

# The Validity of a Mortgage Created as a Gift

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ness, and pure hearsay, in which case the record is based on information received from one disconnected from the business, it is obvious that the decision in *Johnson v. Lutz*<sup>15</sup> represents an interpretation warranted by the terms of the statute and the underlying theory of circumstantial trustworthiness. It is submitted that, by limiting the provision that "the lack of personal knowledge by entrant or maker will not affect admissibility," with the requirement that "the entry must be made by one in the regular course of his business," the Court has in effect decreed that *personal knowledge must exist at the source of the transaction by one in the regular course of his business*, regardless of hearsay in the regular course of business at any other stage.<sup>16</sup>

While such a requirement will apply as well to a complicated system of entries, it is more obvious, due to the simplified procedure, in the case of a casual entry represented by a police blotter. Practically applied, it will simply be necessary to show the usual custom by which an entry was received, without producing the various persons who contributed to the making of it; and then, in order to show that it was not received in the regular course of business, it will be necessary for the objecting party to prove that the entry sought to be admitted was founded on pure hearsay, as distinguished from hearsay in the regular course of business.

DOROTHY SLAYTON.

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## THE VALIDITY OF A MORTGAGE CREATED AS A GIFT.

### I

"There is perhaps no species of ownership known to law which is more complex or which has given rise to more diversity of opinions and even conflict in decisions than which sprung from the mortgage of Real Property."<sup>1</sup> Thus when we consider our problem, which involves but one phase of a single planet in the great universe of mortgage law, it becomes less strange, more feasible and even to be expected that it too should have become part of the chaos. Our inquiry is: Can one create a mortgage by way of gift in New York today? The aspect we shall consider is the situation as between the mortgagor and mortgagee. Enlightenment will best be attained by tracing the history of the mortgage instrument, which in itself has

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<sup>15</sup> *Supra* Note 2.

<sup>16</sup> See opinion by Mr. Justice Byrne in *Kane v. City of New York* (Spec. Tr. Kings Co., N. Y. L. J., April 4, 1930).

<sup>1</sup> *Barrett v. Hinkly*, 124 Ill. 32, 14 N. E. 863 (1883).

developed under exceedingly varied circumstances. The problem suggests three subdivisions:

Is it essential to the existence of a binding mortgage that it be created as a security?

Is a mortgage in itself a grant?

Does a mortgage require consideration?

The first intimation of a mortgage apparently is in the Hebrew Law,<sup>2</sup> under which land could be alienated to secure a debt until the termination of the next jubilee, which occurred at the end of every fifty years, but the original owner was allowed to redeem before the jubilee on payment of a certain sum.<sup>3</sup>

It is suggested by Thomas that the Romans borrowed the idea of mortgage from the Hebrews.<sup>4</sup> The *fiducia* was the first attempt at a mortgage in Rome. The borrower (mortgagor) executed an actual conveyance of property to the lender (mortgagee) upon an agreement known as a *fiducia*, stating that if the loan was paid at the time specified that lender would reconvey the property to the borrower. The lender thus was in a position to sell at any time leaving the borrower only a personal action against him. This was realized as unsatisfactory and led to the next form of mortgage known to the Romans, the *pignus*. By this instrument, title remained in the debtor (mortgagor) and so if the creditor (mortgagee) endeavored to sell the property, the debtor having retained title could recover it from the vendee.

The result of the final development of the Roman mortgage was the most perfect of all the preceding undertakings, insofar as it portrayed and effectuated the true intent of the parties. This was called the *hypotheca*. No title passed to the creditor (mortgagee) and on default no forfeiture took place but the latter had the right to sell the property, retain the sum of the debt and his expenses and return the surplus to the debtor (mortgagor).<sup>5</sup> In this form of instrument, it is contended, is the origin of the English notion of the equitable theory of the mortgage.

Mortgages were next known among the Anglo-Saxons in England. After the Norman Conquest feudalism prevailed; free alienation of property was suspended and thus the mortgage instrument was temporarily out of use. However, when, during the reign of Edward the First, the statute *Quia Emptores Terrarum* was passed, unrestrained disposition of land again was common and with the restriction which impeded the conveyance of land removed, mortgages again came into general use.<sup>6</sup>

<sup>2</sup> Thomas, *Mortgages* (3rd Ed. 1914), Sec. 1.

<sup>3</sup> *Ibid.* citing Neb. 5, 1-7.

<sup>4</sup> *Ibid.* Sec. 2.

<sup>5</sup> Burdick, *Real Property* (1914), Sec. 183.

<sup>6</sup> *Supra* Note 2, Sec. 3; Burdick, *supra* Note 5.

Under the early English law two kinds of land securities were recognized:

1. *Vivum vadium*, meaning live pledge: Here the rents and profits of the land were received by the mortgagee in possession and applied to the reduction of the debt and so the pledge redeemed itself.

2. *Mortuum vadium*, meaning dead pledge: In this case the rents and profits were kept by the mortgagee in possession and not applied towards the payment of the debt.

Both of the above were determinable or base fees with the right of reverter in the feoffor (mortgagor) upon the performance of the condition. In the *vivum vadium* the feoffor (mortgagor) could always redeem, even after default; in the *mortuum vadium* title and all interest in the estate became vested in the feoffee (mortgagee) if the condition was not punctually performed.<sup>7</sup>

*Vivum vadium* never went into general use and there is no trace of the date of its complete disappearance.<sup>8</sup> *Mortuum vadium* is the source from which the modern mortgage emerged. Littleton claimed the reason for the application of the term *mortuum vadium* to this mortgage instrument was because it was doubtful whether the feoffor (mortgagor) would pay on the day limited, and if he should not pay, the land which was put in pledge on condition for payment of the money, was taken from him forever and so dead to him. Granville's theory is that an earlier form of the same security existed by which rents were received by the creditor in lieu of his interest, the land thus becoming for a time dead to the debtor.<sup>9</sup>

The common law mortgage in England was a feoffment subject to a condition that on payment by the feoffor (mortgagor) of a named sum at a certain time he might re-enter, thereby terminating the feoffee's (mortgagee's) fee.<sup>10</sup> Rigid performance of the condition of the common law mortgage was demanded by the courts of law, who refused to consider that the conveyance was intended merely as security for a debt and they treated the estate of the mortgagee as indefeasible if the condition was not promptly complied with by the mortgagor. Since the estate was usually much greater than the debt this resulted in a very harsh practice. But the common law courts were acquainted with no other means or manner of regarding debtors than to make them live up to their bargains, however unfair they might be.<sup>11</sup> Courts of Chancery, influenced by the Roman Law,

<sup>7</sup> Burdick, *supra* Note 5; Thomas, *supra* Note 2, Sec. 4.

<sup>8</sup> *Supra* Note 2, Sec. 4.

<sup>9</sup> *Ibid.* Sec. 6 (According to Thomas, Littleton believed in strict compliance and forfeiture; he was followed by Blackstone. Granville's theory was endorsed by Coote and Williams).

<sup>10</sup> 3 Tiffany, *Real Property* (2nd Ed. 1920), Sec. 599.

<sup>11</sup> *Ibid.*, citing Kent's Com. 140; also *supra* Note 2, Sec. 6.

tempered the severity with which the common law courts enforced the breach of condition. Thomas states that they accomplished their end, "not by declaring that the force of the conveyance after forfeiture and before foreclosure ceases on the payment of the debt for which it was given to secure, but they merely allowed forfeiture to take place and then acting *in personam* declared it unreasonable for the creditor to retain permanently what was intended as a mere pledge."<sup>12</sup> The equity of redemption was incident to this remedy. If, however, the mortgagor did not redeem and the mortgagee sold the property, Chancery would no doubt allow the mortgagee to retain what was due him and force him to return the balance to the mortgagor. In result, it was not unlike the Roman *hypotheca*.

Later, Chancery, regarding the real purpose of the transaction, adopted the view that the mortgagor in spite of his conveyance by way of mortgage still remained owner of the property with all the rights of an owner so far as consistent with the security of the mortgagee, and that the mortgagee had for most purposes merely a lien or charge on the land to secure his debt.<sup>13</sup> Though title still passed to the mortgagee, inasmuch as the legal rights of the mortgagee could only be used to enforce payment of the debt which the mortgage secured, the mortgagee could not be regarded as the owner of the estate, and courts of law later realized that such is not the true condition. Chancellor Kent speaks of this step thus: "One of the most splendid instances of our jurisprudence is the triumph of equitable principles over technical rules and the homage which these principles have received by their adoption in courts of law."<sup>14</sup>

Preceding the colonization of this country in 1600 it was still understood in England that a mortgage of any kind vested the fee in the mortgagee. And when the English settled here, they brought with them this common law aspect of the mortgage which existed in England.<sup>15</sup> It was not until after the Revolution that the question of the effect of the mortgage instrument appears to have been raised directly; about that time efforts were made to enforce the mortgage in Massachusetts and Trowbridge, *J.*, decided the question in his "Pleading."<sup>16</sup> There he stated that the mortgagee was the legal owner of the fee while the mortgagor had an equitable estate only, so that the mortgagee could get possession even before breach of condition unless the right was expressly reserved in the mortgagor. This purported to give an estate to the mortgagee rather than a lien.

However, in New York we find a different situation. "It has long been settled," Tiffany states, "both at law and equity in New York that the mortgagor remains the owner of the fee and the mortgage is a mere security."<sup>17</sup> Many of the states of the Union have

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<sup>12</sup> *Supra* Note 2, Sec. 8.

<sup>13</sup> *Supra* Note 10, Sec. 600.

<sup>14</sup> 4 Kent's Com. 158.

<sup>15</sup> Union National Bank of Col. v. Cook, 110 S. C. 99, 96 S. E. 485 (1918).

<sup>16</sup> *Supra* Note 2, Sec. 23, citing Trowbridge's Pleading, 2 Mass. 551.

<sup>17</sup> Tiffany, Treatise on Real Property, Sec. 507 (1912).

adopted the lien theory of the mortgage now prevalent in New York,<sup>18</sup> either by means of express statutes declaring a mortgage to be a security or by a series of decisions or both.<sup>19</sup> But even the states which adopted the theory that title passes to the mortgagee, now regard the title merely as an additional right whereby he may secure his debt.<sup>20</sup>

Today, to constitute a mortgage, only two things appear to be necessary: that there be a grant, and that the grant be given to secure the performance of an obligation or a valid claim.<sup>21</sup> "No conveyance can be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of a duty, either existing at the time the conveyance is made or to be created or to arise in the future."<sup>22</sup> The answer to the first question, "Is it essential to the existence of a binding mortgage that it be created as a security?" seems necessarily to be in the affirmative.

<sup>18</sup> *Supra* Note 16, citing *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133 (1892); *Power v. Lester*, 23 N. Y. 527 (1861); *Kortright v. Cady*, 21 N. Y. 343 (1860); *Runyon v. Mersereau*, 11 Johns. 534 (1814), Revised Statutes 1828 (1st Ed. R. S. N. Y.), Vol. I, Sec. 2 (Different sets of books shall be kept for recording deeds and mortgages; in one of which sets all conveyances absolute in terms and not intended as mortgages shall be recorded and in the other such mortgages and securities shall be recorded), Vol. II, Sec. 57 (provides that no action in ejectment shall hereafter be maintained for recovery of mortgaged property by the mortgagee); Sec. 139 [now Sec. 249 R. P. L.] (No mortgage shall be considered as implying a covenant for the payment of the sum intended to be secured and where there shall be no express covenant for such payment, contained in the mortgage and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned).

*Murray v. Walker*, 31 N. Y. 399 (1860) (held that legal title is in the mortgagee, but in equity the mortgagor remains the owner until foreclosure); *Trim v. Marsh*, 54 N. Y. 599 (1874) (legal title and possession both remain in the mortgagor until foreclosure).

*Tiffany*, *supra* Note 17. In New York, the view that the mortgagee has legal title is entirely superseded at law and in equity by the view which always prevailed in equity, that the mortgagee has merely a lien for security of his debt.

<sup>19</sup> Lien Theory: California, C. P. A., Sec. 260 (declares that a mortgage is to be regarded as a lien for the purpose of security and not as a conveyance on a condition subsequent); Nevada also has a statute to the same effect, passed in 1896; *Cawley v. Kelly*, 60 Wisc. 315, 19 N. W. 65 (1884); *Devlin v. Quigg*, 44 Minn. 534, 47 N. W. 258 (1890); *Gassert v. Borgk*, 7 Mont. 585, 19 Pac. 281 (1888); South Carolina by statute (1791).

<sup>20</sup> Legal Title Theory: *Wilkins v. French*, 20 Me. 111 (1841); *Mitchell v. Burnheim*, 44 Me. 286, Ludden 2 (1857); *Tyler v. Wright*, 122 Me. 558, 119 Atl. 583 (1923); *Glass v. Ellison*, 9 N. H. 69 (1837); *Bethlehem v. Annis*, 40 N. H. 34 (1860); *Hall v. Byrne*, 2 Ill. 140 (1834); *Erskine v. Townsend*, 2 Mass. 493, L. R. A. 1916 B (1807); *Norcross v. Norcross*, 105 Mass. 265 (1870).

<sup>21</sup> *Burnett v. Wright*, 135 N. Y. 543, 32 N. E. 253 (1892); *Gassert v. Borgk*, 7 Mont. 585, 19 Pac. 281 (1888).

<sup>22</sup> 1 Jones, Sec. 16, citing *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375 (1892).

## II

Is a mortgage in itself a grant? Tiffany states that a legal mortgage even when regarded merely as a lien is not an executory contract since it does not in itself involve any personal obligation.<sup>23</sup> That a mortgage is an executed instrument seems to be the correct view. Ownership is defined as the right by which a thing belongs to some one in particular to the exclusion of all others.<sup>24</sup> But it may be complete (perfect) or incomplete (imperfect). It is complete (perfect) when the thing owned is unencumbered with any real right toward any person other than the owner. It is incomplete (imperfect) when the thing is charged with a real right in a third person. Applying ownership thus classified to the mortgage instrument we find a creation of rights in the mortgagee (regardless of whether he received title or merely a lien to secure his debt) and that the mortgagor's ownership has become incomplete (imperfect) because encumbered by real rights in a third party. The mortgagee has in effect a present right to protect himself against the possible non-performance of the condition of non-payment of the obligation which the instrument is intended to secure. This right is assignable, conveyable and devisable. Thus when a mortgage is executed to a mortgagee he is endowed with a grant of rights in real property. Arguing from the conclusion that an antecedent debt is sufficient consideration to support a mortgage what peculiar position would we be in if we also declared that a mortgage is executory in nature?

## III

Is consideration necessary to the validity of the mortgage itself? It is most important, that in considering this question, we distinguish the mortgage instrument itself from the obligations which it secures, for at the moment we are referring to the former only. The topic of consideration was never introduced in the Roman form of mortgage for the reason that consideration was never required to support any contract or other instrument, either under the Ancient Roman Law or under the Civil Law,<sup>25</sup> motive, or the presence of an inducing cause to the promisor being all that was required. Regarding the mortgage from a purely common-law view as a conveyance on a condition subsequent, such conveyance is perfectly valid without consideration, as would be an absolute deed. Contemplating the mortgage from the equitable point of view, as a grant of a security for the performance of an obligation there is no apparent reason for the introduction of the doctrine of consideration, for a grant is an executed instrument and consideration is applicable only to executory contracts.<sup>26</sup> That,

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<sup>23</sup> *Supra* Note 10, Sec. 606.

<sup>24</sup> Black's Law Dictionary (2nd Ed.), 866.

<sup>25</sup> 1 Williston on Contracts, 230, Sec. 111.

<sup>26</sup> *Supra* Note 23.

consideration is not necessary to the validity of a mortgage itself would seem evident from the fact that a mortgage is valid though given to secure the payment of a pre-existing debt,<sup>27</sup> or to secure advances which the mortgagee may voluntarily make in the future.<sup>28</sup>

Confusion relative to the necessity for consideration in a mortgage arises, no doubt, from a failure to distinguish between the thing (debt or obligation) secured and the term consideration. "The idea that consideration is the price requested and received by the promisor for the promise is the generally accepted one at present time."<sup>29</sup> Also it has been defined as a detriment incurred by the promisee or a benefit received by the promisor for his promise.<sup>30</sup> If the consideration is an act done before the contract is made, it is really by itself no consideration for a new contract. A past indebtedness is undoubtedly a past consideration and therefore cannot be regarded as consideration within the meaning of the term.<sup>31</sup> It cannot be said that anything is being parted with by the mortgagee or that any benefit is being conferred upon the mortgagor, when a mortgage is executed to secure an antecedent debt. When the courts state that past indebtedness is sufficient consideration to support a mortgage, what they really mean is that it is sufficient that a debt is in existence for the mortgage to secure.

Though consideration is not necessary to the validity of the mortgage itself, the question whether the obligation secured is supported by consideration is material, "since a mortgage is in the view at least of a court of equity a nullity except insofar as it secures a valid claim or obligation."<sup>32</sup> And if the mortgage secures a contractual obligation which is not under seal the obligation must be supported by consideration. A seal is merely presumptive evidence of consideration for an executory contract in New York and since the presumption may be rebutted the seal itself can hardly be considered as sufficient consideration for the obligation.<sup>33</sup> It has been held that a mortgage was invalid, not because it was not supported by consideration, but because the obligation it secured was not so supported.<sup>34</sup> By statute in this state,<sup>35</sup> no covenant of personal obligation is necessary to the validity of a mortgage and where it is lacking

<sup>27</sup> *Lehrenkrauss v. Bonnell*, 199 N. Y. 240, 92 N. E. 637 (1910); *DeLancey v. Stearns*, 66 N. Y. 157 (1876).

<sup>28</sup> *Rice v. Groves*, 70 Hun 74, 25 N. Y. Supp. 36 (1893); *Bank v. Kemp*, 21 Cal. App. 571, 132 Pac 617 (1913).

<sup>29</sup> *Supra* Note 25 at 193, Sec. 100.

<sup>30</sup> *Supra* Note 24, citing Anson, Contracts, Sec. 2.

<sup>31</sup> *Supra* Note 29.

<sup>32</sup> *Tyler v. Wright*, 122 Me. 558, 119 Atl. 583 (1923).

<sup>33</sup> N. Y. C. P. A. 342.

<sup>34</sup> *Chesser v. Chesser*, 67 Fla. 16, 64 So. 357 (1914); *Anderson v. Lee*, 73 Minn. 384, 76 N. W. 24 (1898); *Saunders v. Dunn*, 175 Mass. 104, 55 N. E. 893 (1900).

<sup>35</sup> N. Y. R. P. L. 249.

the debt is enforceable against the land, and this does not obviate the necessity for a debt or thing to be secured. It is submitted that the term "personal liability" would have been less misleading than the term "personal obligation" used in the statute.

Tiffany contends that even apart from the necessity of consideration for the personal obligation secured, it is settled that a mortgage purporting to secure the payment of money will be enforced only to the extent of the sum equitably due without reference to amount named in the mortgage instrument or bond or note accompanying it.<sup>36</sup> From this statement it appears that upon foreclosure equity would insist upon knowing precisely how much the mortgagor owes the mortgagee and if it should be found that there was no debt how could equity grant foreclosure to pay a debt which did not exist?

#### IV

Finally we are in a position to treat the principal problem directly, "Can one create a binding mortgage by way of gift?" In Tiffany's Treatise published in 1912<sup>37</sup> it is stated that, except as against creditors who may be defrauded thereby, a mortgage securing in terms the payment of a sum of money is valid though the mortgagor received no part of such sum or any other consideration for making the mortgage; the owner of the land having the same right to make a present of a mortgage on land as to give the land itself and that it would be enforced according to its terms. We will touch the cases he cited to substantiate his statement and also a few additional cases declaring that a mortgage may be given as a gift and then refer to the same author's view on this point taken from a writing of a later date.

In *Calhoun v. Calhoun*<sup>38</sup> land was conveyed to defendant by his parents. He then executed a mortgage to them, one of whom is the plaintiff, to secure the provisions assuring their support for their respective lives. The Court said: "It is immaterial whether the defendant assumed such obligation wholly in payment for the land conveyed to him, or partly in payment of the conveyance and partly for love and affection—either or both would be sufficient." It is clear that there was consideration for the obligation which the mortgage was given to secure in this case. Nevertheless this case is freely cited as one which has held that love and affection is sufficient to support a mortgage.

In *Gates v. Seagraves*<sup>39</sup> "A" deeded property to her daughter, expressing her wish to reserve a benefit to her husband. In consideration of the conveyance the daughter executed a mortgage to her

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<sup>36</sup> *Supra* Note 23.

<sup>37</sup> *Supra* Note 17, Sec. 513.

<sup>38</sup> 49 App. Div. 520, 63 N. Y. Supp. 601 (1900); *Bachmeier v. Bachmeier*, 69 Minn. 472, 72 N. W. 710 (1897).

<sup>39</sup> 56 Ind. App. 486, 105 N. E. 594 (1907).

father according to "A's" request. It is apparent that the mortgage was not voluntary.

In *Bucklin v. Bucklin*<sup>40</sup> to compromise a controversy between husband and wife and to stay prosecution of a suit instituted by the latter for legal separation, the former promised to buy property and grant it to wife and child and to secure such promise, executed a mortgage for their benefit. It is obvious that since the action was stayed there was consideration for the promise to convey, therefore the mortgage secured a valid promise and Judge Denio's language to the effect that a mortgage may be given as a gift is *dicta*.

*Brigham v. Brown*<sup>41</sup> states by way of *dictum* the following: "A man may give a voluntary mortgage if he chooses and it is fraudulent only as to those who are or would be defrauded thereby." In this case Justice Cooley cites *Gale v. Gould*<sup>42</sup> as authority, which holds merely that a deed may be given by way of gift.

In *Campbell v. Tompkins*<sup>43</sup> it is stated also as *dicta* that "It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise absolute control of the owner over his property is taken away for he would not be permitted to give it away in his life-time by deed. A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it, though it was intended merely as a gift; and when executed and delivered it is as valid as if it were based on a full consideration and is not open to the objection that it is a voluntary executory agreement but may be enforced according to its terms as an executed conditional transfer of the real estate mortgaged." No doubt the Court had in mind a situation where a third party challenged the validity of the mortgage which third party was unable to show that he was defrauded by the execution of said mortgage. If, on the other hand, the situation as between the mortgagor and mortgagee was contemplated then it is agreed that the mortgagor could not resist enforcement of the mortgage by saying "it is a voluntary executory agreement" and therefore the mortgage is effective: but he could probably be sustained on the defense that there was nothing to secure (or that the thing secured was without consideration) and therefore there could be no binding mortgage.

*Perkins v. Trinity*<sup>44</sup> has gone further by way of *dicta* than all the preceding cases to say that a mortgage may be given by way of gift. The Court, in effect, repeats what has above been stated in *Campbell v. Tompkins*<sup>45</sup> and then proceeds with this declaration: "The mortgage itself is an executed conveyance, defeasible on the carrying out of an executory contract. This executory contract is

<sup>40</sup> 1 Abb. App. Cases 242 (1864).

<sup>41</sup> 44 Mich. 59, 6 N. W. 97 (1880).

<sup>42</sup> 40 Mich. 515 (1879) (also cited by Jones).

<sup>43</sup> 32 N. J. Eq. 170 (1880).

<sup>44</sup> 69 N. J. Eq. 723, 61 Atl. 167 (1905).

<sup>45</sup> *Supra* Note 43.

subject to all the laws applicable to contracts and must, of course, be supported by consideration. That consideration need not move to the mortgagor and the debt to secure which the mortgage is given may be the debt of another person. But this does not militate against the necessity of finding in each instance (excepting where the question is one of gift) that there was an executory contract on consideration to secure which the executed defeasible conveyance was made." The meaning of the Court is not at all clear. If it was meant that a mortgage, if given as a gift, would not necessarily have to secure anything, it is not plain how it could be created. One of the elements of a mortgage being that the conveyance be given to secure a valid obligation, it is apparent that if we omit the thing secured we will be omitting one of the essentials of the mortgage instrument. If he intended that the existence of the thing secured or its validity would not be open to question in the case of a gift, he would be declaring the mortgage given as a gift an exception.

Tiffany<sup>46</sup> in his work on Real Property, written in 1920, eight years after his treatise mentioned above, speaks thus on the issue of a mortgage by way of gift: "Occasional decisions (citing the Campbell and Brigham cases) to the effect that one may make a gift by executing a mortgage in favor of a donee for a named amount, is open to serious question, except insofar, at least, as a personal obligation under seal for that amount is also given. There is in such case merely a mortgage purporting to secure a debt which debt doesn't exist \* \* \*. According to common law standards it would seem that a sealed obligation to the obligee would be valid in which case a mortgage securing such obligation would also be valid and effective." He states further that a mortgage is valid only *if* it secures a valid claim or obligation but that there need be no personal liability on the part of the mortgagor.<sup>47</sup> In *Tyler v. Wright*<sup>48</sup> it was said: "Since a conveyance cannot be a mortgage unless given to secure the performance of an obligation, the existence of an obligation to be secured is an essential element, without which the mortgage is but a shadow without the substance."

If we concede that in itself a mortgage does not require consideration, and also that it is in itself a grant, the logical conclusion would seem to be that it may be created by way of gift. Yet the grant is one given as security. The inquiry follows what may this grant secure, so that it may be enforced as a mortgage in New York? "It is not every conveyance of land on condition which is in equity

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<sup>46</sup> *Supra* Note 10, Sec. 607.

<sup>47</sup> *Mooney v. Byrne*, 163 N. Y. 86, 57 N. E. 103 (1900); *Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222 (1895); *Hill v. Hoole*, 116 N. Y. 299, 22 N. E. 547 (1889); *Tyler v. Wright*, *supra* Note 32 (where it was held, as in *Baird v. Baird* and *Hill v. Hoole*, that since no obligation existed to be secured, no mortgage could exist). But in all of these cases it was also found that no intention to create a mortgage existed.

<sup>48</sup> *Supra* Note 32.

regarded as a mortgage. Early definitions of mortgages are found where no other conditional conveyances are regarded as mortgages but such as are made for the security of a loan of money. At another date we find equitable doctrines as to mortgages extended to all cases where the conveyance is security for any debt; and the most modern notion is to apply the same doctrines to cases generally where conditional deeds are made as a security for the performance of a contract. But on consideration it will be seen that this principle though generally true can have no application to any other contract than such as by the non-performance create a debt, or a demand in the nature of a debt against the delinquent party."<sup>49</sup> Although the contractual obligation must exist or the debt must be present, the personal liability (as evidenced by a covenant, bond, note, etc.) under either, which personal liability gives the one who seeks to enforce the obligation the power to do so (as against the person) may be lacking. Should said personal liability be absent or become ineffectual because of some statute, the contractual obligation would not also vanish, but on the contrary persist; merely the remedy against the person would cease.

Under the New York statute<sup>50</sup> if the personal liability on the obligation is not present, none shall be implied but the debt or obligation which the mortgage was given to secure shall be enforceable against the land only. The distinction between the personal liability under the obligation and the obligation itself must be kept in mind. We are permitted by statute to dispense with the former, but not with the latter.

Under the Roman law, creating the mortgage as a gift never became an issue, for the obligation did not require consideration and still does not under the civil law.

Under the common law, a mortgage not being recognized as a security, but considered as a conveyance on condition subsequent, there was no need to look for a valid obligation to be secured.

But under the law as it exists in New York today, where the mortgage is regarded as security and must secure a valid claim or obligation the obligation, being governed by the law of contracts, must have a valuable present consideration to support it. The final deduction, therefore, seems to be that a binding mortgage could not be created as a gift.

In *Baird v. Baird, Hill v. Hoole and Tyler v. Wright*,<sup>51</sup> in which it was held that no mortgage existed because there was no debt or obligation to be secured, there was also an additional circumstance present, namely, no intent to create a valid mortgage. What will the courts say if the intent of the mortgagor and mortgagee to create a binding mortgage is clear. Will Equity disregard the necessity for an obligation and consider it more equitable to enforce the

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<sup>49</sup> *Bethlehem v. Annis*, 40 N. H. 34 (1860).

<sup>50</sup> N. Y. R. P. L., Sec. 249.

<sup>51</sup> *Supra* Note 47.

instrument according to its tenor? If the parties clearly state their intent to execute a mortgage to secure the performance of an obligation, contemplated and understood by both parties to be a gift, it would seem just to enforce it. If the mortgagee in such case had surrendered a peppercorn at the request of the mortgagor we do not doubt that it would be enforceable, yet if their intent is very apparent but the peppercorn is not surrendered, it is very uncertain whether it would be enforceable against the mortgagor. Specific intention, heretofore apparently not a controlling factor in arriving at the decision, may at some future time be the basis for a different result.

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