may have been diverting rental funds for other unpaid bills. Although the receiver is an officer of the court and must exercise his own judgment, a receiver's focus should be to ensure the property is secured and maintained.

The power of the court to appoint a receiver and to place in his custody the property in controversy (before the defendant has answered) has become a well-established practice in this country. A court is likely to appoint a receiver in cases where the complainant can show that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss; or where the complainant provides evidence of fraud or imminent danger to the property unless the relief is granted.[241]

B. The Benefit of Appointing a Receiver

As an officer of the court, the receiver acts for the benefit of all involved parties in a foreclosure proceeding.[242] The receiver has possession of the mortgaged real estate and the full power and authority to operate, manage, and conserve such property. In essence, the receiver is a fiduciary of all the parties to the litigation.[243] As a fiduciary, the receiver cannot profit from his position of trust other than through reasonable compensation, which the court may allow under the law.[244] Therefore, the receiver should act in good faith for the benefit of creditors, property owners, and all other parties claiming an interest in the property.

240. 735 ILL. COMP. STAT. 5/15-1704.

241. *See, e.g.*, Fiebaugh v. McGovern, 88 N.E.2d 473, 476 (Ill. 1949); Compton v. Paul K. Harding Realty Co., 285 N.E.2d 574, 580 (Ill. App. Ct. 1972); Nartzik v. Ehman, 191 Ill. App. 71, 80 (1914).

242. CLARK, *supra* note 87, at 680.

243. PSL Realty Co. v. Granite Inv. Co., 395 N.E.2d 641, 646 (Ill. App. Ct. 1979), *aff'd in part, rev'd in part*, 426 N.E.2d 563 (Ill. 1981).

244. Ravlin v. Chi. A & De K.R.R., 129 N.E. 730, 736 (Ill. 1921).

Mortgagees will commonly seek possession of a mortgaged property to enforce the right to rental income collected and to preserve the property value during the foreclosure process. When a loan is secured by a mortgage and note on an income-producing property, such as an apartment complex, shopping center, or office building, rents provide the revenue necessary to operate, manage, and maintain the mortgaged property. Rental income is sometimes the source from which the payments on the mortgaged loan are drawn. After a default occurs, a mortgagor may apply the rents to purposes unrelated to the mortgaged property or the mortgage loan. Thus, a mortgagor, when faced with the possibility of losing the mortgaged property, may utilize the rent revenues for purposes unrelated to the mortgaged property. This process is often referred to as "milking."[245]

A mortgagor implementing this practice will drain the rent revenues as much as possible before having to surrender the property. For instance, a mortgagor may enter into leases in which he will require advance payment of all lease funds, require cancellation of a long-term lease favorable to the tenant in exchange for a cash payment to the mortgagor, or maintain all current leases and collect the rents but at the same time fail to pay taxes, utilities, insurance, and outstanding invoices related to repairs.[246]

C. The Basis for Appointing a Receiver

Under the IMFL, a mortgagee has the right to an appointment of a receiver if he is in possession of the non-residential property prior to judgment.[247] The statute provides that in matters involving non-residential property, the mortgagee "shall" upon request be placed in possession of the mortgaged property, after the filing of a foreclosure complaint and before the entry of a judgment of foreclosure, if the mortgagee is so authorized by the terms of the mortgage, and the court is satisfied that there is a "reasonable probability" the mortgagee will prevail on a final hearing of the cause.[248] If the mortgagee can satisfy these elements of the IMFL, the mortgagor must object and show "good cause" to be able to remain in possession of the property during the foreclosure proceeding.[249] The inquiry as to whether the mortgagee

245. GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 230 (1979).

246. *Id.*

247. *See* 735 ILL. COMP. STAT. 5/15-1219 (2012) (defining what is residential and non-residential property).

248. 735 ILL. COMP. STAT. 5/15-1701(b)(2).

249. *Id. See infra* Part V for a more detailed discussion of the concepts of "reasonable probability" and "good cause."

should prevail in his request for pre-judgment possession commences with the mortgage document and the filing of the mortgage foreclosure action.

A mortgage foreclosure cause of action is a legal proceeding instituted by the mortgagee to terminate the mortgagor's interest in the property. In Illinois, the process of instituting and prosecuting a commercial foreclosure action is set forth in the IMFL.[250] The mortgagee has a right to foreclose on the property only when the mortgagor defaults on the mortgage.[251] The mortgage, note, and other pertinent loan documents relating to the property define the conduct that gives rise to a default. Some conditions that frequently cause a mortgage default include failing to make a monthly payment, filing for bankruptcy, and breaching a material contractual obligation under the loan agreement. After a default, the mortgagee has the option of accelerating any outstanding balance on the loan, commencing an action at law or in equity (including the commencement of a foreclosure proceeding), or exercising some other remedy provided in the mortgage documents to collect the unpaid loan balance.[252] The mortgagor may pursue all or some of those remedies concurrently or successively.[253] Although a mortgagee's various remedies are typically detailed in the mortgage documents, the mortgagee is limited to one satisfaction.[254] Thus, a mortgagee's right to foreclose on property pursuant to a commercial mortgage commences with a mortgagor's default, and in conjunction with the mortgagee's other cumulative rights in relation to the defaulted mortgagor.

1. Mortgage

As previously stated, the IMFL provides that a mortgagee of non-residential real estate is entitled to pre-judgment property possession or appointment of a receiver only if authorized by the terms of the mortgage instrument.[255] Modern commercial mortgages typically contain a provision in which the mortgagor consents to the appointment of a receiver following a default, without regard to whether the mortgagor is insolvent or whether the physical condition of the property has deteriorated or been damaged. Generally, the trial court's decision

250. 735 ILL. COMP. STAT. 5/15-1101 to 5/15-1706.

251. Fed. Nat'l Mortg. Ass'n v. Bryant, 378 N.E.2d 333, 336 (Ill. App. Ct. 1978).

252. Markus v. Chi. Title & Trust Co., 27 N.E.2d 463, 465 (Ill. 1940).

253. Skach v. Lydon, 306 N.E.2d 482, 485 (Ill. App. Ct. 1973).

254. Abdul-Karim v. First Fed. Sav. & Loan Ass'n of Champaign Nat'l Bank, 101 Ill. 2d 400, 406–07 (1984).

255. 735 ILL. COMP. STAT. 5/15-1701(b)(2), 5/15-1702(a), 5/15-1704(a).

to not appoint a receiver should not be reversed unless it is found to be an abuse of discretion.[256]

The language of the mortgage agreement and other documentary evidence largely determines whether a court will award possession of a mortgaged property to a receiver.[257] Clear language in the mortgage agreement providing for the appointment of a receiver is strong evidence that the mortgagor has agreed to such a remedy. The IMFL, however, severely circumscribes the exercise of the court's discretion, as it directs a court to appoint a receiver whenever "a mortgagee entitled to possession so requests."[258] Absent any contractual provision in the mortgage authorizing pre-judgment possession or receivership, the mortgagee will likely have to wait until the conclusion of the foreclosure proceeding to obtain possession of the property and begin collecting rents.

2. Assignment of Rents

In order to allow mortgagees to collect rental income sooner than the completion of the foreclosure proceeding, Illinois law permits a mortgagee to insert an assignment of rents clause into a mortgage agreement. This clause provides a sufficient interest in the rents to authorize the appointment of a receiver through whom the mortgagee can collect rents.[259] In other words, a "mortgagee has no specific lien upon the rents and profits of the mortgaged land *unless* he has in his mortgage stipulated for a specific pledge of them as part of his security."[260] Under Illinois law, an assignment of rents clause in a mortgage does not grant the mortgagee a lien on specific rents already in the possession of the mortgagor—such a lien would violate the general rule that a mortgagor does not have to account to the mortgagee for rents while he remains in possession of the property at issue. Instead, an assignment of rents provision allows the mortgagee to take steps after a default—but before a completion of the foreclosure proceedings—to obtain possession of property and start collecting rents.[261] Until the mortgagee takes such steps, the mortgagor is entitled to keep any rental income generated by the commercial property.

256. DeKalb Bank v. Purdy, 520 N.E.2d 957, 962 (Ill. App. Ct. 1988).

257. Home Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 777 F. Supp. 629, 633 (N.D. Ill. 1991).

258. 735 ILL. COMP. STAT. 5/15-1702(a).

259. Bagley v. Ill. Trust & Sav. Bank, 64 N.E. 1085, 1086 (Ill. 1902).

260. First Nat'l Bank v. Ill. Steel Co., 51 N.E. 200, 202 (Ill. 1898).

261. *See In re* Wheaton Oaks Office Partners Ltd. P'ship, 27 F.3d 1234, 1241–44 (7th Cir. 1994).

The receiver in a foreclosure action does not act on behalf of a mortgagee. Rather, a mortgagee may designate the name of a receiver to the court, and a court may in its discretion appoint a receiver to maintain the property as an officer of the court. A court-appointed receiver is generally tasked with collecting rents, issues, and profits from the mortgaged property.[262] The receiver holds the rents and other profits in excess of expenses—if any rent proceeds remain after the foreclosure is completed and the mortgage indebtedness is satisfied, the mortgager is entitled to the rent revenues.[263]

D. The Appointment of the Receiver

The mortgagee may run to the courthouse to seek the appointment of a receiver under the circumstances outlined above. Because the receiver's possession of the mortgaged premises is the same as the mortgagor's possession, the receiver steps into the mortgagor's shoes as to all leases for the property. Because Illinois adheres to the general rule that rents are incidental to property possession,[264] a mortgagor, as the party in possession and owner of the statutory right of redemption, is entitled to the rents generated from the property.[265] The mortgagor is not required to account for such rental income to the mortgagee so long as he holds onto the property. This scenario can cause problems for the mortgagee should the mortgagor default on the underlying debt.

In this scenario, the mortgagee would like to start collecting the rents generated from the property and apply the funds towards any deficiencies under the mortgage obligation. The only manner in which the mortgagee can access this rental income is if the mortgagee actually acquires possession of the property. It is highly unlikely that the mortgagor will voluntarily relinquish possession of the property to the mortgagee, who may want to milk the property of all rents, and at the same time not make the mortgage payments. Consequently, the mortgagee will need to obtain actual possession, or possession through the appointment of a receiver, in a court of Chancery.[266] The case law in this area makes clear that a mortgagee must obtain possession to the property in order to collect the rents.[267] The rationale for this principle is that a mortgagee should not be permitted to collect rental revenue

262. 735 ILL. COMP. STAT. 5/15-1704(b)(2).

263. Metro. Life Ins. Co. v. Schwarz, 33 N.E.2d 934, 937 (Ill. App. Ct. 1941).

264. DeKalb Bank v. Purdy, 520 N.E.2d 957, 962 (Ill. App. Ct. 1988).

265. *Id.*

266. Comerica Bank-Ill. v. Harris Bank Hinsdale, 673 N.E.2d 380, 382 (Ill. App. Ct. 1996).

267. *Id.*; Fid. Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 71 F.3d 1306, 1308 (7th Cir. 1995).

without assuming the expenses of possessing the property and ensuring that it is properly maintained.

1. The Receiver

Under the IMFL, the mortgagee is allowed to select the receiver he wishes to be appointed by the court.[268] The decision as to which receiver to select and present for the court's consideration will depend on (among other factors) the type of property or collateral to be secured, the size and scope of the property or collateral, the condition of the property (e.g., whether it requires construction), the type of business of the mortgagor, and the experience of the receiver in these respective areas.

The mortgagee's choice will depend in large part on the receiver's anticipated responsibilities during the foreclosure process. For example, a mortgagee seeking a receiver for a multi-unit apartment building will want to select a property manager experienced in managing large apartment complexes. In contrast, a mortgagee seeking a receiver for a property under construction may seek a receiver with a construction management background to oversee site work on the property. Similarly, a mortgagee seeking a receiver for the liquidation of equipment or inventory of a commercial enterprise will want an experienced liquidator who has a business background or the knowledge and experience to sell such inventory.

Today's receivers are no longer merely officers of the court charged with the sole duty of collecting rents and protecting the collateral on the mortgage. In the modern world of mortgage foreclosures, a receiver must be a multi-tasker with the skills and abilities necessary to effectively fulfill the orders of the court.

2. The Order Appointing Receiver

In essence, the underlying mortgage documents and financing agreements executed and entered into by the parties form the basis for the appointment of a receiver. As previously discussed, the receiver is appointed by and works for the court, with the goal of preserving and protecting the property for the benefit of the parties. Although recommended by the mortgagee, the receiver does not take orders or directions from the mortgagee. The receiver must obey court orders so long as an order remains in effect and unimpeached—the receiver's power to perform his duties and responsibilities flows from the order

268. 735 ILL. COMP. STAT. 5/15-1701(c) (2012). A receiver must not be a company or other business entity. *Id.*

granting the appointment of the receiver.[269]

The extent, quality, and detail of the order are without question essential and critical. Furthermore, the court has the inherent authority to enforce the order regarding the appointment of a receiver.[270] Therefore, a judge should take considerable care when drafting the order. The relation of a receiver to the court and the receiver's authority to act is determined by the court's order issuing the appointment.[271] As a result, the mortgagee and the prospective receiver should carefully review the order to avoid any unnecessary revisions once the receiver commences work on the property. Doing so will also prevent the receiver from making unnecessary appearances in court to obtain approval of any and all minor actions or expenditures.

Ultimately, the authority and power of the receiver are those granted by the order of the court appointing the receiver. As long as the receiver does not overstep these powers, the receiver is protected even though the orders may be deemed improper or reversed on appeal.[272] The court order approving the final receiver's report is a ratification of the receiver's actions. In instances where the receiver has incurred expenditures without leave of court, the receiver must establish that the actions were necessary and appropriate.[273]

3. Bond

Before the receiver has been appointed and assumed his responsibilities, the individual must secure a good and sufficient bond in an amount determined by the court from a recognized and authorized surety. A receiver's bond is conditioned on the faithful discharge of a receiver's duties and responsibilities in the named cause of action and compliance with the court's orders. In other words, the purpose of the bond is to ensure the faithful performance of the receiver's duties in the care and administration of the property. The court determines the amount of the bond after careful inquiry as to all relevant factors associated with the property in question.

269. Witters v. Hicks, 780 N.E.2d 713, 722 (Ill. App. Ct. 2002).

270. U.S. Fid. & Guar., Co. v. Old Orchard Plaza Ltd. P'ship, 672 N.E.2d 876, 882–83 (Ill. App. Ct. 1996).

271. CLARK, *supra* note 87, at 36–37.

272. Reardon v. Youngquist, 362 N.E.2d 439, 441 (Ill. App. Ct. 1914).

273. 735 ILL. COMP. STAT. 5/15-1704. The IMFL provides that the receiver "shall have all the usual powers of receivers in like cases." *Id.* § 5/15-1704(b). Therefore, the language of the statute indicates that receivers appointed under the IMFL are to be treated the same as other receivers.

4. Receiver's Duties

The receiver should carefully consider how best to manage and preserve the property during the receivership. One of the first tasks that a receiver should carry out is a thorough walkthrough and examination of the property (so long as he has obtained the mortgagor's consent). If possible, the walkthrough should take place pre-appointment, within the bounds of the law, in order to provide the court with as much information available to issue an order.

The receiver is also tasked with using all reasonable efforts to maintain the property.[274] A receiver likely does not have a right to sell the real estate that is the subject of the receivership estate. Some Illinois courts, however, have permitted receivers to sell units of an unfinished condominium with the proceeds applied to the mortgage indebtedness.[275] Certain courts may permit a receiver to sell the property under his control if the parties so agree or if the real estate is in imminent danger.

Similarly, the receiver has a duty to manage the mortgaged real estate as would a prudent person. The receiver should take into account the effect of the receiver's property management on the interest of the mortgagor.[276] To the extent the receiver obtains sufficient receipts from the mortgaged real estate, the court will require the receiver to maintain existing casualty and liability insurance, use reasonable efforts to maintain the mortgaged real estate, and make repairs and improvements necessary to comply with building and housing codes. Additionally, if there are sufficient proceeds for the operating and other expenses of the property, a court may charge the receiver with paying such costs.[277]

When a receiver fails to exercise the care of a prudent person in renting the property, violates a court order, or fails to collect rent, a court may charge the receiver the amounts the receiver failed to collect.[278] Furthermore, though the IMFL imposes a duty on the receiver to pay certain expenses, it also addresses the scenario where there may not be sufficient funds to so.[279] For instance, if there are insufficient funds generated to maintain the property, the court may

274. *Id.* § 5/15-1704(c)(2).

275. Stephen M. Lasser, *When Owners Fall Behind*, THE COOPERATOR, http://cooperator.com/articles/921/1/When-Owners-Fall-Behind/Page1.html (last visited Jan. 30, 2013); Samuel H. Levine, *The Use of Receiverships for Managing Troubled Assets*, ARNSTEIN & LEHR LLP (2010), http://legalnews.arnstein.com/wp-content/uploads/Commercial-Solutions-Summer-2010-HQ.pdf.

276. 735 ILL. COMP. STAT. 5/15-1704(c).

277. *Id.*

278. Matchless Metal Polish Co. v. Knippel, No. 42858, slip op. at 3–4 (Ill. App. Ct. filed Mar. 9, 1934).

279. 735 ILL. COMP. STAT. 5/15-1704(c).

grant the receiver authority to borrow money,[280] so long as such borrowing is deemed in the best interest of the parties.[281] In many cases, the source of the additional funds is the mortgagee; accordingly, the court may permit a lien to attach to the property.[282] Prior to permitting the receiver to borrow funds for property expenses, the parties must convince the court that doing so is necessary to preserve the property and that all parties consent to the borrowing scheme.

Pursuant to the IMFL, a receiver also has the power and authority to secure tenants and execute leases for the property on terms that are customary for the type and use involved. A receiver even has the power to accept and reject leases. The IMFL, however, explicitly provides that mere appointment of the receiver does not automatically terminate any lease.[283]

Often, the mortgagor presents the issue of whether the receiver will pay real estate taxes during the appointment proceedings. Although the IMFL does not mandate that a receiver pay real estate taxes, it does mandate that to the extent the receiver obtains sufficient receipts from the mortgaged real estate, the receiver "shall" perform certain functions[284] and may perform other functions with those receipts.[285] The payment of real estate taxes is not included in the determined list of mandated and permitted functions. Indeed, the IMFL states that a receiver *has* the authority to pay taxes levied against the mortgaged property, but not that the receiver *must* do so.[286] The IMFL provides a list of how receipts received from the management and operation of the real estate should be allocated; the first seven provisions do not reference the payment of real estate taxes and the final provision states that the balance of receipts shall be held or distributed as ordered by the court.[287] Accordingly, the IMFL does not mandate the receiver to pay real estate taxes.[288]

280. Cody Trust Co. v. Hotel Clayton Co., 12 N.E.2d 32, 35, 37 (Ill. App. Ct. 1937).

281. Equitable Trust Co. of N.Y. v. Chi., Peoria & St. Louis R.R. Co., 223 Ill. App. 445, 449 (1921).

282. Berman, *supra* note 153, at 76.

283. 735 ILL. COMP. STAT. 5/15-1701(e). *See* Kelley/Lehr & Assocs., Inc. v. O'Brien, 551 N.E.2d 419, 425 (Ill. App. Ct. 1990).

284. 735 ILL. COMP. STAT. 5/15-1704(c)(1)–(4).

285. *Id.* § 5/15-1704(c)(5)–(9).

286. *Id.* § 5/15-1704(b)(5). *See* Midwest Bank & Trust Co. v. US Bank, 859 N.E.2d 71, 74 (Ill. App. Ct. 2006) (noting that the statutory language does not obligate receivers to pay real estate taxes).

287. 735 ILL. COMP. STAT. 5/15-1704(d).

288. Furthermore, the pre-IMFL case law was of the view that a receiver was never justified in paying taxes. *See* Perlman v. Marzano, 170 N.E. 254, 256 (Ill. 1930).

5. Compensating the Receiver

The court has the discretion to determine the receiver's compensation for services rendered.[289] The receiver has the burden of establishing the reasonableness of the fees.[290] If a court determines that the receiver has sufficiently satisfied the reasonableness test, the burden shifts to the respondent to demonstrate that the fees in question are not reasonable.[291] However, the court may deny or reduce a receiver's fee if the receiver delegated his managerial responsibilities to an agent without court approval,[292] even though the IMFL imbues broad authority in the receiver to "employ counsel, custodians, janitors and other help."[293]

E. Discharging the Receiver

The appointed receiver is an officer of the court. Consequently, the property placed in the hands of the receiver is in legal custody of the court for the benefit of all parties in interest. Therefore, any unauthorized interference of said possession, either by taking forcible possession of the property committed to the receiver's charge or by legal proceedings for that purpose, without the sanction of the appointing court, is a direct and immediate contempt of court.[294] A court's determination of direct contempt is based upon the act and not upon the alleged intention of the offending party. Furthermore, that the mortgagor or offending party sought legal advice and acted (at least in part) upon such advice cannot be a legal defense for contempt.[295]

If a receiver is found in contempt by a court, has not performed in accordance with the court order, or is poorly managing the property, the receiver may be removed from his duties. The power of a court of equity to remove or discharge a receiver is well-settled in Illinois law and may be exercised at any stage of the litigation.[296] Reasonable attorney fees may be awarded when the appointment of a receiver is revoked or set aside.[297] Additionally, either party may bring a motion to discharge the receiver, so long as the motion provides a sufficient reason to remove the receiver and suggests a new receiver with

289. Brackett v. Sedlacek, 452 N.E.2d 837, 840 (Ill. App. Ct. 1983).
290. *Id.*
291. *Id.* at 841.
292. 735 ILL. COMP. STAT. 5/15-1704(c).
293. *Id.* § 5/15-1704(b)(4).
294. Jones v. Heritage Pullman Bank & Trust Co., 518 N.E.2d 231, 236 (Ill. App. Ct. 1987).
295. Anderson v. Macek, 182 N.E. 745, 746 (Ill. 1932).
296. HIGH, *supra* note 26, at 974–75.
297. 735 ILL. COMP. STAT. 5/2-415(a).

appropriate qualifications.

V. INTERPRETING THE RECEIVERSHIP PROVISIONS IN THE IMFL

A. The Presumption

In Illinois, prior to the completion of a mortgage foreclosure, a mortgagee most likely will seek the appointment of a receiver to manage and operate the mortgaged property. A receiver can be a valuable tool for the mortgagee to: (1) collect rents; (2) manage existing tenant relationships; (3) negotiate and find new leases; (4) handle the day-to-day operations; and (5) avoid waste, loss or destruction.[298] A judge may appoint a receiver as an exercise of the court's equity jurisdiction. The rights of a mortgagee to appoint a receiver in Illinois are governed by chapter 735, act 5, sections 15-1701 and 15-1702 of the Illinois Compiled Statutes (the "Receivership Provisions").[299] The statute provides: "Whenever a mortgagee entitled to possession so requests, the court shall appoint a receiver."[300] In this context, the word "shall" means "mandatory and not permissive."[301] Under the IMFL, the mortgagee is entitled to be placed in possession of the property provided that the mortgagee shows: (1) that the mortgage or other written instrument authorizes such possession; and (2) there is reasonable probability that the mortgagee will prevail on a final hearing of the cause.[302] If the mortgagor objects and shows good cause, the court is required to allow the mortgagor to remain in possession. Whenever a mortgagee is entitled to possession, the court is required to appoint a receiver. Illinois courts do not view the appointment of a receiver as a "drastic" remedy.[303] Based on the Receivership Provisions and Illinois case law, it is the burden of the mortgagor to demonstrate that a receiver should not be appointed for a commercial mortgaged property. In essence, the Chancery courts interpretation of the Receivership Provisions in the IMFL has created a strong presumption in favor of a mortgagee attempting to appoint a receiver for a commercial-mortgaged property. Thus, a mortgagor will have to overcome a substantial burden in order to establish that there is "good cause" under the Receivership Provisions that a receiver should not be appointed.

298. *See* Lasser, *supra* note 275 (providing a variety of roles that a receiver can play when owners fall behind on payments).

299. 735 ILL. COMP. STAT. 5/15-1701 to 1702.

300. *Id.* § 5/15-1702(a).

301. *Id.* § 5/15-1105.

302. *Id.* § 5/15-1701(b)(2); Centerpoint Props. Trust v. Olde Prairie Block Owner, LLC, 923 N.E.2d 878, 883 (Ill. App. Ct. 2010).

303. *See* Travelers Ins. Co., v. La Salle Nat'l Bank, 558 N.E.2d 579, 582 (Ill. App. Ct. 1990).

B. Reasonable Probability

A proven default establishes a reasonable probability of success in a mortgage foreclosure cause of action. Therefore, before a mortgagor needs to demonstrate "good cause" that the appointment of a receiver is not an appropriate remedy, the mortgagee must first establish there is a "reasonable probability that the mortgagee will prevail on a final hearing for cause."[304] The inquiry by the court of equity of "whether a default in fact exists will typically turn on the interpretation of documentary evidence—a non-discretionary function."[305] It should be noted that the IMFL does not set forth what the mortgagee must establish to prevail on the concept of reasonable probability. Therefore, to assert what constitutes a reasonable probability one needs to look to case law.

In order to determine whether a default exists, the court will examine loan documents and other supporting evidence, such as default letters. In *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, an affidavit from a bank officer of the mortgagee setting forth the various defaults of the mortgagor was deemed sufficient for the mortgagee to establish that the mortgagor was in default.[306] The court held that evidence of a proven default under the mortgage documents was sufficient to show a reasonable probability that the mortgagee will prevail on a final hearing.[307] Furthermore, the mortgagee has no obligation to allege misdeeds or omissions on behalf of the mortgagors to be placed in possession of the property.[308]

Thus, the mortgage and the related loan documents may define the conduct giving rise to a default, such as failing to make a monthly payment, filing for bankruptcy, or breaching a material contractual obligation under the loan documents. The mortgagee may sufficiently establish a "reasonable probability" of prevailing in a foreclosure action because of the mortgagor's admission to failing to make interest payments, late charge payments, and real estate tax escrow payments.[309] Additionally, a mortgagor's failure to pay property taxes, when raised by the mortgagee, can be a basis for determining that the mortgagee has a reasonable probability of succeeding.[310] As a result, a proven default

304. 735 ILL. COMP. STAT. 5/15-1701(b)(2).

305. Mellon Bank, N.A. v. Midwest Bank & Trust Co., 638 N.E.2d 640, 646 (Ill. App. 1993).

306. *Id.* at 646–47.

307. *Id.*

308. *Travelers Ins. Co.*, 558 N.E.2d at 582.

309. Home Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 777 F. Supp. 629, 631 (N.D. Ill. 1991).

310. Barclays Bank PLC v. Am. Nat'l Bank & Trust Co. of Chi., 1993 Bankr. LEXIS 607, at

is sufficient to establish a reasonable probability of prevailing in a mortgage foreclosure matter.[311] Therefore, the right to seek the appointment of a receiver will only arise if the mortgagor has defaulted on the mortgage. Accordingly, where there is no default, there is no right to institute a foreclosure proceeding.[312] Recent decisions by Illinois courts have supported the presumption that the mortgagee is entitled to the appointment of a receiver if the mortgagee otherwise meets the requirements of the Receivership Provisions, and has clarified that the burden is on the mortgagor to demonstrate "good cause" that the appointment of a receiver is not an appropriate remedy.

In summary, the Receivership Provisions create a strong presumption in favor of a mortgagee attempting to appoint a receiver for a commercial property. In addition, a mortgagor will have to overcome a substantial burden in order to establish that there is "good cause" under the Receivership Provisions that a receiver should not be appointed.

C. Good Cause

If the mortgagee has established it has both authorization to take possession of the property pursuant to the terms of the mortgage or other written instrument[313] and a reasonable probability of prevailing on a final hearing, then the burden shifts to the mortgagor to object and show "good cause" in order to avoid the appointment of a receiver. In a recent line of cases, the Illinois Appellate Court addressed the issue of what constitutes "good cause" (albeit by rejected arguments demonstrating what is not "good cause").[314] For instance, in *Travelers Insurance Co. v. LaSalle National Bank*, the court rejected the plaintiff's allegations of fraud, waste, mismanagement, or other dissipation of the mortgaged real estate.[315] The court reasoned that the argument raised by the mortgagor was "nothing more than defendants' attempt to shift the burden of making a good cause showing onto the plaintiff."[316] The mortgagee is under "no obligation to allege misdeeds or omissions on the part of the mortgagors in order to be placed in

*1 (Bankr. N.D. Ill. June 1, 1992).

311. Centerpoint Props. Trust v. Olde Prairie Block Owner, LLC, 923 N.E.2d 878, 883 (Ill. App. Ct. 2010).

312. Fed. Nat'l Mortg. Ass'n v. Bryant, 378 N.E.2d 333, 336 (Ill. App. Ct. 1978).

313. 735 ILL. COMP. STAT. 5/15-1701(b)(2) (2012).

314. Bank of Am. v. 108 N. State Retail LLC, 928 N.E.2d 42, 58–61 (Ill. App. Ct. 2010); *Centerpoint Props. Trust*, 923 N.E.2d at 883–87; Fed. Home Loan Mortg. Corp. v. Dearborn Street Bldg. Assocs., LTD., No. 90 C 7143, 1991 WL 18431, at *5 (N.D. Ill. Jan. 31 1991); Travelers Ins. Co. v. LaSalle Nat'l Bank, 558 N.E.2d 579, 582 (Ill. App. Ct. 1990).

315. *Travelers Ins. Co.*, 558 N.E.2d at 582.

316. *Id.*

possession."[317] Moreover, in *Home Life Insurance Co. v. American National Bank & Trust Co.*, the court rejected the argument that there was "no more qualified manager" for the mortgaged property than the current property manager.[318]

Another failed argument of good cause pertains to whether the mortgaged property "can be better performed by the mortgagor or by the mortgagee and/or its receiver."[319] In one case, the demonstration of "good cause" as the harm that would be incurred by the mortgagor if a receiver were appointed outweighed the harm incurred by the mortgagee if the mortgagor remained in possession of the property. Finally, the court has rejected other contentions with regard to good cause, such as: (1) the receivership would add "a whole new layer of costs and attorney fees to the underlying indebtedness;"[320] and (2) a receiver would hurt the development of the property as well as a mortgagor's chances of finding new tenants, investors, or potential buyers.

A seminal case in this area of law is *Centerpoint Properties Trust v. Old Prairie Block Owner, LLC*.[321] In *Centerpoint*, the court held that a mortgagor's claims of impediments to selling or refinancing the property were not a valid defense. The court, in deciding the necessity of a receiver, was primarily moved by the failure of the mortgagor to collect rents, effectively maintain the property, obtain sufficient insurance, and pay invoices and real estate taxes.[322] Furthermore, the court took note of the fact that under the IMFL, there is a presumption in favor of a mortgagee's right to possession, and by extension, the appointment of a receiver.[323] Regarding these rights during the pendency of a foreclosure action, the court ruled that a claim stating that the receiver is not qualified to fulfill its duties regarding the property is irrelevant.[324]

As these cases make clear, a mortgagor will have to overcome a substantial burden in order to establish that there is "good cause" that a court should not appoint a receiver in foreclosure actions. The interests

317. *Id.*

318. Home Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 777 F. Supp. 629, 632 (N.D. Ill. 1991).

319. *Fed. Home Loan Mortg. Corp.*, 1991 WL 18431, at *5.

320. *Id.*

321. 923 N.E.2d 878 (Ill. App. Ct. 2010).

322. *Id.* at 888. After noting those shortcomings, the court held that an evidentiary hearing to determine whether a receiver should be appointed was not required because the hearing would merely delay the trial court's ultimate findings. *Id.* at 889.

323. *See id.* at 883–88.

324. *See id.* at 885.

of society require that the power not be interfered with lightly, as it results from a contract between the parties. Consequently, the party who borrows must consider the bargain and whether or not too much power is being given to the other party in the transaction. Furthermore, in the lexicon of legal opinions there is no one court that has attempted the task of defining and setting forth what is "good cause."

The opinion in *Centerpoint* is the closest any tribunal has come to setting forth what constitutes "good cause." The court stated that evidence of "imminent" funding for the development of property, or an "imminent" loan to refinance, may persuade a court to find "good cause," which would permit the mortgagor to retain possession of the subject property in the interim.[325] The court stressed that the transaction would have to be "imminent" and not merely a possibility at some unknown future date.[326] In sum, there is a strong presumption in favor of the mortgagee seeking to appoint a receiver in commercial foreclosure cases. As a result, the mortgagor's burden of demonstrating "good cause" as to why a receiver should not be appointed is rather difficult to overcome.

As has been established, the mortgagee, in order to obtain the appointment of a receiver, need only show authorization by the terms of the mortgage or other written instrument and a reasonable probability that the mortgagee will prevail on a final hearing of the cause. Mortgagors, on the other hand, will be left contending with the presumption favoring the mortgagee in the appointment of a receiver. The possibility of the mortgagor prevailing over the appointment will require more than a reliance on probability and chance.

D. Possibilities and Probabilities Are Not a Defense

The probability that conditions will considerably improve, and that the mortgagor will therefore be better able in the near future to discharge the indebtedness, does not merit the interference of equity, if for no other reason than because it is too vague and indefinite to be capable of determining with certainty. This result stays true no matter how strongly our sympathies may be with the unfortunate defaulting mortgagor who has become the victim of economic hard times. This sympathy cannot be a basis for equity jurisdiction, and in Chancery cannot be an instrument of speculation as to the future values of the property in question even for the benefit of the unfortunate mortgagor-speculator. Those who speculate in real estate take the risk of

325. *Id.*
326. *Id.*

depression in value of the property at the time the loan expires. If the Chancellor that sits in Chancery has the right and power to disregard statutory mandates or prohibit the enforcement of a right merely because of adverse conditions or resulting misfortunes that have fallen upon the mortgagor, the outcome would be to greatly limit, if not entirely destroy, all commercial mortgage dealings based upon a signed contract. No lender would feel secure in loaning money under an obligation that the borrower would repay the loan pursuant to their agreement. This legal scenario would result in different rules applicable to one individual from another, and under similar circumstances, dependent only upon the whim of the judge presiding over the case of the woeful facts. As a result, Chancery has frowned on interfering with the regular procedure of the foreclosure process. The rights of a mortgagee demand the protection of a court of equity no less than those of the mortgagor.

Courts of equity can no more disregard statutory requirements and provisions than can courts of law. The courts of equity are bound by the provisions set forth in a statute, and where the rights of the parties are clearly defined and established by law, equity has no power to change or disturb those rights. Equity, however, has throughout the years met all conditions where an injustice or wrong would otherwise result. Equity's modes of relief are not fixed and rigid; Chancery can mold remedies to meet the conditions with which it has to deal. The mortgagor, in the midst of a commercial mortgage foreclosure and facing the presumptive appointment of a receiver, need not despair; relief may be on its way if not today then tomorrow. For the pendulum of equity most certainly will swing the other way. Arguably, it appears that the court has slowly commenced winding the presumption clock in another direction.

CONCLUSION

> It is the spirit and not the form of law that keeps justice alive.[327]
>
> – Earl Warren

An economic crisis is undeniably an emergency, and in times of emergencies, not only is there authority, but there is a clear duty upon courts of equity to use every lawful means to alleviate the stress and tension of the resultant situation. Nevertheless, courts of equity are also as much bound by the statutes in place as are the other branches of government. Thus, equity cannot and will not interfere with the lawful

327. THE QUOTABLE LAWYER 11 (Tony Lyons ed., 2010).

and orderly procedure of the appointment of a receiver in a foreclosure matter where it is clearly set forth by the legislative body of the state. Interpret and analyze as it may, a court of equity must still exercise discretion within the confines of the statute. Courts of equity throughout the ages, however, have carefully scrutinized all shifts, subterfuges, and devices that have sought to lessen the possessive interest of the mortgagor and the security interest of the mortgagee. More fundamentally, a failure by the courts of Chancery to enforce the current statutory receivership provisions as strong antidotes to financial crisis may establish a de facto acquiescence to the dominant demands of the financial marketplace. At that point, our laws become the resting place for unfair practices and broad disrespect for the law generally. In this backdrop of economic instability, as the modern courts of equity endeavor to balance the property interests of the mortgagor and the mortgagee, it becomes evident why the appointment of a receiver has been viewed throughout the ages as the foremost equitable remedy that a court of equity can exercise.