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## Equitable Mortgages--A Wavering Doctrine in New York

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magistrate would be put to the choice of setting bail at a figure under the statutory sum, or waiting for the time when three judges could hear the application, the suggestion is indeed worthy of consideration.

Rather than extend the contempt power of the court to prevent "bail jumping" by defendants bonded by irresponsible sureties, it is suggested that "bail jumping" statutes, similar to the New York statute, be considered.<sup>184</sup>

The various systems of bail procedure throughout the nation suggest themselves as "experimental laboratories," to aid in the development of flexible, constantly improving methods of securing the attendance of defendants at trial. It would be remiss to ignore this vast proving ground.



## EQUITABLE MORTGAGES—A WAVERING DOCTRINE IN NEW YORK

### *Introduction*

The munificence of equity is perhaps best exemplified by the evolution therein of the law of mortgages. At common law, a mortgage was to all intent and purposes a conveyance of the legal estate, subject to defeasance only if the mortgagor repaid the debt on a prescribed day; failure to comply on that date vested absolute title in the mortgagee.<sup>1</sup> To relieve against grievous hardships resulting to mortgagors in many instances, equity developed a distinct theory of mortgages, based on the ancient maxim that equity regards the substance rather than the form, and will relieve against forfeitures whenever the party can be fairly compensated by an award of money. The mortgagor was given a right in equity to redeem the property even after his default; it is this right to which the abbreviated term "equity of redemption" refers.

Gradually, the concept arose in equity that certain security transactions, wherein the debtor pledged his property to the repayment of an obligation, could be effectuated, although title to the property did not pass to the creditor. No legal right existed in the creditor; merely an equitable right, *in personam*, to compel the debtor to apply the subject of security to the debt. This form of security transaction has come to be known as an equitable mortgage.<sup>2</sup>

<sup>184</sup> New York is the *only* state making bail jumping a crime. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 127 n. 97 (1947).

<sup>1</sup> 4 POMEROY, *EQUITY JURISPRUDENCE* § 1179 (5th ed. 1941).

<sup>2</sup> See Note, 20 *COL. L. REV.* 519, 520 (1920); Walsh, *Equitable Mortgages*, 9 *N. Y. U. L. Q. REV.* 429 (1932).

Generally, whenever the intent to create a mortgage is manifested it constitutes a mortgage in equity, without regard to the form of the agreement.<sup>3</sup> Equitable mortgages result from myriad transactions,<sup>4</sup> and chattels<sup>5</sup> as well as realty may be the subject of the charge.

It is the purpose here to discuss one method of creating an equitable mortgage, *i.e.*, by the deposit of title deeds, to point up its ramifications, and general acceptance in the various jurisdictions and New York in particular.

### *Equitable Mortgage by Deposit of Title Deeds or Other Muniments of Title*

The origin of the doctrine of equitable mortgage by deposit of title deeds or other muniments of title is generally attributed to the early English decision of *Russel v. Russel*.<sup>6</sup> The significance and effect of this decision is that for the first time the depositor's interest in the *property* was subjected to an enforceable charge.<sup>7</sup> Prior thereto, the creditor's remedy was limited to his obstinate retention of the debtor's deeds in an attempt to embarrass the latter into repaying the debt. If the debtor brought a possessory action at law for their recovery, he would not prevail unless he offered to repay the sum for which the deeds were deposited; or if he sued in equity, he had to do equity, with the same result.<sup>8</sup>

The practice of securing loans by depositing title deeds was, at that time, customary<sup>9</sup> and convenient for small and short term com-

<sup>3</sup> Cf. *Sullivan v. Corn Exchange Bank*, 154 App. Div. 292, 139 N. Y. Supp. 97 (2d Dep't 1912); *Sprague v. Cochran*, 144 N. Y. 104, 114, 38 N. E. 1000, 1002 (1894). "The whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done." See 3 U. OF CIN. L. REV. 88 (1929).

In certain instances, equity will imply an intent where none exists, creating an equitable lien to relieve against hardships. The vendor's and vendee's liens are examples. See Britton, *Equitable Liens—A Tentative Analysis of the Problem*, 8 N. C. L. REV. 388, 393 (1930).

<sup>4</sup> See Note, 31 COL. L. REV. 1335 (1931); 45 HARV. L. REV. 747 (1932).

<sup>5</sup> For an excellent article dealing in part with equitable mortgages on chattels, see Note, 20 COL. L. REV. 519 (1920).

<sup>6</sup> 1 Brown Ch. C. 269, 270, 28 Eng. Rep. 1121, 1122 (1783). "An issue was directed to try whether the lease was deposited as security for the sum advanced by the plaintiff. . . ." The jury found it was deposited as security, and Lord Thurlow ordered the lease sold and the proceeds applied to plaintiff's debt.

<sup>7</sup> Cf. *Ex parte Coming*, 9 Ves. Jr. 115, 117, 32 Eng. Rep. 545, 546 (1803). "I remember, previously to *Russel v. Russel* it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage . . . resting altogether upon parol. . . ." See 1 JONES, MORTGAGES § 247 (8th ed. 1928); 4 POMEROY, EQUITY JURISPRUDENCE § 1264 (5th ed. 1941).

<sup>8</sup> Cf. *Keys v. Williams*, 3 Y. & C. 55, 60, 160 Eng. Rep. 612, 614 (1838). *But see Brander v. Boles*, Prec. Ch. 375, 24 Eng. Rep. 169 (1713).

<sup>9</sup> See *Gardner v. McClure*, 6 Gilf. 167, 171 (Minn. 1861).

mercial loans. Recognizing the commercial necessities and the probable intention of the parties, the courts created an affirmative lien on the property encompassed therein, by way of an equitable mortgage.<sup>10</sup>

The basis of fact upon which the doctrine took seed and flourished in England was the absence of an extensive system of land registry.<sup>11</sup> There being no method of permanent recordation of deeds or similar muniments of title, the possession thereof by the owner of the estate was essential to prove his title. In contracting for the sale of his property, he would be compelled to exhibit his title deeds by a prudent vendee; and in a conveyance of the fee, the title deeds had to be delivered to the grantee.<sup>12</sup> When, therefore, the debtor released his deeds to the creditor, the mere possession by the creditor was sufficient to create a presumption that they were deposited as security, by way of an equitable mortgage.<sup>13</sup> However, the authorities were not uniform in this interpretation of the nature of the transaction, some construing the deposit of deeds with a creditor as evidence of an agreement by the debtor to execute a legal mortgage<sup>14</sup> with all its remedial incidents.<sup>15</sup>

In the instances where the deeds were deposited, either with the creditor or his solicitor<sup>16</sup> for the *express* purpose of having a legal mortgage prepared, confusion resulted on the question of whether or not a present equitable mortgage was created by the deposit. It

<sup>10</sup> *Russel v. Russel*, 1 Brown Ch. C. 269, 28 Eng. Rep. 1121 (1783). Cf. *Keys v. Williams*, 3 Y. & C. 55, 60, 160 Eng. Rep. 612, 614 (1838).

<sup>11</sup> 1 JONES, MORTGAGES § 245 (8th ed. 1928).

<sup>12</sup> Walsh, *Equitable Mortgages*, 9 N. Y. U. L. Q. REV. 437 (1932); 4 POMEROY, EQUITY JURISPRUDENCE § 1264 n. 13 (5th ed. 1941). Cf. *In re Snyder*, 138 Iowa 553, 556, 114 N. W. 615 (1908). See *Oliver v. Hinton*, [1899] 2 Ch. 264.

<sup>13</sup> Cf. *Ex parte Langston*, 17 Ves. Jr. 227, 231, 232, 34 Eng. Rep. 88, 89 (1810). "It has been long settled, that a mere deposit of title-deeds upon an advance of money, without a word passing, gives an equitable lien. . . ." *But see Chapman v. Chapman*, 13 Beav. 308, 312, 51 Eng. Rep. 119, 120 (1851).

<sup>14</sup> For a detailed discussion on the characteristics of a legal mortgage under the English common law, see 4 POMEROY, EQUITY JURISPRUDENCE § 1179 *et seq.* (5th ed. 1941).

<sup>15</sup> "The deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court. . ." *Birch v. Ellames*, 2 Anst. 427, 145 Eng. Rep. 924 (1794). Cf. *Carter v. Wake*, 4 Ch. D. 605, 606 (1877). But see Walsh, *Equitable Mortgages*, 9 N. Y. U. L. Q. REV. 429, 437 (1932). ". . . [T]hese transactions [deposit of title deeds] involve no agreement to execute a formal mortgage, and therefore there is a total absence of specific enforcement of any such contract in the enforcement of these equitable mortgages. . . ."

<sup>16</sup> The fact that a deposit is made with a person other than the debtor does not prevent the equitable mortgage from arising, if the third person acts as agent or trustee for the mortgagee. See *Lloyd v. Attwood*, 3 De G. & J. 614, 44 Eng. Rep. 1405 (1859), holding that a borrower might deposit his title deeds with his own solicitor as security. *But see Ex parte Coming*, 9 Ves. Jr. 115, 32 Eng. Rep. 545 (1803).

would appear that the *proved intent* would negate any presumption that the deposit itself was meant as a charge on the estate. Ironically, Lord Thurlow, the original expounder of the doctrine in the *Russel* case, in a later decision<sup>17</sup> declared no equitable mortgage existed in the above situation, while courts, initially critical of the doctrine, took a broader view, stating that there should be no distinction between a deposit for the express purpose of having a security prepared, and a deposit intended to operate as an immediate security.<sup>18</sup>

### *The Statute of Frauds*

Where the deposit of title deeds was unaccompanied by a writing setting forth the purpose thereof, a serious question was raised as to the effect of the doctrine on the Statute of Frauds.<sup>19</sup> Though the equitable mortgage by deposit of deeds is not a *contract* for the sale of land, nor a *sale* of land, but simply a *charge* or *lien* on the land, not recognized in a court of law, nevertheless the power of the mortgagee to change the ownership of the property by foreclosure would seem sufficient to bring the doctrine within the *policy* of the statute.<sup>20</sup>

The court, in *Norris v. Wilkinson*,<sup>21</sup> fired a verbal broadside at the doctrine created in *Russel v. Russel*, stating: "I do not see, why there should be such a disposition to relieve parties from the necessity of attending to the requisitions of the Statute. There is no case, where a man is willing to part with his title-deeds, in which he would not also be ready to sign a memorandum of two lines; specifying the purpose, for which he had parted with them. By dispensing with

<sup>17</sup> *Ex parte Bulteel*, 2 Cox Ch. 243, 30 Eng. Rep. 113 (1790). Lord Thurlow's view was concurred in by the later decision of *Norris v. Wilkinson*, 12 Ves. Jr. 192, 33 Eng. Rep. 73 (1806). Compare *Brander v. Boles*, Prec. Ch. 375, 24 Eng. Rep. 169 (1713).

<sup>18</sup> *Hockley v. Bantock*, 1 Russ. 141, 38 Eng. Rep. 55 (1826). Cf. *Edge v. Worthington*, 1 Cox Ch. 211, 212, 29 Eng. Rep. 1133 (1786); *Ex parte Wright*, 19 Ves. Jr. 255, 258, 34 Eng. Rep. 513 (1812). Lord Eldon declared that the "deposit of deeds until a mortgage" was evidence of an agreement for a mortgage, and that an "equitable title to a mortgage" was in equity as good as "legal title."

<sup>19</sup> 29 CAR. II, c. 3, § 4 (1677). "And be it further Enacted . . . That . . . no Action shall be brought . . . [4] . . . upon any Contract or Sale of Lands, Tenements, or Hereditaments, or Any Interest in or concerning them . . . [6] unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof shall be in Writing, and signed by the party to be charged therewith. . . ."

<sup>20</sup> The preamble of the statute recites its purpose to be: "For Prevention of many Fraudulent Practices which are commonly endeavoured to be upheld by Perjury, and Subornation of Perjury." There is just as much opportunity for perjury to be practiced in stating a mortgage was contemplated by the deposit of the deeds, as in any other transaction relating to real property. See *Ex parte Whitbread*, 19 Ves. Jr. 209, 34 Eng. Rep. 496 (1812).

<sup>21</sup> 12 Ves. Jr. 192, 197, 198, 33 Eng. Rep. 73, 76 (1806).

any written evidence of the contract, an opening is left for all the fraud and perjury, which the Statute was calculated to exclude."

Lord Eldon, in subsequent decisions, opined that the cases establishing this doctrine approached a virtual judicial repeal of the Statute of Frauds.<sup>22</sup> However, an attempt was subsequently made to justify the existence of the doctrine on the ground of commercial expediency, though the court admitted an infraction of the Statute of Frauds.<sup>23</sup>

The cases establishing the doctrine<sup>24</sup> hold that the mere deposit of title deeds raises the presumption that it was intended to create an interest in the land, and in that way there is something greater than a mere parol agreement; it is something in the nature of a part performance to take the case out of the Statute of Frauds. Although an advance of money in reliance on an oral agreement that a mortgage on real estate will be given is not a sufficient part performance to escape the bar of the Statute of Frauds,<sup>25</sup> nevertheless it would seem that a deposit of title deeds would be an act contemplating the effectuation of that which was promised, and is sufficiently referable to the parol agreement to be good evidence thereof and to prevent perjury.

#### *Extent of Security—Deeds to be Deposited and Property Affected*

When, in some instances, the deeds deposited were only a part of those in the depositor's chain of title, the impressment of the equitable mortgage was resisted by the depositor for that reason. But the early jurists thought it would greatly curtail the beneficial effect of the doctrine, based in part on the expediency for small and short term transactions<sup>26</sup> and the importance of the deeds in English law,<sup>27</sup> to require the creditor to obtain from his debtor every deed relating to the property to effectuate the equitable mortgage.<sup>28</sup> They

<sup>22</sup> *Ex parte* Whitbread, 19 Ves. Jr. 209, 34 Eng. Rep. 496 (1812); *Ex parte* Hooper; *In re* Hewett, 19 Ves. Jr. 477, 478, 479, 34 Eng. Rep. 593 (1815). "With great deference to Lord Thurlow, who first held, that the deposit of a deed necessarily implied an agreement for a mortgage, I repeat, that this decision has produced considerable mischief; and that the case of *Russel v. Russel* . . . ought not to have been decided, as it was." See also *Ex parte* Kensington, 2 Ves. & B. 79, 35 Eng. Rep. 249 (1813).

<sup>23</sup> *Cf.* *Keys v. Williams*, 3 Y. & C. 55, 60, 61, 160 Eng. Rep. 612, 614 (1838). "In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title deeds and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute."

<sup>24</sup> *Russel v. Russel*, 1 Brown Ch. C. 269, 28 Eng. Rep. 1121 (1783); *Keys v. Williams*, 3 Y. & C. 55, 160 Eng. Rep. 612 (1838).

<sup>25</sup> *In re* Beetham; *Ex parte* Broderick, 18 Q. B. D. 380 (1886).

<sup>26</sup> See *Roberts v. Croft*, 24 Beav. 223, 53 Eng. Rep. 343 (1857). *Cf.* *Keys v. Williams*, 3 Y. & C. 55, 60, 61, 160 Eng. Rep. 612, 614 (1838).

<sup>27</sup> See note 12 *supra*.

<sup>28</sup> *Lacon v. Allen*, 3 Drew. 579, 582, 583, 61 Eng. Rep. 1024, 1025, 1026 (1856). "Then the question is, is it necessary that every title-deed should be de-

generally required, however, that the deeds deposited be material evidence of the owner's title, though the determination of their materiality was seemingly a matter within the discretion of the court in each case.<sup>29</sup>

It was generally held that the equitable mortgage created by the deposit of title deeds presumptively affected *all* the property encompassed by deeds deposited, and *prima facie*, limited thereto.<sup>30</sup> This is true, notwithstanding that the depositor falsely asserts that the deeds actually deposited relate to other or more property.<sup>31</sup> If damages result, no doubt the creditor may seek recovery by appropriate action at law; but certainly a specific enforcement of the agreement would be a clear violation of the Statute of Frauds.

On the other hand, if a written memorandum accompanies the deposit of the deeds, limiting or expanding the amount of property to be affected, then, the resulting equitable mortgage will be correspondingly limited or expanded, although the deeds relate to a greater or smaller estate than mentioned in the memorandum.<sup>32</sup> This is consistent with the expressed intentions of the parties, upon which the doctrine was originally based.

#### *Extension of the Doctrine—Future Advances*

Unlike a legal mortgage, which secures only the original advance,<sup>33</sup> the doctrine of equitable mortgage by deposit of deeds was extended to allow, under certain circumstances, the original deposit and consequential mortgage, to continue as security for future ad-

posited? Suppose the owner had lost an important deed, could he not deposit the rest? In each case we must judge whether the instruments deposited are material parts of the title; and, if they are, it is not sufficient to say there are other deeds material, or even more material, if there is sufficient evidence to shew that the deposit was made for the purpose of creating a mortgage." See also *Roberts v. Croft*, 24 Beav. 223, 53 Eng. Rep. 343 (1857); 1 JONES, MORTGAGES § 248 (8th ed. 1928).

<sup>29</sup> See note 28 *supra*.

<sup>30</sup> *Ashton v. Dalton*, 2 Coll. 565, 63 Eng. Rep. 863 (1846); *Ex parte Powell*; *In re Moore*, 6 Jur., Part 1, 490 (1842).

<sup>31</sup> *Cf. Jones v. Williams*, 24 Beav. 47, 55, 53 Eng. Rep. 274, 277 (1857). "If this view were the law, [that the mortgage lien would affect property not encompassed by the deed] any deed might be deposited, with an allegation that it should be held as a deposit to charge any lands which were the property of the depositors." *But see Ex parte Powell*; *In re Moore*, 6 Jur., Part 1, 490 (1842).

<sup>32</sup> *Dixon v. Muckleston*, 8 Ch. 155 (1872). It might be well to note that it would have been sufficient to create an enforceable equitable mortgage, if the writing alone were given, indicating a promise or intent to create a mortgage, even without an accompanying deposit of title deeds. It was already an established doctrine of equity, that an agreement to give a mortgage was in equity a mortgage.

<sup>33</sup> See *Ex parte Hooper*; *In re Hewett*, 19 Ves. Jr. 477, 34 Eng. Rep. 593 (1815).

vances made to the mortgagor.<sup>34</sup> There must, however, be clear proof of an agreement, written or parol, that the original deposit was intended to secure the subsequent as well as the present advance, or that the subsequent advance was made upon a *later* agreement that the deposited deeds were to be security for it also.<sup>35</sup> It is not necessary, to effectuate the mortgage in the latter situation, that the deeds be returned to the debtor and by him redeposited,<sup>36</sup> inasmuch as the later agreement is equivalent thereto and has the same effect.<sup>37</sup>

### *Priority and Enforcement*

The equitable mortgage created by the deposit of title deeds is superior to *all* subsequent claims of mere volunteers, and to claims of those who derive their interest from the depositor, with actual or constructive notice; but being an equitable charge it may be severed by a conveyance to a bona fide purchaser.<sup>38</sup> Generally, having established the mortgage lien by suit in equity, it is enforced, after the redemption period set by the court<sup>39</sup> has expired, by having the property sold, and the proceeds applied to the debt.<sup>40</sup> However, it would seem that in those decisions construing the deposit of title deeds as an agreement to make a legal mortgage with all its rem-

<sup>34</sup> *Ex parte* Langston, 17 Ves. Jr. 227, 34 Eng. Rep. 88 (1810).

<sup>35</sup> *Ex parte* Kensington, 2 Ves. & B. 79, 35 Eng. Rep. 249 (1813); *Ex parte* Whitbread, 19 Ves. Jr. 209, 34 Eng. Rep. 496 (1812); *Ex parte* Langston, 17 Ves. Jr. 227, 34 Eng. Rep. 88 (1810). It is perhaps singular to note that Lord Eldon, who was perhaps the greatest critic of the doctrine, was the first to extend the doctrine to include future advances. However, as he indicated, the doctrine having been created, the extension followed by logical reasoning.

<sup>36</sup> *Ex parte* Hooper; *In re* Hewett, 19 Ves. Jr. 477, 34 Eng. Rep. 593 (1815). Compare *Ex parte* Whitbread, 19 Ves. Jr. 209, 34 Eng. Rep. 496 (1812).

<sup>37</sup> *Ex parte* Langston, 17 Ves. Jr. 227, 34 Eng. Rep. 88 (1810).

<sup>38</sup> *Lloyd v. Attwood*, 3 De G. & J. 614, 44 Eng. Rep. 1405 (1859). But it is difficult to see how the depositor could effectuate a valid sale or conveyance thereby severing his creditor's equity. If he failed to produce the deeds at the proposed sale, the intended purchaser would be put on inquiry to determine the reason, and would serve as constructive notice to the purchaser, that the deeds may have been deposited by way of an equitable mortgage. The creditor holding the title deeds is well secured, and it is submitted that the danger of losing his lien is more apparent than real.

As to what constitutes sufficient notice, see *Jones v. Williams*, 24 Beav. 47, 53 Eng. Rep. 274 (1857); *Bozon v. Williams*, 34 Y. & J. 150, 148 Eng. Rep. 1131 (1829); 2 POMEROY, EQUITY JURISPRUDENCE § 612 (5th ed. 1941).

<sup>39</sup> In *Parker v. Housefield*, 2 My. & K. 419, 420, 39 Eng. Rep. 1004 (1834), the plaintiff sued to obtain immediate benefit of his equitable mortgage. In allowing the defendant six months in which to redeem, the court said: "Such being the light in which Courts of Equity view equitable mortgages by deposit of title deeds, [*i.e.*, that an equitable title to a mortgage was as good as a legal mortgage] it would seem to follow that the remedy to be afforded to such mortgagees should, as nearly as possible, correspond with that to which legal mortgages are entitled. . . ."

<sup>40</sup> *Russel v. Russel*, 1 Brown Ch. C. 269, 28 Eng. Rep. 1121 (1783).

edial incidents,<sup>41</sup> an absolute transfer of the estate to the mortgagee would be effected by strict foreclosure.<sup>42</sup>

### *The Doctrine in the United States*

It was perhaps inevitable that the doctrine of equitable mortgage resulting from the mere deposit of title deeds would be rejected in a great majority of American jurisdictions.<sup>43</sup> The basis of fact existing in England upon which the doctrine there was able to flourish<sup>44</sup> was directly opposed to our approved methods of real estate conveyancing, and especially to our system of land recordation.<sup>45</sup> The court in *In re Snyder*<sup>46</sup> sharply focused this distinction, while rejecting the application of the doctrine, with the following passage: "Under our system of registry, however, possession of title deeds is of no real importance to the owner of the estate. He cannot [sic, can?] convey the land without them. They are not necessary in order to ascertain the condition of the title. . . ." <sup>47</sup> Other jurisdictions, with equal vigor, refused to adopt the circumventual English attitude with respect to the relation of the doctrine to the Statute of Frauds.<sup>48</sup> In declaring the deposit of title deeds ineffective

<sup>41</sup> See note 15 *supra*.

<sup>42</sup> *Pryce v. Bury*, 2 Drew. 11, 61 Eng. Rep. 622 (1853). Cf. *Carter v. Wake*, 4 Ch. D. 605, 606 (1875). ". . . in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on."

The doctrine of equitable mortgage by deposit of title deeds has been clearly preserved in comparatively recent English legislation, and has apparently been established as a permanent principle in English law. See LAW OF PROPERTY ACT 1925, c. 20, §§ 13, 40, 15 & 16 GEO. 5, c. 20.

<sup>43</sup> *Davis v. Harris*, 211 Ala. 679, 101 So. 458 (1924); *Bloom v. Noggle*, 4 Ohio St. 45 (1854). See 19 L. R. A. (n. s.) 206 (1909).

<sup>44</sup> See note 11 *supra*.

<sup>45</sup> 4 POMEROY, EQUITY JURISPRUDENCE § 1265 (5th ed. 1941). N. Y. REAL PROP. LAW § 291 (recording statute in New York).

<sup>46</sup> 138 Iowa 553, 556, 114 N. W. 615 (1908).

<sup>47</sup> To the same effect is 1 JONES, MORTGAGES § 251 (8th ed. 1928); 4 POMEROY, EQUITY JURISPRUDENCE § 1265 (5th ed. 1941). ". . . owners [in the U. S.] look to the records as furnishing the real evidence of title, and . . . the true condition of all interests in . . . the land which could effect the rights of purchasers or incumbrancers . . . even in preference to the original deeds. In fact, no presumption or inference would . . . be raised from the mere possession of title deeds by a stranger."

<sup>48</sup> The statutory provisions enacted by the several states corresponding to the original English statute (see note 19 *supra*) have taken two forms: those which provide that "no action shall be brought" on any contract for the sale of land, and those which declare "void" any such contract. See 2 WILLISTON, CONTRACTS § 526 n. 6 (Rev. ed. 1936). A typical statute is that of New York. N. Y. REAL PROP. LAW § 259. "A contract for . . . the sale, of any real property, or an interest therein, is void, unless the contract or some note or memorandum thereof . . . is in writing. . . ."

to impress a mortgage on the estate of the depositor, the court in *Schitz v. Dieffenback*<sup>49</sup> reasoned that the deposit "[b]eing no more than a parol mortgage, (for it is only by parol that the meaning and object of such delivery is ascertained), it cannot now be made a question . . . that there can be no such thing as a valid efficacious parol mortgage. . . . a parol mortgage is contrary to the spirit of our legislation in the statute of frauds. . . ."

However, it would seem that if the deeds deposited with the creditor were not recorded, the same basis of fact would exist as did in England where no system of registry was available, and so the objection to the recognition of the doctrine in the United States becomes less forceful. The possession of the title deeds by the owner becomes once more "the badge of ownership." And it has been held, in such circumstances, that the reasoning of the English decisions would apply and control.<sup>50</sup>

Even in those jurisdictions which have expressly rejected the English doctrine, it has nevertheless been held that where a written agreement accompanies a deposit of title deeds, stating the purpose of the deposit to be security for the debt, it will be given effect as a mortgage in equity.<sup>51</sup> Similarly, it would seem, that although an enforceable equitable mortgage on the property does not result from the deposit of the title deeds, if in fact they were deposited as security for an obligation, the obligor could not recover them unless the obligation for which they were deposited is satisfied.

In a few jurisdictions, however, the English doctrine has been given recognition as a subsisting rule of equity jurisprudence and acted upon.<sup>52</sup> But the courts have applied more stringent safeguards to prevent ambiguity in construing the purpose of the deposit, by refusing to *presume* a deposit for security.<sup>53</sup> Likewise, it has been held that a debt or obligation must exist *at the time* the deeds are

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<sup>49</sup> 3 Pa. 233 (1846).

<sup>50</sup> *Jennings v. Augir*, 215 Fed. 658, 661 (W. D. Wash. 1914). "As long as the deed is unrecorded, and, without fraud on the part of the grantor, returned to him by the grantee—thus putting it in his power to destroy the same, and thereby greatly jeopardizing any evidence of rights thereunder, if not rendering it impossible for the grantee to establish his title . . . it appears clear that the reasoning upon which the English cases have been decided would apply and control." See also *Griffin v. Griffin*, 18 N. J. Eq. 104 (1866).

<sup>51</sup> *First Nat. Bank v. Caldwell*, 9 Fed. Cas. 81, No. 4,798 (C. C. D. Neb. 1876); *Higgins v. Manson*, 126 Cal. 467, 58 Pac. 907 (1899). *But cf.* *Gardner v. McClure*, 6 Gilf. 167 (Minn. 1861) (holding that a mortgage on real estate cannot be created by a deposit of title deeds, even though accompanied by a writing stating the object of the deposit).

<sup>52</sup> *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494 (1898); *Hackett v. Reynolds*, 4 R. I. 512 (1857); *Jarvis v. Dutcher*, 16 Wis. 326 (1862).

<sup>53</sup> *Cf.* *Mandeville v. Welch*, 5 Wheat. 277, 284 (U. S. 1820). "But in cases of this nature [deposit of title deeds], the doctrine proceeds upon the supposition, that the deposit is clearly established to have been made as security for the debt; and not upon the ground that the mere fact of a deposit unexplained affords such proof."

deposited as security, for, notwithstanding the depositor subsequently incurs an obligation to the depositee, the "equitable mortgage will not be created to take effect in the future."<sup>54</sup> Where the mortgage exists, its proper mode of foreclosure seems to be by suit in equity and a decree for the sale of the affected property,<sup>55</sup> as opposed to the ordinary English remedy of strict foreclosure, cutting off the equity of redemption.<sup>56</sup>

### *The Doctrine in New York*

New York has been listed by text writers and other authorities as one of the few jurisdictions in which the English doctrine of equitable mortgage by deposit of title deeds has been recognized and adopted,<sup>57</sup> although some New York courts, seemingly unimpressed, have been less forceful in declaring the extent of its recognition.<sup>58</sup>

The doctrine in New York was given an oblique introduction and a cursory disposition in the early Supreme Court case of *Jackson v. Dunlap*<sup>59</sup> decided shortly after its English birth in *Russel v. Russel*.<sup>60</sup> The suit was one at law for ejectment, both litigants claiming title from the decedent. The defendant had agreed to purchase the property in question from the decedent, and pursuant thereto a formal, fully executed, attested and acknowledged deed had been prepared, but withheld by the decedent until the consideration was fully paid. Although defendant had made some payments, the decedent in his will devised the property to the plaintiff. In granting judgment for the plaintiff, Chief Justice Lansing found it "not necessary . . . to enter into the doctrine of equitable mortgages," deciding that there had been no valid delivery of the deed to the defendant.<sup>61</sup> The opinion of the Chief Justice indicates by implication that, in a proper situation, the doctrine would be applied. As a mat-

<sup>54</sup> *Biebinger v. St. Louis Continental Bank*, 99 U. S. 143, 146 (1878) (the money must be loaned or the debt created "on the faith of the deposit of this deed").

<sup>55</sup> *Hackett v. Reynolds*, 4 R. I. 512 (1857); *Jarvis v. Dutcher*, 16 Wis. 326, 335 (1862). The equitable mortgage by deposit of title deeds is foreclosed ". . . by suit in equity to establish the lien, and for a sale in case the principal, interest and costs are not paid on a given day."

<sup>56</sup> See note 42 *supra*.

<sup>57</sup> 1 JONES, MORTGAGES § 252 (8th ed. 1928); 4 POMEROY, EQUITY JURISPRUDENCE § 1265 (5th ed. 1941); *Griffin v. Griffin*, 18 N. J. Eq. 104 (1866).

<sup>58</sup> In *Sleeth v. Sampson*, 237 N. Y. 69, 74, 142 N. E. 355, 357 (1923), Judge Cardozo stated: "To what extent, if at all, this form of equitable mortgage is permitted in New York, is involved in some obscurity."

<sup>59</sup> 1 Johns. 114 (N. Y. 1799).

<sup>60</sup> 1 Brown Ch. C. 269, 28 Eng. Rep. 1121 (1783).

<sup>61</sup> Generally, a deed is delivered and title passes when the parties intend that result. Chief Justice Lansing construed the intent of the parties to be that no estate was to pass to defendant until the full purchase price was paid. See 4 TIFFANY, REAL PROPERTY § 1034 *et seq.* (3d ed. 1939).

ter of fact, Justice Kent, in a dissenting opinion, considered the delivery complete, construing the intent of the parties to be that the deed ". . . should . . . be retained by the grantor by way of security, till payment," concluding that "[t]his was the creation of an equitable lien in the grantor; but such a lien or equitable mortgage cannot be set up at law, as a legal estate." A subsequent decision, involving, *inter alia*, similar facts, declared a redelivery of a deed by the grantee to the grantor by way of security amounted to "an equitable lien on the premises in the nature of a mortgage," citing *Jackson v. Dunlop* as sole authority.<sup>62</sup>

It was not until 1844, that the applicability of the doctrine was squarely presented to the New York Chancery court in *Rockwell & Hobby v. Hobby*.<sup>63</sup> The defendant's testator had advanced money to his mother to discharge a bond and mortgage and upon his death her unrecorded deed was found among his effects. The purpose of the deed's deposit with the decedent was involved in some obscurity, each litigant proposing conflicting reasons. The court, declaring that "[t]he only inference is, that the deed was deposited as security for the advance" decreed that an equitable mortgage had thereby been constituted upon the property encompassed in the deed. It is significant to note that the court relied entirely upon the original English cases<sup>64</sup> as precedent, adopting the doctrine therein promulgated with all its broad ramifications,<sup>65</sup> and without any indication or innuendo that the doctrine of equitable mortgage by deposit of title deeds was inconsistent with the New York registry laws or Statute of Frauds. If the impelling force behind this decision was the fact that the deed was unrecorded,<sup>66</sup> it was not apparent in the opinion. The doctrine seemed firmly entrenched in New York jurisprudence. A subsequent New Jersey decision,<sup>67</sup> applying New York law<sup>68</sup> to a

<sup>62</sup> *Jackson v. Parkhurst*, 4 Wend. 369, 376 (N. Y. 1830). The court also cites the case of *Jackson v. Phipps*, 12 Johns. 418 (N. Y. 1815), but this case deals solely with the question of the delivery necessary to effectuate a conveyance and does not concern the law of equitable mortgages.

<sup>63</sup> 2 Sand. Ch. 9 (N. Y. 1844).

<sup>64</sup> The court cites: *Ex parte Coming*, 9 Ves. Jr. 115, 32 Eng. Rep. 545 (1803); *Ex parte Wetherell*, 11 Ves. Jun. 398, 32 Eng. Rep. 1141 (1805); *Ex parte Langston*, 17 Ves. 230, 34 Eng. Rep. 88 (1810); *Ex parte Kensington*, 2 Ves. & B. 79, 35 Eng. Rep. 249 (1813).

<sup>65</sup> The court, relying on the English cases (*supra* note 64), stated that the mere deposit of title deeds, without more, creates an equitable mortgage. Moreover, if the deeds were deposited for the purpose of having a formal mortgage executed, the court stated, an equitable mortgage would attach immediately upon the deposit.

<sup>66</sup> As was previously noted, some American jurisdictions, though ostensibly critical of the doctrine's applicability in the United States, have nevertheless applied it where the deed deposited was unrecorded. See *Jennings v. Augir*, 215 Fed. 658, 661 (W. D. Wash. 1914).

<sup>67</sup> *Griffin v. Griffin*, 18 N. J. Eq. 104 (1866).

<sup>68</sup> The property affected by the deed was situated in New York, and pursuant to the doctrine of *lex loci rei sitae*, the law of New York was held ap-

situation substantially similar to that in the *Hobby* case, held the deposit of the title deeds with the creditor constituted an equitable mortgage.

In *Chase v. Peck*,<sup>69</sup> Justice Denio, perhaps to reaffirm the status of the doctrine in New York law, stated that "[t]he courts of equity in this state have adopted the general doctrines of the English chancery upon this subject [equitable mortgages], as upon many others. The cases of a mortgage created . . . by a deposit of title deeds, have not been frequent with us; but the doctrine has been applied in a few instances, and I do not find any judgment or *dictum* by which it has ever been questioned." For several decades, the doctrine continued to be the unquestioned law of the state, being indirectly reinforced in some instances by way of *dicta* wherever the Statute of Frauds was unsuccessfully interposed to bar an impressment of an equitable lien.<sup>70</sup> Seemingly, the doctrine of part performance was more liberally extended in connection with parol contracts to mortgage, than with parol contracts for the conveyance of land;<sup>71</sup> and the mere payment of money in reliance on an oral agreement to give a mortgage was considered sufficient part performance to prevent the operation of the statute.<sup>72</sup> But Justice Cardozo, in *Sleeth v. Sampson*,<sup>73</sup> attempted to curtail this apparent extension, and to unify the acts of part performance necessary to remove *any* parol agree-

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plicable. For cases involving the conflict of laws problem, see *Fall v. Estin*, 215 U. S. 1 (1909); *Clouse v. Clouse*, 185 Tenn. 666, 207 S. W. 2d 576 (1948).

<sup>69</sup> 21 N. Y. 581, 583, 584 (1860). This was the first expression by the Court of Appeals on the question of the doctrine's applicability, although the statement was merely *dictum*.

<sup>70</sup> In *Sprague v. Cochran*, 144 N. Y. 104, 113, 38 N. E. 1000, 1002 (1894), it was pointed out that "[t]he doctrine of equitable mortgages is not limited to written instruments intended as a mortgage . . . but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transactions or agreements as to land should be in writing in order to take them out of the operation of the Statute of Frauds for two reasons, first, because they are completely executed by at least one of the parties and are no longer executory, and, secondly, because the statute by its own terms does not affect the power which courts of equity have always exercised to compel specific performance of such agreements." See also *Smith v. Smith*, 125 N. Y. 224, 26 N. E. 259 (1891).

<sup>71</sup> The part performance necessary to take an oral contract for the conveyance of land out of the operation of the Statute of Frauds must be "un-equivocally referable" to the agreement to convey. *Burns v. McCormick*, 233 N. Y. 230, 135 N. E. 273 (1922).

<sup>72</sup> See note 70 *supra*.

<sup>73</sup> 237 N. Y. 69, 142 N. E. 355 (1923). The plaintiff, in this case, advanced money to defendant's decedent, relying on the latter's oral agreement to execute a formal mortgage on his property as security. Pursuant to the agreement the decedent had deposited with the plaintiff his deeds and an abstract of title saying: "You look these over, and see what you can do, and we will go down to the lawyer's in a few days and draw this up." Upon decedent's death shortly thereafter, plaintiff sued those succeeding to decedent's title to specifically enforce the oral agreement.

ment affecting real property from the operation of the statute,<sup>74</sup> explaining prior decisions on their respective facts,<sup>75</sup> and concluding that "payment without more does not obviate the necessity for a writing."<sup>76</sup> It was urged by the plaintiff in the *Sampson* case that the title deeds deposited with him by the debtor constituted a part performance of the latter's agreement to execute a mortgage, sufficient to sustain a decree of specific performance. The court, avoiding the issue, proceeded to cast a doubt on the applicability of the doctrine of equitable mortgage by deposit of title deeds stating, "[t]o what extent, if at all, this form of equitable mortgage is permitted in New York, is involved in some obscurity." Surprisingly, in support of this statement, the court cites the *Dunlap*, *Hobby* and *Peck* cases which have endeavored to dispel any doubt as to the acceptance of the doctrine.<sup>77</sup> Moreover, the court notes that "[e]ven in England . . . the deposit must have been made for the purpose of creating a present or immediate security, and not merely as a preliminary step to the preparation of a mortgage which will be security thereafter." But as the plaintiff was not seeking to impress an equitable lien on the property, relying on the deposit of the deeds, but seeking instead

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<sup>74</sup> *Id.* at 72, 142 N. E. at 357. "One who promises to make another the owner of a lien or charge upon land, promises to make him the owner of an interest in land, and this is the equivalent in effect to a promise to sell him such an interest."

<sup>75</sup> In *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000 (1894), a formal mortgage had actually been given, but the description of the property therein did not include the property agreed to be mortgaged, and in *Smith v. Smith*, 125 N. Y. 224, 26 N. E. 259 (1891), the lender went into possession of the property and made improvements thereon. But the difficulty with the attempted distinction is that in the *Cochran* case, the formal mortgage which was executed did not *misdescribe* the property to be affected, but actually *omitted* certain property which was orally agreed to be included as part of the security. As regards the omitted property, the agreement to give a mortgage thereon was purely oral, and the court held that the act of advancing money by the lender was sufficient part performance to relieve him from the bar of the statute. Also, the *Smith* case represents the unusual situation where the mortgagee is married to the mortgagor and makes improvements on the mortgaged premises.

<sup>76</sup> Professor Walsh, after a review of the applicable New York cases, expresses doubt as to the propriety of this statement in *Sleeth v. Sampson*, and concludes that it is "opposed to established law in England and most of the states in this country as well as in *New York*." (emphasis added). Walsh, *Equitable Mortgages*, 9 N. Y. U. L. Q. Rev. 429, 440 n. 30 (1932).

<sup>77</sup> The court also cites the case of *Stoddard v. Hart*, 23 N. Y. 556 (1861). The court in that case only recognizes that "[i]n this State the doctrine is almost unknown, because we have no practice of creating liens in this manner." But it continues to explain that "[i]f it be specifically agreed to execute a legal mortgage . . . [t]he deposit of title deeds is evidence of such an agreement." *Id.* at 561. Thus the court indicates that in a proper situation, the doctrine would apply in New York. In *Bowers v. Johnson*, 49 N. Y. 432 (1872), which Justice Cardozo also cites, the court did not express doubt as to the applicability of the doctrine, but merely concluded that the facts in the case did not warrant its application.

specific performance of the debtor's agreement to execute a mortgage, the expressions of the court relative to the doctrine of equitable mortgage by deposit of title deeds was clearly *dictum*. The real issue, to wit, whether a deposit of title deeds is sufficient part performance of a proven oral agreement to execute a mortgage, so as to prevent the operation of the Statute of Frauds, was left unanswered. The issue was now "involved in some obscurity" where none had existed before.

The problem was raised again in the comparatively recent case of *Lee v. Beagell*.<sup>78</sup> There the plaintiff-grantee of certain real estate had redeposited his unrecorded deed with the grantor as security for a loan. Upon the failure to repay the loan, the grantor conveyed the property to the defendant with the same agreement as to repayment by the plaintiff. The plaintiff having failed to pay within the specified time, the defendant recorded his deed.<sup>79</sup> Although allowing the plaintiff to redeem the property, the court reflected the obscurity involved in the recognition afforded the doctrine of equitable mortgage by deposit of title deeds in New York,<sup>80</sup> though significantly failing to cite the *Sampson* case among the cases relied upon as binding. It would seem, therefore, that notwithstanding the ambiguous decision in the *Sampson* case, the doctrine will apply in New York wherever the situation presents itself.

### *Conclusion*

The obviously conflicting bases of fact with reference to land recordation existing in England and the United States<sup>81</sup> reasonably accounts for the disparity of emphasis placed by each on the doctrine of equitable mortgage by deposit of title deeds. However, a common ground of reconciliation may be suggested. It cannot be questioned that a deposit of title deeds as security for a debt has *some* meaning. It is not an empty gesture, and should create some rights, legal and equitable, even without an accompanying written agreement. It does, at the very least, constitute a pledge of the *deeds themselves*, valid between the parties to the pledge, preventing the depositor from re-

<sup>78</sup> 174 Misc. 6, 19 N. Y. S. 2d 613 (Sup. Ct. 1940).

<sup>79</sup> Under the Recording Act in New York, the equitable lien created by a deposit of title deeds can be effectively cut off by a sale of the premises to a bona fide purchaser, without notice, and who records his deed. N. Y. REAL PROP. LAW § 291. See *Griffin v. Griffin*, 18 N. J. Eq. 104, 107 (1866).

<sup>80</sup> *Lee v. Beagell*, 174 Misc. 6, 8, 19 N. Y. S. 2d 613, 616 (Sup. Ct. 1940). "Although the creation of equitable mortgages by the deposit of title deeds has not been recognized in this State to the extent that it is in England, nevertheless, the courts have not hesitated to utilize this method of attaining justice when the equities so require."

<sup>81</sup> 4 POMEROY, EQUITY JURISPRUDENCE § 1264 n. 13 (5th ed. 1941); Walsh, *Equitable Mortgages*, 9 N. Y. U. L. Q. REV. 429, 437 (1932). Cf. *In re Snyder*, 138 Iowa 553, 556, 114 N. W. 615 (1908).

covering them at law or in equity until the debt for which they were deposited has been discharged.<sup>82</sup> It would be consonant with the evident intention of the parties if the mere pledge of the deeds without further express agreement were considered in equity a lien on the property encompassed therein, enforceable as between the parties, against the property of the debtor. To this extent the deposit may be effectuated in any jurisdiction and would be in complete harmony with our established system of recordation and conveyancing. Also, it should be noted that the English decisions creating the doctrine assumed a mere deposit of title deeds without *any* agreement and *implied* an agreement to give a mortgage, thereby creating the equitable lien. But, if a writing accompanies the deposit stipulating that it was made by way of security, and intended to create a charge on the property, then, under the established principles of equity prevailing throughout the United States, the writing itself would constitute an equitable mortgage.<sup>83</sup> It has never been suggested that such a transaction conflicts with our system of land registry, and, it is submitted, such a transaction is substantially the same as the simple deposit from which the implied intent to give a mortgage was deduced. To this extent, therefore, the original English doctrine may be held to be applicable in our jurisdictions.

It is only where the rights of third parties intervene, that the efficacy of the doctrine diminishes in the United States. An equitable lien created by the deposit of title deeds should not be permitted to operate against subsequent grantees or incumbrancers, even with actual notice of the deposit, for under our system of registry, where the record of a deed furnishes the only reliable evidence of title, no presumption or inference should arise from the mere possession of the deeds by a stranger. It is therefore submitted, that unless the rights of third parties intervene, the doctrine of equitable mortgage by deposit of title deeds can be effectively applied as between the parties to the deposit, without conflicting with the established system of title recordation.

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<sup>82</sup> See note 8 *supra*.

<sup>83</sup> *Jennings v. Augir*, 215 Fed. 658 (W. D. Wash. 1914); *Higgins v. Manson*, 126 Cal. 467, 58 Pac. 907 (1899); *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823 (1893).