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WHEN A DEED BY MORTGAGOR TO MORTGAGEE IS AN ABSOLUTE CONVEYANCE

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IT is common knowledge that the present method of foreclosure is expensive, slow and cumbersome, and that such work must be undertaken by competent attorneys who should be paid for their skill and experience. Our antiquated foreclosure laws permit too long an interval between the commencement of proceedings and the final vesting of title in the mortgage owner. From the investor's standpoint the situation is further complicated, if the property is occupied as a homestead, by the reluctance of the courts to appoint receivers of such property and by the unavoidable temptation to persons about to lose their homes to neglect the buildings and fail to pay the taxes, knowing that any money spent for such purposes would be lost to them along with the home. To hasten the clearance of the title and to vest immediate possession in the mortgagee, where no intervening liens are found, many attorneys have recommended the giving of a sum of money or some other consideration by the mortgagee to the mortgagor in exchange for a deed of the equity of redemption. In this way the expense of court proceedings, counsel and master's fees, publication charges and the like are saved.

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Some attorneys hesitate to take this action, feeling that should property value increase within a reasonable period, the courts might consider the bargain unduly harsh and look for some method by which the law will presume that the transaction was inequitable or that it constituted the taking of further security and thus allow the debtor the right to redeem his property upon payment of the debt.

It is not the purpose of this investigation to consider the myriad of cases which have gone to the upper courts to establish the right to redeem from a mortgage which in form was a warranty deed. Our statute on mortgages,[1] as well as the uniform decisions of all the states, have excepted this situation from the maxim of the common law that parol evidence cannot be heard to modify a written contract; so where the intention at the outset was to make a conveyance to secure the payment of a debt, whether already existing or incurred simultaneously with the conveyance, such evidence is freely admissible. The courts have uniformly permitted the introduction of such evidence in cases where the intention is evident at the outset.

However, this intention must be clear, as was pointed out in the case of *Sutphen* v. *Cushman*,[2] where a bill was filed to permit redemption from a deed absolute in form conveying several hundred acres of land in LaSalle County. At the time of the conveyance in 1856 the grantor was indebted to the grantee on a bond made in 1852, and was also indebted on a mortgage held by the grantee on the land conveyed by the warranty deed. At the time the deed was made, an accounting was had between the parties, but the bond and note were not cancelled. Although the Supreme Court held the transaction to constitute a mortgage, it stated that it entirely disregarded the testimony of witnesses introduced to establish their

[1] Ill. Rev. Stat. 1937, Ch. 95, § 13.
[2] 35 Ill. 186 (1864).

understanding of the nature of the transaction and to relate conversations of the parties, saying,

> The conveyance purports to convey an absolute estate to the grantee, and it must be taken as the exponent of the rights of the parties, unless some equity is shown, not founded on the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed, but independently, both of the deed itself and of the understanding with which it was executed.

This case has been cited many times and still declares the law on the subject.

Examination of the cases in most of the states indicates clearly that the principal thing to be observed in such transactions is the cancellation of the debt. With the mortgage released and the note cancelled and surrendered to the person liable, there can be no redemption. It is a cardinal principle of the law of foreclosure that without a debt there can be no mortgage; without a mortgage there can be neither foreclosure nor redemption.[3] Therefore, if the transaction consists of a mere cancellation of the mortgage and the debt so that the relation of debtor and creditor has ceased, there is no reason in the law why the mortgagee cannot take a conveyance from the mortgagor with perfect safety. The danger arises where some other element is injected into the transaction.

The method most commonly followed by the local bar, where the mortgagor, in the hope of recovering his property, desires the mortgagee to give him a right of repurchase, is for the parties to draw an option contract which is given to the grantor-mortgagor together with the cancelled note at the same time that the mortgagor gives the mortgagee a deed to his equity of redemption. By the option, the grantor is given the right to repurchase within a certain period at a certain price. If, in such a transaction, the circumstances disclose the continuance of the relation of debtor and creditor, though in different guise, a suit to redeem may, without a doubt,

[3] Tarleton v. Vietes, 1 Gilm. (Ill.) 470 (1844).

be maintained, and it is in such situations that most of the litigation occurs.

The mere existence of an option alone should not give rise to the presumption that the relation of debtor and creditor continues, for one having an option is not, because of that fact, under any obligation to pay, and hence he could not be regarded as a debtor. So where there is no debt or mortgage in fact, an agreement to resell does not change an absolute conveyance into a mortgage.[4] On the other hand, the failure to cancel the evidence of indebtedness would give rise to the presumption that the relation of debtor and creditor continued and the entire transaction could be deemed a mortgage.[5] The transaction could as well take the form of a conditional sale, whereby the title of the grantee would be defeated upon the condition of payment by the grantor to the grantee of a certain sum by a definite time. Whether the right to reconveyance is evidenced by option or condition of defeasance is immaterial. However, one should not form conclusions as to the validity of a transaction as exemplified in a case, without the keenest consideration of the facts. Thus, in *Hughes and Dial* v. *Sheaff*,[6] in discussing the rule regarding the determination whether a deed absolute on its face, accompanied by a contemporaneous agreement to reconvey or an option to repurchase, is a sale on condition or a mortgage, the court said:

> . . . the line of distinction between mortgages and defeasible sales cannot well be marked out by any general rule, and each case must, in a great measure, be determined on its own circumstances. . . .
>
> And hence the court must take into consideration the price, the circumstances, all the antecedent facts, the situation of the parties, and from these determine the true nature of the transaction. These differ, as we know, as the names of the parties differ, and they so influence the determination in each case, that

[4] Glover v. Payn, 19 Wend. 518 (1838); Robinson v. Cropsey, 6 Paige 480 (1838); Baker v. Thrasher, 4 Den. 493 (1847).

[5] Farmers Loan & Trust Co. v. Carroll, 5 Barb. 613 (1849); Lawrence v. Farmers Loan & Trust Co., 13 N. Y. 200 (1855).

[6] 19 Iowa 335 (1865).

it is next to impossible to deduce from them any general, safe and comprehensive rule. Now, if the relation of creditor and debtor in any given case continues, and the debt still subsists, we can readily see that the relation of mortgagee and mortgagor still remains. If, however, the debt is extinguished by a fair agreement, and the grantor has the privilege merely of refunding if he pleases, by a given time, and thereby entitles himself to a reconveyance, there is a conditional sale and the equity of redemption does not continue; for a mortgage without a debt, or a debtor without a debt, cannot exist. The contract being fairly made, a court of equity will not relieve the grantor who neglects to perform the condition on which the privilege of repurchasing depended. For while the policy of the law prohibits the conversion of a real mortgage into a sale, it does not prohibit the making of conditional sales.

The Michigan Supreme Court in *Cornell* v. *Hall*,[7] a somewhat similar case, said:

A glance at the numerous adjudications in controversies of this kind will suffice to show that each case must be decided in view of the peculiar circumstances which belong to it. . . . Where . . . the mind is uncertain whether a security or a sale was intended, the court . . . will be somewhat guided by prudential considerations and will consequently lean to the conclusion that a security was meant as more likely than a sale, to subserve the ends of abstract justice and avert injurious consequences. And where the idea that a security was intended is conveyed with reasonable distinctness by the writings, and no evil practice or mistake appears, the court will incline to regard the transaction as a security rather than a sale, because in such a case the general reasons which favor written evidence concur with the reason just suggested. But if, upon the whole case, it satisfactorily appears that a conditional sale was intended, the transaction must retain the stamp which the parties have themselves given to it. Since, therefore, the intention of the parties is the vital question, it is essential to attend to their situation, the price fixed in connection with the value of the property, the conduct of the parties before and after, and all the surrounding facts. . . .

The former debtor's remaining in possession after the transaction was an element in a decision of the Supreme Court of West Virginia[8] holding the transaction to con-

[7] 22 Mich. 377 (1871).

[8] Davis, Committee v. Demming, 12 W. Va. 246 (1877).

stitute a mortgage. After noting the possibility of an inadequate price paid by the mortgagee to the mortgagor, the court said:

If the vendor remains in possession of the property after the alleged sale, this is a circumstance that tends to show that it was not really a sale, but a mortgage, for such continuing possession in the vendor after a sale, if not inconsistent with the sale, is an unusual accompaniment of it.

In this case, however, there was no cancellation of the debt between the parties.

In an illuminating case from Arizona,[9] in which a sale by debtor to creditor with an agreement to repurchase was before the court, it was held erroneous to exclude evidence bearing on the question of whether the debt had or had not been extinguished. The court said:

Had it been shown, by the execution of the deed . . . and the contemporaneous agreement to reconvey, that the relation of the debtor and creditor . . . had ceased by virtue of the execution of the deed, it would justify the inference that the transaction constituted a simple conveyance with an agreement to reconvey, and not a mortgage.

Conway's Executors (and Devisees) v. *Alexander,*[10] decided in 1812, is a leading case on this subject. The Supreme Court of the United States there laid down the rule that for a defeasible purchase to be a mortgage there must be a debt continuing to exist in favor of the grantee subject to the conveyance. The facts made it plain that the grantor was under no obligation to repay and that the grantee had no desire to lend money with or without security. Chief Justice Marshall made the following often quoted statement:

To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as infants.

[9] Reese v. Rhodes, 3 Ariz. 235, 73 P. 446 (1890).

[10] 7 Cranch 218, 3 L. Ed. 321 (1812).

Such contracts are certainly not prohibited either by the letter or by the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of the courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be whether the contract in a specified case is a security for the repayment of money or an actual sale.

In the case of *Ranstead* v. *Otis*,[11] there was presented the situation under which the power of sale in a mortgage was before the court. An auction sale was held pursuant to the power, and the property was bid in by a stranger. The land was worth probably double the amount paid for it, but because of the outstanding dower and homestead rights claimed by the mortgagor's wife (who had not joined in the mortgage), its market value was impaired. When it was claimed that the sale was irregular and therefore subject to attack, the mortgagor conveyed the property to the bidder at the sale for a nominal consideration and received from him a written instrument by which the grantee agreed to reconvey the property within six months for an agreed price, approximately the amount of the bids at the mortgage sale. The mortgagor, three years after the expiration of the period, filed a bill claiming the right to redeem, and when the lower court dismissed the bill, an appeal was taken. The Supreme Court, in affirming the decree, said:

Whether the sale . . . under the mortgage was valid, or voidable, or void, is a question not necessary to be decided. It was at least a sale at which Otis bought as a stranger, and in good faith, and as such purchaser he claimed the title in fee. For the sake, however, of removing all doubt . . . he agreed with Ranstead, if the latter would execute to him a quit claim deed, he would give to Ranstead a contract entitling him to a conveyance upon the

[11] 52 Ill. 30 (1869).

payment, within six months, of a little more than the amount expended by Otis. It is wholly incorrect to say that in this transaction Otis was abusing his power as a creditor or mortgagee. He was not acting in either capacity, and was in no position to dictate terms to Ranstead. If the sale under the mortgage was valid, he already had Ranstead's title, and the agreement to convey to him, upon the payment of $2,500, within six months, was a simple act of kindness. If, on the other hand, the sale under the mortgage was invalid, Otis was rather at the mercy of Ranstead than Ranstead in the power of Otis. . . . But it was only by the election of Ranstead that Otis could assume towards him the position of a creditor. He had no debt which he could enforce against Ranstead. . . . Although there was no monied consideration for this deed, it is incorrect to say it was made without any consideration. The consideration was the contract, which gave Ranstead a certain right of purchase on reasonable terms, in place of an uncertain right of redemption, to be attended with litigation and expense.

In the case of *Rotan Grocery Company* v. *Turner*,[12] the debtor conveyed land by absolute conveyance to his creditor and received back an agreement to reconvey on payment of the consideration for the deed, and the court holding the transaction to constitute a conditional sale, quoted the following passage from Jones on Mortgages: An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation binding him to reconvey, upon being reimbursed within an agreed period, an amount equal to the debt and interest thereon. If the conveyance extinguishes the debt, and the parties so intended, so that a plea of payment would bar an action thereon, the transaction will be held an absolute or conditional sale, notwithstanding. And so, if there was in fact a sale, an agreement by the purchaser to resell the property within a limited time, at the same price, does not convert it into a mortgage. . . . But if the indebtedness be not cancelled, equity will regard the conveyance as a mortgage, whether the grantee so regards it or not. He cannot at the same time hold the land absolute and retain the right to enforce payment on the debt on account of which the conveyance is made. The test, therefore, in cases of this sort, by which to determine whether the conveyance is a sale or a mortgage, is found in the question whether the debt is discharged or not by the conveyance.

[12] 46 Tex. Civ. App. 534, 102 S. W. 932 (1907).

A similar decision was reached in the suit of *West* v. *Hendrix*,[13] where the evidences of an antecedent debt were cancelled and delivered to the grantor at the time of the conveyance and the delivery of an agreement to resell, and the court remarked that a mortgage cannot exist without a debt and that an option to repurchase cannot turn an otherwise absolute transaction into a mortgage, notwithstanding an inadequacy of consideration for the conveyance.

A later Florida case,[14] on facts somewhat similar, laid down a test to be whether any obligation enforcible against the mortgagor existed thereafter, saying that if it is optional with the mortgagor as to whether any liability exists contingent on his desire or lack of desire to have a reconveyance, there is no existing indebtedness which a mortgage might be said to secure, and,

> Where a mortgagor, for the purpose of settling and cancelling the mortgage indebtedness, executes and delivers to the mortgagee a deed conveying the fee-simple title to the mortgaged property, and the mortgagee, in consideration thereof, acknowledges payment of the indebtedness, and cancels and surrenders the promissory notes, evidencing such indebtedness, together with the mortgage securing the payment, the fact that in the same instrument, or in another instrument contemporaneous therewith, the vendee agreed that upon the payment of a stipulated sum, within a specified time, to [*sic*] reconvey the property to the vendor, does not render such deed a mortgage; there being, under such circumstances, no debt or obligation for the payment of money secured by the deed.

In California the court held an absolute conveyance by mortgagor to mortgagee not to be a mortgage where the deed stipulated that it was executed in consideration of the cancellation of the notes and mortgage and was not intended as security, notwithstanding that the mortgagee had executed an agreement to reconvey on payment of a sum of money and to permit the mortgagor to remain

[13] 28 Ala. 226 (1856).

[14] Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1925).

in possession until the expiration of the option to repurchase.[15]

A case from Iowa[16] was similar in the principal facts. There the mortgagor took, in addition to the surrender of the notes and the contract of reconveyance, a lease from the mortgagee for the period of the option right. The court confirmed the claim of the mortgagee that the transaction was a conditional sale.

Illinois is no laggard in following the path laid down by other states and observes carefully the distinction between the cancellation and the retention of the evidences of the debt. In *Johnson* v. *Prosperity Loan and Building Association,*[17] Johnson filed a bill praying that a deed and contract executed simultaneously be decreed to be a mortgage and that he be granted leave to redeem. The deed was made in 1897 and was an ordinary warranty deed. By contract of even date the grantee and Johnson agreed that the latter would pay certain arrears on mortgages held by the grantee together with further payments thereon. The contract provided that the grantee might borrow on the property and required annual accountings between the parties, certain compensation to the grantee and his attorney, and reconveyance within a stated period upon payment of all sums advanced with interest. The encumbrances to be paid by the grantee were in fact paid by him but he retained the cancelled notes and trust deed unreleased. The bill to redeem was filed within the time of reconveyance set up in the contract.

The court held the entire transaction to constitute a mortgage and that the limitation of the right to reconvey set up by the contract was not a final extinguishment of the right to redemption by the grantor in the deed. The court called attention to the retention of the cancelled mortgage and notes and the failure to release the instru-

[15] Woods v. Jensen, 130 Cal. 200, 62 P. 473 (1900).
[16] Bigler v. Jack, 114 Iowa 667, 87 N. W. 700 (1901).
[17] 94 Ill. App. 260 (1900).

ments as strong proof establishing them as a mortgage.

In *Pitts* v. *Cable,*[18] Pitts filed a bill to redeem from a warranty deed alleged to be a mortgage to secure payment of a debt. With the deed, a contract was made for reconveyance to the grantor upon payment of the amount of an existing debt with interest. The note evidencing the debt was surrendered when the papers were signed and no other obligation to pay the money was signed by the complainant. The complainant remained in possession and paid part of the taxes. Four years after the expiration of the time for reconveyance, Cable conveyed the property to defendant Bennett, at which time the bond for reconveyance had not been recorded. The testimony indicated that the property was taken in payment of the debt and not as security. The court, noting that the mortgage was cancelled, held that the transaction was a sale and not a mortgage, adding:

Had Cable retained the note, that would have been a strong circumstance to establish the transaction as a mortgage. But if such was the design, it is strange that Cable left the transaction in the position that there was no mutuality. He had nothing by which he could have enforced payment of the balance, had the property proved insufficient on a foreclosure, had this in fact been a mortgage. . . . It is urged that the fact that Pitts remained in possession and paid taxes is evidence that the parties understood the transaction to be merely a security. . . . Even if it appears that he remained in possession not as a tenant but in continuance of his former occupancy, it would not have been sufficient to overcome the clear testimony.

In *Mann* v. *Jobusch,*[19] Henry Mann in 1875 made a mortgage, which in 1888 was still unpaid. At that time, Mann conveyed the property to Jobusch, the mortgagee, and the notes were surrendered and the mortgage released. The parties thereupon made a contract for a reconveyance on March 1, 1890, upon payment of fourteen hundred dollars and interest. In June, 1890, Jobusch conveyed the property to Ernest Mann, who had no

[18] 44 Ill. 103 (1867).

[19] 70 Ill. App. 440 (1897).

knowledge of the contract of purchase by Henry Mann nor of the claim that the transaction was a mortgage. In 1895 the present bill for redemption was filed. The court, stating that a man cannot stand by and speculate on the appreciation of values, held that the transaction did not contemplate a mortgage, but that the conveyance was in satisfaction of the debt; that the contract was not a revival of the debt, but an agreement to reconvey upon payment; and that Mann was not obligated to make the payment. The court refused to allow redemption.

In *Freer* v. *Lake,*[20] a bill was filed by Lake for redemption and for an accounting. In 1871 one Gilbert made a note secured by a trust deed in usual form, and the title later passed to the complainant, Mary Lake, who assumed the mortgage. When the maturity of the notes approached, negotiations were entered into between the parties, and, upon maturity of the notes, Freer, their holder, prepared a deed which was signed by the parties, and at the same time wrote a letter stating that he considered himself bound in the event anything could be made out of the property during the next three years more than interest, taxes and so forth, to give Mrs. Lake the benefit of it. Thereupon the deed was executed and the debt extinguished. Within a month Freer sold the property for about one hundred dollars more than the amount of the cancelled notes, but repairs had been made by him in about the same amount. The court held that the relation of mortgagor and mortgagee did not continue, since there was no mortgage debt in existence, but held that the letter accompanying the deed established a trust and that Freer was bound to pay over any surplus above the debt, interest and so forth, to Mrs. Lake. It appeared from the case that the property had increased in value during the three years subsequent to Freer's conveyance.

In *Jeffery* v. *Robbins,*[21] the following facts appear:

[20] 115 Ill. 662, 4 N. E. 512 (1886).
[21] 167 Ill. 375, 47 N. E. 725 (1897).

Emma J. Jeffery and her husband made a quit claim deed on June 28, 1888, conveying, in consideration of one dollar, certain lots at the southeast corner of Dearborn and Adams streets, in Chicago, to Burr Robbins. Her sole interest in the land was a ninety-nine year leasehold estate, and she was then in default under the lease for rent, taxes and other items, in a sum exceeding six thousand dollars. In the proceedings (a bill to redeem) she claimed that Robbins agreed to advance the money to make good these defaults and enough more to pay the rents and taxes for the five years ensuing, and that the deed was given as security for these sums. Robbins, on the other hand, claimed that John B. Jeffery, the husband, was on that date in debt to him in a sum exceeding seventeen thousand dollars, and that he, Robbins, advanced more than six thousand dollars to Mrs. Jeffery to pay the ground rent and taxes and agreed with the Jefferys that the deed was in payment of both debts. On that date he executed to Mrs. Jeffery an agreement binding himself to reconvey the property to her at any time within five years on payment of such sums. At the time the deed and contract for resale was made Robbins surrendered to Jeffery the seventeen thousand dollars in notes held by him. Mrs. Jeffery having filed a bill for leave to redeem on payment to Robbins of only the six thousand dollars advanced to her for rent and taxes, the lower court dismissed the bill for want of equity, and on appeal the Supreme Court affirmed the decree of the lower court, citing *Pitts* v. *Cable*,[22] and *Hanford* v. *Blessing*,[23] holding that the execution of an absolute deed and a bond for reconveyance does not of itself stamp the transaction as a mortgage, but if the proofs indicate that the parties intended an absolute sale with right of purchase, such intention must govern, and further, that where the evidences of indebtedness are surrendered

[22] 44 Ill. 103 (1867).
[23] 80 Ill. 188 (1875).

such surrender is strong proof that a mortgage is not intended.

Statements are sometimes loosely made that where a deed is given simultaneously with an agreement to reconvey upon payment of the purchase price, the transaction will be regarded as a mortgage.[24] Reference to the cases cited in support of such statements will disclose an intention of the parties to so treat it. For example, in *Weed* v. *Stevenson*[25] the deed and agreement for defeasance were both recorded as a mortgage in the book of mortgages and both parties so regarded it. In *Harrison et al.* v. *The Trustees of Phillips Academy,*[26] the conveyance, if absolute, would have been a fraud on creditors, but the grantee apparently understood the deed to be given only as security to protect him from loss which he might suffer as surety of the grantor, and he made no claim that the deed was absolute.

It is elementary, of course, that even though a deed, absolute in form, is, as between the grantor and grantee, a mortgage, a stranger, who for value and without notice receives title from the grantee, will take free of any claim of right to redeem. The aggrieved mortgagor in such cases is limited to a personal action against the mortgagee.

While the cancellation of the debt is necessary and in many cases is sufficient to close the transaction as a mortgage, equity has the power to set aside a deed of the mortgagor's equity of redemption if the deed is shown to have been procured through oppression, fraud, or undue influence, and gross inadequacy of consideration might be evidence of oppression. Because of the relationship between the parties and the opportunity for unfair dealing arising therefrom, the court will closely scrutinize the transaction.

[24] See note, 3 L. Ed. 322.

[25] 1 Clarke (N. Y.) 166 (1840).

[26] 12 Mass. 456 (1815).

Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. . . . Where confidential relations and the means of oppression exist, the scrutiny is severer than in the cases of a different character. . . . If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands.[27]

Such language standing alone might well affect one's willingness to accept a deed in lieu of foreclosure, but an examination of the facts of cases using such language will restore confidence. In the case from which the language was quoted, the mortgagee had been getting interest at the rate of 2 per cent per month compounded, on unpaid sums. This fact ran a comparatively small principal debt to ten thousand dollars. Because of drought the productivity of the land had been impaired, and there was little chance of selling the land for its probable worth. There was evidence that the grantors were given to believe that their deed was security only and that the grantee had misrepresented the contents of the deeds to the mortgagors, who could not read English. It also appeared, by inference at least, that the land was worth perhaps two and one-half times the amount of the debt.

Evidence of sharp dealing was likewise shown in the Illinois case of *Cassem* v. *Heustis,*[28] where the additional factor of a relation of attorney and client entered. The California case of *Bradbury* v. *Davenport*[29] came up on demurrer to a complaint to have a deed declared a mortgage, and so the statement that the land was worth a great deal more than the amount of the debt (about twice

[27] Alexander v. Rodriguez, 79 U. S. (12 Wall.) 323, 20 L. Ed. 406 (1870).
[28] 201 Ill. 208, 66 N. E. 283 (1903).
[29] 114 Cal. 593, 46 P. 1062, 55 Am. St. Rep. 92 (1896).

as much) was admitted, and since the cancellation of the debt was the only consideration, the demurrer was overruled. But it is to be noted that the complaint also averred that the deed was procured from the grantor at a time when the grantor was afflicted with an illness of which he died a few months later, and because of the peculiar circumstances appearing in the case the court reversed the decree of the lower court and gave the plaintiff (successor in title to the mortgagor) leave to amend his complaint.

However, in contrast with the last mentioned case is *Deming* v. *Smith.*[80] The principal debt fell due in February of 1933. On May 15, 1933, the debt, including unpaid interest and taxes, came to $135,747.54. About that time the parties reached an agreement for extension and the mortgagors placed in escrow a deed conveying their interest in the land to the mortgagee. If the debt was paid on or before January 1, 1935, the deed was to be redelivered to the grantors. If it was not so paid, the deed was to be delivered to the grantee. On December 31, 1934, the debt not having been paid, the mortgagors commenced action against the mortgagee and escrow holder to enjoin the delivery of the deed by the latter to the former. The defendants answered and the mortgagee filed a cross complaint to quiet title. From judgments for the mortgagee on complaint and cross-complaint the plaintiffs appealed. It had been urged by the plaintiffs that the deed was executed in great haste under fear of foreclosure and also that the value of the property exceeded the amount of the debt by $281,850. The court, in sustaining the judgment for the mortgagee, said:

These rules, which enjoin upon the mortgagee the strictest duties of fair dealing in such transactions cannot be applied to the facts alleged in the complaint before us. Giving full effect to the allegation of the great value of the property, we are unable to discern any inequity in the transaction. Plaintiffs were fully competent. Without any payment on account of the principal

[80] 66 P. (2d) 454 (Cal., 1937).

of the debt they were allowed more than one year and seven months within which to dispose of their property at its reasonable value. It was not alleged that they were unable to do so, nor does it appear that they were hindered in any way in such efforts as they may have made to dispose of it. The agreement was not unfair in this respect. It did not have the effect of depriving plaintiffs of their property at an unreasonable or unfair price. The extension of time was for their benefit and it would appear that they were better off with it than without it. . . . Her [the mortgagee's] insistence that plaintiffs either execute the deed or refuse to execute it, for the consideration of an extension of time [and the cancellation of the debt], was but the assertion of her legal rights in the premises.

As a matter of law mere inadequacy of consideration alone is not a ground for voiding a contract or deed. As a matter of equity it would probably be more accurate to say that gross inadequacy of consideration is merely a circumstance from which the court may infer either that there has been constructive fraud or that the great difference in value discloses an intent of the parties to regard the deed merely as a continuation of the mortgage if other circumstances point to such an intent.[31]

Where the grantor is personally liable for the mortgage debt, as where he signed the notes or where he assumed the payment of the mortgage upon purchasing the land from the mortgagor, the extinguishment of the debt, relieving him from liability on a deficiency decree, should be sufficient consideration for a deed if the fair value of the property is less or not greatly in excess of the indebtedness, including principal, interest, unpaid taxes, and other advancements. Where the deed is to be given by one who is not personally liable for the mortgage debt, as where the grantor purchased the land subject to the mortgage but did not assume the debt, so that no deficiency decree could be obtained against him, the discharge of the debt is of no benefit to him and might not be deemed an adequate consideration. In such situation,

[31] See Russell v. Southard, 12 How. 139, 19 Curtis 66, 13 L. Ed. 927 (1851); Peugh v. Davis, 6 Otto (96 U. S.) 332, 24 L. Ed. 775 (1878).

therefore, it would be safer for the mortgagee to pay the grantor a monetary consideration for the deed, the amount to be determined by the fair value of the property if that be more than the mortgage debt, or if it be less, then an amount which could be considered as more than nominal consideration.

It may be seen from all of the foregoing cases that there is a very broad twilight zone between the mortgage by warranty or quit claim deed and the conditional sale deed or sale with option to repurchase. Nevertheless, it is thought to be reasonably safe to continue the practice which has grown up at the local bar to deal with the mortgagor in such a manner that the debt is cancelled and, perhaps, an option of reconveyance is given as part consideration, and even in some cases a prepaid lease for the option period. Unless the difference in value is extreme, so that the court may feel, to quote the language of some of the decisions, that the creditor is dealing unconscionably with the borrower, such a case will hardly be disturbed by any court.