

Note de recherche — Research Note
The Law of the Land
Rural Debt and Private Land Transfer
in Upper Canada, 1841-1867

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In mid-nineteenth century Upper Canada, installment contracts or "bargain and sale agreements" were the pre-eminent mode of land-transfer in rural areas. In contrast, mortgages were generally limited to facilitating capital investment in commercial and manufacturing centers. Case reports indicate that these two different schemes of land transfer and finance resulted from settlement policies, population growth, economic conditions and social pressures.

Dans le Haut-Canada du milieu du XIX^e siècle, les contrats de paiement à tempérament ou le simple marchandage étaient les principaux modes de transmission de terrain dans les régions rurales. Aussi, le rôle des hypothèques se limitait généralement à faciliter l'investissement des capitaux dans les milieux commerciaux et manufacturiers. Des études de cas indiquent que les deux modes distincts de transmission de terrain et de fonds étaient les résultats des politiques de colonisation, de la croissance démographique, des conditions économiques et des pressions sociales.

Today, mortgage agreements and vendor-purchaser, or installment, contracts are the most common methods of financing land acquisition in the common law provinces of Canada. In mid-nineteenth century Upper Canada, installment contracts, or "bargain and sale agreements", were the pre-eminent mode of land transfer in rural parts of the province. Mortgages, in contrast, were primarily a method of facilitating capital investment in emerging manufacturing enterprises and other commercial activities. As such, their use was largely restricted to Upper Canada's urban communities.

The existence of these two different schemes of land transfer and finance was a product of several identifiable factors. Prevailing public land settlement policies, population growth, economic conditions, and social pressures created the environment from which the rural private land transfer system emerged. The relationships between those holding real property and those seeking to purchase it was to a very great extent a product of the restricted access to land. Indeed, private disposition of land was the indirect result of government regulation of settlement. By the time of the *Act of Union, 1841*¹, settlement policies determined who held land in Upper Canada, and the nature of that ownership. These policies had an impact upon settlers, farmers and speculators by determining the quantity

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1. (United Kingdom), 3 & 4 Victoria, chapter 35.

of real estate available for sale and thus the price at which it would be offered. Government regulation of settlement shaped the nature and structure of legal, economic and social institutions, and affected the mechanisms governing private land transfers precisely because it limited access to the land.

Furthermore, the social significance of bargain and sale contracts was recognized by Upper Canada's Court of Chancery. The Court, through an expansive interpretation of the principle of specific performance, accorded purchasers under bargain and sale agreements as much protection as that traditionally afforded mortgagors, something modern Canadian and English courts have been reluctant to do.² Throughout the Union period, the Court deliberately and explicitly enforced these contracts for the private sale of land to enhance economic development, promote public settlement policies, and thwart on-going land speculation.

The pre-eminent contractual form of effecting private land sales in Upper Canada was the vendor-purchaser agreement or, in the common parlance of the day, the indenture or contract of bargain and sale. Under these arrangements, the vendor holds title to, and ownership of, the land as security until the purchase price is fully paid by installment. Upon payment of the final installment, the vendor conveys title to the property to the purchaser. According to the Court of Chancery, the installment agreement "almost universally prevailed in this province".³ Indeed, Chancellor William Hume Blake declared in 1850 that "it is impossible to contemplate the vast extent of property in this province held under contracts similar" to these arrangements.⁴

Bargain and sale contracts and mortgage agreements are both credit transactions designed to facilitate land transfers. Indeed, if the vendor is to finance the transaction, he waits for the purchase price in both situations while the land is the security for the sale.

However, each method of financing operates on different capital considerations. A mortgage agreement, as a lending transaction, presupposes that the lender has sufficient capital on hand to lend for a term, usually longer than one year. While mortgages were not unknown as a method of financing land sales in Upper Canada, large pools of private and institutional capital of the sort necessary to create an extensive mortgage market were scarce.⁵ By the 1850s, Canada was engaged in an aggressive development effort which saw the unprecedented expansion of railroad, canal and road networks.⁶ These enterprises were expensive. Although nearly one hundred million dollars were expended on railroad

2. See, for example, *Oxford Development Group Ltd. v. Tahsis Estates Ltd., et al.*, [1984] 6 Western Weekly Reports [hereafter cited as W.W.R.] 651 (British Columbia Supreme Court [hereafter cited as B.C.S.C.]); *Steedman v. Drinkle*, [1916] Appeal Cases [hereafter cited as A.C.] 275 (Privy Council (England) [hereafter cited as P.C.]). For an outline of the protection given a mortgagor, see the *Mortgages Act*, Revised Statutes of Ontario 1980, chapter 296, and the Ontario Rules of Civil Procedure, Ontario Regulations 560/84, Rule 64.

3. *O'Keefe v. Taylor* (1850), 2 Grant's Chancery Reports [hereafter cited as Gr.] 95 (Upper Canada Court of Chancery [hereafter Ch.], p. 108.

4. *Ibid.*, p. 98. For similar comments, see *Van Norman v. Beaupré* (1856), 5 Gr. 599 (Ch.); *McDonald v. Elder* (1850), 1 Gr. 513 (Ch.); *Hook v. McQueen* (1851), 2 Gr. 490 (Ch.).

5. See, for example, D.P. Gagan, "The Security of Land: Mortgaging in Toronto Gore Township, 1835-95", in F.H. Armstrong, H.A. Stevenson, & J.D. Wilson (eds.), *Aspects of Nineteenth-Century Ontario* (1974); J. Clarke, "Land and Law in Essex County, Maldon Township and the Abstract Index to Deeds", 11 (1978) *Social History* 475. More data from Regional Registry Offices is necessary to gain a clearer idea of debt relationships in the province.

6. Almost 2,000 miles of railroad was laid between 1850 and 1860 throughout British North America, most of it in the Province of Canada: H.I. Cowan, *British Immigration Before Confederation*, (Ottawa: Canadian Historical Association, 1968) p. 16.

construction alone, the money had to be raised almost entirely on the London market, forcing the Canadian Government to undertake heavy financial obligations.⁷

From a global point of view, relatively little British capital flowed into the province. The bulk of British foreign investment in this era was being pumped into the United States.⁸ Hugh Aitken has posited that there were many reasons for this phenomenon: Upper Canada paid a comparatively low rate of interest on public debentures; there was a reluctance on the part of Montreal merchant houses to channel money into the interior; the Canadian mercantile community looked to England to re-invest profits; and Upper Canadian bonds were not marketed aggressively in London.⁹

The paucity of private capital in the provincial mortgage market was exacerbated by the absence of an institutional infrastructure capable of facilitating land sales. In the early nineteenth century, banks dominated the capital market. However, they lacked long-term credit appropriate to financing real capital investment and to the ready transfer of such assets.¹⁰ Perhaps most important, their charters prohibited them from lending money on the security of land, except as additional security on a loan made in the ordinary course of a commercial banking transaction.¹¹

Saving banks began to appear in the 1820s. These financial institutions were designed to provide savings facilities for such "lower classes" as journeymen, tradesman, mechanics, servants and labourers — the people not served by chartered banks. The savings banks, however, more or less confined their activities to urban areas.¹²

Private merchant bankers were a common source of money used to finance a host of commercial activities. They arranged mortgages, traded in stocks, discounted notes and made commercial loans.¹³ While generally peculiar to large urban centres, they tended to operate out of small towns and villages in Upper Canada, primarily because of the absence of adequate chartered banking and general financial facilities in those places.¹⁴ What little capital existed for mortgage-lending in rural areas was typically provided by these entrepreneurs.

The financial institution that was destined to catapult mortgage-financed land sales to pre-eminence as a form of land transfer in the last quarter of the nineteenth century was the building society. After the enactment of a general incorporation law for building societies in 1846, these forerunners of modern-day credit unions began to appear across the province.¹⁵ They possessed significant advantages over the savings and chartered banks: "They

7. A.R.M. Lower, *Colony to Nation: A History of Canada*, (Toronto: Longman's, Green & Co., 1946) p. 285.

8. By the end of the 1830s over \$170,000,000 in British capital had been invested in American states, while Upper Canada received only the "merest trickle": H.G.J. Aitken, "A Note on the Capital Resources of Upper Canada", (1952) 18 *Canadian Journal of Economics & Political Science* 525, p. 527.

9. *Ibid.*, p. 527.

10. E.P. Neufeld, *The Financial System of Canada*, (Toronto: Macmillan, 1972), p. 178.

11. See, for example, the incorporation statutes for the Bank of Upper Canada, 1821 (59 George III, chapter 24, section 15 [Ont.]), the Commercial Bank of the Midland District, 1832 (2 William IV, chapter 11, section 14 [Ont.]) and the Gore Bank, 1835 (5 William IV, chapter 46, section 14 [Ont.]); see also *The Commercial Bank v. The Bank of Upper Canada* (1860), 7 Gr. 425 (Upper Canada Court of Appeal [hereafter cited as C.A.]).

12. Neufeld, p. 41. See the prospectus of the Home District Savings Bank in *Ibid.*, p. 141.

13. *Ibid.*, p. 41.

14. *Ibid.*, p. 41.

15. *Upper Canada Building Society Act*, Statutes of Canada 9 Victoria, chapter 90 (Canada) (1846).

catered to the very strong demand for real estate credit and they introduced... installment payments for shares.”¹⁶ However, the building societies initially concentrated on the security of residential and other urban real estate; it was not until about 1870, in response to demand, that they began to provide long-term credit to farmers and other rural actors.

Mortgage relationships were thus confined to urban areas. If a perusal of case reports is any indication, mortgages were used primarily in urban centres as instruments by which land was provided as security to private lenders, banks and other lending institutions in return for loans to enable the mortgagor to engage in commercial activities.¹⁷ Mortgages seem to have been used routinely by debtors to pay off their creditors, or to secure arrangements such as partnership debts.¹⁸ Private lenders, organized as mercantile firms, regularly took mortgages as security for debts owed to them, discounted them, and assigned them to banks.¹⁹ Businessmen also used mortgages to secure “floating balances”, namely lines of credit, to engage in extended transactions with creditors.²⁰ These arrangements often involved considerable sums of money; in one case a mortgage was executed to secure two thousand pounds for advances of up to seven thousand, five hundred pounds.²¹ Similarly, transfers of land in Toronto and other large towns involved sales of small blocks of property for substantial amounts of money.²² These urban mortgage relationships, involving small entrepreneurs, incorporated business associations, private lenders and chartered banks, signalled an emerging commercial market which would expand into the hinterland after Confederation. At the time under consideration, however, large concentrations of capital were restricted in their application to the cities and towns.

Meanwhile, the demand for long-term credit persisted in rural areas. The market for productive agricultural land was expanding as farmers sought to acquire contiguous land to expand crop production or to provide their sons with a homestead, and as industrious immigrants and rural entrepreneurs such as mill owners sought to enhance their holdings. Farm mortgages were not uncommon, but neither were they widespread. In the 1840s, capital was necessary to put new agricultural land into production. Farmers borrowed in the early 1850s to expand production to meet market demands for their produce, and borrowed again to weather the depression which began in 1857. Towards the end of the 1860s, farm modernization necessitated additional capital.²³ The private merchant banker not only

16. Neufeld, p. 42. Neufeld provides a good introduction to the development of building societies, but there is a need for an exhaustive study of these financial institutions to understand debt structuring, capital formation, patterns of institutional lending and the like in late nineteenth century Upper Canada. Much of this information would be useful in examining social structures and economic development patterns in the province during this period. A fruitful place to begin research would be the archives of the oldest building society, the Port Sarنيا Syndicate (still in operation as the Lambton Loan and Investment Company), and the most successful, the Canada Permanent Building and Savings Society (now the Canada Permanent Mortgage Corporation), with a view to their development from building societies to mortgage loan companies.

17. See *Grant's Chancery Reports*.

18. *Counter v. Wylde* (1850), 1 Gr. 538 (Ch.); in *Le Targe v. De Tuiell* (1850), 1 Gr. 15 (Ch.) (debtor in Goderich gives mortgage back to merchant creditors as security for commercial debt).

19. See, for example, *Bethune v. Coulett* (1849), 1 Gr. 81 (Ch.); *Covert v. The Bank of Upper Canada* (1852), 3 Gr. 246 (Ch.); *Gooderham v. De Grassi* (1850), 2 Gr. 135 (Ch.)

20. See, for example, *Buchanan v. Kerby* (1855), 5 Gr. 332 (Ch.); *Russell v. Davey* (1858), 5 Gr. 13 (Ch.); *Fraser v. Sutherland* (1850), 2 Gr. 442 (Ch.)

21. *Buchanan v. Kerby*, *supra*. See also *Covert v. The Bank of Upper Canada*, *supra*.

22. *Arnold v. Mclean* (1854), 4 Gr. 337 (Ch.) (two acres sold upon the execution of a mortgage for 1,000 in Toronto).

23. D.P. Gagan, “The Security of Land,” p. 138. Gagan’s analysis is confined to Toronto Gore Township, but his conclusions seem to be confirmed in examining the reasons for borrowing as outlined in the fact situations of some cases. See *Kerby v. Kerby* (1856), 5 Gr. 587 (Ch.) and *Arkell v. Wilson* (1855), 5 Gr.

provided what capital was available to small businessmen, but also emerged as one of the dominant lenders in the farm mortgage market.²⁴ Further, David Gagan has demonstrated that in Toronto Gore Township farmers not only indentured themselves to these private lenders, but also “to individuals whose social and economic standing were comparable to their own, individuals who in all probability were friends and neighbours as well.”²⁵ Thus, “when a yeoman of the Gore required capital, he normally sought it among men of his own vocation.”²⁶ Farmers and “gentlemen” (usually retired farmers) made up more than two-thirds of the total number of private mortgagees in the townships, nearly two-thirds of the non-resident private lenders, and almost 80% of the resident private lenders.²⁷

An element of social stratification therefore emerged in the use of mortgage arrangements to transfer land or to indenture it to make improvements to real property. Rural Upper Canadians were not only distinguished by their ownership and cultivation of land, but also by the accumulation of capital through investment in property. Contemporaries identified a successful farmer as one who had achieved prosperity by way of “sundry loans here and there in the neighbourhood, both on mortgage security and notes of hand as well.”²⁸ This activity may explain how certain established farmers came to accumulate capital sufficient to purchase the new properties they sought either for the improvement of an existing homestead or for the benefit of their offspring.

Thus, even in the 1850s, one could distinguish an ordinary farmer from a rural capitalist. Through their understanding and manipulation of credit, these men were able to provide financing for rural land acquisition and improvements.²⁹ It bears emphasis, however, that due to the “fluidity of society”, this rural stratification developed slowly.³⁰ Consequently, long-term rural or urban capital available for mortgage financing of land sales remained scarce; more than 87% of the Toronto Gore Township mortgages were amortized over six years or less.³¹ Simply put, the demand for long-term credit in the rural areas could not be met by the small pools of savings available.³² Had there not been a paucity of long-term investment capital in the province in the mid-nineteenth century, perhaps mortgages would have been more common across the province.

Macro-economic factors may also have had an impact on the relatively inactive provincial mortgage market, particularly given the violent fluctuations in the export trade of the 1850s.³³ If the mortgagor’s motivation was to finance the acquisition of expensive

470 (Ch.) Gagan correctly states that there is a need for a comprehensive analysis of rural indebtedness in order to understand the impact of various debt relationships on legal and social norms and structures of the time.

24. See *Le Targe v. De Tuyell*, *supra*; Gagan, “The Security of Land,” p. 145.

25. Gagan, “The Security of Land,” p. 145.

26. *Ibid.*, p. 147. Three per cent of the mortgages in the Township, in fact, stipulated that no interest would be charged by the mortgagee.

27. *Ibid.*, p. 147. An analysis of the origins of farmers’ savings, where they were kept, and possibly how, if at all, they were invested would be very informative as a study of rural debt and social habits. Bank records, or judicial archives may yield some clues in this regard.

28. Gagan, “The Prose of Life: Literary Reflections of the Family, Individual Experience and Social Structure in Nineteenth Century Canada”, (1976) 9 *Journal of Social History*, pp 367-74.

29. Given John Clarke’s data on Maldon Township in Essex County, this analysis would confirm that such practices were common in many townships throughout the province. See Clarke, “Land and the Law in Essex County,” p. 479.

30. *Ibid.*, p. 479.

31. Gagan, “The Security of Land,” p. 149.

32. Neufeld, p. 179.

33. N. Macdonald, *Canada: Immigration and Colonization, 1841-1903*, (Toronto: Macmillan, 1966), p. 77.

land to enhance productivity, the collapse of the wheat market in the 1850s spelled disaster; if the purpose of going into debt was to expand the farm for the benefit of sons, “then perpetuating the traditional farm family culture became an expensive, debt-prone proposition which threatened the very basis of the family’s security.”³⁴ Many families, including established farming families, left the province in these circumstances rather than indenture their land to mortgagees. David Gagan has indicated that the Peel County mortgage market was relatively static, “catering to a small number of new proprietors with very little capital who bought out established owners almost wholly on credit.”³⁵

Just as purchasers were reluctant in principle to indenture their real property, vendors were often unwilling to finance purchases by way of mortgage. The nature of mortgage law itself discouraged rural lending at the time. A mortgage is a security device by which a mortgagee retains an interest in a mortgagor’s land for the payment of the debt. At the heart of the mortgagee’s security was (and still is) the action for foreclosure, or foreclosure and sale. An action for foreclosure is a request to the court to extinguish all the mortgagor’s rights, or those of his grantees, in the property subject to the mortgage. Foreclosure was developed by the Court of Equity as a correlative right to the mortgagor’s right to redeem the land by payment of the mortgage debt after the legal time for redemption had expired.³⁶ In Upper Canada, a mortgage involved the absolute conveyance of title to secure a debt. If the mortgagor defaulted at law, the mortgagee’s interest became absolute and indefeasible — the mortgagee could sell or otherwise deal with the land free from any right of the mortgagor.³⁷ However, the mortgagee did not take the property as owner; he could not in equity deal with the property as his own, either under judicial sale or under a power of sale. In equity, the holder of the right of redemption, usually the mortgagor unless the interest was assigned, was regarded as the actual owner, subject to the right of the mortgagee to be paid his mortgage debt.³⁸ The mortgagee was prohibited from stipulating in the mortgage

34. Gagan, “Land, Population and Social Change: The ‘Critical Years’ in Rural Canada West”, (1978) 9 *Canadian Historical Review*, pp. 293-301.

35. *Ibid.*, p. 302.

36. Courts of equity in England initially began interfering in mortgage contracts to protect the mortgagor against the harsh strictures of the common law. Since at common law the mortgagee took absolute title to the property to secure his debt, upon default of payment the estate of the mortgagee became absolute and irredeemable. Equity, however, recognized that a mortgage essentially operated only as a security for the performance of a debt. Courts felt it unjust that the mortgagee should retain for his own benefit what was intended as a security. As such, a court of equitable jurisdiction, the Court of Chancery, allowed the mortgagor a period of time to redeem the property after his default. To do complete justice, Courts of Equity permitted the mortgagee to foreclose to realize the debt after the redemption period expired. The origin and development of equitable redemption and foreclosure is cogently summarized in the decision of the English Court of Appeal, particularly the judgment of Jessel, Master of the Rolls, in *Campbell v. Holyland* (1877), 7 Chancery Division Reports 166. A court of equity, the Court of Chancery, did not exist in Upper Canada until 1837. For the problems associated with the absence of equitable jurisdiction in Upper Canada, see Elizabeth Brown, “Equitable Jurisdiction and the Court of Chancery in Upper Canada”, 21 (1983) *Osgoode Hall Law Journal* 275; *Falconbridge on Mortgages*, 4th ed., (Ogincourt, Ontario: Canada Law Book, 1977), p. 68; E. Bell and H.L. Dunn, *A Treatise on the Law of Mortgages of Real Estate* (Toronto, 1899), p. 7. This treatise is one of the first works concerning the law of mortgages in Canada.

37. Bell and Dunn, p. 158. See also *Nesbitt v. Rice* (1864), 14 Upper Canada Common Pleas Reports [hereafter cited as U.C.C.P.] 409.

38. *Ibid.*, p. 38. See also *Doe d. Vernon v. White* (1859), 9 New Brunswick Reports [hereafter cited as N.B.R.] 314 (C.A.); *Mann v. English* (1876), 38 Upper Canada Queen’s Bench Reports [hereafter cited as U.C.Q.B.] 240 (C.A.); *Fletcher v. Rodden* (1882), 1 Ontario Reports [hereafter cited as O.R.] 155 (C.A.); *Robertson v. Robertson* (1878), 25 Gr. 486 (C.A.). The fact that the mortgagee’s relationship to the land did not contemplate absolute ownership was expressed in the maxim “Once a mortgage, always a mortgage.”

contract a right to purchase the land himself upon default.³⁹ Further, any conveyance of land having for its object the securing of payment of money was considered in equity to be a mortgage, regardless of what it was called.⁴⁰

The mortgagee also had certain positive responsibilities to the mortgagor which were quite onerous: although the legal estate went to the mortgagee upon default, he was nevertheless deemed a trustee for the mortgagor of the proceeds upon sale, subject only to his own claim; any surplus was to be paid to the mortgagor.⁴¹ Public notice of, and good faith in, all sales were also strict requirements.⁴² Even though a mortgagee was entitled to a decree of sale or foreclosure at his option as against a mortgagor, the procedure was cumbersome, especially since the mortgagor was generally given a six-month period in which to pay his debt and redeem the property after the commencement of foreclosure proceedings.⁴³ It was therefore well established by the early twentieth century that "Courts of Equity regarded the mortgage as still unextinguished and unsatisfied so long as the mortgagee retains the land."⁴⁴ For the rural vendor of land seeking to deal with his security after default free from any fetters, the mortgage was a prohibitively restrictive mechanism.

And default occurred frequently in Upper Canada.⁴⁵ The paucity of long-term investment capital, social dislocation caused by restricted access to land as a result of public land policies, a growing population frustrated by the lack of inexpensive, arable land, and the resultant emigration of Upper Canadian settlers were undoubtedly contributing factors to this phenomenon. If land was to be transferred between private parties, a mechanism had to be found which would secure the vendor's interest in the property in case of default, and which would not prevent him from extending credit in the sale of the property.

Bargain and sale contracts emerged as a practical solution to this problem.⁴⁶ If case reports are representative, the bulk of these arrangements took place in the countryside. Disputes arose most often among mill owners, farmers, riparian owners, speculators and other such rural actors.⁴⁷ Sales of land often involved parties other than the vendor and

39. *Fallon v. Kennan* (1866), 12 Gr. 388 (Ch.); Bell and Dunn, p. 192; see also *Howard v. Harding* (1871), 18 Gr. 181 (Ch.) (a mortgagee's solicitor also barred from purchasing the property).

40. See *Fink v. Paterson* (1860), 8 Gr. 417 (Ch.); *Cayley v. McDonald* (1868), 14 Gr. 540 (Ch.); *Hawke v. Milliken* (1866), 12 Gr. 236 (Ch.); *Rapson v. Hersee* (1869), 16 Gr. 685 (Ch.); Bell and Dunn, p. 6.

41. *Kelly v. Imperial Loan and Investment Co.* (1855), 11 Supreme Court of Canada Reports [hereafter cited as S.C.R.] 516, affirming 11 Ontario Appeal Reports [hereafter cited as O.A.R.] 526 (mortgagee is trustee of proceeds); *Richmond v. Evans* (1861), 18 Gr. 508 (C.A.) (surplus to be paid to mortgagor).

42. *Richmond v. Evans*, *supra*.

43. See *Meyers v. Harrison* (1850), 1 Gr. 492 (Ch.) (option); *Rigney v. Fuller* (1853), 4 Gr. 198 (Ch.) (six month redemption period); Bell and Dunn, p. 159 (cumbersome process). No private power of sale was given by law in the absence of an express stipulation in the contract. *Gowland v. Gorbutt* (1867), 13 Gr. 578 (Ch.); *Prentice v. Consolidated Bank* (1866), 13 O.A.R. 69. Further, it was not until about 1850 that courts even allowed a judicial sale of mortgaged property, the mortgagee's only relief being foreclosure. See *Meyers v. Harrison*, *supra*, and Bell and Dunn, p. 158.

44. *Davidson v. Sharpe* (1920), 52 Dominion Law Reports [hereafter cited as D.L.R.] 1866 (Supreme Court of Canada [hereafter cited as S.C.C.]), p. 193.

45. Elizabeth Brown, p. 279.

46. The key underlying issue in this analysis is to determine precisely how bargain and sale contracts developed in Upper Canada. Such an inquiry obviously merits greater attention and is beyond the scope of the present paper. Fundamental to an examination of this issue is the role that lawyers in Upper Canada played in drafting these contracts and to what extent they were influenced by English, indigenous or American documentary precedents.

47. See *Grant's Chancery Reports*. As to the parties to these agreements, see for example, *Farquharson v. Williamson* (1850), 1 Gr. 93 (Ch.) (Whitby area); *Paul v. Blackwood* (1852), 3 Gr. 394 (Ch.) (property located near the Talbot Road between London and Port Stanley — the dispute involved two millers); *McLaughlin v.*

purchaser. Guarantees or bonds often were signed by local attorneys or successful businessmen to assure the vendor of the buyer's ability to pay the purchase price on installment.⁴⁸ In most of these transactions, the purchasers had little, if any, capital to commit to the acquisition of real property.⁴⁹ Farmers' sons, established farmers and immigrants were all vying for property in the hands of farmers or speculators with little more than a desire to establish themselves on the land or to continue its improvement.

The bargain and sale agreement was ideally suited to these people's needs. It gave them the opportunity to purchase land on installment; each payment was to be met by proceeds from the sale of produce from cleared land. The vendor retained title to the property as security for the full payment of the price. Upon payment of the final installment of the purchase price, title to the property was conveyed to the buyer.

The bargain and sale contract also suited the needs of the vendor. Security over his interest in his most valuable asset was the vendor's primary objective before extending credit in the form of installment payments to the purchaser. A market for land was created by the shortage of good soil in the province, which, in turn, had been caused by land policies and population increase. Healthy economic conditions spurred on by expanding transportation and trade networks were also contributing factors. However, the shortage of capital and the high incidence of default caused by poor soils, unattractive future prospects, and consequential emigration of settlers and established farmers would cause even the most speculative landholder to hesitate before extending credit in any land sale unless he was assured he could get the property back.⁵⁰

There were a number of advantages to the bargain and sale contract as a security device in credit relationships. Aside from a minimal capital outlay, if the purchaser defaulted on a payment or fled the province, the vendor was entitled to treat the contract as at an end. Since he was the legal and equitable owner of the property, the vendor could then resell the property (often improved by the defaulting purchaser) on a rising market and perhaps realize a profit in the process.⁵¹ Other remedies available to a vendor upon a purchaser's default (and not available to a mortgagee, whose only recourse was foreclosure or foreclosure and sale), were to affirm the contract and seek specific performance, and to obtain cancellation of the contract if the agreement was not performed.⁵² Further, a vendor under a bargain and sale contract did not have to concern himself with redemption periods, trusteeship of proceeds upon sale, the return of any surplus to the purchaser, a cumbersome foreclosure procedure, or any of the other duties and restraints equity imposed upon a mortgagee. Bargain and sale agreements gave the vendor an efficient, secure method of disposing of his property as he saw fit when dealing with unexpected exigencies. Given the demand for land, there was almost always another ready purchaser.

Whiteside (1859), 7 Gr. 573 (Ch.) (dispute over a mill privilege in Laxton Township); *Bishop v. Markley* (1860), 8 Gr. 335 (Ch.) (dispute between miller and riparian owner over sale of a mill); *Hook v. McQueen* (1851), 2 Gr. 490 (Ch.) (sale of a parcel of land in Middleton Township along the Talbot Road).

48. See *Morin v. Wilkinson* (1850), 2 Gr. 157 (Ch.) (suretyship agreement to secure the sale of land in the Town of Sandwich); *Hook v. McQueen*, *supra* (bond signed for purchaser).

49. *O'Keefe v. Taylor* (1850), 2 Gr. 95 (Ch.) is a good example of this situation (purchase of land in Colbourne, on Lake Ontario).

50. *Van Wagner v. Terryberry* (1855), 5 Gr. 324 (Ch.) and *Burns v. The Canada Company* (1859), 7 Gr. 587 (Ch.) are good examples of legal wranglings subsequent to debtors absconding to the U.S.

51. See *Re Hornbrook* (1888), 12 Practice Reports (Ont.) [hereafter cited as P.R.] 591; see also *Skelly v. Skelly* (1871), 18 Gr. 495 (Ch.)

52. See V. Di Castri, *Law of Vendor and Purchaser*, 2nd ed., (Toronto: Carswell, 1976) p. 636 for a comprehensive summary of the vendor's remedies.

At first glance, the vendor held a considerable advantage over the purchaser in case of default. However, the Court of Chancery, acutely sensitive to the importance of encouraging land transfers between private parties as a mode of social and economic development, accorded the purchaser under a bargain and sale contract as much protection as it granted any mortgagor.⁵³ The Court's philosophy was that the power of ownership and transfer was a power to exploit the land for individual and collective gain: to develop the colony and to enhance prosperity.⁵⁴ The Court felt that since land was essentially traded as a chattel⁵⁵ and since

real estate [in Upper Canada] is much more the subject of traffic than in England, and where it is, consequently applied in a much greater variety of ways, and changes hands much more frequently, it is peculiarly important that its transfer should be freed, as far as possible, from the technicalities of the common-law system.⁵⁶

The strict application of English precedent was not permitted to hamper that which was perceived judicially to be a fundamentally important mechanism to facilitate the occupation of the waste land of the province, the key to its continued growth.⁵⁷ Consequently, the strict common law rules of specific performance were adapted to a central-Canadian social and economic milieu.⁵⁸ Land, in short, was of such vital social importance that any method of augmenting its transferability to accelerate settlement was presumed to be in the public interest:

[W]e are about to define the position of multitudes by whom a country is being peopled, by whose enterprise and labour the wastes of this vast province are rendered subservient to the purpose of civilization with unexampled rapidity.... [I]t is of vital importance, not only to the attainment of justice in particular cases, but to the general welfare, that, in this court, where alone such [bargain and sale] contracts can be enforced, the numerous titles which depend exclusively upon this jurisdiction for their validity, should not be shaken by the introduction of doctrines, which, however suited to other states of society, have no application in our present social condition, but that they should be shown to rest upon settled and solid foundations.⁵⁹

53. More research needs to be carried out in this area. Recourse to case law alone is insufficient, since claims of judicial instrumentalism in this context are necessarily speculative. Some work has been done in this regard, but there is need for more. See J.D. Blackwell, "William Blake and the Judicature Acts of 1849: The Process of Legal Reform at Mid Century in Upper Canada", pp. 132-74, in D.H. Flaherty (ed.), *Essays in the History of Canadian Law, Vol. 1*, (Toronto: Published for the Osgood Society by University of Toronto Press, 1981); Elizabeth Brown, *supra*; M.A. Banks, "The Evolution of Ontario Courts, 1788-1981", pp. 492-572, in D.H. Flaherty (ed.) *Essays in the History of Canadian Law, Vol. 2*, (Toronto: Published for the Osgood Society by University of Toronto Press, 1983).

54. R.C.B. Risk, "'The Last Golden Age': Property and the Allocation of Losses in Ontario in the Nineteenth Century", 27 (1977) *University of Toronto Law Journal* 199, p. 214. The need for more study of the instrumental role of the Chancery Court has already been discussed, n. 73. It would be interesting to examine the extent to which judicial functionalism was a product of or influenced by what appears to be a strong equity bar. Members of the equity bar such as Oliver Mowat and Philip M.M.S. Vankoughnet rose to positions of judicial and political prominence. Their impact on a society at the advent of industrial and economic development would be an enlightening study, it would seem, in interest conflict and representation. It would therefore appear that issues of economic change, access to the courts and the social sensitivity of the Court would be an obvious point of departure for any evaluation of judicial instrumentalism in the mid-to late nineteenth century.

55. *Hook v. McQueen*, *supra*, p. 449.

56. *McDonald v. Elder* (1850), 1 Gr. 513 (Ch.), p. 523.

57. *Morin v. Wilkinson* (1850), 2 Gr. 157 (Ch.)

58. See, for example, *Ibid.*; *McDonald v. Elder*, *supra*; *O'Keefe v. Taylor*, *supra*; *Hook v. McQueen*, *supra*.

59. *O'Keefe v. Taylor*, *supra*, pp. 98-99. To appreciate the prevalence and social impact of these contractual relationships, empirical studies at the township level should be done. Clarke's study of Maldon Township in Essex County indicates that bargain and sale contracts were the most commonly recorded instruments in the local Abstract of Deeds: Clarke, "Land and Law in Essex County", p. 479. More research of this nature should be carried out in the various county Registry Offices.

Judicial regulation of bargain and sale contracts in the public interest had less to do with the formalistic application of black-letter legal rules than with a conscious desire to promote social stability and economic development.

The potential for abuse by vendors inherent in bargain and sale contracts therefore had to be minimized. The temptation must have been great for cash-poor vendors, whether they were speculators or neighbouring freeholders, to exercise their strict contractual rights on a rising market by terminating the contract upon a trivial default.⁶⁰ Such an action would invariably leave a purchaser (who was typically hoping to establish a farm or mill) dispossessed of the improvements he had made to the land. The Court quickly demonstrated that it would not countenance this form of speculation by vendors. It interpreted specific performance, the only equitable remedy available to a purchaser in a contract for the sale of land, more expansively than it was interpreted under traditional common law doctrine, a doctrine which was concerned with strict enforcement of contractual stipulations. The stated rationale for this extension of equity's assistance was that such unjust enrichment contravened the public interest:

If public convenience requires that land, so much the subject of barter, and at the same time, comparatively speaking, of such trifling value, should be affected by contracts more pliant, less artificial, and consequently less expensive than the common-law system permits, then...public convenience must also require an equitable jurisdiction by which such contracts may be enforced...

The Court went on to say that it was also obliged to consider

The long credit of which sales of land are for the most part made, and the extreme fluctuations in value to which it is subject. [Therefore, it is] especially important in this province, that parties should be able to count with confidence upon the literal fulfillment of contracts of this class; how imperfect the administration of justice would be should this court refuse to decree specific performance, leaving purchasers to their action of damages, the only remedy which the common law furnishes.⁶¹

By interpreting the strict rules of contract regarding specific performance in the context of Canadian conditions, the Court not only made the purchaser less vulnerable upon default, but also granted him a limited equity of redemption to fulfill the terms of the agreement, something courts in the twentieth century have generally refused to do.⁶² The Court was willing to allow purchasers a "reasonable time" to perform their obligations under the contract so long as they applied for relief promptly.⁶³ Similarly, if the Court found

60. See Gagan, "Property and Interest: Some Preliminary Evidence of Land Speculation by the 'Family Compact' in Upper Canada, 1820-1840", (1970) 70 *Ontario History*, p. 63.

61. *McDonald v. Elder*, *supra*.

62. "There are powers which the court does not possess with respect to determination of an agreement for sale which it may exercise on foreclosure of a mortgage. One of these is the power of the court to grant a period of redemption": *Oxford Development Group, Limited v. Tahsis Estates, Ltd., et al.*, [1984] 6 W.W.R. 656 (B.C.S.C.), p. 655; see also *Armour v. McColl* (1922), 22 *Ontario Weekly Notes* [hereafter cited as O.W.N.] 131 (C.A.). Modern Canadian courts have tended to give broad interpretations to the vendor's remedies, while interpreting the purchaser's rights quite restrictively, especially with respect to the conditions a purchaser is required to meet before obtaining specific performance. See *Oxford Development, supra*; *Steedman v. Drinkle*, [1916] 1 A.C. 275 (P.C.); *Labelle v. O'Connor* (1908), 15 *Ontario Law Reports* [hereafter cited as O.L.R.] 519 (C.A.); *Di Castri*, p. 609.

63. *Di Castri*, p. 526. Thus, a vendor had to give a purchaser notice of how long he had to meet his payment after default. These notices in effect made time of the essence in the extended payment period, whether or not such a term was or was not inserted in the contract. Purchasers, therefore, did not have an indefinite period in which to perform the terms of the agreement. However, the Court would exercise its equitable jurisdiction to assist the purchaser if the vendor arbitrarily ended the contract, or set an unreasonably short payment date. *Ibid.*, pp. 525, 526.

that the vendor acquiesced in the delay of payment, then the vendor remained under the obligation to convey title upon final payment.⁶⁴ Part performance of the contract also merited a reasonable extension of the time to pay upon default.⁶⁵

By the same token, vendors were given equity's protection against speculative purchasers who delayed bringing actions for specific performance until land value increased. Where a purchaser did not perform his part of the contract in a reasonable time, a vendor had the right to treat the agreement as at an end. The Court would not decree specific performance to assist the purchaser on the ground that just as a vendor cannot preclude the expectations of a purchaser by dealing with the contract as subsisting after delay, neither can a purchaser by waiting to bring an action for specific performance, "speculate on the property of his vendor."⁶⁶ The importance of bargain and sale contracts to the stability of land transfers and settlement in the province meant that "a purchaser not ready with the price, according to the contract, ought...to show a very special case for the interference of the Court against the vendor."⁶⁷ It would create havoc throughout the province if vendors could be "harassed" with suits of specific performance by speculating purchasers; it would "subject vast numbers of persons to the most unreasonable burthens [sic],... in many cases greatly disproportionate to the subject matter of the contract."⁶⁸

Security considerations were at the root of the relative advantages of bargain and sale contracts over mortgage agreements in the transfers of land. The social and economic milieu created by official land policies, population increases and good economic conditions produced a demand for land that outstripped supply. Government direction of settlement had failed to develop the socio-economic foundations it was designed to achieve. The cash sales system was rife with inequities and outright corruption.⁶⁹ A prospective purchaser was just as well served by the private market for land. Under an installment contract, little capital was required, and the Court of Chancery provided relief against sharp practices. Judicial instrumentalism therefore buttressed an established form of conveyance, rather than assisted in its creation. The Court served, in effect, as insurance against unconscionable conduct by either party to the contract.

The advantage of bargain and sale contracts over a mortgage relationship at the time was therefore manifest. R.C.B. Risk has commented that while 'property' and 'contract' dominated economic and legal thought in the first half of the nineteenth century, property "greatly exceeded contract in the bulk and complexity of its common law doctrine."⁷⁰ Thus, land transactions were more easily effected through a contractual mechanism, a device which also subsequently emerged as an expeditious tool by which to manipulate judicially desirable social ends. Further, the absence of capital for the extension of long term credit ensured that a contractual instrument would dominate as a form of financing land transactions on credit. The law of mortgages was a cumbersome method by which to transact land sales for both vendors and purchasers.

64. *O'Keefe v. Taylor*, *supra*.

65. *Farquharson v. Williamson* (1850), 1 Gr. 93 (Ch.).

66. *Hook v. McQueen*, *supra*, p. 496.

67. *Ibid.*, p. 499.

68. *Ibid.*, pp. 499-500. See also *Langstaffe v. Mansfield* (1854), 4 Gr. 607 (Ch.); *Walker v. Brown* (1868), 14 Gr. 237 (Ch.) where the purchaser waited until oil was discovered on the property to bring an action for specific performance; see *Crawford v. Birdsall* (1860), 8 Gr. 415 (Ch.) where specific performance was requested 18 years after the land had been sold because of a rise in property values.

69. L.F. Gates, *Land Policies of Upper Canada* (Toronto, University of Toronto Press, 1968), p. 268.

70. Risk, "The Last Golden Age," p. 199.

Ironically, the simplicity of the installment contract ensured its ultimate demise. More mortgage disputes came before the courts than disputes involving bargain and sale contracts. Mortgage transactions by-and-large originated in the urbanizing districts, and therefore often involved complicated commercial relationships which ran aground more regularly than private sales of rural land. By contrast, bargain and sales contracts generally seemed to achieve their intended purpose.⁷¹ In any case, it was too troublesome for a vendor to sue for default since he kept the property and could usually resell it quickly. Further, the security of the bargain and sale arrangement was best suited to an under-developed agrarian society.

However, as economic development, spurred on by railroad construction, continued apace throughout the 1850s and 1860s, larger pools of capital accumulated. Institutions such as building societies and trust companies emerged to meet a demand created by capitalists seeking to invest their money. Companies such as the Canada Permanent Building and Savings Society were able to attract sufficient amounts of capital to start lending to the countryside by the early 1870s. Third-party institutional lenders offered advantages for vendors and purchasers of rural land, especially since many original purchasers now searched for capital to improve their holdings.⁷² Vendors received purchase money almost immediately upon the signing of the contract of sale. They accumulated disposable capital they could invest profitably. The purchaser acquired all the rights and protections accorded by law to the mortgagor. As well, if he borrowed from a building society, he could generally choose his own time of redemption with the assurance that he was giving fair value for what he received; he could obtain a reduced payment which no mortgagee would accept; and, it was much easier to redeem at any time.⁷³

Government regulation of land settlement restricted access to land and perpetuated the concentration of real property in the hands of a select few; once population in Upper Canada increased to a level sufficient to bring the land onto the market and economic conditions were favourable, the financing of land sale transactions became a problem given the shortage of capital in the province. A legal mechanism was then adapted to these circumstances to facilitate the efficient traffic in land. These transactions in turn were superintended by the Court of Chancery because of their profound importance to the public interest, that being the speedy, smooth settlement of Upper Canada for social, political, military and economic reasons.

71. While *Grant's Chancery Reports* shows that most suits for specific performance were brought by purchasers, it does not explain why fewer bargain and sale agreements than mortgage cases were brought before the courts. Perhaps it was because bargain and sale agreements functioned with less need for judicial interference than did mortgage contracts, or perhaps due to the nature of the bargain and sale contract there was often little need to bring the matter before the courts. On the other hand, the issue may be one of accessibility to the courts. Perhaps courts were more inaccessible in rural areas while mortgage relationships developed in urban centres, the venues of courts and lawyers. There is an important need to look at court structure and accessibility during this period.

72. See Gagan, "The Security of Land."

73. See the 1855 prospectus of the Canada Permanent Building and Savings Society in Neufeld, p. 16-17. There were attendant advantages given to the third-party mortgagees: *Ibid.*