



1931

# Consideration in Mortgages

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## Recommended Citation

Barnes, Clarence E. (1931) "Consideration in Mortgages," *Kentucky Law Journal*: Vol. 19 : Iss. 2 , Article 3.  
Available at: <https://uknowledge.uky.edu/klj/vol19/iss2/3>

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# CONSIDERATION IN MORTGAGES

## I

### NECESSITY FOR A CONSIDERATION

The whole question as to whether a consideration is necessary to support a valid mortgage is one of great importance. At common law, the mortgage was regarded as passing the whole legal title to the estate pledged to the mortgagee, who became the owner of it, although his title was liable to be defeated on a condition subsequent. If the debtor punctually performed his part of the contract at the appointed time, the estate of the mortgagee, by the performance of the condition, determined and ceased, but as the legal title was in him, the estate was not revested in the mortgagor by the mere act of payment or other performance, but it was necessary that the mortgagee should reconvey to him by deed.

Equity courts looked with disfavor on the strict common-law doctrine of absolute forfeiture of the estate on non-payment of the mortgage debt. Accordingly, they established the rule that the debtor should still have a right to redeem after the breach of the condition at law. Thus, until foreclosure, the mortgagor continues to be the real owner of the fee. His equity of redemption is tantamount to the fee at law. In some few American states the common-law doctrine still prevails, although extensively modified by the equitable principles set forth.

Now, a mortgage is considered quite generally as merely security for a primary obligation. There is no reason for the introduction of the doctrine of consideration as it may affect the validity of a mortgage, unless a mortgage is to be deemed an executory contract and a lien only, in all its consequences.<sup>1</sup>

For the most part, the authorities are uniform in holding that a consideration is necessary in order that a mortgage should be enforced.<sup>2</sup> A few cases hold, and even then the con-

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<sup>1</sup> *Kulp v. Kulp*, 21 L. R. A. 550, note.

<sup>2</sup> *Hall v. Davis* (1884) 73 Ga. 101; *Scott v. Magloughlin* (1890) 133 Ill. 33, 24 N. E. 1030.

clusion is questionable, that a mortgage intended as an enforceable primary obligation, given without consideration, is valid, except as against creditors.<sup>3</sup> These cases are quite unsatisfactory for the proposition indicated and by far the majority hold that a debt is an essential requisite of a mortgage.<sup>4</sup>

The consideration for a mortgage, in the nature of a debt can be either preexisting or created at the time, or even may arise in the future.<sup>5</sup> Furthermore, the consideration may pass at the execution of the mortgage or at a subsequent time.<sup>6</sup> One recognized authority says regarding this matter:<sup>7</sup>

"It is not necessary that any consideration should pass at the time of the execution of the mortgage. That may be either a prior or a subsequent matter. Mortgages are frequently given to secure existing debts, in which case the consideration generally held valid, is a past consideration."

Even the cases that hold that a valid mortgage may be executed without a consideration are qualified to the extent that such a mortgage is not valid if it may tend to defraud other people. Thus in *Brigham v. Brown*:<sup>8</sup>

"A man may give a voluntary mortgage if he chooses, and it will be good except as to those who might be defrauded by it. But the fact that a mortgage is given without consideration may have an important bearing on any disputed question concerning its delivery or recording."

And in another case:<sup>9</sup>

"If a mortgage is given without any consideration the mortgagor can maintain a bill in equity to have the mortgage and note delivered up and cancelled."

Generally speaking then, while there must be some consideration for a chattel mortgage,<sup>10</sup> it is not essential that a debt exist independently of the mortgage. The parties may confine

<sup>3</sup> *Brooks v. Dalrymple*, 12 Allen (Mass.) 102; *Brighman v. Brown*, 44 Mich. 59; and *Campbell v. Tompkins*, 32 N. J. Eq. 170.

<sup>4</sup> *Arizona Copper Est. v. Watts*, 237 Fed. 585; *McNeill v. McNeill*, 204 Ill. A. 237; *Donovan v. Boech*, 217 Mo. 70, 116 S. W. 263; *Cawley v. Kelley*, 60 Wisc. 315, 19 N. W. 65. See also *Finnerty v. John S. Blake, etc., Realty Co.*, 276 Mo. 332, 207 S. W. 772; *Schaepfi v. Glade*, 195 Ill. 62, 62 N. E. 874; *Parks v. Sherman*, 208 Mich. 297, 176 N. W. 583.

<sup>5</sup> Jones on *Mortgages*, 6th Ed., section 265.

<sup>6</sup> *Evans v. Pence*, 78 Ind. 439; *Duncan v. Miller*, 64 Iowa 223, 226.

<sup>7</sup> Jones, *Chattel Mortgages*, 6th Ed., section 611.

<sup>8</sup> *Brigham v. Brown*, 44 Mich. 59.

<sup>9</sup> *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 893.

<sup>10</sup> *Look v. Comstock*, 15 Wend. 244.

the remedy of the mortgagee to the mortgage alone.<sup>11</sup> In fact, the debt may be owed to one person and the mortgage given by another.<sup>12</sup>

As to what the courts consider a valid obligation is a somewhat complicated matter. Generally, anything which is consideration for a contract constitutes a valuable consideration for a chattel mortgage.<sup>13</sup> Clearly, a mortgage under seal obviates the necessity of consideration and is invariably held valid.<sup>14</sup>

## II

### TYPES OF CONSIDERATION HELD SUFFICIENT

First of all, the courts are uniform in holding that an antecedent or preexisting debt is a valid consideration for a mortgage.<sup>15</sup> In this respect there is no appreciable variance among the authorities. One might well question why the consideration of a mortgage is not of the same formality as that for a deed. As indicated above it has the same significance in the event the mortgagor does not act during the period of redemption.

Unless there has been additional evidence offered which clearly proves a lack of consideration, a recital of "\$10.00 in hand paid" as the consideration of a mortgage is sufficient to sustain it on demurrer for want of consideration, in the absence of all other evidence.<sup>16</sup> If the consideration is valuable it need not be adequate. A recital in the mortgage of a consideration of one dollar, receipt of which is acknowledged by the mortgagor, prima facie shows a valuable and real consideration and its actual payment, and in the absence of opposing proof, such a consideration is sufficient to support the mortgage.<sup>17</sup> In any

<sup>11</sup> *Matthews v. Sheehan*, 69 N. Y. 585; *Blake v. Corbett*, 120 N. Y. 327.

<sup>12</sup> *Blake v. Corbett*, 120 N. Y. 327.

<sup>13</sup> *Cobb v. Malone*, 87 Ala. 514, 6 So. 299.

<sup>14</sup> *Calkins v. Long*, 22 Barb. 97; *Best v. Thiel*, 79 N. Y. 15.

<sup>15</sup> *Usina v. Wilder*, 58 Ga. 178; *Hewitt v. Powers*, 84 Ind. 295; *Lee State Bank v. McEltheney*, 227 Mich. 322, 198 N. W. 928.

<sup>16</sup> *Grimball v. Mastin*, 77 Ala. 553.

<sup>17</sup> *Laurence v. McCalmont*, 2 How. 426; *Bolling v. Munchus*, 65 Ala. 558; *Grimball v. Mastin*, 77 Ala. 553.

case, a nominal consideration named is sufficient, and in fact, it is not essential that any consideration be expressed.<sup>18</sup>

The consideration to support a mortgage is valid even when it moves from the mortgagee to a third party.<sup>19</sup> This is entirely consistent with the theory of consideration in the field of contracts. While the mortgage must be founded on a valuable consideration generally, the consideration need not be one moving directly from the mortgagee to the mortgagor; but any benefit to the mortgagor or a stranger, or damage or loss to the mortgagee rendered or sustained at the request of the mortgagor is sufficient.<sup>20</sup>

Again, consistent with the theory of a detriment to the promisee in a contract, the release of what the mortgagee believed to be a good cause of action, and which was at least *prima facie* so, is a sufficient consideration for a note and mortgage.<sup>21</sup> Of a similar character, the relinquishment of his right to bid at a judicial sale by a creditor who has no other means of obtaining payment of his debt is a sufficient consideration to support a mortgage for the amount of the claim given him by the one who at the sale secures the legal title to the land sold.<sup>22</sup>

Another field in which the question of consideration has been much mooted is where there is some blood relationship between the parties. In this direction there is a decided conflict in the authorities. A consideration need only be sufficient to uphold the mortgage as a conveyance of an estate to make it valid between the parties to it, others having no greater right. The relation of blood between the father and daughter would be sufficient consideration.<sup>23</sup> Logically, no more consideration should be necessary to uphold a conveyance upon condition than an absolute conveyance. The estate conveyed is the same. This estate could be defeated by the payment of the sum of money mentioned in the mortgage deed.

Where there is a blood relationship between the parties, some cases hold that there is no necessity of a money consid-

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<sup>18</sup> *Robinson v. Williams*, 22 N. Y. 330.

<sup>19</sup> *Rockafellow v. Peay*, 40 Ark. 69.

<sup>20</sup> Jones, *Chattel Mortgages*, 6th Ed., sec. 610.

<sup>21</sup> *Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848.

<sup>22</sup> *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306.

<sup>23</sup> 2 Bl. Comm. 296; 4 Kent. Comm. 464; 3 Wash. Real Property, bk. 3, ch. 5, sec. 3.

eration. The relationship between a father and child is sufficient.<sup>24</sup> Thus, a mortgage by a daughter to her father as security for the debts of her deceased husband, though they could not be enforced against her, will be upheld.<sup>25</sup> In one case, however, the relation of affection existing between two brothers at the time when the instrument in question was executed was adverted to as one of the circumstances which repelled every inference of a mortgage, and confirmed the presumption attached to the deeds themselves.<sup>26</sup>

In some instances, even the relationships arising out of marriage are regarded as having a distinct tendency to show that a transaction was a mortgage. In one case,<sup>27</sup> the confidential relation of the parties, (brothers-in-law) was taken to show an arrangement for a mortgage. In still other cases of this character, however, the relation is not counted upon, to show a mortgage was intended.<sup>28</sup> Still another line of cases hold that although love and affection is sufficient consideration for a deed, it is not so for an executory contract.<sup>29</sup>

The extent to which the courts will sometimes go in finding a consideration on which they can support a mortgage transaction is illustrated in a New York case. Herein the first mortgage contained a provision that if it should prove ineffectual for the purpose intended, a second should be executed in its place. The consideration of the first was held sufficient to support a second made in pursuance of such provision.<sup>30</sup>

Even the giving of additional time for the payment of an existing debt, by a valid agreement, for any period, however short, though it be for a day only, is held to be sufficient to support a mortgage or a conveyance, as a purchase for a valuable consideration.<sup>31</sup>

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<sup>24</sup> *Bucklin v. Bucklin*, 1 Abb. App. Cas. 247.

<sup>25</sup> *Roy v. Hollenbeck*, 42 Fed. 381.

<sup>26</sup> *Jones v. Jones*, (1906) 20 S. D. 632, 108 N. W. 23.

<sup>27</sup> *Babcock v. Wyman*, (1856) 19 How. 289, 15 L. Ed. 644.

<sup>28</sup> In *Forester v. Van Auken*, (1903) 12 N. D. 175, 96 N. W. 301, grantee was mother-in-law of grantor; and, in *Mooney v. Morris*, (1900) 57 S. W. 442, grantee was brother-in-law of grantor, yet the relationship was not referred to as a means of characterizing the transaction.

<sup>29</sup> *Kirkpatrick v. Taylor*, 43 Ill. 208; *Forbes v. Williams*, 15 Ill. App. 305.

<sup>30</sup> *Hincks v. Field et al*, 14 N. Y. Supp. 247, 37 N. Y. St. Rep. 724, aff'd 129 N. Y. 633.

<sup>31</sup> *Cary v. White*, 52 N. Y. 138; *Gilchrist v. Gough*, 63 Ind. 576;

Liability to loss on the part of the mortgagee is consideration for a mortgage given to secure him against it, as much as a direct benefit to the mortgagor, of whatever nature it may be.<sup>32</sup> The consideration is valid in such case even though the mortgage is given after the surety has incurred the obligation.<sup>33</sup>

While the courts are rather consistent in holding that a valuable consideration is necessary to support a mortgage, it is not generally necessary that the consideration be adequate.<sup>34</sup> Blackstone defines a valuable consideration with reference to a conveyance as:

“money, marriage or the like, which the law esteems an equivalent given for the grant.”<sup>35</sup>

The adequacy of the consideration becomes most apparent, not when determining the validity of a mortgage at its inception, but when the court endeavors to determine the intent of the parties, i. e., whether a mortgage or a conditional sale was intended.

### III

#### A MORTGAGE AS A GIFT

While several cases are sometimes stated by text writers to support the proposition that a mortgage can be validly executed as a gift, it is to be questioned whether the conclusion is sound. As pointed out before, one might well conclude that no more should be necessary to uphold a conveyance on a condition (a mortgage) than an absolute conveyance, but the courts are prone to consider that a mortgage is only a secondary obligation to secure a primary obligation, a debt, and that a prerequisite to the validity of the same is a valuable consideration.

In one of the type cases, a husband gave a bond and mortgage to his wife. He was not indebted to her at the time in any sum whatever. The court held that the bonds were a promise on the part of the husband to pay at some future day the sums mentioned in them, and being without consideration, the promise

*Schumpert v. Dillard*, 55 Miss. 348; *Port v. Embree*, 54 Iowa 14, 6 N. W. 83.

<sup>32</sup> *Haden v. Buddensick*, 4 Hun. 649, 49 How. Pr. 241.

<sup>33</sup> *Williams v. Silteman*, 74 Tex. 601, 12 S. W. 534.

<sup>34</sup> *Lawrence v. McCalmont*, 2 How. 426.

<sup>35</sup> 2 Bl. Comm. 296.

could not be enforced against the donor, or against his estate, a meritorious consideration not being sufficient to sustain such a promise.<sup>36</sup>

#### IV

#### THE STATUTE OF LIMITATIONS

Still another question of no inconsiderable significance is a determination of the character of the obligation which supports the mortgage when the original consideration runs afoul the statute of limitations. The most likely situations apparent at once are those in which an action on the debt is barred because of the operation of the Statute of Limitations, or a situation in which the debtor has been discharged of his obligations by a proceeding in bankruptcy.

Consistent with the principle that the debt is the principal thing and the mortgage is only security therefor, the courts generally hold that the statute of limitations does not discharge the debt or extinguish the right but only takes away the remedy. The reason for the rule, in general, is that the mortgage and the debt give rise to distinct causes of action, and distinct remedies may be pursued as to them.<sup>37</sup>

Even though the debt may be barred by the statute of limitations, the lien may be enforced.<sup>38</sup> The theory in the United States is that the general effect of the Statute is merely to take away the remedy and not to extinguish the debt.<sup>39</sup> In regard to this conception, Justice Hogeboom says in *Pratt v. Huggins*:<sup>40</sup>

"It is said that the note from the lapse of time is presumed to be paid. Not altogether so; for the law allows a suit on it, and a recovery unless the Statute of Limitations is pleaded. It is, therefore, at most but a presumption; suffered to be overthrown, it is true, only in one way, and that is by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts on the remedy."

Although the mortgagee may foreclose his mortgage after the debt is barred, he cannot foreclose it after the statutory period

<sup>36</sup> *In re James*, 40 N. E. 876.

<sup>37</sup> *Sichel v. Carillo*, 42 Cal. 493; *Low v. Allen*, 26 Cal. 141.

<sup>38</sup> *Kellar v. Stinton*, 14 B. Mon. (Ky.) 307; *McElmoyle v. Cohen*, 13 Pet. 19.

<sup>39</sup> *Waltermire v. Westover*, 14 N. Y. 16.

<sup>40</sup> 29 Barb. 277.



has run against the mortgage as a specialty.<sup>41</sup> Only in a limited number of jurisdictions is a mortgage so considered.<sup>42</sup>

Ordinarily, the statute of limitations as to the debt does not in any way apply to the mortgage security. This remains in force until the debt is paid. Payment can be established by direct evidence and also by the statutory presumption that payment has been made within twenty years after the cause of action arose.<sup>43</sup>

If the debt is secured by a lien or other security, the fact that the original debt is barred does not necessarily operate as a bar against the lien or security,<sup>44</sup> although this rule has been applied in jurisdictions in which it is said that the debt is extinguished by the operation of the statute of limitations.<sup>45</sup> This rule applies in cases in which the debt barred by the statute is secured by a mortgage on realty,<sup>46</sup> or by a chattel mortgage.<sup>47</sup>

That the statute of limitations does not completely extinguish the remedy is evidenced by the fact that the courts will sometimes permit the mortgagee to sell the mortgaged property after the statute of limitations has run against foreclosure, where a power of sale is contained in the mortgage.<sup>48</sup> The consideration to support the validity of the mortgage in such a case is apparently the original obligation. If the period which is fixed by the statute has run, the original obligation may serve as a consideration for a new promise.<sup>49</sup>

Thus, so far as the question of consideration is concerned, the creditor may proceed to foreclose his mortgage notwithstanding the bar of the debt by the statute of limitations. The cases are uniform in this respect.<sup>50</sup> The reasoning back of this rule is explained in *Bush v. Cooper* wherein the court explains that it was:

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"The intention of the legislature to carry out the distinction be-

<sup>41</sup> *Kerr v. Lydecker*, 51 Ohio St. 240, 37 N. E. 267.

<sup>42</sup> *Balley v. Smith*, 14 Ohio St. 396.

<sup>43</sup> *Longstreet v. Brown* (N. J. Eq.) 37 Atl. 56.

<sup>44</sup> *Holmquist v. Gilbert*, 41 Colo. 113, 92 Pac. 232.

<sup>45</sup> *Bishop v. Douglas*, 25 Wisc. 696; *Cerney v. Pawlot*, 66 Wisc. 262, 28 N. W. 183.

<sup>46</sup> *Holmquist v. Gilbert*, *supra*.

<sup>47</sup> *Lembeck & Betz Eagle Brewing Co. v. Krause*, 109 Atl. 293.

<sup>48</sup> *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385.

<sup>49</sup> Sec. 320, p. 1670-1678, Page on Contracts.

<sup>50</sup> *Müller v. Helm*, 2 S. & M. 697; *Bank Metropolis v. Gutschlick*, 14 Peters 19; *Thayer v. Mann*, 19 Pick. 535.

tween the personal liability of the debtor and the liability of the land, and to preserve the latter in full force, unaffected by the discharge of the debtor."<sup>51</sup>

Practically the same result is obtained where the debtor has been discharged of his obligations by bankruptcy proceedings. The act of Congress of 1841 specifically provides that:

"Nothing in the act shall be construed to annul, destroy or impair . . . any liens, mortgages, or other securities on property, real or personal."<sup>52</sup>

From this it is manifest that:

"While the privilege was granted to the debtor to be personally discharged from the debt, any security which the creditor might have, consisting of a lien on property was left in as full force as though the debtor had never been discharged from the debt, for the security of which the lien was made."<sup>53</sup>

## V

### CONSIDERATION IN "LIEN" AND "TITLE" JURISDICTIONS

One pertinent question remains. Is the doctrine of consideration in mortgages affected by the determination of whether it is executed in a "lien" or "title" jurisdiction? In England and in many of our states the law courts still hold to the old legal theory and regard the title and right of possession as passing to the mortgagee, though the strict legal doctrine has become much modified. But even in the law courts of the "title" theory states, the mortgagor today is regarded as the real owner as to everyone except the owner of the mortgage.<sup>54</sup> In the majority of the states the law courts have adopted the equitable theory of mortgages, and in these states the title remains in the mortgagor, who is the owner of the property, and the mortgagee has only a lien on it.<sup>55</sup>

<sup>51</sup> 15 L. Ed. 273, 274.

<sup>52</sup> Sec. 2, Act of Congress, 1841.

<sup>53</sup> *Bush v. Cooper*, 26 Miss. 509, 510.

<sup>54</sup> The states in which this view prevails are Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia.

<sup>55</sup> The states in which this view prevails are California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Wisconsin, Utah, and Washington. In Delaware, Mississippi and Missouri,

The doctrine of consideration is technically applicable to executory contracts only. Even the courts of equity consider a mortgage as an executed rather than an executory contract. A mortgage conveys a legal interest to land although the mortgagee cannot obtain possession before foreclosure, even in case of default. Still, the mortgagee gets an interest in the mortgaged land, and the extent of his interest is measured by the obligation it purports to secure. Thus, so far as the mortgage conveys a legal interest, there is no more or no less necessity for consideration than when full legal title subject to a condition subsequent is conveyed.<sup>56</sup> In either case, it is necessary that there be a debtor-creditor relation between the mortgagor and the mortgagee, which pre-supposes the existence of a debt or an obligation of legal import.

The chief difference in the application of the two theories, the "lien" or the "title" theory, arises not in the substantive question of consideration to support the contract, which is the same in both instances, but in the character of the rights which the parties acquire under the mortgage.

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there is a combination of the two theories. Before default the mortgagee has only a lien, after default he has legal title.

<sup>56</sup>Morris Karon, 2 Wisc. L. R. 59, 60.

