



1947

# A Mortgage as a Gift

William O. Gilbreath  
*University of Kentucky*

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## Recommended Citation

Gilbreath, William O. (1947) "A Mortgage as a Gift," *Kentucky Law Journal*: Vol. 36 : Iss. 1 , Article 11.  
Available at: <https://uknowledge.uky.edu/klj/vol36/iss1/11>

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# STUDENT NOTES AND COMMENTS

## A MORTGAGE AS A GIFT THE PROBLEM IN GENERAL

The question as to whether a mortgage may be the subject of a valid gift presents many problems. The first of these is whether the gift is good if the mortgage is an undertaking of a third person, not the donor himself. On the other hand, if the donor is also the mortgagor, is the mortgage good? Is the result different in the so-called title states from that reached in the states holding a mortgage to be a mere lien? In determining the validity of a mortgage as a gift all of these questions should be considered.

### GIFT OF MORTGAGE WHERE THE DONOR IS NOT THE MORTGAGOR.

It appears to be well settled that a gift of a mortgage, where the donor is not the mortgagor, is valid. Pomeroy in his *Equity Jurisprudence* states:

“Whatever doubt may have once been entertained, the rule is now well established that all things in action which consists [sic] of the promises or undertakings of third persons, not the donor himself, of which the legal or equitable title can pass by delivery, may be the subject of a valid gift, including \* \* \* mortgages  
\* \* \* ”<sup>1</sup>

### GIFT OF MORTGAGE BY MORTGAGOR-DONOR AT THE COMMON LAW AND IN THE SO-CALLED “TITLE-STATES.”

At common law a mortgage of real property was defined as an estate created by a conveyance of the property, absolute in its form, but which was intended to secure the performance of some act by the mortgagor, and was to be void if the act was performed agreeably to the terms prescribed at the time of making the conveyance.<sup>2</sup> In other words, the mortgage created an estate in the mortgagee which was defeasible upon the performance by the mortgagor of a condition subsequent. Looking at the problem from the common law point of view, a mortgage on real estate by way of a gift is just as effective as a conveyance not on a condition.<sup>3</sup> In *Campbell v. Tompkins* the court said:

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<sup>1</sup> 4 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) sec. 1148.

<sup>2</sup> BLACKSTONE COMM. (5th ed. 1820) 157.

<sup>3</sup> 3 TIFFANY, REAL PROPERTY (2d ed. 1920) sec. 606; see, *Brooks v. Dalrymple*, 94 Mass. (12 Allen) 102 at 194 (1866) *Bucklin v. Bucklin* 40 N. Y. (1 Keyes) 141, 1 Abb. App. sec. 242 (1864).

"It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise, the absolute control of the owner over his property is taken away, for he would not be permitted to give it away in his lifetime by deed. The mere fact that there was no consideration would not now render the mortgage invalid. A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it, although it was intended merely as a gift; and, when executed and delivered, it is not open to the objection that it is a voluntary executory agreement, but it may be enforced according to its terms as an executed conditional transfer of the real estate mortgaged."<sup>4</sup>

From this it appears that at the common law and in the so-called "title states" a mortgage is a transfer of a legal interest in realty, completely executed, not subject to attack because of lack of legal consideration, and good as the subject of a gift.

#### GIFT BY MORTGAGOR-DONOR IN "LIEN THEORY" STATES.

It is in the states holding a mortgage to be a mere lien that the greatest difficulty concerning the subject matter at hand is encountered. This is largely due to over-reaching decisions by the courts.

In equity, a mortgage is security for a debt,<sup>5</sup> and it is a well settled rule of the law of mortgages, that the same defenses are available in an action to foreclose a mortgage, with the exception of the Statute of Limitations,<sup>6</sup> as against the debt it secures. It is likewise well established that a prerequisite to the validity of the debt is a valuable consideration,<sup>7</sup> and, unless the obligation is not so supported, a mortgage securing such obligation will not be enforced.<sup>8</sup> These rules are correctly applied where the parties intended the debt as the primary obligation with the mortgage as security therefor. However, difficulty arises when the rules are applied to cases where the parties clearly intend the mortgage as a gift.

In the case of *Bard v. Bard*,<sup>9</sup> a father deeded his farm to his two sons and took back a mortgage for the purpose of protecting the farm from the sons' improvidence, but he never intended to enforce the mortgage. The court followed the intention of the parties and

<sup>4</sup> 32 N. J. Eq. 170, 172 (1880) *accord*, *Brooks v Dalrymple*, 94 Mass. (12 Allen) 102, 104 (1866).

<sup>5</sup> 4 KENT, COMM. (11th ed. 1867) 154; 4 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) sec. 1192.

<sup>6</sup> WALSH, MORTGAGES (1934) 175.

<sup>7</sup> 1 JONES, MORTGAGES (6th ed. 1904) sec. 610.

<sup>8</sup> *Barned, Consideration in Mortgages* (1931) 19 Ky. L. J. 146, 151.

<sup>9</sup> *Cotton v Graham*, 84 Ky 672, 2 S.W 647 (1887), 5 TIFFANY, REAL PROPERTY (3rd ed. 1939) sec. 1401.

<sup>10</sup> 145 N. Y. 659, 40 N. E. 22 (1895) *accord*, *Dexter v Licktenwalter*, 48 N. D. 633, 186 N. W 279 (1921).

demed foreclosure of the mortgage. It was intimated by the court that the mortgage might have been valid, had the intention of the parties been to enforce it. Another case giving effect to the manifested intention of the parties is *Goethe v. Gmelin*.<sup>11</sup> There husband and wife held land by the entirety and executed a note and a mortgage on the land to the wife's daughter by way of gift. The devisee of the surviving tenant sought to have the note and mortgage decreed void. The bill of complaint was dismissed and the gift was held to be valid. In a later case,<sup>12</sup> a grandfather executed a mortgage on land by way of gift to his granddaughter. Later he changed his mind and brought suit to have the mortgage set aside. It was held that a mortgage unaccompanied by a note might be the subject-matter of a gift. The case of *Brigham v. Brown*<sup>13</sup> contained a statement that a mortgage intended as a gift would be valid without consideration; however, the mortgage in that case was held to be void as against a subsequent purchaser for lack of proper recording. *Bucklin v. Bucklin*<sup>14</sup> was clearly put on the ground that a mortgage intended as a gift was valid even without consideration.

From the cases considered it appears that equity will look to the intention of the parties and decide the case accordingly. If the mortgage was intended as a gift, then equity will follow that intent, so long as the rights of antecedent creditors are not involved. If the mortgage was intended to be for a consideration and the consideration fails, then the mortgage will not be enforced. It is not at all surprising that the intention of the parties is the determining factor in deciding the validity of a mortgage to secure an obligation. The assertions found in many of the cases to the effect that consideration is necessary to the validity of a mortgage are misleading since the requirement of consideration is limited to those cases where the mortgages are security for an obligation and has no application to mortgages intended as gifts. Tiffany says that the doctrine of consideration applies to executory contracts only, and a legal mortgage, even when regarded as a lien merely, is not an executory contract, but rather an executed one.<sup>15</sup>

### CONCLUSION

It seems well established that a gift of a mortgage by one not the mortgagor is a valid gift. Where the mortgagor is the donor, the common law view that a mortgage is a conveyance on a condition subsequent and hence, can be made the subject of a gift, is unassailable upon principle since absolute control of the owner over

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<sup>11</sup> 256 Mich. 112, 239 N. W. 347 (1931).

<sup>12</sup> *Cooklin v. Cooklin*, 260 Mich. 69, 244 N. W. 232 (1932)

<sup>13</sup> 44 Mich. 60, 6 N. W. 97 (1880).

<sup>14</sup> 40 N. Y. (1 Keyes) 141, 1 Abb. App. sec. 242 (1864).

<sup>15</sup> 5 TIFFANY, REAL PROPERTY, (3rd ed. 1939) sec. 1401.

his property is a necessary incident of ownership. It is not necessary that the mortgage be security for an enforceable obligation. The view in some of the lien theory states, that a mortgage is executory and a promise to make a gift in the future, is untenable. Even under the lien theory a mortgage still conveys a legal interest in land, a lien which may become a title by the decree of the court.<sup>30</sup> Even if the mortgagee cannot get possession until foreclosure, he gets a limited legal interest in the land mortgaged. This interest, where the mortgagee obtains it by way of a gift, should be just as valid as where he obtains the legal title subject to a condition subsequent by way of gift at the common law.

WILLIAM O. GILBREATH

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<sup>30</sup> See, *United States v Commonwealth Ins. & Trust Co.*, 193 U. S. 651 (1904).