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English Doctrine of Equitable Mortgages by Deposit of Title Deeds or Other Muniments of Title

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THE ENGLISH DOCTRINE OF EQUITABLE MORTGAGES BY DEPOSIT OF TITLE DEEDS OR OTHER MUNIMENTS OF TITLE*

I. Introduction

At an early date, the severity of the common law mortgage led to interference by Chancery, by giving the debtor an equity of redemption. Gradually Chancery extended its jurisdiction to include situations where the debtor had given a written instrument, too defective to be enforced as a mortgage at law, holding that such a transaction constituted an equitable mortgage, provided that the agreement manifested an intention to create a lien on the land. Such an attempted conveyance is usually called an "equitable mortgage." That term is also employed where the debtor has made a specifically enforceable contract to give security, and where title deeds have been deposited by way of security. The latter species of security will be considered with reference to the doctrine in England, where it originated. The special purpose being to determine the actual status of the doctrine in the English law of equitable mortgages. It will be assumed that the object of the parties was to give the creditor the fullest possible measure of protection. The doctrine will be discussed primarily with reference to the creation of an affirmative charge upon the land to which the title documents relate. Questions of priority will not be discussed. The differences in effects between an affirmative mortgage on the land involved and a defensive lien on the documents will be considered.

II. In General

It is generally agreed that the doctrine of equitable mortgage by the deposit of title deeds or other muniments of

* The writer is indebted for helpful suggestions to Professor Morton C. Campbell.

title owes its origin to the case of *Russel v. Russel,* decided by Lord Thurlow in 1783.[1] In this case, a lease having been pledged with the plaintiff (E) by a person (R) who afterwards became bankrupt, the pledgee filed his bill for a sale of the leasehold estate. The plaintiff's claim was opposed by the assignees of the bankrupt, who argued that the effect would be to charge the land without a writing, in violation of the fourth clause of the Statute of Frauds and Perjuries. Lord Loughborough said that the delivery of the lease was a delivery of the title to the plaintiff for a valuable consideration; that the Court had nothing to do but to supply the legal formalities; and that, in such cases, the contract was not *to be* performed but was *executed.* Ashurst, Lord Commissioner, observed that it was open to explanation upon what terms the lease was delivered; and "an issue was directed to try whether the lease was deposited as security for the sum advanced by the plaintiff." The jury found that it was deposited as security. The case afterwards came on before Lord Thurlow on the equity reserved, "when his Lordship ordered that the lease should be sold, and the plaintiff paid his money."

It appears from the reporter's note to this case that "the same point has since been determined in the cases of *Featherstone v. Fenwick,* May 1784, and *Hartford v. Carpenter,* 17th and 18th of April, 1785, where Lord Thurlow held that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated; although there was no special agreement to assign, the deposit affords a presumption that such was the intent."

Several important considerations are presented by *Russel v. Russel* and the note thereto. First, as between *debtor* and *creditor,* the *mere* possession of the deeds by the latter raises a *presumption* that they were deposited with him as security for the debt; and the burden of proof lies on the debtor to

[1] 1 Brown Ch. C. 269.

rebut this presumption. So that the delivery of title deeds by the *debtor* to the *creditor* is sufficient to constitute an equitable mortgage. But the authorities require that the circumstances of the deposit must be such as to justify a presumption of an intention to create an equitable mortgage.[2] Certainly the deposit by a debtor with his creditor would be sufficient to give rise to the operation of such presumption, if there were no qualifying circumstances.

If, however, the mortgagor (R) has executed a legal mortgage he may still deposit title deeds with the mortgagee (E) as a security, but the mortgage deed would *presumably* show the extent of the contract between R and E, and the burden would be on E to show that the title deeds were deposited with him as an additional security.[3]

Secondly, E (the depositee) was given a direct power over the estate itself, *i. e.*, he was allowed to foreclose. Before the decision of Lord Thurlow in *Russel v. Russel,* a party with whom deeds were deposited was only entitled *to hold* the title deeds so as to enforce payment by embarrassing the debtor, but unaccompanied by any *charge* upon the estate. If the owner of the estate brought trover, he could not recover without paying or offering to pay the sum for which the deeds were pledged; if he sued in equity, he had to do equity, and the same answer was given.[4] If the right given to the creditor had stopped here, it would not have been in the nature of a mortgage at all. The estate in the land would

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2 In Bozon v. Williams, 3 Y. & J. 150, 161 (1829), Sir William Alexander, C. B., said ". . . it is stated to have been decided, that the mere deposit of deeds constitutes an equitable mortgage, even without a word being said. . . . . Where it has been so decided, it has always been, where the possession could be accounted for in no other way, or the holder was otherwise a stranger to the title and the lands."

In the later case of Dixon v. Mackleston, 8 L. R. (Ch. App.) 155, 162 (1872), Lord Selborne says that "the mere possession of deeds without evidence of the contract upon which the possession originated, or at least of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security."

3 Wardle v. Oakley, 36 Beav. 27 (1864).

4 See discussion by Lord Chief Baron Abinger, in Keys v. Williams, 3 Y. & C. 55, 60 (1838).

only have been affected in this collateral manner; and there would have been no infraction of the Statute of Frauds and Perjuries. This raises the question as to whether the deposit *might* effectuate the object of the parties, where that object is to give E the fullest measure of protection, by embarrassing the debtor without necessarily charging the land? This is quite possible where the value of the land increases or where the creditor has a wide margin of security. But if the creditor has no margin of security or if the value of the land decreases, then the creditor does not necessarily get an effective security. Furthermore, the debtor may not be enabled to repay the loan or to secure a prospective vendee for his property; or he may be indifferent towards repayment.

Again, we are told that it was customary for parties borrowing money, to secure the creditor by depositing with him the deeds of land;[5] and that such a transaction saved time and expense and was very convenient in case of small, short-time loans. So that the courts went one step further than giving a *defensive lien* on the title deeds, and were desirous probably of carrying out what they considered to be the intention of the parties and of recognizing what seemed to be commercial necessities, when they recognized the rule that the deposit with the creditor was in itself evidence not only that the deeds were to operate as a security, but such security was to be effectuated by a mortgage.[6]

The English Courts have gone to great lengths in characterizing this species of security. To quote:

". . . it appears that a deposit of title deeds has always been considered as an imperfect mortgage, which the mortgagee is entitled to have perfected, or rather a contract for a mortgage, which . . . would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed." [7]

Again,

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5 Flandrau, J., in Gardner v. McClure et al., 6 Minn. 250, 260 (1861).

6 See remarks of Flandrau, J., in Gardner v. McClure et al., *supra* note 5.

7 Per Sir C. Pepys, M. R., in Parker v. Housefield, 2 My. & K. 419, 420 (1834). This extract is quoted with approval in M'Kay v. M'Nally, 13 Ir. L. T. 130, 135 (1879), a case decided by the Supreme Court of Judicature.

"The common rule of this Court as to an equitable mortgage by deposit, is this: by the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee." [8]

As we have already observed, within two years after the decision in *Russel v. Russel,* Lord Thurlow held that the deposit of title deeds as security "entitled the holder to have a mortgage and to have his lien effectuated."

Other authorities are at hand to the effect also that a deposit of title deeds as security will be treated as an agreement to execute a legal mortgage,[9] which would carry with it all the remedies incident to such a mortgage. We might wonder as to why the equitable mortgagee by deposit of deeds should want to bring a suit to have a legal mortgage executed instead of enforcing his equitable mortgage directly by some remedy afforded to him for that purpose. On the other hand, he might desire to have possession of the premises before maturity.

III. With Respect to the Statute of Frauds and Perjuries

A. In General

Russel v. Russel presents a more serious question, *viz.,* as to whether the doctrine of that case is a judicial repeal of the Statute of Frauds and Perjuries to the extent that the doctrine prevails.[10] On the one hand, in the English cases

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8 Per Sir Richard Lorin Kindersley, V. C., in Pryce v. Bury, 2 Drew. 41, 42 (1853).

9 In Carter v. Wake, L. R. 4 Ch. D. 605, 606 (1875), Jessel, M. R., said: ". . . when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage."

In Birch v. Ellames, 2 Anst. 427, 431 (1814), the Chief Baron of the Exchequer said: "The deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court, against the mortgagor, or any who claim under him with notice, actual or constructive, of such deposit having been made."

10 In Ex parte Whitbread, 19 Ves. Jr. 209, 34 Eng. Rep. 496, Lord Eldon said that the decisions establishing this doctrine approached to a virtual repeal of the Statute of Frauds and Perjuries. Again, in Ex parte Hooper, 19 Ves. Jr. 477, 478, 479, 34 Eng. Rep. 593, the same great Chancellor said: "With great

we notice that the deposits were, in some cases, accompanied by a written memorandum stating the purpose for which they were made; sometimes they were entirely without writing. It is the latter class of cases, if any, that contravenes the Statute of Frauds and Perjuries. In *Norris v. Wilkinson,*[11] Sir William Grant bitterly denounced the doctrine of *Russel v. Russel* in the following language:

"I do not see, why there should be such a disposition to relieve parties from the necessity of attending to the requisitions of the Statute (of Frauds and Perjuries). There is no case, where a man is willing to part with his title-deeds, in which he would not also be ready to sign a memorandum of two lines; specifying the purpose, for which he had parted with them. By dispensing with any written evidence of the contract, an opening is left for all the fraud and perjury, which the Statute was calculated to exclude."

The wisdom of this statement is obvious. There would not seem to be any more inconvenience in such cases than in cases of a sale or conveyance of an interest in land. Commercial necessities would not seem to outweigh interests of security of acquisitions, regardless of other considerations that might be said to exist during the latter part of the eighteenth and the early part of the nineteenth centuries.[12]

Does a deposit of title deeds as security for a debt come within the letter of the Statute of Frauds and Perjuries? Section I relates to the creation of estates, and it is sufficiently

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deference to Lord Thurlow, who first held, that the deposit of a deed necessarily implied an agreement for a mortgage, I repeat, that this decision has produced considerable mischief; and that the case of *Russel v. Russel* . . . ought not to have been decided as it was." In Ex parte Kensington, 2 Ves. & Bea. 79, 83, he wondered why the doctrine came to be settled as it was. In Ex parte High, 11 Ves. Jr. 403, 32 Eng. Rep. 1143, he considered the decision in Russel v. Russel was "much to be lamented."

In Norris v. Wilkinson, 12 Ves. Jr. 192, Sir William Grant expresses great disapprobation of the doctrine, and considers it to be a violation of the Statute of Frauds and Perjuries.

Alexander, Lord Chief Baron, in Bozon v. Williams, 3 Y. & J. 150, 161, regrets the inroad which the doctrine of equitable mortgages by mere deposit of title deeds has made on the wise provisions of the Statute of Frauds and Perjuries.

11 12 Ves. Jr. 192, 197 (1806).

12 Most of the cases involving this question were decided in the latter part of the eighteenth and in the early part of the nineteenth centuries.

comprehensive in its language to embrace the creation of every possible estate in land. But it seems to be directed to interests of *ownerships* rather than *security interests*. So that the equitable mortgage by deposit of title deeds is not within the terms and intendment of this section.

Section IV, part 4, evinces an intention on the part of the framers of the Statute to embrace all transactions affecting the title to real estate, specifying as it does those interests which may be said merely to *concern* land. Thus from the standpoint of *subject matter*, part 4 of this Section is broad enough to embrace equitable, as well as legal, interests in land.[13] Our next inquiry is: What is the *nature of the transaction* which this part of the Statute requires to be in writing? Is an equitable mortgage by deposit of title deeds required thereby to be in writing in order to be enforceable? It is not a *contract to sell* or a *contract of sale*, but simply a *charge of* or *contract to charge* the land. The common law does not take cognizance of such a transaction; and we are concerned only with the situation as it is recognized by Chancery. It is trite to remark that in a court of equity, the debt is the principal, and the estate in the land the accessory. It is not land, *qua* land, which passes, but a security interest in the land, subservient to the debt. So courts of equity might with obvious propriety regard such a situation as a consequential translation of the interest in the land and as such not within the express prohibition of the Statute. Yet it reposes in E a power by foreclosure to change the ownership of the land, and, hence, is within the *policy* of the Statute.

The full scope and purpose of the Statute seems to have been somewhat overlooked. In the title we notice that it is "An Act for the Prevention of Frauds and Perjuries." In the shortening process of the decisions, the word "perjuries" has been dropped entirely. The preamble even more emphatical-

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13 See BROWNE, THE STATUTE OF FRAUDS (1st ed.) § 229.

ly emphasizes the element of perjury, for therein it is recited that the very purpose of the Statute is "*for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury.*" Lord Eldon was careful to call attention to the question of perjury in his denunciations of the decision in *Russel v. Russel.*[14] Sir William Grant was equally as careful to point out the possibility of perjury in such situations.[15] Lord Eldon said that the act of deposit was not a sufficiently noteworthy act to prevent the danger of perjured testimony; that it might well be referable only to a defensive lien on the documents.[16] On the other hand, there is the possibility of the depositor favoring one creditor at the expense of another or others. So that the result in *Russel v. Russel* leaves a wide margin for the operation of perjured testimony.

But over and against these considerations is the view of Lord Thurlow, the original expounder of the doctrine, "that the fact of adverse possession of the deeds by the person claiming the lien, and out of the other, was a fact, that entitled the Court to give an interest" in the land.[17] That is to say that a prior possession in R would serve as a check.

If we look at the history of the law of mortgages, as it was developed by Chancery, we will see that the rigidity of the common law led to interference by Chancery, first with respect to the equity of redemption after the *law day* in cases of the so-called "dead pledge," *i. e., mortuum vadium;* [18] and, second, Chancery gradually extended its jurisdiction until it became the rule that any written instrument, too incomplete and informal to be enforced as a mortgage at law, would be enforced as a lien upon the land, provided that a sufficient intent to that effect was manifested. Therefore, ex-

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14 See Ex parte Whitbread, 19 Ves. Jr. 209 (1812).
15 In Norris v. Wilkinson, 19 Ves. Jr. 192, 197 (1806).
16 In Ex parte Whitbread, *supra* note 14.
17 Remarks of Lord Eldon, in Ex parte Coming, 9 Ves. Jr. 115, 117a (1803).
18 2 STORY, EQUITY JUR. (13th ed.) § § 1004-1015.

cept for the Statute of Frauds and Perjuries, it would seem to be but one step forward for Chancery to enforce such a lien where the agreement was evidenced only by the deposit of the title deeds.

Lord Chief Baron Abinger attempted to justify the doctrine. He declared:

"In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute." [19]

He knew better than we know about the necessities and expediency of commercial transactions in 1838. But we do know that Sir William Grant thirty-two years previously had said that there was no case

". . . where a man is willing to part with his title deeds, in which he would not also be ready to sign a memorandum of two lines; specifying the purpose, for which he had parted with them." [20]

B. PART PERFORMANCE

Where one party advances money to another upon the faith of an oral agreement by the latter to secure its payment by a deposit of title deeds to certain lands, will equity impress upon the land, the title deeds to which have been deposited in accordance with the oral agreement, a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt? Is it necessary that such a transaction be in writing to take it out of the operation of the Statute of Frauds and Perjuries? Nothing in the Statute should affect the power of Chancery to compel specific performance of agreements partly executed.

Lord Loughborough rested his opinion in *Russel v. Russel* upon the ground of part performance. He said:

"In all these cases the contract is not *to be* performed, but *is* executed."

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[19] In Keys v. Williams, 3 Y. & C. 55, 60, 61 (1838).

[20] In Norris v. Wilkinson, 12 Ves: Jr. 192, 197 (1806).

But it seems probable that the law of equitable mortgage by deposit of title deeds can be justified upon the same principles as those that govern in the general law of specific performance as applied to cases where, in respect to contracts relating to interests in land, the Statute of Frauds and Perjuries is not complied with. The English cases hold that there is an inference from the mere deposit of title deeds that it was intended to give an interest in the land, and in that way there is something more than a mere parol contract, something in the nature of part performance, so as to take the case out of the Statute of Frauds. That is to say, a mere verbal agreement for deposit without an act is not sufficient to exclude the operation of the Statute; there must be some act of part performance changing the legal position of the parties. Such was the rationalization of the doctrine in *In re Beetham, Ex parte Broderick,*[21] apparently the latest English decision on the subject. That decision requires that the act of part performance relied upon must *in its nature be referable to the specific parol contract* sought to be enforced. Under the English rule, the mere deposit of the title deeds would be an act of such a character. The English cases hold that the advance of money on an oral agreement that it should be secured by a mortgage on real estate is not a sufficient part performance under the Statute of Frauds and Perjuries.[22] Although there is some conflict, the weight of authority requires that the deposit of title deeds be made for the purpose of creating a *present* security, and not merely as a preliminary step to the preparation of a mortgage which will be security thereafter.[23] As we have already noticed, Lord Thurlow thought the act of deposit to be a sufficiently noteworthy act to prevent perjury.[24] From another viewpoint, the rule of the English cases is that the

21 L. R. 18 Q. B. D. 380 (1886).

22 Ex parte Hall; In re Whitting, (1879) L. R., 10 Ch. Div. 615. See note 30 A. L. R. 1403, 1404.

23 See section IV. *infra.*

24 See note 17, *supra.*

mere delivery and taking possession of the land itself in pursuance of an oral agreement for the sale of the land is a sufficient part performance to take the case out of the Statute. So it would seem to follow that possession of the title documents, carrying the control over disposition of the land, would suffice, provided, of course, that they are delivered in pursuance of an oral agreement to give security.[25]

The doctrine of part performance was not referred to in the Statute of Frauds and Perjuries of 1677; but the Law of Property Act of 1925 "does not affect the law relating to part performance." [26]

IV. Deposit of Title Deeds to Prepare a Legal Mortgage

Some doubt has been raised as to whether the deposit of title deeds for the purpose of having a legal mortgage prepared creates an equitable mortgage. In such cases there is additional difficulty in sustaining it as an equitable mortgage. The *proved intent* would expressly negative any implication that such deposit itself was meant as a *charge*. And if that intent is specifically enforced by directing a mortgage to be made, the direction will be based, not on an implication of law, but on express parol evidence, admitted in contravention of the Statute.[27] The deposit would not be by way of part performance of the agreement but as a preliminary step looking towards the preparation of a legal mortgage—an act *ancillary* to performance.

It is not a little singular that Lord Thurlow, the original expounder of the doctrine establishing an equitable mortgage by deposit of deeds, should have decided the question

25 5 Pomeroy's Equity Jur. (2nd ed.) § 2241.
26 3 Everyday Statutes Ann., p. 2376.
27 Adams' Equity (5th Am. ed.) § 125.

in the negative,[28] while Lord Eldon, who considered the doctrine of *Russel v. Russel* as pernicious, should have taken, as he did, a larger view, and held that the intention being sufficiently shown by the purpose for which the deeds were delivered when a legal mortgage was to be prepared, there should be no distinction between a deposit for the avowed purpose of having a security prepared, and a deposit intended to operate as an immediate security.[29]

In *Ex parte Bruce*,[30] Lord Eldon held that an equitable mortgage was created by the deposit of title deeds for the purpose of preparing a legal mortgage. For aught that ap-

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28 In Ex parte Bulteel, 2 Cox 243 (1790) (delivery of deeds to E to have mortgage prepared; E delivered to solicitor, whom parties had agreed upon to prepare the mortgage; mortgage was prepared by solicitor, but before execution of it, a commission in bankruptcy was issued against R. Lord Thurlow held, that E got no equitable mortgage on the real estate); Lord Thurlow's view was confirmed by Sir William Grant, M. R., in Norris v. Wilkinson, 12 Ves. Jr. 192 (1806).

It is rather curious that in a *dictum* in Edge v. Worthington, 1 Cox 211, decided by Sir Lloyd Kenyon, M. R., in 1786, it was said that an agreement to mortgage with a subsequent delivery of the deeds will amount in equity to a mortgage. This is probably explainable by the fact that Edge v. Worthington was not in print when Norris v. Wilkinson and Ex parte Bulteel were decided, and so was not called to the attention of either Lord Thurlow or of Sir William Grant. See argument in Hockley v. Bantock, 1 Russ. 141, 144 (1826).

29 In Ex parte Bruce, 1 Rose's Bank. Cas. 374 (1813), where a petition for a sale was resisted on the ground that the deeds were delivered to petitioner, not as security, but in order that a legal mortgage might be prepared, Lord Eldon, in holding that an equitable mortgage was created by a deposit of deeds for the purpose of preparing a legal mortgage, said: "The Principle of Equitable Mortgage is, that the Deposit of the Deeds is Evidence of the Agreement; but if they are deposited for the express Purpose of preparing the Security of a legal Mortgage, is not that stronger than an implied Intention?"

Cf. Ex parte Wright, 19 Ves. Jr. 256, 258 (1812), where he (Lord Eldon) said that the "deposit of deeds *until a mortgage*" was evidence of an agreement for a mortgage, and that an "equitable title to a mortgage" was in equity as good as a "legal title."

In Hockley v. Bantock, 1 Russ. 141 (1826), Lord Gifford held that delivery of title deeds by executors to agents of one of the residuary legatees, for purpose of having a mortgage prepared, in pursuance of an agreement to that effect, entitled the legatee to an equitable lien as against the executors, following the decision in Ex parte Bruce.

Again, in Keys v. Williams, 3 Y. & C. 55, 62 (1838), Lord Chief Baron Abinger said, that if it were necessary to decide the specific point, he should say that an agreement to grant a mortgage for money already advanced and a deposit of deeds for the purpose of preparing a mortgage, was in itself an equitable mortgage by deposit.

30 1 Rose's Bank. Cas. 374 (1813).

peared, there was *no intention* in this case that the deeds should *be held by way of a present security* until the legal mortgage should be executed. There were three conceivable situations: (1) Present defensive lien on the deeds *and* preparation of a legal mortgage; (2) Delivery merely for the purpose of preparation of a mortgage, R having the right to recall at any time; and (3) Delivery merely for the purpose of safe-keeping, R having the right to recall. The proved intent in the case was opposed to the conclusion that any *present* security was intended. So the presumption of a deposit by way of security was actually rebutted. The views of Lord Eldon on this subject are not quite reconcilable. Seven years after his decision in *Ex parte Bruce,* he held that a delivery of a part of the title deeds of an estate for the purpose of preparing a legal mortgage did not constitute a valid equitable mortgage, on the ground that it *was not the intention of the parties that a mortgage should be created until an actual one was executed.*[31] *Ex parte Bruce* was not cited, but surely his Lordship did not forget his decision in that case. The earlier decisions of Lord Thurlow, in *Ex parte Bulteel,* and of Sir William Grant, in *Norris v. Wilkinson,* to the contrary, were not expressly overruled or discussed by Lord Eldon. Sir William Grant was careful to point out, in *Norris v. Wilkinson,* the distinction between a deposit by way of a present and immediate security, *i. e.,* a deposit by way of security until a legal mortgage is executed, and a deposit merely for the purpose of having a legal mortgage prepared, where the delivery of the deeds is only a step towards its preparation. Lord Eldon overlooked this distinction in *Ex parte Bruce* but observed it in his later decision.[32]

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31 Ex parte Pearce; In re Price, 1 Buck Bank. Cas. 525 (1820).

32 For a critical discussion of the English cases, see 2 POWELL ON MORTGAGES, by COVENTRY (6th ed.) p. 1056; MILLER, LAW OF EQUITABLE MORTGAGES, pp. 50, 51.

On principle, it is submitted that the distinction noted in *Norris v. Wilkinson* is sound, and will probably be accepted as the leading English authority on the subject. It is observed by Lord Justice Turner in what is probably the most recent case involving the proposition, *viz., Lloyd v. Attwood,* decided in 1859.[33] But Mr. Miller says that, from the greater favor shown by Chancery "of late years toward these securities," the view of Lord Eldon in *Ex parte Bruce* as supported by that of Lord Chief Baron Abinger in the case of *Keys v. Williams* [34] will be adopted.[35] It might be noted here that, in one of the leading American decisions on the subject of equitable mortgage by deposit of title deeds, Judge Cardozo says that under the English rule a deposit of title deeds for the purpose of preparing a legal mortgage is not a sufficient part performance under the Statute of Frauds and Perjuries unless the deposit was by way of affording a *present* security until the legal mortgage was executed.[36] Probably Judge Cardozo was unaware of the conflict in the English decisions on the particular proposition.

V. Deeds to be Deposited—All Necessary?

An equitable mortgage may be created by the deposit of a *part* of the title deeds. It would seem to be undesirable to require that *every* deed in the chain of R's title should be deposited before an equitable mortgage could be created by a deposit of title deeds. It would greatly curtail the practical benefit of the doctrine if the depositee should be required to obtain *all* of the title deeds in order to effectuate an equitable mortgage. Suppose the owner has lost an important deed; could he not deposit the rest? Or suppose that the deeds deposited, while material links in the title, contain no reference to any other material deeds that are actual-

33 3 De G. & J. 614, 651, 652 (1859).

34 See note 27, *supra.*

35 Miller, Law of Equitable Mortgages, p. 51.

36 See Sleeth v. Sampson, 237 N. Y. 69 (1923); Campbell's Cases on Mortgages, 54, 56, 57.

ly outstanding? Should the depositee be deprived of the benefit of his deposit because he did not secure all the deeds, excepting from consideration any question of priority? The English Courts have answered in the negative.[37] They do generally require that the deeds deposited be material evidences of title. The *materiality* seems to be a matter largely discretionary with the court deciding the particular case.[38]

In *Ex parte Pearse, In re Price,* Lord Eldon argued against extending the doctrine of *Russel v. Russel* to a case of a deposit of *part* of the deeds, from a practical standpoint. "Suppose," he said, that "the deeds have been divided amongst twenty different creditors, would each of them have been equitable mortgagees?" [39]

On the other hand, the Vice-Chancellor, Sir Richard Torin Kindersley, in *Lacon v. Allen,*[40] presents another view from the practical aspect. "Suppose," he queried, that "the owner has lost an important deed, could he not deposit the rest?" In the same case, the Vice-Chancellor treaded upon the tail of his own argument. He said:

". . . at the time he (the mortgagor) was called upon to give security he deposited all he had, and the reason why he did not deposit more was that he had already given another mortgage, and parted with the deeds."

Part of the title deeds would seem to serve the purpose of creating an equitable mortgage, in view of the importance of the deeds in the English law and in view of the *expediency* [41] involved in such situations. The depositee should not be required to absolutely assure himself that he acquires every title deed; nor that the deeds deposited should show a good title in the depositor, as, for instance, when he deposits all the deeds except the conveyance to himself.[42]

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37 Ex parte Chippendale; In re Potter, 1 Deac. 67 (1835); Ex parte Arkwright, et al., 3 M. D. & De G. 129 (1843); Lacon v. Allen, 3 Drew. 579 (1856).

38 See Lacon v. Allen, 3 Drew. 579 (1856).

39 1 Buck Bank. Cas. 525, 526 (1820).

40 3 Drew. 579, 581 (1856).

41 See Roberts v. Croft, 24 Beav. 223, 230, 231 (1857).

42 Roberts v. Croft, 24 Beav. 223 (1857).

VI. Property Subject to Equitable Mortgage by Deposit of Title Deeds

The English Courts have logically and wisely held that the deposit of deeds could not create an equitable mortgage on property to which they do not relate.[43] That is to say, if R deposits the title deeds of *Blackacre* with E, assuring him, at the time, that they are the title deeds of *Whiteacre*, but to which, in reality, they do not relate, this does not create an equitable mortgage on *Whiteacre*. E would have an action for damages for fraudulent representations; but it seems that he could not have specific performance from R. The Statute of Frauds and Perjuries would probably prevent such relief. E would not have either possession of *Whiteacre* nor power of disposition. Such deposit would not affect third parties with whom R (if he is owner) afterwards deposits the title deeds of *Whiteacre* as security. As a matter of policy, it would not seem to be desirable to permit E to charge any lands of R merely because he held the title deeds to part of R's property and alleged that by reason of R's misrepresentations he (E) had believed that the deeds included other property than that which they actually did.

Prima facie a deposit of title deeds creates an equitable mortgage on all the property comprised in them.[44] And *prima facie* an equitable mortgage by deposit of title deeds will be confined to the property comprised in the deeds deposited.[45] The latter is true even though, as we have already observed, the depositor falsely asserts that the deeds actually deposited relate to property not comprised therein. On the other hand, although the deeds deposited may apply to various tracts of land or properties, yet the memorandum of deposit may limit the equitable mortgage to a part only of

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43 Jones v. Williams, 24 Beav. 47 (1857).

44 Per Knight Bruce, V. C., in Ashton v. Dalton, 2 Coll. 565 (1846).

45 Per Sir John Cross, in Ex parte Powell; In re Moore, 6 Jur., Part 1, 490, 491 (1842).

the properties or land comprised in the deeds.[46] This is consistent with an application of the doctrine of equitable mortgages by deposit of title deeds. Furthermore, it is consistent with the theory as to the intent to create an equitable mortgage by a deposit of deeds.

VII. Whether Future Advances are Secured

The doctrine of equitable mortgages by deposit of title deeds, unaccompanied by a memorandum, has been extended so that the deposit may be security for subsequent advances. Although a legal mortgage cannot be extended to subsequent advances by a subsequent parol agreement,[47] a deposit of title deeds may be evidence, either written or parol, be held to extend to subsequent advances. There must be proof of an agreement that the deposit was originally made as security for the subsequent as well as for the first advances, or clear proof that the subsequent advance was made upon a later understanding that the deeds were to be security for it.[48] It is not a little singular that Lord Eldon, who expressed so much dissatisfaction with *Russel v. Russel,* should be the first to extend the doctrine of that case to future advances under a later understanding.[49] He said he was still more dissatisfied with the extension of the doctrine,[50] although the extension seemed to follow by parity of reasoning.[51] He regarded the later transaction as equivalent to a re-delivery of the deeds to the mortgagor (depositor) and a delivery back to the mortgagee (depositee). Lord Eldon would not require that formality. Would evidence of surrender and redelivery satisfy the requirements of the Statute? Such evidence could as easily be fabricated as that of evidence of intention to charge; there is no prior possession in the mort-

46 Wylde v. Radford, 12 W. R. 38 (1863).

47 Ex parte Hooper; In re Hewett, 1 Mer. 7 (1815).

48 Ex parte Langston, 34 Eng. Rep. 88 (1810); Ex parte Whitbread, 19 Ves. 209 (1812); Ex parte Kensington, 2 Ves. & B. 79 (1813).

49 In Ex parte Langston, 34 Eng. Rep. 88 (1810).

50 In Ex parte Hooper; In re Hewitt, 1 Mer. 7, 9 (1815).

51 In Ex parte Langston, 34 Eng. Rep. 88, 89 (1810).

gagor to serve as a check as in the case of original deposit. Lord Eldon might well have stopped short of future advances made under subsequent understandings.

VIII. RETENTION OF "DEPOSIT" BY "DEPOSITOR"

The deposit of title deeds as security for a debt due to a third person will not be effectual to create an equitable mortgage if made to the wife of the depositor,[52] nor, *a fortiori,* if the debtor is permitted to retain the deeds. To so hold would be to rest the doctrine upon a parol allegation of one person of a parol understanding denied by another. There is no adverse possession of the deeds in E to serve as a check. But if R gives a memorandum in writing to E, stating that he holds the deeds for E, there would seem to be no doubt but that this would constitute an equitable mortgage upon the estate of R.[53]

Where the debtor holds the deposit with a memorandum of deposit as employee of the creditor, it would seem to constitute an equitable mortgage.[54] But if the debtor holds both the deposit and the memorandum of deposit in his private capacity, no equitable mortgage is created in favor of the creditor.[55]

The deposit may be made either to the creditor himself or to some third person over whom the depositor has no control.[56] But an equitable deposit in the hands of one creditor will not be extended to an advance made by another creditor, unless the person holding the deeds is a mere trus-

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52 Ex parte Coming, 9 Ves. Jr. 115 (1803) (E, who petitioned to be admitted as a creditor under a Commission of Bankruptcy, loaned a certain sum to R, who agreed to make a mortgage; R deposited title deeds with wife, to secure the money lent; *held,* not to create an equitable mortgage).

53 So held in Baynard v. Woolley, 20 Beav. 583 (1855).

54 Ferris v. Mullins, 2 Sm. & G. 378 (1854).

55 Adams v. Claxton, 6 Ves. Jr. 225, 230 (1801).

56 Lloyd v. Attwood, 3 De G. & J. 614 (1858), holding that, as an equitable mortgage could be created by a deposit of title deeds with a trustee for the intended mortgagee, it could not be denied that a borrower might deposit his title deeds with his own solicitor as such trustee.

tee and has made no advance.[57] Lord Eldon said that from a moral viewpoint the second creditor ought to have a lien, but that the Statute prevented and it must not be repealed further than it had been repealed by his predecessors.[58]

It is not in the power of the mortgagee by any act of his own merely, to become a "depositee" for third parties. But there would seem to be no reason why R, the mortgagee by deposit and the second creditor could not agree orally that an equitable mortgage shall be created in such manner, and that such an agreement should not be valid.[59]

IX. Conclusions

In respect to the Statute of Frauds and Perjuries, it is fairly obvious that to-day the difficulty that confronted the court in *Russel v. Russel* would be practically negligible.

The doctrine of that case really formed an exception to the Statute of Frauds and Perjuries. The justification for this exception probably lay in two considerations: (1) That of commercial expediency; and (2) the fact that in England, the title deeds—"the visible badge of ownership"—had such an important place in the transfer of interests in land. No one could prove title without the deeds. There was an absence of registries, except in the counties of Middlesex and York, where a search could be made to ascertain the titles to lands, with the exception of copy-hold titles, which were to be found recorded in the manor courts. So an examination of the deeds in original transfers of title on sale of land was very important. The security of the purchaser, for the validity of the title in his grantor, was the exhibition of the deeds which established that title.

With respect to commercial expediency, there is undoubtedly no such necessity to-day, whatever it may have been in the early nineteenth century. So that probably the only basis

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57 Ex parte Whitbread, 34 Eng. Rep. 496 (1812).
58 In Ex parte Whitbread, 34 Eng. Rep. 496, 497 (1812).
59 See In re Henry; Ex parte Crossfield, 3 Ir. Eq. R. 67.

of fact which exists in England for the doctrine of equitable mortgage created by a deposit of title deeds accompanied by an oral agreement that the depositee hold as security for a loan, is the importance of the deeds in furnishing the evidence of title.

An equitable mortgage of land, created by a mere deposit of title deeds, was not required to be registered under the provisions of the Middlesex Registry Act,[60] because there was "no instrument to be registered." [61] But where the deposit was accompanied by a written memorandum, it required registration in order to maintain its priority.[62]

The recent English legislation preserves the doctrine of equitable mortgages by deposit of title deeds. The Law of Property Act of 1925, does not affect the power of creating an equitable mortgage by deposit of title deeds. On the contrary, section 13 of the Act provides that it "shall not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land, nor affect any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of any documents relating to a legal estate in the land." [63] This is undoubtedly a clear cut expression of an intention to preserve this form of security in the English law. We have a reinforcement in section 40 of the same Act, which replaces section 4 of the Statute of Frauds and Perjuries of 1677. Although part performance was not referred to in the Act of 1677, and quite obviously it would not be, Section 40 of the law of Property Act of 1925 "does not affect the law relating to part performance." [64]

So in regard to registration, equitable mortgages by deposit of deeds are protected. Section 97 of the Law of Prop-

60 7 ANNE, c. 20, § 1.
61 Sumpter v. Cooper, 2 B. & A. 223, 226 (1831).
62 Moore v. Culverhouse, 27 Beav. 639 (1860).
63 3 EVERYDAY STATUTES ANN., p. 2361.
64 3 EVERYDAY STATUTES ANN., p. 2376.

erty Act of 1925 provides that: "Every mortgage affecting a legal estate in land made after the commencement of this Act, whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate affected) shall rank according to its date of registration as a land charge pursuant to the Land Charges Act, 1925." [65]

One thing should be noted, however, in both of these Acts, that although this new legislation preserves the right of creating a security by the deposit of title deeds, to be within the saving clauses the documents must relate to the *legal* estate. It does not appear as to whether this limitation existed before the passage of such legislation. Probably Parliament intended to remove any doubt in respect to this question.

Therefore, it seems that this form of security has a permanent niche carved for it in the English law of Mortgages.

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[65] 3 EVERYDAY STATUTES ANN., p. 2422. See section 10 of the LAND CHARGES ACT OF 1925, in 2 EVERYDAY STATUTES ANN., pp. 1695, 1696.