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Martin Fogelman

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## The Deed Absolute as a Mortgage in New York

### Cover Page Footnote

Associate Professor of Law, Fordham University School of Law; member of the New York Bar.

# THE DEED ABSOLUTE AS A MORTGAGE IN NEW YORK

MARTIN FOGELMAN\*

## I. INTRODUCTION

**I**N a variety of circumstances, usually indicative of ignorance, negligence, mistake or overreaching, the requisites for the creation of a mortgage valid at law have not been met.<sup>1</sup> In some now fairly well defined situations, courts have been willing—subject to the Statute of Frauds<sup>2</sup>—to grant relief by declaring the creation of a mortgage within the ken of equity. Thus, where there has been an agreement to lend money, the borrower to execute a mortgage upon Blackacre, owned or to be purchased by him, and the money has been loaned<sup>3</sup> and the land acquired by the borrower, but the mortgage has not been executed, an equitable mortgage arises.<sup>4</sup> Further, an agreement to hold or treat property as security may give rise to an equitable mortgage,<sup>5</sup> and defectively executed

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\* Associate Professor of Law, Fordham University School of Law; member of the New York Bar.

1. See Osborne, *Mortgages* § 23 (1951); 1 Jones, *Mortgages of Real Property* § 75, at 62-63 (8th ed. 1928) (hereinafter cited as Jones). Cf. 3 Tiffany, *Real Property* § 661, at 2743 (2d ed. 1920).

2. See *Sleeth v. Sampson*, 237 N.Y. 69, 142 N.E. 355 (1923).

3. The statement by Jones to introduce this type of equitable mortgage that: "An agreement to give a mortgage or security on certain property, not objectionable for want of consideration, is treated in equity as a mortgage, upon the principle that equity will treat that as done which by agreement is to be done," 1 Jones § 226, at 264, is too broad to be accurate. It is the actual lending of the money, followed by the breach of agreement, which gives rise to the mortgage in equity, as Jones later seems to note. *Id.* at 265-66. See Walsh, *Mortgages* § 8, at 42 (1934). Cf. *Payne v. Wilson*, 74 N.Y. 348 (1878).

4. See *Poole v. Tannis*, 137 Wis. 363, 118 N.W. 188, vacated, 137 Wis. 363, 118 N.W. 864 (1908); *Burdick v. Jackson*, 7 Hun 488 (N.Y. Sup. Ct. 1876). 1 Jones § 226; Osborne, *op. cit.* supra note 1, § 25; Walsh, *op. cit.* supra note 3, § 8, at 52 (1934).

5. Compare *Chase v. Peck*, 21 N.Y. 581 (1860), with *Stoddard v. Hart*, 23 N.Y. 556 (1861). In the former case, the court held that an agreement to hold property as security for a grantee's promise to support the grantor gave rise to a valid equitable mortgage, although there was no promise to execute a mortgage. In the latter case, the same court indicated that the right to specific performance was indispensable to the creation of an equitable mortgage, and apparently felt, since "there was no agreement to make a new mortgage . . . [and] it is not pretended that this understanding was to be expressed in any form of writing," that consequently no equitable mortgage could arise. *Id.* at 562. Cf. *Sleeth v. Sampson*, 237 N.Y. 69, 142 N.E. 355 (1923), where Cardozo, J. states that the action was brought for specific performance; however, the record on appeal indicates the action was to impress a lien on real property. Outside of New York, the courts predominantly favor the rule of Chase. Under *Stoddard*, it is apparent that no equitable mortgage could arise under an agreement to hold property as security, as no unperformed promise remains to be enforced specifically, except possibly in a quibblingly semantic way. See Osborne, *op. cit.* supra note 1, § 28; Walsh, *op. cit.* supra note 3, § 8, at 44-46 (1934). See 1 Glenn, *Mortgages* § 17.2 (1943); 20 *Colum. L. Rev.* 519, 521 (1920).

legal mortgages may be enforced in equity.<sup>6</sup> In England, at least, delivery of the deed to the property as security creates a valid equitable mortgage of the subject premises.<sup>7</sup>

To be distinguished from the mortgage by way of *delivery* to the mortgagee of the deed which had conveyed the mortgaged premises to the mortgagor, is the altogether separate device of execution of a deed *by* the owner-mortgagor *to* the mortgagee, for the purpose—which is not accomplished—of permitting the creditor to hold title as security. This security device is the major concern of this article.

Historically, perhaps the most serious defect of the common-law mortgage was the fact that if the sum promised was not paid on the law day, the entire estate mortgaged was indefeasibly vested in the mortgagee. Indeed, in form, the common-law mortgage was a conveyance in fee, subject to be defeated by payment of the debt on the law day (condition subsequent).<sup>8</sup> The common-law courts enforced the transaction precisely according to its form.<sup>9</sup> Accordingly, if Blackacre, worth £5,000, were conveyed to John by William upon condition that if William repay £100 on June 1 next, William could re-enter and reclaim his estate, and if William did not so pay, Blackacre belonged indefeasibly to John, and William forfeited the value of £4,900.<sup>10</sup>

Equity courts, at first upon the traditional grounds of equitable intervention—such as to protect against fraud and to protect widows and children—and later generally to prevent forfeiture, began to relieve borrowers from the stringent terms of their deeds.<sup>11</sup> Thus became developed the equity of redemption—the idea that despite the terms and form of the mortgage contract, the mortgage is not a sale of land, but a security device intended to give assurance that the lender gets back his loan, with appropriate interest, but nothing more.<sup>12</sup> Although the law day had passed, the mortgagor could come into equity within a reasonable time thereafter and recover his lands upon payment of the debt plus interest and costs.<sup>13</sup> Attempts by lenders to contract out this equity of redemption, or to limit its effect, were dealt with by the princi-

6. *Sprague v. Cochran*, 144 N.Y. 104, 38 N.E. 1000 (1894); *Smith v. Smith*, 125 N.Y. 224, 26 N.E. 259 (1891); 1 *Jones* § 23; *Osborne*, op. cit. supra note 1, § 32.

7. See *Osborne*, op. cit. supra note 1, §§ 34-35. Judge Cardozo, in *Sleeth v. Sampson*, 237 N.Y. 69, 142 N.E. 355 (1923), stated, as to delivery of title deeds: "To what extent, if at all, this form of equitable mortgage is permitted in New York, is involved in some obscurity" and that this form of mortgage "is frowned upon as contravening the policy of the statute [of frauds]." *Id.* at 74, 142 N.E. at 357.

8. See *Kortright v. Cady*, 21 N.Y. 343, 344 (1860); 1 *Jones* § 512.

9. 1 *Jones* § 5.

10. 1 *Jones* § 7. See 3 Holdsworth, *History of English Law* 129 (3d ed. 1927).

11. See *Walsh*, op. cit. supra note 3, § 3.

12. See 4 Pomeroy, *Equity Jurisprudence* § 1180 (5th ed. 1941). See also *Lawrence v. Farmers' Loan & Trust Co.*, 13 N.Y. 200, 209 (1855).

13. See *Turner*, *The Equity of Redemption* 27 (1937).

ple bearing the somewhat Gertrude Stein-like designation: "Once a mortgage, always a mortgage."<sup>14</sup> The phrase is intended to convey the idea that any transaction, the true nature of which is a security device (mortgage), will be treated as a mortgage regardless of the form in which lawyers or parties might attempt to cast it.<sup>15</sup> In other words, if the transaction is in its basic nature a mortgage, an equity of redemption exists therein, and any agreement contemporaneous with the creation of the mortgage which attempts to destroy or modify the equity of redemption will be invalid.<sup>16</sup> Deeds to the property, intended as devices to insure that the grantee be repaid an obligation owed by the grantor fall within this condemnation. Judge Vann put it well in *Mooney v. Byrne*:<sup>17</sup> "An instrument executed simply as security cannot be turned into a conditional sale by the form of a covenant to reconvey, and even if there was a doubt as to the meaning the contract would be regarded as a mortgage, so as to avoid a forfeiture, which the law abhors."

Section 320 of the New York Real Property Law states it thus (and thereby creates further ambiguity): "A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage. . . ." Difficulty arises where there is no "other written instrument," but other proof shows the intent to have been to create a security transaction. This will be discussed later.

## II. ADMISSIBILITY OF EXTRINSIC EVIDENCE

If the development by the courts of equity of the "equity of redemption" was to mean anything, it had to be protected against devices designed to frustrate it. The device of having the borrower convey his land to the lender by a deed absolute is an obvious method designed for this purpose. Accordingly, equity early allowed the introduction of oral evidence to establish that the transaction was in fact a security de-

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14. See 1 Jones § 8, at 10.

15. Osborne, op. cit. supra note 1, § 97.

16. See *Peugh v. Davis*, 96 U.S. 332, 336-37 (1877). The doctrine has become so firmly established that attempts by a mortgagor to sell the land mortgaged to the mortgagee are scrutinized with care, and may be frustrated if there is fraud, overreaching, oppression, inadequate consideration, etc. Compare *Bradbury v. Davenport*, 120 Cal. 152, 52 Pac. 301 (1898), with *Holden Land & Live Stock Co. v. Interstate Trading Co.*, 87 Kan. 221, 123 Pac. 733 (1912), appeal dismissed, 233 U.S. 536 (1914). Both cases indicate that while a mortgagor may sell the mortgaged property to the mortgagee, the mortgagee in such cases may be treated almost as a fiduciary purchasing from his beneficiary and the transaction will be scrutinized with care. The latter case indicates, however, that a contract whereby the mortgagee may buy the land from the mortgagor is void for the same reasons that a deed absolute intended as security is held to be merely a mortgage. See 16 U. Miami L. Rev. 493 (1962).

17. 163 N.Y. 86, 92, 57 N.E. 163, 164 (1900).

vice.<sup>18</sup> If this was proved, then there existed an equity of redemption which could not be eliminated or contracted away, regardless of the form in which the transaction was cast. A good judge recently put it thus: "The right to redeem is an essential part of a mortgage and such right will be read into it by law even if no provision for redemption is to be found in the instrument."<sup>19</sup> It would seem that the proper view is that parol is admissible in all such cases to prove the true nature of the transaction. In a few jurisdictions, such proof is limited to cases of fraud, mistake or some similar typical ground available for reformation in equity.<sup>20</sup> Where a clear and unambiguous deed or accompanying memorandum on its face shows that a conveyance is affirmatively intended, most jurisdictions would not admit parol to vary the terms of the integrated writing.<sup>21</sup> In the typical case, however, there will be a deed only, or a deed and defeasance.<sup>22</sup> These would not normally contain language which would operate to exclude parol, and so, in the typical case, parol is admissible. In New York, as early as 1871, Judge Allen wrote concerning the rule that allows a deed to be shown to be intended as security only:

The rule does not conflict with that other rule, which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties, and courts of equity will always look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties.<sup>23</sup>

Contrary to some earlier New York cases, Judge Allen indicated that it is now too late to controvert the proposition that a deed, absolute upon its face, may, in equity, be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation or as to the form of the instrument is not an essential element in an action for relief, and to give effect to the intention of the parties.<sup>24</sup>

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18. See Y.B. 9 Edw. 4, 25, 34 (1470); *Maxwell v. Mountacute*, Prec. Ch. 526, 24 Eng. Rep. 235, 236 (Ch. 1719).

19. *Sakow v. Bossi*, 30 Misc. 2d 110, 113, 214 N.Y.S.2d 120, 123 (Sup. Ct. 1961) (Markowitz, J.).

20. See Osborne, *op. cit. supra* note 1, § 72, at 179, and the New York cases cited in note 21 *infra*.

21. See *Thomas v. Scutt*, 127 N.Y. 133, 27 N.E. 961 (1891) (chattels); *Marsh v. McNair*, 99 N.Y. 174 (1885); and cases cited in Annot., 111 A.L.R. 448 (1937).

22. "A defeasance has been defined as a deed or written instrument which defeats the force or operation of some other deed." 1 Jones § 290, at 332.

23. *Horn v. Keteltas*, 46 N.Y. 605, 610 (1871). See also *Juilliard v. Chaffee*, 92 N.Y. 529, 534-35 (1883); *Sturtevant v. Sturtevant*, 20 N.Y. 39, 40 (1859).

24. *Horn v. Keteltas*, *supra* note 23, at 609. See also *Chase Nat'l Bank v. Tover*, 245 App. Div. 615, 283 N.Y. Supp. 832 (1st Dep't 1935), *aff'd mem.*, 271 N.Y. 518, 2 N.E.2d 674 (1936), noted 11 *Notre Dame Law*. 371 (1936).

In New York, parol is admissible for this purpose in actions at law as well as in equity.<sup>25</sup>

It may be noted that, contrary to Professor Walsh,<sup>26</sup> the lien theory of mortgages was not the result of merger of law and equity, for, as Professor Osborne points out, New York was the leading state to establish the lien theory, and it did so before the merger of law and equity.<sup>27</sup>

### III. THE STATUTE OF FRAUDS

The Statute of Frauds has not been successfully offered as too much of an obstacle to proving that a deed is a mortgage, despite the apparent possibilities of fraud were a grantor later to rue his conveyance and insist his deed was given as security.<sup>28</sup> Indeed, the converse argument has been accorded more favor, *viz.*, that it would be fraud for a grantee to contend that a deed given to him and accepted by him as security is anything more than a mortgage.<sup>29</sup> In other words, as Jones puts it, "The statute designed to prevent frauds and perjuries would become in this way an effectual instrument of fraud or injustice."<sup>30</sup> It is now settled that the Statute of Frauds has no application to these cases, perhaps, in the view favored by Osborne, because the extrinsic evidence deals with the *retention* by the grantor of an interest in land, rather than with the transfer of such interest.<sup>31</sup>

### IV. BURDEN OF PROOF

The burden of proof rests upon the party seeking to prove that the deed absolute is a mortgage.<sup>32</sup> Not so simple to answer is the question of what type of evidence will be sufficient to prove the case. It is apparent, I suppose, that a person who wishes to show that a document which looks like the typical conveyance is in fact something else, will have a difficult time proving it, despite Phaedrus' dictum that "*Non semper ea sunt quae videntur.*"<sup>33</sup>

In other words, we must start with the presumption that the document is what it purports to be—a deed to the property.<sup>34</sup> Indeed, it has been

25. *Despard v. Walbridge*, 15 N.Y. 374, 378-79 (1857).

26. *Walsh*, *op. cit. supra* note 3, § 6.

27. *Osborne*, *op. cit. supra* note 1, § 73, at 182.

28. *Cf. Sturtevant v. Sturtevant*, 20 N.Y. 39 (1859).

29. *DeBartlett v. DeWilson*, 52 Fla. 497, 42 So. 189 (1906).

30. 1 *Jones* § 395, at 480. See also *Carr v. Carr*, 52 N.Y. 251, 260 (1873); but *cf. Sturtevant v. Sturtevant*, 20 N.Y. 39 (1859).

31. *Osborne*, *op. cit. supra* note 1, § 85, at 205.

32. *Streeter Constr. Co. v. Kenny*, 209 App. Div. 697, 703-04, 205 N.Y. Supp. 611, 616-17 (1st Dep't 1924); see also *515 2nd St. Corp. v. Bisnoff*, 250 App. Div. 642, 645, 295 N.Y. Supp. 94, 97-98 (2d Dep't 1937).

33. *Phaedrus*, *Fables*, Book IV, Fable 2, line 5.

34. *Ensign v. Ensign*, 120 N.Y. 655, 24 N.E. 942 (1890) (memorandum decision). See also *Coyle v. Davis*, 116 U.S. 108, 112 (1885).

said that there is a "strong" presumption to that effect.<sup>35</sup> If there is no written defeasance, the proof required to show that the paper is a mortgage is said to be "clear and conclusive."<sup>36</sup> Where there is a written defeasance, the burden is less onerous.<sup>37</sup> The stringent burden of the criminal law—proof beyond a reasonable doubt—has been rejected in New York in one case,<sup>38</sup> but another<sup>39</sup> states: "When an oral defeasance is relied upon, it is said that it must be established by clear and conclusive evidence beyond a reasonable doubt."<sup>40</sup> Both tests appear in *Streeter Constr. Co. v. Kenny*:<sup>41</sup>

The burden of establishing an oral defeasance to such a deed is an onerous one resting on whoever alleges it, and its existence, and also its precise terms, must be established by clear and conclusive evidence, otherwise the strong presumption that the deed expresses the entire contract between the parties to it is not overcome. A conveyance of land in fee so executed, acknowledged and recorded is of too great solemnity and of too much importance to be set aside or converted into a mere security upon loose or uncertain testimony, and it will not be unless the existence of the alleged oral defeasance is established beyond a reasonable doubt.<sup>42</sup>

In doubtful cases, the courts tend to construe the device as a mortgage.<sup>43</sup>

#### V. EVIDENCE

Jones puts it thus: "The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract."<sup>44</sup> It is fine to say "find the intention of the parties"; the law does so in myriad circumstances. It

35. *Streeter Constr. Co. v. Kenny*, 209 App. Div. 697, 703, 205 N.Y. Supp. 611, 616 (1st Dep't 1924).

36. *Ensign v. Ensign*, 120 N.Y. 655, 24 N.E. 942 (1890) (memorandum decision); *Coyle v. Davis*, 116 U.S. 108, 112 (1885) ("clear, unequivocal and convincing"); *Streeter Constr. Co. v. Kenny*, supra note 35, at 703-04, 205 N.Y. Supp. at 616-17.

37. 1 Jones § 299.

38. *Southard v. Curley*, 134 N.Y. 148, 155-56, 31 N.E. 330, 332 (1892) (reformation of contract). See also *Susquehanna S.S. Co. v. A. O. Anderson & Co.*, 239 N.Y. 285, 296, 146 N.E. 381, 385 (1925) (reformation of contract).

39. *Bascombe v. Marshall* (No. 1), 129 App. Div. 516, 113 N.Y. Supp. 991 (2d Dep't 1908), aff'd mem., 198 N.Y. 538, 92 N.E. 1077 (1910).

40. 129 App. Div. at 518, 113 N.Y. Supp. at 992-93. *Accord*, *Hurwitz v. Natruth Holding Corp.*, 194 Misc. 56, 86 N.Y.S.2d 65 (Sup. Ct. 1949), aff'd mem., 277 App. Div. 1028, 100 N.Y.S.2d 1011 (1st Dep't 1950).

41. 209 App. Div. 697, 205 N.Y. Supp. 611 (1st Dep't 1924).

42. *Id.* at 703-04, 205 N.Y. Supp. at 616, quoting *Ensign v. Ensign*, 120 N.Y. 655, 656, 24 N.E. 942, 943 (1890). See also *Fernicola v. Rudolph*, 18 App. Div. 2d 957, 238 N.Y.S.2d 286 (4th Dep't 1963).

43. *Mooney v. Byrne*, 163 N.Y. 86, 92, 57 N.E. 163, 165 (1900); cf. *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218, 237 (1812). See also 1 Jones § 331.

44. 1 Jones § 309, at 370. See also 60 *Columbia St., Inc. v. Leofreed Realty Corp.*, 110 N.Y.S.2d 417, 420 (Sup. Ct. 1952), aff'd mem., 281 App. Div. 969, 120 N.Y.S.2d 925 (1st Dep't 1953).



is another thing to be successful at it. The deed absolute cases are perhaps more difficult than the contract or testament cases because there the parties have, often deliberately, chosen to conceal their intention to mortgage by using the paraphernalia of conveyancing. Nevertheless, it is the intention we seek: if the purpose was to secure an obligation, the law conclusively presumes the intention to have been to mortgage. The types of evidence which help point to the parties' purpose are discussed below.

#### A. *Existence of a Personal Debt*

In the typical conveyance of land, the buyer becomes indebted for part of the purchase price, the debt being secured by a purchase-money mortgage executed by the buyer to the seller or lender, or by the assumption of an existing mortgage by the buyer. However, when the seller, by contemporaneous agreement becomes (or has been) indebted to the buyer, something strange may be afoot. It may well be that the seller has borrowed money from the buyer, and conveyed the land to him as security. If so, the deed conveys nothing, but merely gives the "grantee" a lien. Accordingly, it has sometimes been said that it is "a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor."<sup>45</sup> If this ingredient is absent, the document is said to be a deed. In jurisdictions which pursue this reasoning, the absence of a remedy against the person of the grantor<sup>46</sup> precludes a finding that a deed was intended as a security device rather than an absolute or conditional conveyance.<sup>47</sup> Such jurisdictions perpetuate the common-law idea that a personal debt was an essential element to the validity of the security device. It has been said concerning the old Welsh mortgage that a presumption exists that "every mortgage implies a loan, and every loan implies a debt; and that though there were no covenant nor bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage. . . ."<sup>48</sup>

Even the early New York cases, however, disclosed the contrary idea that "there may, no doubt, be a mortgage without any personal liability on the part of the mortgagor, if the parties choose to contract in that form. . . . But where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute conveyance into a mortgage."<sup>49</sup>

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45. *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218, 237 (1812).

46. It is not necessary that the duty be expressed in the deed. It is sufficient that there be a pre-existing debt, a loan in contemplation which is later consummated or an agreement of any kind for the payment of an obligation.

47. See cases cited in 1 Jones §§ 311, 316.

48. *King v. King*, 3 P. Wms. 358, 360, 24 Eng. Rep. 1100, 1101 (Ch. 1735).

49. *Glover v. Payn*, 19 Wend. 518, 521 (N.Y. Sup. Ct. 1838).

The New York cases do not indicate that a *personal* debt is required. We may assume, although the New York cases are not entirely satisfactory, that a mortgage is not valid without some obligation.<sup>50</sup> New York Real Property Law § 249, provides:

A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.

Accordingly, it is sufficient in New York that an obligation exists; the mortgagee may safely limit his remedy to the land, at least insofar as is concerned the validity of the mortgage.<sup>51</sup> In such cases, it may well be said that the obligation is "regarded as due by the land itself."<sup>52</sup>

There can be no question, however, that even though no personal obligation is necessary, its existence or absence is of great significance in determining whether a deed absolute was intended as a conditional or absolute sale or as a mortgage.<sup>53</sup> Thus it is a material aid in assisting the court to find the intention of the parties.<sup>54</sup> In *Macauley v. Smith*,<sup>55</sup> the court put it thus: "Stress is laid by the defendants upon the fact that the grantor did not expressly covenant to repay the money. The cases are to the effect that this is one of several circumstances to be considered. . . ." However, where there has been a debt owing from the grantor to the grantee, which continues after execution of the "deed," or where a new debt is contemporaneously created, the inference is irresistible that a mortgage was created.

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50. The question, otherwise stated, is whether a mortgage may be created as a gift. (This is to be distinguished from the question whether a valid existing mortgage may be assigned as a gift, the answer to which is clearly in the affirmative.) In *Bucklin v. Bucklin*, 40\* N.Y. 141 (1864), the court, in dictum, indicated that no consideration was necessary, but it seems that the duty of a husband to support his wife and child furnished adequate consideration in that case. In *Baird v. Baird*, 145 N.Y. 659, 40 N.E. 222 (1895), the court, in dictum, indicated that consideration was necessary to the existence of a valid legal mortgage. In that case, however, it seems clear the mortgage was not intended to be enforced. In *Welch v. Graham*, 124 N.Y. Supp. 945 (Sup. Ct. 1910), *aff'd mem.*, 148 App. Div. 900, 132 N.Y. Supp. 1150 (4th Dep't 1911), *aff'd mem.*, 210 N.Y. 637, 105 N.E. 1102 (1914) the courts adhered to the Baird dictum. See also *In re Derrico*, 90 N.Y.S.2d 889 (Surr. Ct. 1949), *aff'd mem.*, 279 App. Div. 615, 107 N.Y.S.2d 815 (2d Dep't 1951); *Sheehy v. Kane*, 227 App. Div. 635, 235 N.Y. Supp. 882 (2d Dep't 1929) (*per curiam*); cf. *Glover v. Payn*, *supra* note 49, at 521. These cases must be distinguished from those where a mortgage is given to secure an obligation, and the mortgage is declared unenforceable because the obligation is unenforceable. See *Beck v. Sheldon*, 259 N.Y. 208, 181 N.E. 360 (1932).

51. See *Mooney v. Byrne*, 163 N.Y. 86, 57 N.E. 163 (1900); *Meehan v. Forrester*, 52 N.Y. 277 (1873).

52. 3 *Tiffany*, Real Property § 607 (2d ed. 1920). See also *Walsh*, *op. cit.* *supra* note 3, § 16.

53. See *Horn v. Keteltas*, 46 N.Y. 605 (1871).

54. See *Osborne*, Mortgages § 103, at 247 (1951).

55. 132 N.Y. 524, 530-31, 30 N.E. 997, 998 (1892).

### B. *Negotiations of the Parties*

With the admissibility of extrinsic evidence there came a fertile area of proof, *viz.*, that there had been negotiations between the parties, and perhaps but more doubtfully, negotiations between the "grantor" and third persons, looking toward a loan. In the leading case in the Supreme Court of the United States, Mr. Chief Justice Marshall noted that "the proof is also complete, that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage."<sup>56</sup> Thus the negotiations and conduct of the parties which lead to the "deed" are significant in reaching a conclusion as to the character of the transaction.<sup>57</sup>

### C. *Relationship Between the Value of the Land and the Consideration*

A great disparity between the value of the land and the price paid has long been regarded as a factor of great significance toward proving that a mortgage rather than sale was intended. Thus, in *Macauley v. Smith* it was said that "it is not presumable that [the grantor] . . . intended to sell property worth \$30,000 for \$15,240."<sup>58</sup> In *Horn v. Ketchas*, Judge Allen's observation that "the premises greatly exceeded in value the consideration paid for the deed"<sup>59</sup> was a significant factor in the conclusion that a mortgage was created. The point is well summarized by Mr. Chief Justice Marshall:

A conditional sale made in such a situation, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended.<sup>60</sup>

### D. *The Existence of a Written Defeasance*

Where the only written instrument evidencing the transactions is the deed, and no other writing shows terms upon which the grantor may recover his property, the proof required to show that the deed was a mortgage is sometimes hard to come by. However, where there is another contemporaneously executed writing along with the deed which contains terms upon which the grantor may repurchase, there is clear proof at least that the parties intended the grantor to be able to get his land back. As the best recent writer in the field has noted, the only question becomes whether the grantor gets back his land by virtue of a contract of repurchase, as in the case of a conditional sale, or by virtue of a

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56. *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218, 238 (1812).

57. See *Umpqua Forest Indus. v. Neenah-Oregon Land Co.*, 188 Ore. 605, 217 P.2d 219 (1950).

58. 132 N.Y. at 530, 30 N.E. at 998.

59. 46 N.Y. 605, 608 (1871).

60. *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218, 241 (1812).

mortgagor's right to redeem.<sup>61</sup> Not only is the mortgagor's task easier where there is a written defeasance, but as an early New York case indicated: "In all doubtful cases a contract [to reconvey] will be construed to be a mortgage rather than a conditional sale. . . ."<sup>62</sup>

It is possible, of course, to sell land to the grantee, and give a true option to the grantor to repurchase. If the debt between the parties is extinguished by the conveyance, rather than suffered to remain a continuing obligation, such would be easier of proof.<sup>63</sup>

#### E. Retention of Possession by "Grantor"

If the grantor remains in possession, especially if he continues to pay taxes, assessments, etc., accruing after the date of the conveyance, the courts find this factor indicative of mortgage. Thus, in one New York case, the court's comment that "the grantor remained in possession of the premises for about two years after the delivery of the deeds"<sup>64</sup> was of significance in reaching the conclusion. Where the grantee, under otherwise somewhat equivocal circumstances, took possession, the transaction was sustained as a sale.<sup>65</sup> The continued possession of the grantor is therefore a significant circumstance tending to show a security device rather than sale.<sup>66</sup>

#### F. Miscellaneous Factors

A miscellany of other factors have been regarded by the courts as keys to the intention of the parties. Thus, where the grantee is a notorious money lender, the courts may be quicker to find the instant transaction to have been a secured money-lending arrangement.<sup>67</sup> Similarly, where the grantor has died testate at the time the question arises, if he has not attempted to devise the subject property, the court may conclude that the testator believed he no longer owned it (*i.e.*, that the prior transaction was a sale).<sup>68</sup> If the grantor stood by in silence while the grantee improved the property, the courts may be quicker to find a sale.<sup>69</sup> If the grantor was hard pressed for money, the opportunity for the grantee to dictate the form the transaction would take is apparent,

61. Osborne, *op. cit.* supra note 54, § 88, at 213. See also Walsh, *Mortgages* § 7, at 41 (1934).

62. *Matthews v. Sheehan*, 69 N.Y. 585, 590 (1877).

63. *Macauley v. Smith*, 132 N.Y. 524, 30 N.E. 997 (1892); *Randall v. Sanders*, 87 N.Y. 578 (1882).

64. *Macauley v. Smith*, supra note 63, at 530, 30 N.E. at 998.

65. *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218 (1812).

66. See *Luesenhop v. Einsfeld*, 93 App. Div. 68, 87 N.Y. Supp. 268 (4th Dep't 1904), *rev'd mem.*, 184 N.Y. 590, 77 N.E. 1191 (1906).

67. See *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218 (1812); cf. *Youssoupoff v. Widener*, 246 N.Y. 174, 158 N.E. 64 (1927).

68. See *Conway's Ex'rs v. Alexander*, supra note 67.

69. See *Conway's Ex'rs v. Alexander*, supra note 67, at 240.

and the courts find the opportunity for, and therefore the possibility of, overreaching to exist. This factor tends to create the mild inference of mortgage.<sup>70</sup> Possibility for breach of fiduciary or close family relationships has been noted by the courts. In one New York case the court noted that the seller "had the benefit of the advice of an experienced business man and of his own lawyer."<sup>71</sup> In another, the court observed that "the covenantee in the defendant's agreement, was counsel for the plaintiff in the transaction, aiding him in procuring the loan. . . ."<sup>72</sup> Delay of the grantor in making claim of title has been noted,<sup>73</sup> as has the question whether the device has been used as an attempt to evade the usury laws,<sup>74</sup> possibly by putting what otherwise would be called "interest" in the form of rent to the grantor.<sup>75</sup> Whether the deed contains a covenant assuming a prior mortgage is another circumstance to be considered in determining the purpose of the parties.<sup>76</sup> Other factors which have been considered include the education, age and experience of the grantor, and the making of insurance payments.<sup>77</sup>

#### VI. EFFECT OF A DEED ABSOLUTE

Contrary to a recent suggestion that "the mortgage is customarily couched, now as at common law, in the form of a conveyance,"<sup>78</sup> this is neither the practice nor does it conform to the statutory formula in New York that "the mortgagor hereby mortgages to the mortgagee."<sup>79</sup> No habendum clause, as in title jurisdictions, is usual, necessary or advisable. The modern New York legal mortgage is not a conveyance in form or effect,<sup>80</sup> but merely is a declaration of the existence of a legal lien.<sup>81</sup>

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70. *Macauley v. Smith*, 132 N.Y. 524, 530, 30 N.E. 997, 998 (1892); *Horn v. Keteltas*, 46 N.Y. 605 (1871); cf. *Conway's Ex'rs v. Alexander*, 11 U.S. (7 Cranch) 218 (1812) (fact that grantor was in jail and hard pressed for money held to be outweighed by other factors).

71. *Youssouppoff v. Widener*, 246 N.Y. 174, 187, 158 N.E. 64, 68 (1927) (sale of two Rembrandt portraits). See also *Towner v. Berg*, 5 App. Div. 2d 481, 172 N.Y.S.2d 258 (3d Dep't 1958).

72. *Horn v. Keteltas*, 46 N.Y. 605, 608-09 (1871).

73. 1 Jones § 404, at 500-02.

74. *Horn v. Keteltas*, 46 N.Y. 605 (1871) (loan of \$10,000; provision for reconveyance upon payment of \$12,500 with interest within one year—thus interest at over 25%).

75. 1 Jones § 324, at 406-08.

76. *Kraemer v. Adelsberger*, 122 N.Y. 467, 476, 25 N.E. 859, 862 (1890). If the assumption is contained in a mortgage, it is unenforceable. See *Garnsey v. Rogers*, 47 N.Y. 233 (1872).

77. See Annot., 89 A.L.R.2d 1940 (1963).

78. *Marks, Maloney & Paperno, Mortgages and Mortgage Foreclosure in New York* 34 (1961).

79. N.Y. Real Prop. Law § 258, dual Schedules M and N.

80. *First Fed. Sav. & Loan Ass'n v. Levy*, 31 Misc. 2d 459, 222 N.Y.S.2d 908 (Sullivan County Ct. 1961). Indeed, a mortgage upon real property is itself personal property. *Gaughan v. Nickoloff*, 28 Misc. 2d 555, 556, 214 N.Y.S.2d 487, 489 (Sup. Ct. 1961).

81. It is a "conveyance" within the meaning of the Statute of Frauds and the recording act. See *Sleeth v. Sampson*, 237 N.Y. 69, 142 N.E. 355 (1923).

The deed absolute intended as a mortgage is treated as a mortgage. As in the case of the legal mortgage, the conveyance (deed) conveys nothing. Title remains in the grantor.<sup>82</sup> The mortgage in these cases is not a valid legal mortgage because the instrument (deed) does not properly identify the nature of the transaction.<sup>83</sup> Such mortgage, therefore, is an equitable one. Accordingly, at common law, it stood to be cut off by the interest of a subsequent purchaser for value and, within the meaning of the recording act, by a subsequent purchaser for value who first records.<sup>84</sup>

However, since the grantor has put in the hands of a grantee a document which looks like a deed, to say the least, a third person purchasing the property from the "grantee" in good faith and for value may qualify as a bona fide purchaser for value by estoppel.<sup>85</sup> He is not a true bona fide purchaser because his grantor had no title to convey. A redemption action still exists in such cases in favor of the grantor-mortgagor.<sup>86</sup> Of course, the land itself—now in the hands of a bona fide purchaser for value by estoppel—cannot be redeemed.<sup>87</sup> However, the value thereof when the right to redeem was perfected (or the price received by the mortgagee who wrongfully sold property which was not his to sell), or the value at the time of trial, whichever is higher, may be recovered from the mortgagee-grantee (but not from his purchaser).<sup>88</sup> Although only a money judgment may be recovered, the action is still one to redeem, and hence the statute of limitations for such action is applicable.<sup>89</sup>

82. *Thorn v. Sutherland*, 123 N.Y. 236, 25 N.E. 362 (1890); *Odell v. Montross*, 68 N.Y. 499, 503 (1877). See *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N.Y. 1, 17 N.E. 405 (1888).

83. See note 1 *supra*.

84. N.Y. Real Prop. Law § 291.

85. *Mooney v. Byrne*, 163 N.Y. 86, 57 N.E. 163 (1900).

86. *Ibid.*

87. *Ibid.*

88. An interesting question would arise if the grantor-mortgagor should convey title to a bona fide purchaser for value after the grantee-mortgagee has conveyed to a bona fide purchaser for value by estoppel. Apart from the recording act, it would seem that the grantor's conveyance would cut off the estoppel which arose in favor of the purchaser from the grantee. Under the recording act, the answer would seem to depend on whether the grantee of the grantee-mortgagee recorded his deed, and if so, whether such recording gives constructive notice to the subsequent purchaser from the grantor-mortgagor. Technically, such recording should not give constructive notice because the recording is not in the chain of title to the land. In such cases, however, the likelihood of the grantor-mortgagor being in possession is high, so that a purchaser from the grantee-mortgagee would not qualify as bona fide. Further, unless the mortgage tax is paid, the mortgage may not be introduced in evidence, and there is a penalty tax if the mortgage has been recorded without payment of the tax. See N.Y. Tax Law § 258; *Mutual Life Ins. Co. v. Nicholas*, 144 App. Div. 95, 128 N.Y. Supp. 902 (1st Dep't 1911).

89. *Mooney v. Byrne*, 163 N.Y. 86, 57 N.E. 163 (1900).

## VII. RECORDING

Section 320 of the New York Real Property Law provides as follows:

A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.

This section makes several things clear, and, unfortunately, plunges several others into obscurity. Most of the difficulty lies with the statute itself, which refers expressly only to deeds absolute which are shown to be mortgages by a *written defeasance*. What about the cases where there is no written defeasance?

It seems clear that a deed which is in fact a security device and therefore a mortgage, and which is recorded as a deed, has been improperly recorded, whether or not there is a written defeasance, and such recording does not give constructive notice of the existence of the lien.<sup>90</sup>

If, however, the deed is recorded as a mortgage, three possibilities arise. First, there may be a written defeasance which is recorded with the deed. This recording, pursuant to the statute, clearly is valid and gives constructive notice. Secondly, there may be a written defeasance which is not recorded with the deed. Here again, the statute is clear, and the recording is ineffectual to give constructive notice. Of course, if it is actually seen by a third person such individual then would have actual knowledge thereof. The third possibility is that there is no written defeasance at all. Dictum in *White v. Moore*<sup>91</sup> indicates that in such case the recording is a nullity. The reasoning was that there can be no satisfactory reason why the condition of defeasance should not be in writing, and if it is not so memorialized, the mortgagee will be placed in the same position as any mortgagee who fails properly to record his mortgage. However, in *Odell v. Montross*,<sup>92</sup> the court said that in *White v. Moore* the Chancellor had held that the fact that there was no written defeasance did not take the instrument out of the operation of the statute requiring all mortgages to be recorded as mortgages. In *In the Matter of Mechanics' Bank*,<sup>93</sup> the court concluded that "whether a right to redeem depends upon a separate written instrument or rests in parol,

90. *White v. Moore*, 1 Pai. Ch. 551 (N.Y. Ch. 1829); *Howells v. Hettrick*, 160 N.Y. 308, 54 N.E. 677 (1899). Cf. *Mathews v. Damainville*, 100 App. Div. 311, 91 N.Y. Supp. 524 (1st Dep't 1905), *Dey v. Dunham*, 2 Johns. Ch. R. 182 (N.Y. Ch. 1816), rev'd, 15 Johns. R. 555 (N.Y. Ct. Err. 1818).

91. 1 Pai. Ch. 551 (N.Y. Ch. 1829).

92. 68 N.Y. 499, 503 (1877).

93. 156 App. Div. 343, 141 N.Y. Supp. 473 (2d Dep't), aff'd mem., 209 N.Y. 526, 102 N.E. 1106 (1913).

to operate as notice the instrument given as security for the debt must be recorded as a mortgage and not as a deed."<sup>94</sup> It should also be borne in mind that the statute applies only where recordings are relevant; it has no application where the case arises between the original parties.<sup>95</sup>

### VIII. CONCLUSION

With the law fairly clear at any early stage that the grantee of a deed absolute intended as security is a mortgagee only, what explanation may be offered for the many attempts still to case the security device in the hairy garb of a deed?<sup>96</sup>

We may put aside those cases where, without counsel, the parties actually intended to create a mortgage in form and effect, and lacked the professional competence to do so correctly. Similarly, let us discount the hopefully nonexistent case of the similarly naive lawyer.

The most obvious reason why a lender might choose to insist on a deed rather than a mortgage is an attempt to reduce or eliminate the expense, annoyance, delay and protections to the mortgagor which he presumes (usually correctly) are attendant upon statutory foreclosure. It is suggested that the supposed elimination of these disadvantages—even assuming them to be such—is insufficient to outweigh the unreliability and dangers of such device: there is the ever real possibility that a court will later declare the deed to have been a mortgage; in such event the costs, delays and embarrassments may be phenomenal. Further, due to possibly improper recording as a deed rather than as a mortgage, further difficulty may ensue. If the terms of the mortgage rest in parol, embarrassment and loss may be occasioned by the mortgagor's proffer of proof as to terms of the mortgage. If the contemplated advantage was thought to be an immediate transfer of possession of the property to the grantee-mortgagee, a court declaring the transfer to be a mortgage may well order an accounting of rents and profits, with the onerous fiduciary obligations and consequences thereof. There is also the possibility that if a defeasance specifies a high "repurchase" price, usury may be a defense, and in New York, a sword.<sup>97</sup> Moreover, there exists the chance that a court may regard the deed as a conveyance fraudulent against creditors of the grantor.<sup>98</sup>

94. 156 App. Div. at 347, 141 N.Y. Supp. at 477. Cf. Walsh, *op. cit.* supra note 61, § 33, at 156.

95. Fox v. Sizeland, 170 Misc. 390, 9 N.Y.S.2d 350 (Sup. Ct. 1938).

96. An earlier attempt at disguise may be recalled. See Genesis 27:22.

97. Horn v. Keteltas, 46 N.Y. 605 (1871). N.Y. Gen. Bus. Law § 377 (will be Gen. Obligations Law § 5-515 [effective September 27, 1964]). Cf. Buckingham v. Corning, 91 N.Y. 525 (1883); Wright v. Clapp, 28 Hun 7 (N.Y. Sup. Ct. 1882); Wheelock v. Lee, 64 N.Y. 242 (1876); Metz v. Gunther, 14 App. Div. 2d 574, 218 N.Y.S.2d 78 (2d Dep't 1961) (memorandum decision).

98. See Osborne, *op. cit.* supra note 54, § 81.