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Mortgages--Consideration and a Valid Debt Or Obligation--Are Either Or Both Necessary to the Validity of a Mortgage

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MORTGAGES—CONSIDERATION AND A VALID DEBT OR OBLIGATION—ARE EITHER OR BOTH NECESSARY TO THE VALIDITY OF A MORTGAGE?

I. Introduction

The distinct questions of whether a debt or obligation which a mortgage secures is a requisite to the validity of the mortgage and whether a mortgage must be supported by sufficient consideration are the subjects of a great diversity of opinion and a good deal of confusion. This is reflected in some of the South Carolina cases. This discussion is aimed at some degree of clarification of the law as it stands in South Carolina on these two questions. The situation contemplated in this note is the creation of a legal mortgage of real property as between the mortgagor and the mortgagee.

II. The Obligation

It is generally agreed that a valid debt or obligation is essential to the existence of a mortgage[1] because "the idea of a mortgage is founded upon the conveyance being by way of security for the payment of money or the like. . . ."[2] In the early South Carolina case of *McCaughrin & Company v. Williams*[3] the court affirmed the trial court's holding that a mortgage of land was a valid security even though it recited a bond to be secured by it, which bond was not executed, since there was in fact an indebtedness of the mortgagor to the mortgagee. The court quoted from Jones' *Mortgages of Real Property* with approval: "The validity of a mortgage does not depend upon the description of the debt contained in the deed . . . *it depends rather upon the existence of the debt it is given to secure.*"[4] And in *Duckworth v. McKinney*[5] the court, in upholding the lower court's overrul-

1. *E.g.*, Bitzenburg v. Bitzenburg, 360 Mo. 70, 226 S.W.2d 1017 (1950); 1. L. Jones, Mortgages of Real Property § 265, at 344 (7th ed. 1915); G. Osborne, Mortgages § 103, at 246 (1951); 9 G. Thompson, Real Property § 4745, at 380 (J. Grimes ed. repl. 1958); 5 H. Tiffany, Real Property § 1401, at 278 (3d ed. 1939).

2. 2 E. Washburn, Real Property 46 (4th ed. 1876); *see* Note, *The Validity of a Mortgage Created as a Gift*, 4 St. John's L. Rev. 276, 280 (1930).

3. 15 S.C. 505 (1881).

4. *Id.* at 516-17 (emphasis added).

5. 58 S.C. 418, 36 S.E. 730 (1900).

ing of a demurrer to the defendant's answer in a foreclosure action, stated:

> The contention on the part of the [plaintiff] that while *failure* [emphasis in the original] of consideration of an obligation under seal, may be set up as a defense to an action on such an instrument, yet want of consideration cannot, as the seal imports a consideration, cannot avail the [plaintiff] in this case, for two reasons: 1st, Because the note, which constitutes the substratum of plaintiff's action, was not an instrument under seal—the allegation in the complaint being that the note sued on is a "*promissory note*" [emphasis in the original]. *And if the note was without consideration, then there was no debt, and if no debt, then there could be no valid mortgage.*[6]

The court had occasion to meet the issue squarely in *Williams v. Lawrence.*[7] The plaintiff had been given a mortgage by her mother, purporting to secure a note, which she promptly recorded. The transaction was not, however, intended as genuine but only to protect her mother's property from judgment creditors, a threat which never materialized. There was no consideration for the note nor was it under seal. It was consequently unenforceable. The court affirmed the dismissal of the complaint on the ground, *inter alia*, that "[a] mortgage is different from other instruments in that, in order that it may be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given to secure."[8] It is apparent from these cases that the South Carolina view is in accord with the weight of authority.[9]

It should be noted that the court in *Williams*[10] used the language "debt or obligation *of the mortgagor.*"[11] This would seem to indicate that the obligation must be a personal obligation of the mortgagor. There is authority, however, for the proposition

6. *Id.* at 426, 36 S.E. at 733 (emphasis added). The second reason was that the defendant's answer really made out a defense of failure of consideration.

7. 194 S.C. 1, 8 S.E.2d 838 (1940).

8. *Id.* at 11, 8 S.E.2d at 842.

9. This may also be inferred from the statutory language: "[T]he mortgagor shall be deemed the owner of the land and the mortgagee as owner of the *money lent or due. . . .*" S.C. CODE ANN. § 45-51 (1962) (emphasis added).

10. 194 S.C. 1, 8 S.E.2d 838 (1940).

11. *Id.* at 11, 8 S.E.2d at 842 (emphasis added).

that the obligation need not be the personal obligation of the mortgagor.[12] This appears to be the rule in South Carolina.[13]

Before leaving the discussion of the obligation underlying a mortgage, it should be noted that the obligation need not be one for which the mortgagor or the third person is personally liable. The barring of a debt by a statute of limitations, for example, does not affect the validity of the mortgage.[14] Nor does the discharge of the maker of the note in personal bankruptcy discharge the mortgage.[15] Finally, the alteration of a note which has the effect of avoiding it has no effect on the mortgage which secures the debt represented by the note.[16]

III. The Consideration

It is commonly asserted or assumed that a mortgage must be supported by a sufficient consideration.[17] This is true of the South Carolina decisions.[18] Such assertions, however, are incorrect according to the leading writers.[19] It is said that a common law mortgage is a conveyance on condition subsequent and no more requires consideration than any other executed transfer of property.[20] No different rule should apply where the mortgage

12. *E.g.*, 5 H. Tiffany, *supra* note 1 § 1404, at 282.

13. Staggs v. Bridgman, 232 S.C. 402, 102 S.E.2d 362 (1958); Theodore v. Mozie, 230 S.C. 216, 95 S.E.2d 173 (1956); Clanton v. Clanton, 229 S.C. 356, 92 S.E.2d 878 (1956); Greer Bank & Trust Co. v. Waldrop, 155 S.C. 47, 151 S.E. 920 (1930) (dictum); *see* G. Osborne, *supra* note 1 § 103, at 249; 5 H. Tiffany, Real Property § 1404 (3d ed. 1939, Supp. 1967); Karesh, *Security Transactions, 1956-57 Survey of S.C. Law*, 10 S.C.L.Q. 114, 123 (1957).

14. Nichols v. Briggs, 18 S.C. 473 (1883); *see* G. Osborne, *supra* note 1 § 103, at 249; 5 H. Tiffany, *supra* note 1 § 1404, at 283.

15. Nichols v. Briggs, 18 S.C. 473 (1883) (dictum); *see* G. Osborne, *supra* note 1 § 103, at 250; 5 H. Tiffany, *supra* note 1 § 1404, at 283.

16. Edwards v. Sartor, 69 S.C. 540, 48 S.E. 537 (1904); Smith v. Smith, 27 S.C. 166, 3 S.E. 78 (1887); Gillett v. Powell, Speers Eq. 142 (S.C. 1843); *see* G. Osborne, *supra* note 1 § 103, at 250; 5 H. Tiffany, *supra* note 1 § 1404, at 283.

17. *E.g.*, Lee State Bank v. McElheny, 227 Mich. 322, 198 N.W. 928 (1924); *see* 1 L. Jones, *supra* note 1 § 610, at 999; G. Osborne, *supra* note 1 § 107, at 262; 5 H. Tiffany, *supra* note 1 § 1401, at 276; 1 C. Wiltsie, Mortgage Foreclosure § 92, at 171 (5th ed. rev. 1939).

18. Jackson v. Walters, 246 S.C. 486, 144 S.E.2d 422 (1965); Theodore v. Mozie, 230 S.C. 216, 95 S.E.2d 173 (1956); Bandy v. Bandy, 187 S.C. 410, 197 S.E. 396 (1938); Bank of Charleston v. Oates, 160 S.C. 188, 158 S.E. 272 (1931); Greer Bank & Trust Co. v. Waldrop, 155 S.C. 47, 151 S.E. 920 (1930); Nichols v. Andrews, 149 S.C. 1, 146 S.E. 610 (1929).

19. G. Osborne, *supra* note 1 § 107, at 261; 5 H. Tiffany, *supra* note 1 § 1401, at 277; W. Walsh, Mortgages § 14, at 74 (1934); 1 C. Wiltsie, *supra* note 17 § 92, at 172.

20. National City Bank v. Wagner, 216 F. 473 (7th Cir. 1914); G. Osborne, *supra* note 1 § 107, at 261; 5 H. Tiffany, *supra* note 1 § 1401, at 277; W. Walsh, *supra* note 19 § 14, at 74; Note, *The Validity of a Mortgage Created as a Gift*, 4 St. John's L. Rev. 276, 281 (1930); 8 Wis. L. Rev. 184 (1932).

gives a lien (as in South Carolina by statute)[21] since there is no reason for the introduction of the doctrine of consideration which is properly applicable to executory contracts only. A legal mortgage, whether regarded as a conveyance on condition subsequent or as a lien, "is not an executory contract, it not in itself involving any personal obligation."[22] That a mortgage is valid without consideration is indicated by the fact that a mortgage is valid even though given to secure a pre-existing debt of a third person[23] which, in the law of contracts, would be past consideration—thus no consideration.

The failure to differentiate between the mortgage and the obligation it secures is assigned as the most frequent source of confusion.[24] Two reasons given for this are the use of "the word mortgage to refer . . . to the debt, the property security, or the composite unit of the two"[25] and the requirement of an obligation, which makes the validity of the mortgage indirectly dependent upon the consideration for the obligation which it secures.[26] Confusion resulting from this requirement is apparently the reason for the rather frequent reference to the lending of the money or other act which creates the debt or obligation as the "consideration" for the mortgage.[27] Many of the writers and judges who have fallen into this habit recognize that "consideration" in the mortgages context has a different meaning from consideration in the law of contracts.[28] In spite of this they have gone further and brought a modified version of the doctrine of consideration from contract law over into the law of

21. S.C. CODE ANN. § 45-51 (1962).

22. 5 H. TIFFANY, *supra* note 1 § 1401, at 277. *See* G. OSBORNE, *supra* note 1 § 107, at 261; Note, *Consideration in Mortgages*, 19 KY. L.J. 146, 154 (1931).

23. Greer Bank & Trust Co. v. Waldrop, 155 S.C. 47, 151 S.E. 920 (1930) (dictum); Lawrence v. Hicks, 132 S.C. 370, 128 S.E. 720 (1925); Pierson v. Green, 69 S.C. 559, 48 S.E. 624 (1904); Koster v. Welch, 57 S.C. 95, 35 S.E. 435 (1900); *see* G. OSBORNE, *supra* note 1 § 107, at 261 n. 78; 5 H. TIFFANY, *supra* note 1 § 1401, at 277 n. 5; Karesh, *Security Transactions, 1956-57 Survey of S.C. Law*, 10 S.C.L.Q. 114, 123-24 n. 27 (1957).

24. G. OSBORNE, *supra* note 1 § 107, at 262; Note, *The Validity of a Mortgage Created as a Gift*, 4 ST. JOHN'S L. REV. 276, 282 (1930).

25. G. OSBORNE, *supra* note 1 § 107, at 262.

26. *Id.*; W. WALSH, *supra* note 19 § 14, at 75.

27. *See, e.g.*, Jackson v. Walters, 246 S.C. 486, 144 S.E.2d 422 (1965); 3 R. POWELL, REAL PROPERTY ¶ 444 (P. Rohan ed. 1966); 9 G. THOMPSON, *supra* note 1 § 4745, at 382; Note, *Consideration in Mortgages*, 19 KY. L.J. 146, 147 (1931); Note, *The Validity of a Mortgage Created as a Gift*, 4 ST. JOHN'S L. REV. 276, 282 (1930).

28. *See, e.g.*, First Nat'l Bank v. National Grain Corp., 103 Conn. 657, 131 A. 404 (1925); 1 L. JONES, *supra* note 1 § 611, at 1002; 3 R. POWELL, *supra* note 28 ¶ 444, at 575.

mortgages. Thus it is said: "[T]he mortgage is closely akin to an ordinary contract as to which sufficient consideration must be found."[29]

It is not surprising, therefore, to find courts invoking the law of sealed instruments to sustain a mortgage against an attack on the ground of lack of a valid obligation.[30] As an example, the South Carolina court, in *Bandy v. Bandy*,[31] said: "[W]here a mortgage is executed with all the formalities required, under seal, the party who executed it, would not be permitted to impeach it on the sole ground that it was without consideration"[32] (that is, on the ground that there was no valid obligation for which the mortgage was given to secure). And again in the recent case of *Jackson v. Walters*[33] it was held that since the mortgage was under seal, the court would not pass upon whether there was "consideration" for the mortgage.[34] Since one of the requirements for the creation of a legal mortgage in South Carolina is that it be under seal,[35] the court seemed to be saying, in effect, that there is no requirement in South Carolina that the mortgage be given to secure a debt or obligation. This position does not appear to be reconcilable with that of the court in cases such as *Duckworth*[36] and *Williams*[37] which, as previously noted, indicate that a valid debt or obligation to be secured is indeed an essential requirement of a mortgage.[38] Further, the court, in *Duckworth*,[39] discussing the plaintiff's contention that the seal

29. 3 R. POWELL, *supra* note 28 ¶ 444, at 575. One writer goes so far as to say: "A mortgage, like every *other* contract, must be founded on a valuable consideration." 1 L. JONES, *supra* note 1 § 610, at 999 (emphasis added).

30. Jackson v. Walters, 246 S.C. 486, 144 S.E.2d 422 (1965) (note and mortgage); Bandy v. Bandy, 187 S.C. 410, 197 S.E. 396 (1938) (note and mortgage); Bank of Charelston v. Oates, 160 S.C. 188, 158 S.E. 272 (1931) (bond and mortgage); *see* 1 L. JONES, *supra* note 1 § 613, at 1006; 5 H. TIFFANY, *supra* note 1 § 1401, at 276 n. 3; 1 C. WILTSIE, *supra* note 17 § 101, at 185.

31. 187 S.C. 410, 197 S.E. 396 (1938).

32. *Id.* at 413, 197 S.E. at 397. The result is correct as the court also held that the defendant had not proved lack of "consideration."

33. 246 S.C. 486, 144 S.E.2d 422 (1965).

34. As in *Bandy*, there were other grounds for the decision which justified the result.

35. Arthur v. Screven, 39 S.C. 77 (1893). Of course, a mortgage without a seal may still be effective as an equitable mortgage. *Id.*

36. 58 S.C. 418, 36 S.E. 730 (1900).

37. 194 S.C. 1, 8 S.E.2d 838 (1940).

38. Note that in several cases where lack of "consideration" was pleaded in a foreclosure action, the court looked into the matter of "consideration" in spite of its aforementioned assertions that the seal on the mortgage imports consideration. Carsten v. Wilson, 241 S.C. 516, 129 S.E.2d 431 (1963); Pennell & Harley, Inc. v. Harris, 210 S.C. 504, 43 S.E.2d 490 (1947).

39. 58 S.C. 418, 36 S.E. 730 (1900).

imports "consideration" (apparently referring to the seal on the mortgage since the note secured was not under seal), summarily dismissed the contention without any reference at all to the seal on the mortgage.

It should be noted that even though there is no consideration for the obligation which the mortgage purports to secure, if the obligation itself is sealed, it is a valid obligation as the seal imports consideration,[40] and the mortgage likewise is valid.[41] Thus, in cases where the obligation is represented by a bond, which from its very nature is, at common law, usually an instrument under seal,[42] the obligation is valid regardless of the lack of consideration. Failure of consideration, however, may be shown even though the obligation is under seal.[43] For example, in *Koster v. Welch*[44] a mortgage purporting to secure a simultaneously executed bond in the amount of $480 was delivered to the plaintiff together with the bond. The mortgagor was indebted to the mortgagee for $380 but the other $100 was never advanced. In a foreclosure action, the court held that, although the defendant would not have been allowed to show that the bond was without consideration, he could show failure of consideration in the amount of $100.[45]

IV. GIFT MORTGAGES

It is not at all clear whether a mortgage executed by way of a gift, without any debt or obligation which it secures, is valid.[46] There are occasional decisions holding that a mortgage may be the subject of a gift.[47] Jones, in his treatise, asserts that "[a] mortgage may be made by way of gift, when the rights of creditors are not thereby interfered with."[48] On the other hand,

40. Carter v. King, 11 Rich. 125 (S.C. 1857).

41. *See* Koster v. Welch, 57 S.C. 95, 35 S.E. 435 (1900); 5 H. TIFFANY, *supra* note 1 § 1401, at 279.

42. Boyd v. Boyd, 2 Nott & McC. 125 (S.C. 1819).

43. Bank of Charleston v. Oates, 160 S.C. 188, 158 S.E. 272 (1931).

44. 57 S.C. 95, 35 S.E. 435 (1900).

45. The court pointed out, however, that the plaintiff had not asked that the $100 be included in the judgment of foreclosure.

46. The situation contemplated is entirely different from that of a gift of a valid mortgage by one who is not the mortgagor. *See* Note, *A Mortgage as a Gift*, 36 KY. L.J. 121 (1947).

47. *E.g.*, Goethe v. Gmelin, 256 Mich. 112, 239 N.W. 347 (1931). *See* G. OSBORNE, *supra* note 1 § 103, at 251; 5 H. TIFFANY, *supra* note 1 § 1401, at 279; W. WALSH, *supra* note 19 § 14, at 74; 1. C. WILTSIE, *supra* note 17 § 92, at 172.

48. 1 L. JONES, *supra* note 1 § 614, at 1007.

there is authority that a mortgage cannot be created by way of a gift because a mortgage cannot exist without an obligation which it secures.[49] These seemingly conflicting positions can be reconciled, it is said, on the basis of intention of the parties when the mortgage was executed.[50] If the parties intended that the mortgage secure a debt or obligation, a valid debt or obligation is essential to the validity of the mortgage, but not otherwise. Some courts appear to have accepted this reasoning,[51] and others have rejected it.[52] It has been suggested that, since it is undesirable to have an impasse where neither party can use the property, and since the courts should not aid an "Indian giver," the partly-perfected, intended gift should be completed.[53] This idea has been criticized on the ground that "the intention was not to give the property itself but some other performance with the property meant merely as security for that other intended benefit."[54]

The court in South Carolina apparently has not had occasion to deal with the problem of a mortgage intended as a gift other than in a case in which creditors of the mortgagor-donor, to whom he was indebted at the time the mortgage was executed, were resisting foreclosure.[55] In that case it was said:

> [T]he giving of a mortgage to secure the payment of a so-called debt is a very unusual way of making a gift. . . . Whatever doubts may have been entertained as to the right of the heirs or devisees of [the mortgagor]—mere volunteers — to resist foreclosure of a mortgage, we cannot for a moment suppose that anyone acquainted, in the least degree, with settled principles of law, would have doubted the right of creditors to do so.[56]

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49. *E.g.*, Tyler v. Wright, 122 Me. 558, 119 A. 583 (1923); *see* G. OSBORNE, *supra* note 1 § 103, at 246 n. 11. It has already been noted that, under the law of sealed instruments, a sealed obligation executed as a gift would be valid so that a mortgage given to secure the obligation would be valid also. See text accompanying notes 40 and 41 *supra*.

50. G. OSBORNE, *supra* note 1 § 104, at 252; 31 MICH. L. REV. 102 (1932). *See* W. WALSH, *supra* note 19 § 16, at 80, 81.

51. *E.g.*, Brigham v. Brown, 44 Mich. 59, 6 N.W. 97 (1880); *see* 31 MICH. L. REV. 102 (1932).

52. *E.g.*, Coon v. Shry, 209 Cal. 612, 289 P. 815 (1930); *see* 31 MICH. L. REV. 102 (1932).

53. 1 G. GLENN, MORTGAGES § 5.6, at 34 (1943).

54. 4 AMERICAN LAW OF PROPERTY § 16.65, at 125 (A.J. Casner ed. 1952).

55. Gardner v. Gardner, 49 S.C. 62, 26 S.E. 1001 (1897).

56. *Id.* at 75, 26 S.E. at 1006.

Although there has been no particular discussion of the validity of gift mortgages in South Carolina, the court has, on several occasions, as previously mentioned, indicated that, since a mortgage is an instrument under seal, it would not look into the question of lack of "consideration" (that is, obligation secured).[57] On the other hand, there are the cases which hold that a valid obligation is essential to the existence of a mortgage.[58] In view of this apparent conflict together with the lack of decided cases, it would be very difficult presently to make any statement as to what the law is in South Carolina with regard to gift mortgages.

V. Conclusions

It is submitted that the cases in which the South Carolina court has applied the law of sealed instruments to preclude any showing of lack of an obligation secured by the mortgage are weakened by the fact that in every such case there were alternate holdings or other grounds on which the decision could have been based. Therefore, should the court be faced with the question again, these cases present no particular obstacle to an adherence to the general rule recognized and followed in South Carolina that the validity of the mortgage depends upon the validity of the obligation secured thereby.

As for gift mortgages, the better view, which can be reconciled with this general rule, seems to be that of looking to the intention of the parties to determine the validity of such mortgages.

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57. Jackson v. Walters, 246 S.C. 486, 144 S.E.2d 422 (1965); Bandy v. Bandy, 187 S.C. 410, 197 S.E. 396 (1938); Bank of Charleston v. Oates, 160 S.C. 188, 158 S.E. 272 (1931).

58. Williams v. Lawrence, 194 S.C. 1, 8 S.E.2d 838 (1940); Duckworth v. McKinney, 58 S.C. 418, 36 S.E. 730 (1900); McCaughrin & Co. v. Williams, 15 S.C. 505 (1881) (dictum).