

ABSOLUTE CONVEYANCE AS A MORTGAGE IN IOWA

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In two recent decisions, the Iowa Supreme Court has continued the vitality of the ancient doctrine that an absolute deed, under some circumstances, will be held in equity to be a mortgage.¹ When the grantor of an absolute conveyance asserts that the grantee holds the title only as security, the court will examine the environment of the transaction to determine if, in equity, the transaction was actually an absolute conveyance or only security for a "debt." Such factors as the amount of consideration given for the conveyance in relation to the value of the property, the prior relations and dealings between the parties and subsequent acts in relation to the land have been held especially important in this determination. If held to be only a mortgage, the grantor will be permitted to redeem the property by repaying the "debt."

Although the parties legally intended to make a warranty or quit claim deed, if the purpose of the transaction is to convey for security, the court of equity will pierce the legal intent as expressed in the document and enforce the actual intent, discernible from objective acts and subjective purposes, by decreeing the absolute conveyance to be a mortgage. Even though the parties legally intended the conveyance to take effect as absolute, if the essence of the transaction is to convey for security, this transaction will be given the legal effect of a mortgage and the grantor will be permitted to redeem.²

The purpose of this Article is to analyze the factors that the Iowa Supreme Court has considered in affirming or rejecting the claim that a deed is a mortgage and the effect of a decree finding a mortgage. The inquiry necessarily delves into the interrelatedness of the facts, for the result depends upon intent as manifested by these fact patterns. Since neither the presence nor the absence of any one factor is dispositive and because each case is unique and must turn on its own ambience, it may be unrealistic to lift individual factors from the total context. However, lucidity requires and similarity of fact patterns permits an organizational breakdown.³

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¹ Koch v. Wasson, 161 N.W.2d 173 (Iowa 1968); Collins v. Isaacson, 158 N.W.2d 14 (Iowa 1968).

² It is also argued that the parties believed appellees' right of redemption would be cut off upon default on March 1, 1941. It may be that appellees, as well as appellants, supposed or believed the transaction would be effective to cut off appellees' right of redemption. But this is not controlling. The important inquiry is whether the deed was intended for security; if so, the settled policy of the law accorded appellees the right to redeem, whether they knew it or not. Stated in another way, the important question is, what rights does the law give these parties under the arrangement made, not what they conceived their rights to be."

Guttenfelder v. Iehsen, 230 Iowa 1080, 1086, 300 N.W. 299, 303 (1941).

³ The term "equitable mortgage" will not be used herein because it is a generic term

I. NATURE OF THE ACTION

The extraordinary power of equity to decree an absolute conveyance to be but a mortgage is, in some respects, similar to an action to set aside a deed because of incompetency, fraud or undue influence.⁴ However, the proof required in an action to set aside is more severe, for every presumption is in favor of regularity.⁵ Consequently, it is easier to have a conveyance declared a mortgage than to have it declared void, even though both actions involve contradiction of the precise terms of a written instrument involving land. This is probably due to the fact that the results of a mortgage are not as cataclysmic as those of setting aside an absolute conveyance. If a mortgage, the grantor may redeem by repaying the consideration plus interest,⁶ but if a deed is voided, the property returns to the grantor without his surrendering any consideration. Furthermore, while requests to declare a deed a mortgage involve, for the most part, business relationships, the "set aside" actions generally involve intra-family situations where gifts are frequent.⁷

The evidence necessary to void a deed must relate to the mental condition of the grantor.⁸ The evidence necessary to declare a deed a mortgage must relate to the subjective intent of both parties as shown by their objective relationship. In the latter action the parties ostensibly intended an absolute conveyance, but if the actual relationship demonstrated an intent to make only a security transaction, the grantor will be permitted to redeem even in an absence of fraud.⁹ Thus, while the burden of proof may be similar,¹⁰ the proof relates to a different set of circumstances.

Decreeing an absolute conveyance to be a mortgage also differs from a constructive trust. The constructive trust doctrine is a remedial device formed by operation of law *after* the fact and is intended to prevent unjust enrichment.¹¹ The grantee must be shown to have fraudulent intent, or some similar

which encompasses all situations where equity will declare a mortgage. For examples, a promise to give a mortgage, money being extended in reliance and a defective legal mortgage. See generally Note, *Equitable Mortgages in Iowa*, 44 IOWA L. REV. 716 (1959). More precise terminology will be used to avoid confusion with other concepts. Thus, the terms "grantor" and "grantee" will be used to denote the parties to the transaction rather than "buyer" and "seller" or "mortgagor" and "mortgagee," which are thought to represent legal conclusions, only correct when declared to be so by a court. The terms "grantor" and "grantee" appear on the instrument and are neutral regarding the ultimate legal relationship of the parties.

⁴ See, e.g., *Stephenson v. Stephenson*, 247 Iowa 785, 74 N.W.2d 679 (1956); *Leonard v. Leonard*, 234 Iowa 421, 12 N.W.2d 899 (1944); *Brewster v. Brewster*, 194 Iowa 803, 188 N.W. 672 (1922).

⁵ Cases cited note 4 *supra*.

⁶ *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968).

⁷ Compare cases cited note 6 *supra* with cases cited note 4 *supra*.

⁸ Cases cited note 4 *supra*.

⁹ *Richardson v. Barrick*, 16 Iowa 407 (1864). See also *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968).

¹⁰ Clear and convincing evidence in the mortgage cases; clear, satisfactory and convincing evidence in the deed cases. *Koch v. Wasson*, 161 N.W.2d 173, 178 (Iowa 1968); *Stephenson v. Stephenson*, 247 Iowa 785, 788, 74 N.W.2d 679, 681 (1956).

¹¹ RESTATEMENT (SECOND) OF TRUSTS § 44 (1959).

state of mind, before he can be declared as a constructive trustee for the grantor.¹² When declaring the conveyance to be a mortgage, however, the intent of *both parties at the time of the conveyance* is the primary consideration.¹³ Again, while the standard of proof may be similar or even identical,¹⁴ the proof must be adduced on a different basis.

There should be no confusion between an absolute conveyance as a mortgage and an express trust in real estate because the latter must, by statute, be in writing.¹⁵ In seeking to have an absolute conveyance held as only a mortgage, express written language must necessarily be contravened, the mortgage relationship thus being proved entirely by parol evidence.¹⁶

II. CIRCUMSTANCES CONSIDERED IN DECREERING AN ABSOLUTE CONVEYANCE TO BE A MORTGAGE

In deciding whether an absolute conveyance will have the effect of a mortgage, the court examines a variety of factors in order to determine the actual intention of the parties involved. Of primary importance among the various factors are the adequacy of consideration, the relationship and prior dealings of the parties and the subsequent possession of the property at bar. Other factors such as payment of taxes,¹⁷ improvements by the grantor in possession¹⁸ and other acts indicative of ownership by the grantor in possession will also be considered. In the final analysis, any single factor may be determinative of the issue.

A. Consideration

Probably, the major factor in deciding whether an absolute conveyance is a mortgage is the adequacy of the consideration given for the conveyance in relation to the value of the property. The general rules are consistent with common sense. The estate transferred¹⁹ is valued at the time of the original conveyance, not later when substantial appreciation may have taken place.²⁰

¹² *Loschen v. Clark*, 256 Iowa 413, 127 N.W.2d 600 (1964); *Homolka v. Drahos*, 247 Iowa 525, 74 N.W.2d 589 (1956); *England v. England*, 243 Iowa 274, 51 N.W.2d 437 (1952). See also *Rance v. Gaddis*, 226 Iowa 531, 284 N.W. 468 (1939) (where a transaction was declared a mortgage and the grantee was held constructive trustee for the grantor).

¹³ *Koch v. Wasson*, 161 N.W.2d 173, 178 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14, 18 (Iowa 1968).

¹⁴ Clear, satisfactory and convincing evidence for both. *Collins v. Isaacson*, 158 N.W.2d 14, 18 (Iowa 1968); *England v. England*, 243 Iowa 274, 278, 51 N.W.2d 437, 439 (1952); *Thompson v. Thompson*, 240 Iowa 1162, 1172, 39 N.W.2d 132, 138 (1949).

¹⁵ Iowa Code § 557.10 (1966); *Krebs v. Lauser*, 133 Iowa 241, 110 N.W. 443 (1907); *McElroy v. Allfree*, 131 Iowa 112, 108 N.W. 116 (1906); *Hain v. Robinson*, 72 Iowa 735, 32 N.W. 417 (1887).

¹⁶ *Koch v. Wasson*, 161 N.W.2d 173, 176 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14, 18 (Iowa 1968).

¹⁷ *Brown v. Hermance*, 233 Iowa 510, 513, 10 N.W.2d 66, 68 (1943); *McElroy v. Allfree*, 131 Iowa 112, 118, 108 N.W. 116, 118 (1906).

¹⁸ *Heng v. Heng*, 244 Iowa 226, 230, 56 N.W.2d 484, 486 (1953); *McElroy v. Allfree*, 131 Iowa 112, 118-19, 108 N.W. 116, 118-19 (1906).

¹⁹ *Hemsted v. Hemsted*, 150 Iowa 635, 130 N.W. 413 (1911) (regarding a life estate).

²⁰ *Lerdall v. Lerdall*, 197 N.W. 451 (Iowa 1924); *Hemsted v. Hemsted*, 150 Iowa 635, 130 N.W. 413 (1911); *Mahaffy v. Faria*, 144 Iowa 220, 226, 122 N.W. 934, 936 (1909).

As the evidence is nearly always conflicting, the court generally gives short shrift to the self-serving estimates of the grantor and grantee.²¹ Where consideration is found to have been adequate, the conveyance is generally absolute²² and if inadequate, it is almost always declared a mortgage.²³ There is reason to believe that adequacy of consideration is almost completely dispositive of the issue.²⁴ A theory which supports a contrary rule is that if the consideration or "debt" is equal to or exceeds the value of homestead property, then the grantee will not be prejudiced economically if the grantor is allowed to redeem.²⁵ This theory, grounded upon the unique nature of real property and the historic importance of the homestead, appears contrary to the general rule that adequate consideration renders the conveyance absolute and seems salutary. The theory originated in a dissenting opinion, but was not followed upon a rehearing in which the prior majority was reversed.²⁶ However, the Iowa Supreme Court has since held inadequate consideration to be "not conclusive of security,"²⁷ a demonstration of the court's tendency to balance all the equities in the transaction.

B. *Relationship and Prior Dealings of the Parties*

When a grantor requests that his absolute conveyance be declared a mortgage, the court examines the relationship between the parties in order to discern whether the grantor has been overreached by the grantee. The facts of the early cases read like the melodramas so popular during the time: A woman under duress from a drunken husband deeding over her homestead to a greedy capitalist;²⁸ an illiterate, hard-pressed farmer conveying to a smooth loan broker;²⁹ "[T]he sordid story of the duplicity and depravity of a human male, and of the weakness and credulity of a foolish woman."³⁰ Understandably, these grantors won their cases easily. Consequently, a primary consideration is the grantor's burden of debt, seemingly under the rationale that "necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."³¹ That the

²¹ See, e.g., *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Blum v. Keene*, 245 Iowa 867, 63 N.W.2d 197 (1954).

²² See, e.g., *Shanda v. Clutier State Bank*, 220 Iowa 290, 260 N.W. 841 (1935); *Maytag v. Morgan*, 208 Iowa 658, 226 N.W. 93 (1929); *Betts v. Betts*, 132 Iowa 72, 106 N.W. 928 (1906).

²³ See, e.g., *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Swartz v. Stone*, 243 Iowa 128, 49 N.W.2d 475 (1951); *Klingensmith v. Klingensmith*, 193 Iowa 350, 185 N.W. 75 (1921); *Fort v. Colby*, 165 Iowa 95, 144 N.W. 393 (1913). Probably the outstanding case on this point is *Wilson v. Patrick*, 34 Iowa 362 (1872).

²⁴ W. WALSH, *MORTGAGES* 38-39 (1934).

²⁵ *Brown v. Hermance*, 6 N.W.2d 867 (Iowa 1942) (dissenting opinion), *rev'd on rehearing*, 233 Iowa 510, 10 N.W.2d 66 (1943).

²⁶ *Id.* The consideration was apparently felt inadequate in the final opinion.

²⁷ *Blum v. Keene*, 245 Iowa 867, 902, 63 N.W.2d 197, 216 (1954).

²⁸ *Keeline v. Clark*, 132 Iowa 360, 106 N.W. 257 (1906).

²⁹ *Haggerty v. Brower*, 105 Iowa 395, 75 N.W. 321 (1898).

³⁰ *Rance v. Gaddis*, 226 Iowa 531, 533, 284 N.W. 468, 469 (1939).

³¹ *Vernon v. Bethell*, 28 Eng. Rep. 838, 839 (1762).

grantor was in debt and distraught,³² illiterate³³ or ignorant,³⁴ unrepresented by counsel³⁵ especially when the grantee had a lawyer³⁶ or generally not on equal bargaining terms with the grantee³⁷ are all factors to be considered on the grantor's behalf. On the other hand, grantors on equal bargaining terms with the grantees are, in close cases, less likely to have their conveyances declared security instruments.³⁸

Of course, not all the grantors who have been successful in having an absolute conveyance declared to be a mortgage have been paupers, for some of the deeds subsequently decreed to be mortgages have involved considerable amounts of property.³⁹ Nor has it been a necessity that the grantee be a stranger, for several conveyances later held to be mortgages were to members of the grantor's family.⁴⁰ Nor are bad motives on the part of the grantee the test, for the grantee often desired only assistance for the grantor and impeccable security for himself.⁴¹ In these cases, facts and circumstances other than overreaching showed the conveyances were intended for security.

If the overreached grantor enjoys success,⁴² then it would seem that the grasping and overreaching grantor would find disfavor. The greedy, litigious grantor,⁴³ the speculator who conveys one step ahead of his judgment creditors⁴⁴ and the liar⁴⁵ have all had their conveyances declared absolute and final. Questionable circumstances such as failure to list the property in a bankruptcy inventory⁴⁶ and abandoning the property after the conveyance⁴⁷ have been mentioned as tending to disprove the grantor's equitable ownership. In a case where the consideration was quite inadequate and the grantee stated the transaction was a mortgage by deed, the court nonetheless declared the deed absolute because the plaintiff-grantor admitted he had conveyed to defraud his creditors. The court commented with ironic understatement that such a circumstance "does not place plaintiff [grantor] in a very enviable

³² Koch v. Wasson, 161 N.W.2d 173, 175 (Iowa 1968); Tansil v. McCumber, 201 Iowa 20, 28-29, 206 N.W. 680, 684 (1925); Fort v. Colby, 165 Iowa 95, 144 N.W. 393 (1913); Caruthers Adm'r v. Hunt, 18 Iowa 576, 577 (1865).

³³ Haggarty v. Brower, 105 Iowa 395, 397, 75 N.W. 321, 322 (1898); Montgomery v. Chadwick, 7 Iowa 113, 117 (1858).

³⁴ McGuire v. Halloran, 182 Iowa 209, 215, 160 N.W. 363, 365 (1916).

³⁵ Koob v. Zoller, 231 Iowa 1106, 1109-10, 3 N.W.2d 130, 131-32 (1942).

³⁶ Koch v. Wasson, 161 N.W.2d 173 (Iowa 1968); Guttenfelder v. Iebsen, 230 Iowa 1080, 300 N.W. 299 (1941); Harrington v. Foley, 108 Iowa 287, 79 N.W. 64 (1899).

³⁷ Davis v. Wilson, 237 Iowa 494, 503, 21 N.W.2d 553, 559 (1946).

³⁸ See, e.g., Blum v. Keene, 245 Iowa 867, 879-81, 63 N.W.2d 197, 203-04 (1954); Maytag v. Morgan, 208 Iowa 658, 672, 226 N.W. 93, 99 (1929).

³⁹ Fort v. Colby, 165 Iowa 95, 144 N.W. 393 (1913); Laub v. Romans, 131 Iowa 426, 105 N.W. 102 (1906); Adams v. Holden, 111 Iowa 54, 82 N.W. 468 (1900).

⁴⁰ Laub v. Romans, 131 Iowa 426, 105 N.W. 102 (1906); Langer v. Meservy, 80 Iowa 158, 45 N.W. 732 (1890); Wilson v. Patrick, 34 Iowa 362 (1872).

⁴¹ Collins v. Isaacson, 158 N.W.2d 14 (Iowa 1968); Swartz v. Stone, 243 Iowa 128, 49 N.W. 475 (1951); Guttenfelder v. Iebsen, 230 Iowa 1080, 300 N.W. 299 (1941).

⁴² Cases cited notes 28-38 *supra*. But see Hinman v. Sage, 208 Iowa 982, 221 N.W. 472 (1929).

⁴³ Bradford v. Helsell, 150 Iowa 732, 130 N.W. 908 (1911).

⁴⁴ Bilbo v. Ball, 184 Iowa 875, 894, 188 N.W. 753, 761 (1922).

⁴⁵ Maytag v. Morgan, 208 Iowa 658, 669, 226 N.W. 93, 98 (1929).

⁴⁶ Betts v. Betts, 132 Iowa 72, 77, 106 N.W. 928, 929-30 (1906).

⁴⁷ Lerdall v. Lerdall, 197 N.W. 451 (Iowa 1924).

position in [a] court of chancery."⁴⁸ In another, where it was shown that the consideration was less than adequate, the grantor was unsuccessful apparently because of his inveterate mendacity.⁴⁹ Thus, grantors have no monopoly on virtue, and in equity cases, a lack of virtue may alone be dispositive of the issue.

In addition to the relations at the time of the transaction, the court will also examine the prior relations and dealings between the parties. When the parties originally were mortgagor and mortgagee, and the prior debt continues, the deed will generally be declared to be a mortgage. Such is the result of the application of the sturdy maxim of equity, "once a mortgage, always a mortgage."⁵⁰ Since the only reason for the conveyance may be to enhance the mortgagee's security and to release the mortgagor's redemption, courts cast a skeptical eye on the transaction, even to the point of presuming the conveyance to be a continuation of the mortgage.⁵¹ To overcome this presumption, the grantee-mortgagee must show the transaction to be fair and open, both in dealings between the parties and consideration.⁵² Possibly the grantee-mortgagee should insist on a provision in the conveyance that it is in consideration of the pre-existing debt and not to secure it,⁵³ but in light of the tender regard displayed for the debtor-grantor⁵⁴ and the desire to pierce form and derive at substance,⁵⁵ such a boilerplate statement would probably not save the conveyance if there were overreaching or inadequate consideration.

The grantee-mortgagee may not take title directly from the mortgagor. After prior arrangements, the mortgagee-grantee will take the title from an outside source, usually a private seller⁵⁶ or judicial sale.⁵⁷ However, despite an early decision to the contrary,⁵⁸ the Iowa Supreme Court has consistently held that under a proper showing, equity will declare the transaction to be a mortgage,⁵⁹ the result turning upon the same circumstances and considerations as a two-party transaction.⁶⁰

⁴⁸ *England v. England*, 94 Iowa 716, 718, 61 N.W. 920, 921 (1895).

⁴⁹ *Blum v. Keene*, 245 Iowa 867, 63 N.W.2d 197 (1954).

⁵⁰ *Key v. McCleary*, 25 Iowa 191, 193 (1868).

⁵¹ *Swartz v. Stone*, 243 Iowa 128, 132, 49 N.W.2d 475, 477 (1951); *Davis v. Wilson*, 237 Iowa 494, 498, 21 N.W.2d 553, 556-57 (1946); *Morton Farm Mut. Ins. Ass'n v. Farquhar*, 200 Iowa 1206, 1212, 206 N.W. 123, 126 (1925).

⁵² *Guttenfelder v. Iebsen*, 230 Iowa 1080, 1083-84, 300 N.W. 299, 301 (1941); *Fort v. Colby*, 165 Iowa 95, 127-30, 144 N.W. 393, 404-05 (1913).

⁵³ *F. MESSER & M. VOLZ, IOWA PRACTICE*, 171-72 (1954). See also *J. MARSHALL, IOWA TITLE OPINIONS & STANDARDS* 4.3 (1963).

⁵⁴ Cases cited notes 51 & 52 *supra*.

⁵⁵ *McElroy v. Allfree*, 131 Iowa 112, 117, 108 N.W. 116, 118 (1906).

⁵⁶ *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968); *Brown v. Hermance*, 233 Iowa 510, 10 N.W.2d 66 (1943); *Rogers v. Davis*, 91 Iowa 730, 59 N.W. 265 (1894).

⁵⁷ *McElroy v. Allfree*, 131 Iowa 112, 108 N.W. 116 (1906); *Roberts v. McMahan*, 4 Greene 34 (Iowa 1853).

⁵⁸ *Hain v. Robinson*, 72 Iowa 735 (1887).

⁵⁹ *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968); *Swartz v. Stone*, 243 Iowa 128, 49 N.W.2d 475 (1951); *Davis v. Wilson*, 237 Iowa 494, 21 N.W.2d 553 (1946); *Montgomery v. Chadwick*, 7 Iowa 113 (1858). *Contra*, *Krebs v. Lauser*, 133 Iowa 241, 110 N.W. 443 (1907).

⁶⁰ Cases cited notes 56, 57 & 59 *supra*.

C. Possession

Ordinarily, where an absolute conveyance is given as security the grantor will continue in possession of the property. When all the other circumstances to be considered are balanced, the grantor's possession is "taken into consideration"⁶¹ and at times can be a "circumstance inconsistent with appellants' [grantees'] claim of absolute conveyance, . . ."⁶² However, the grantor may simply manage the property and, then, possession will not be persuasive enough for the court to declare the conveyance as a mortgage.⁶³

Often, after a grantor has made a conveyance and remains in possession, payments to the grantee will be disguised. A monthly payment, denominated as rent, is "a circumstance to be considered," but does "not necessarily disprove appellant's [grantor's] equitable ownership."⁶⁴ Nor does a later lease negate the possible inference that the earlier conveyance was a mortgage.⁶⁵ This analysis is in full harmony with the equitable desire to get to the substance and actual intent of a transaction, disregarding any legal forms used to conceal the actual intent.⁶⁶

Conversely, it would appear that the grantee being in possession under an absolute deed should be a circumstance indicating a sale.⁶⁷ Such an assumption would be consistent with the economic necessities of commercial land mortgages. Nevertheless, there have been many cases where the grantee has gone into possession following an absolute conveyance and the deed has been held to be a mortgage.⁶⁸ "Indeed, it is not at all an unusual circumstance that a deed given as a mortgage is accompanied or followed by a surrender of possession or by a lease to the grantor. Two purposes are thus served; the security is ordinarily thereby increased, and it serves to aid the disguise by which the real nature of the transaction is concealed."⁶⁹ The weaker the bargaining power of the grantor, the more likely the grantee can extract such terms. It appears manifestly unjust to turn such weakness on the part of the grantor into an argument that the grantee's conveyance is absolute.

⁶¹ *Wilson v. Patrick*, 34 Iowa 362, 370 (1872).

⁶² *Guttenfelder v. Iebesen*, 230 Iowa 1080, 1085, 300 N.W. 299, 302 (1941). See also, *Swartz v. Stone*, 243 Iowa 128, 49 N.W.2d 475 (1951); *Koob v. Zoller*, 231 Iowa 1106, 3 N.W.2d 130 (1942); *McElroy v. Allfree*, 131 Iowa 112, 108 N.W. 116 (1906).

⁶³ *Ridings v. Marengo Sav. Bank*, 147 Iowa 608, 125 N.W. 200, 201 (1910).

⁶⁴ *Brown v. Hermance*, 233 Iowa 510, 515, 10 N.W.2d 66, 68 (1943). See *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968).

⁶⁵ *Davis v. Wilson*, 237 Iowa 494, 504, 21 N.W.2d 553, 560 (1946); *Fort v. Colby*, 165 Iowa 95, 125, 144 N.W. 393, 404 (1913). See *Annot.*, 129 A.L.R. 1435, 1511-13 (1940).

⁶⁶ *McElroy v. Allfree*, 131 Iowa 112, 117, 108 N.W. 116, 118 (1906). See also *Cold v. Beh*, 152 Iowa 368, 378, 132 N.W. 73, 77 (1911) (use of "redeem" in a contract to reconvey did not necessarily mean the transaction was a mortgage).

⁶⁷ *England v. England*, 94 Iowa 716, 61 N.W. 920 (1895); *Woodworth v. Carman*, 43 Iowa 504 (1876).

⁶⁸ *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *McGuire v. Halloran*, 182 Iowa 209, 160 N.W. 363 (1916); *Keeline v. Clark*, 132 Iowa 360, 106 N.W. 257 (1906); *Laub v. Romans*, 131 Iowa 427, 105 N.W. 102 (1906); *Allen v. Kemp*, 29 Iowa 452 (1870); *Montgomery v. Chadwick*, 7 Iowa 113 (1858); *Robert v. McMahan*, 4 Greene 34 (Iowa 1853).

⁶⁹ *Fort v. Colby*, 165 Iowa 95, 130, 144 N.W. 393, 406 (1913).

III. SPECIAL FORMS OF CONVEYANCES—THE CONDITIONAL SALE AND THE INSTALLMENT CONTRACT

When the conveyance sought to be declared a mortgage is a warranty or quit claim deed, the court will pay little, if any, attention to the form of the conveyance, but, rather, will look through the form to arrive at the intention of the parties. However, when the form to be pierced is a conditional sales contract or an installment contract for the sale of land, the court is likely to give considerable attention to the manner of conveyance.

A. Conditional Sales Contract as a Mortgage

Probably the most difficult determination is when the conveyance sought to be declared a mortgage is in the form of a conditional sales contract, where the deed is accompanied by a written or parol option to repurchase at a given price for a certain period of time. Generally, the issue of whether the deed is a conditional sale or security for a loan⁷⁰ is to be resolved in favor of a mortgage⁷¹ in order to prevent "fraud and oppression."⁷² The analysis employed in the determination follows the foregoing situations in that the court examines consideration and the relationships to derive at the "intention" of the parties.⁷³ Some earlier cases developed a rule of thumb: if a *debt* remained between the parties, the transaction was a mortgage and the grantor could redeem after the option period had lapsed; but if there were no debt or a debt was extinguished, the conveyance was absolute after the lapse of the option period.⁷⁴ This general rule developed into a presumption so that a continuing debt would permit an absolute conditional sale of land to be declared a mortgage.⁷⁵ However, the presumption apparently has not prevented the court from declaring the deed to be a mortgage absent a personal debt,⁷⁶ for there is apparently only one case where a grantor of an absolute conditional sale, which would ordinarily have been declared a mortgage, lost because there was no personal debt.⁷⁷ Thus, the proper analysis should be that the existence of a debt is a "circumstance entitled to weight."⁷⁸

Although some recent cases have recited the necessity of a debt when it

⁷⁰ *Trucks v. Lindsey*, 18 Iowa 504, 508 (1865).

⁷¹ *Scott v. Mewhirter*, 49 Iowa 487 (1878); *Hughes & Dial v. Sheaf*, 19 Iowa 335 (1865); *Trucks v. Lindsey*, 18 Iowa 504 (1865).

⁷² *Hughes & Dial v. Sheaff*, 19 Iowa 335 (1865).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Ross v. Automobile Ins. Co.*, 228 Iowa 668, 677, 292 N.W. 813, 817 (1940); *McKenney & Seabury v. Nelson*, 220 Iowa 504, 510, 262 N.W. 101, 104 (1935); *Hinman v. Sage*, 208 Iowa 982, 984, 221 N.W. 472, 473 (1928); *Cold v. Beh*, 152 Iowa 368, 372, 132 N.W. 73, 75 (1911); *Barthell v. Syverson*, 54 Iowa 160, 6 N.W. 178 (1880); *Alston v. Wilson*, 44 Iowa 130 (1876).

⁷⁶ *Tansil v. McCumber*, 201 Iowa 20, 32, 206 N.W. 680, 685 (1925); *Laub v. Romans*, 131 Iowa 427, 430, 105 N.W. 102, 103 (1906); *Biard v. Reininghaus*, 87 Iowa 167, 54 N.W. 148 (1895).

⁷⁷ *Greff v. Hobbs*, 159 N.W. 429, 435 (Iowa 1916).

⁷⁸ *Guttenfelder v. Iebesen*, 230 Iowa 1080, 1085, 300 N.W. 299, 302 (1941).

was, in fact, present⁷⁹ or have been decided on other points,⁸⁰ the two most recent cases declared conveyances in the form of conditional sales contracts to be mortgages absent the existence of binding personal obligations.⁸¹ Thus, it would appear the requirement of a debt has implicitly been abandoned. While the results in the Iowa cases appear proper, the court should not recite the necessity for a personal debt even if one is present. A mortgage is not always a personal obligation, for the mortgagee's remedy can be limited to the land.⁸² Therefore, it should be irrelevant in an option to repurchase situation whether the security is confined to the property or is a personal debt of the grantor. "The question, therefore, is whether there was a loan, not how it was to be paid."⁸³ From the point of view of the grantor who is claiming a conveyance to be a mortgage, the personal compulsion to pay is great, for if the disparity in consideration is broad, he stands to take a substantial economic loss whether there is a personal debt or not.⁸⁴

B. Installment Contract as a Mortgage

Another difficult area of determination is when the conveyance sought to be declared a mortgage is in the form of an installment contract for the sale of land. The Iowa installment contract for the sale of land is an instrument between the seller and the buyer of real estate which provides, upon default by the buyer, for service of notice upon said buyer and forfeiture of his interest.⁸⁵ Upon default and proper service of notice, the seller gets the land and retains permanent improvements and payments of principal and interest.⁸⁶ Although this windfall for the seller is difficult to justify in legal theory,⁸⁷ its harsh effect can be defended by practical economics. The installment contract is a form of security device favorable enough to the creditor so that the private seller is willing to extend credit to the buyer who has little money for a down payment.⁸⁸ The installment contract is used instead of a purchase money mortgage which, except for the forfeiture provisions, it resembles.⁸⁹ The law regarding forfeiture has been completely statutory as neither the common-law nor equity has played much of a role.⁹⁰ The Iowa Supreme

79 *Greene v. Bride & Son Constr. Co.*, 252 Iowa 220, 224, 106 N.W.2d 603, 606 (1960).

80 *Reusch v. Shafer*, 241 Iowa 536, 547-48, 41 N.W.2d 651, 657 (1950).

81 *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968).

82 G. GLENN, *MORTGAGES* § 5.4 (1943); T. TIFFANY, *REAL PROPERTY* § 1396 (3d ed. 1939).

83 G. GLENN, *MORTGAGES* § 12, at 61 (1943).

84 *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968).

85 IOWA CODE ch. 656 (1966).

86 Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786 (1961).

87 *Id.* at 786-88.

88 See also INT. REV. CODE of 1954, § 453.

89 G. GLENN, *MORTGAGES* § 343 (1943).

90 Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 792 (1961). The court once announced that a patently unjust forfeiture would be set aside by equity. *Holman v. Wahner*, 221 Iowa 1818, 1324, 268 N.W. 168, 171 (1936). Conveyance law

Court has treated forfeiture of an installment contract as matter entirely within the four corners of the document itself, despite the large amount of equity the buyer could lose.⁹¹

The installment contract is in direct contrast to the court's vigilance to protect the equity of redemption by decreeing a deed a mortgage.⁹² In the latter situation, the form of the document is irrelevant,⁹³ the relation of the parties is fixed by law, not by instrument,⁹⁴ the parties cannot, by waiver or agreement, cut off redemption,⁹⁵ a forfeiture provision is void⁹⁶ and foreclosure must be via judicial sale.⁹⁷

There have been several Iowa cases in which the court permitted the "buyer" under an installment contract with a forfeiture provision to redeem in equity. The distinguishing feature of these cases is that in each, the individual seeking to have the installment contract declared to have the effect of a mortgage originally had the absolute fee in the property involved. Equity would not come to the aid of the buyer who was not the original owner. Thus, where an owner of land conveys it to a buyer and the transaction is financed by an installment contract, equity will not interfere. However, where the "seller" in an installment contract conveyed money to the "buyer" and financed the repayment of the loan with an installment contract for the sale of land owned by the "buyer," equity may interfere.⁹⁸

In *Miller v. Martin*,⁹⁹ the parties exchanged a warranty deed and an installment contract. When the grantee of the original warranty deed (the "seller" under the installment contract) sought to have the forfeiture provision of the installment contract enforced, the original grantor (denoted "buyer" in the installment contract) raised equitable defenses and was successful in having the transaction reformed to a mortgage. In *Greene v. Bride and Sons Construction Company*,¹⁰⁰ the original grantor gave a quit claim deed and

is also statutory. See Iowa CODE §§ 557.1, 557.3, 558.12 & 622.36 (1966). However, as mentioned equity has played a role despite the ironclad language of the statutes.

⁹¹ *Small v. Ogden*, 259 Iowa 1126, 147 N.W.2d 18 (1966) (\$29,000 paid). See 51 Iowa L. Rev. 488, 492 n.26 (1966).

⁹² See, e.g., *Swartz v. Stone*, 243 Iowa 128, 133, 49 N.W.2d 475, 478 (1951); *Guttenfelder v. Iebesen*, 230 Iowa 1080, 1086, 300 N.W. 299, 303 (1941); *Fort v. Colby*, 165 Iowa 95, 102, 144 N.W. 393, 395 (1913).

⁹³ *Klingensmith v. Klingensmith*, 193 Iowa 350, 352, 185 N.W. 75, 76 (1921); *Bradford v. Helsell*, 150 Iowa 732, 735, 130 N.W. 908, 909 (1911); *Keeline v. Clark*, 132 Iowa 360, 366, 106 N.W. 257, 259 (1906).

⁹⁴ *Davis v. Wilson*, 237 Iowa 494, 503, 21 N.W.2d 553, 559 (1946); *Brown v. Hermance*, 233 Iowa 510, 10 N.W.2d 66 (1943); *Guttenfelder v. Iebesen*, 230 Iowa 1080, 1086, 300 N.W. 299, 303 (1941).

⁹⁵ *Koch v. Wasson*, 161 N.W.2d 173, (Iowa 1968); *Tansil v. McCumber*, 201 Iowa 20, 206 N.W. 680 (1925); *Fort v. Colby*, 165 Iowa 95, 144 N.W. 393 (1913).

⁹⁶ *Brown v. Hermance*, 233 Iowa 510, 514, 10 N.W.2d 66, 68 (1943).

⁹⁷ *Fort v. Colby*, 165 Iowa 95, 144 N.W. 393 (1913); *Harrington v. Foley*, 108 Iowa 287, 293, 79 N.W. 64, 66 (1899). See generally Blum, *Iowa Statutory Redemption After Mortgage Foreclosure*, 35 Iowa L. Rev. 72 (1949).

⁹⁸ In the former situation, the obligor under the contract promises to forfeit the land and his equity for failure to pay for the purchase of the land. In the latter, the obligor promises to forfeit the land and his equity therein for failure to pay for a loan of money.

⁹⁹ 246 Iowa 910, 70 N.W.2d 141 (1955).

¹⁰⁰ 252 Iowa 220, 106 N.W.2d 603 (1960).

assigned a certificate of redemption to the grantee under an installment contract. The court treated the transaction as a sale with an option to repurchase, stating that "a contract between the parties can be considered a part of the mortgage transaction"¹⁰¹ and found the entire transaction to be a mortgage.¹⁰² In two other cases, the vendees under an installment contract were originally grantors of deeds. The original grantors intended the deeds to be part of a security transaction and the subsequent installment contracts did not change the relationship. The courts permitted the prior grantors, denoted vendees in the installment contracts, to redeem.¹⁰³ The limits of the holdings in these cases are implicit in the statement: "[F]orfeiture does not apply to contracts for reconveyance of property conveyed by an absolute deed to secure the payment of a debt."¹⁰⁴ Thus, unless there is a prior absolute conveyance between the parties, the vendee under an installment contract finds his interest is subject only to the limits of the contract itself and the applicable statutes.¹⁰⁵

The narrow requirement that there must have been a previous title in the "buyer" before an installment contract can be declared to have the effect of a mortgage seems inconsistent with the third-party cases, where the grantee takes title from an outside source, rather than from the purported mortgagor.¹⁰⁶ Even though the purported mortgagor never had "title" nor made an "absolute conveyance," the relationship is often declared to be that of mortgagor and mortgagee.¹⁰⁷ Thus, there appears to be no reason why the doctrine that an absolute conveyance can be a mortgage should not apply to an installment contract simply between a buyer and seller regardless of whether there was a prior absolute conveyance between the parties. The Iowa Supreme Court has repeatedly held in connection with deeds that in a security transaction the relation of the parties is fixed by law, not by the form of the documents used.¹⁰⁸ An installment contract is palpably a security transaction; the buyer is a debtor and probably wouldn't have entered into such a transaction unless he had no choice, for the obligation is certainly onerous; buyers under installment contracts for the sale of land are generally ignorant of their obliga-

¹⁰¹ *Id.* at 226, 106 N.W.2d at 607.

¹⁰² *Id.* at 227, 106 N.W.2d at 608.

¹⁰³ *Swartz v. Stone*, 243 Iowa 128, 49 N.W.2d 475 (1951); *McRobert v. Bridget*, 168 Iowa 28, 149 N.W. 906 (1914).

¹⁰⁴ *McRobert v. Bridget*, 168 Iowa 28, 31, 149 N.W. 906, 907 (1914).

¹⁰⁵ IOWA CODE ch. 656 (1966).

¹⁰⁶ See cases cited notes 56, 57 & 59 *supra*.

¹⁰⁷ *Heng v. Heng*, 244 Iowa 226, 56 N.W.2d 484 (1953); *Johnson v. Board of Sup'rs*, 237 Iowa 1103, 24 N.W.2d 449 (1946); *Jones v. Gillett*, 142 Iowa 506, 118 N.W. 314 (1908), *aff'd on rehearing*, 121 N.W. 5 (Iowa 1909); *Zuver v. Lyons*, 40 Iowa 510, (1875). In *Brown v. Hermance*, 233 Iowa 510, 514, 10 N.W.2d 66, 68 (1943), the court stated:

It is well established that where one party purchases real estate, and borrows all or a portion of the purchase price from another party, the vendee may have the title pass direct from the vendor by warranty deed to said third party, and may establish by parol that the same is, in fact, a mortgage, and held by the said third party solely as security for the purchase price so advanced for the vendee.

¹⁰⁸ See notes 92-97 & accompanying text *supra*. *Contra*, IOWA CODE § 557.3 (1966) which provides: "Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used."

tions;¹⁰⁹ the buyer is ordinarily in possession, and after the principal is reduced, the value of the property exceeds the debt. All of these factors are important regarding the inquiry as to whether a conveyance will be declared a mortgage.

It appears that the current attitude of the Iowa Supreme Court on installment contracts is that although "equity abhors forfeitures,"¹¹⁰ the proceeding to forfeit an installment contract is statutory¹¹¹ and will prevail unless the equitable defense that a prior conveyance was really a mortgage is successfully interposed.¹¹² At early common-law, the mortgage was simply a deed with defeasance; equity added the implicit provision of redemption.¹¹³ Seemingly, the present law of forfeiture of installment contracts for the sale of land in Iowa is in the same stage of development as was the law of mortgages in the age of Coke: the debtor must "pay on the nail or lose his shirt."¹¹⁴ Of course, equitable principles triumphed, and today, in the mortgage field, the investment of the mortgagor is protected by an adamant set of procedures designed to realize the full value out of the land and to permit the debtor time to raise funds.¹¹⁵ However, if the creditor is able to obtain an installment contract instead of a mortgage, deed of trust or lease with option to buy, the debtor may find he must forfeit his interest in the land plus all the principal and interest payments if he defaults, the creditor gaining a windfall beyond the interest on his investment and rent. The installment contract has thus far been immune to the equitable principles which have shaped the balance of real estate security law and remains an exception to the doctrine that an absolute conveyance can be a mortgage. Unless an installment contract is used, no matter how ingenuously the parties maneuver the transaction through leases and options,¹¹⁶ if the essence is a mortgage the debtor will be permitted to redeem. "[W]hy then should not the vendee, whose status in equity so nearly approaches that of the mortgagor, be allowed the same equity of redemption?"¹¹⁷

IV. TRIAL, BURDEN OF PROOF AND LIMITATIONS

When the issue of whether a conveyance will have the effect of a mortgage is raised, the grantee will always hold the legal title to the property. This legal

¹⁰⁹ N. HINES & M. HARRIS, *INSTALLMENT LAND CONTRACTS IN IOWA* 105-08 (Agricultural Law Center, Univ. of Iowa 1965).

¹¹⁰ See, e.g., *Steele v. Northup*, 259 Iowa 443, 451, 143 N.W.2d 302, 306 (1966); *Bentler v. Poulson*, 258 Iowa 1008, 1012, 141 N.W.2d 551, 553 (1966); *Roshek Realty Co. v. Roshek Bros.*, 249 Iowa 349, 358, 87 N.W.2d 8, 13 (1957); 4 J. POMEROY, *EQUITY JURISPRUDENCE* § 1180 (5th ed. 1941).

¹¹¹ IOWA CODE ch. 656 (1966). But see statutes cited notes 90 & 108 *supra*.

¹¹² *Richards v. Crawford*, 50 Iowa 494 (1879).

¹¹³ G. GLENN, *MORTGAGES* § 11 (1943); G. OSBORNE, *MORTGAGES* § 69 (1951).

¹¹⁴ G. GLENN, *MORTGAGES* § 3, at 11 (1943).

¹¹⁵ Blum, *Iowa Statutory Redemption After Mortgage Foreclosure*, 35 IOWA L. REV. 72 (1949), suggested that the delay of one year was needed for parties to figure out the procedure.

¹¹⁶ See *Fort v. Colby*, 165 Iowa 95, 144 N.W. 393 (1913).

¹¹⁷ 32 YALE L.J. 65, 68 (1922).

title will prevail unless equitable defenses are successfully interposed.¹¹⁸ The grantor of the conveyance can take the initiative and bring an action in equity to have the deed declared a mortgage and to quiet title,¹¹⁹ or the issue can be raised as a defense to an action brought by the grantee.¹²⁰

A. Evidence

Contrary to most actions involving realty, neither the parol evidence rule¹²¹ nor the statute of frauds¹²² applies in actions to declare a conveyance a mortgage.¹²³ Probably due to the antiquity of the doctrine, the reasons for these exceptions have never been satisfactorily stated.¹²⁴ Possibly, it is because the agreement to reconvey is collateral to a deed¹²⁵ or that the deed has been fraudulently obtained¹²⁶ or that there has been no agreement to convey legal interest in land¹²⁷ or that the contract is merely reformed to add an omitted defeasance clause.¹²⁸ Suffice it to assert that almost any evidence is admissible¹²⁹ although some sort of dead man's exclusion has been applied.¹³⁰

The burden placed on the party claiming a deed to be but a mortgage is proof by somewhat more than a preponderance of the evidence: "the evidence must be clear, satisfactory and convincing."¹³¹ This is, of course, the standard necessary to alter any instrument involving land.¹³² However, if the parties were mortgagee and mortgagor before the conveyance, the deed is presumed to be a continuation of the security¹³³ unless both parties intended an absolute sale¹³⁴ and the transaction was based on adequate consideration.¹³⁵

¹¹⁸ *Richards v. Crawford*, 50 Iowa 494 (1879).

¹¹⁹ *Koch v. Wasson*, 161 N.W.2d 173 (Iowa 1968); *Swartz v. Stone*, 243 Iowa 128, 49 N.W.2d 475 (1951).

¹²⁰ For example, in an action for forfeiture of a purported lease or forceable entry and detainer. *Collins v. Isaacson*, 158 N.W.2d 14 (Iowa 1968); *McRobert v. Bridget* 168 Iowa 28, 149 N.W. 906 (1914).

¹²¹ *Hamilton v. Wosepka*, 154 N.W.2d 164 (Iowa 1968) (seems to apply to all written contracts the search for subjective intent). See text accompanying note 2 *supra*.

¹²² Iowa Code § 622.32(3) (1966).

¹²³ Apparently, this has always been the case. *Trucks v. Lindsey*, 18 Iowa 504 (1865). But see *Thorp v. Bradley*, 75 Iowa 50, 39 N.W. 177 (1888).

¹²⁴ See Note, 15 Iowa L. Rev. 192 (1930). Justice Deemer called the admission of parol evidence in these cases "hornbook law, needing no authorities in its support." *Mahaffy v. Faris*, 144 Iowa 220, 224, 122 N.W. 934, 935 (1909).

¹²⁵ § A. CORBIN, CONTRACTS 300 (1951); 4 J. WIGMORE, EVIDENCE § 2434 (1941).

¹²⁶ *Bigler v. Jack*, 14 Iowa 667, 672, 87 N.W. 700, 701 (1901); S. WILLISTON, CONTRACTS § 635 (3d ed. 1961).

¹²⁷ 2 A. CORBIN, CONTRACTS 399-400 (1950).

¹²⁸ C. KEIGWIN, CASES ON MORTGAGES 160-61 (1936).

¹²⁹ *Laub v. Romans*, 131 Iowa 427, 431, 105 N.W. 102, 103 (1906); *Green v. Turner*, 38 Iowa 112, 113 (1874).

¹³⁰ *Bilbo v. Ball*, 194 Iowa 875, 886, 188 N.W. 753, 758 (1922); *Laub v. Romans*, 131 Iowa 427, 430, 105 N.W. 102, 103 (1906). See also *McElroy v. Allfree*, 131 Iowa 112, 108 N.W. 116 (1906).

¹³¹ *Collins v. Isaacson*, 158 N.W.2d 14, 18 (Iowa 1968).

¹³² Iowa R. Civ. P. 344(f)(11), (12).

¹³³ *Swartz v. Stone*, 243 Iowa 128, 132, 49 N.W.2d 475, 477 (1951).

¹³⁴ *Davis v. Wilson*, 237 Iowa 494, 498, 21 N.W.2d 553, 556-57 (1946).

¹³⁵ *Guttenfelder v. Iebsen*, 230 Iowa 1080, 1083-84, 300 N.W. 299, 300-01 (1941). A pre-existing mortgagee-mortgagor relationship has been stated to shift to the grantee the burden of proving the transaction is not a continuation of the security. *Morton Farm Mut. Ins. Ass'n v. Farquhar*, 200 Iowa 1206, 1212, 206 N.W. 123, 126 (1925).

Review by the supreme court is *de novo*.¹³⁶ If the prayer seeks general equitable relief, the court is not limited to any specific relief requested but can provide almost any sort of solution to provide justice between the parties.¹³⁷ This equitable prerogative was well stated as far back as 1864:

It has ever been the pleasure, as it has been the duty and special province of courts of equity, to disrobe transactions of their garbs of verbiage, technicalities and special contrivances adopted to conceal their real nature, or to entrap the weak, the unlearned or oppressed, and to discover the true character of the transaction and enforce it as it really is, regardless of the forms with which cunning and artifice may have surrounded it.¹³⁸

In those cases where the claim that a conveyance is a mortgage is rejected, it is customary for the supreme court to review the environment of the transaction and observe where the evidence is uncorroborated and contradictory,¹³⁹ why the claim is farfetched,¹⁴⁰ why the party claiming a mortgage is mendacious¹⁴¹ or where the contentions are just not convincing.¹⁴²

B. Passage of Time

Due to the nature of the action to have an absolute conveyance declared a mortgage, the particular facts are generally cold by litigation.¹⁴³ Generally, the statute of limitations will bar antique claims that an absolute conveyance is a mortgage.¹⁴⁴ In *Mahaffy v. Faris*,¹⁴⁵ the Iowa Supreme Court indicated that when the statute of limitations has barred an action against the grantor to repay the money expended, the reciprocal right to redeem must also be barred. The court continued to assert that "[t]here may, of course, be excep-

¹³⁶ Iowa R. Civ. P. 344(f)(7). Sometimes the issue of whether a conveyance is a mortgage is raised before a jury. See *Ross v. Automobile Ins. Co.*, 228 Iowa 668, 292 N.W. 813 (1940); *Kaldenberg v. Boyd*, 196 Iowa 133, 194 N.W. 211 (1923); *Harris v. Barnes City Sav. Bank*, 194 Iowa 492, 188 N.W. 862 (1922).

¹³⁷ *Herring v. Neely*, 43 Iowa 157 (1876). See, e.g., *Simpson v. Bostwick*, 248 Iowa 238, 80 N.W.2d 339 (1957); *Fitchner v. Walling*, 225 Iowa 8, 279 N.W. 417 (1938); *Caldwell v. City of Ottumwa*, 198 Iowa 666, 200 N.W. 336 (1924); *Nelson v. Robinson*, 184 Kan. 240, 336 P.2d 415 (1959); A. CORBIN, *CONTRACTS* § 1137 (1950). But see *Steele v. Northrup*, 259 Iowa 443, 143 N.W.2d 302 (1966) (review on cited error only in some cases).

¹³⁸ *Richardson v. Barrick*, 16 Iowa 407, 410 (1864).

¹³⁹ *Lerdall v. Lerdall*, 197 N.W. 451 (Iowa 1924); *Betts v. Betts*, 132 Iowa 72, 75, 106 N.W. 928, 929 (1906).

¹⁴⁰ *Reusch v. Shafer*, 241 Iowa 536, 41 N.W.2d 651 (1950).

¹⁴¹ *Blum v. Keene*, 245 Iowa 867, 63 N.W.2d 197 (1954).

¹⁴² *Reusch v. Shafer*, 241 Iowa 536, 41 N.W.2d 651 (1950); *Robertson v. Moline M. Stoddard Co.*, 106 Iowa 414, 76 N.W. 736 (1898) (same case on earlier appeal, 88 Iowa 463, 55 N.W. 495 (1893)); *Iowa State Sav. Bank v. Coonrod*, 97 Iowa 106, 66 N.W. 78 (1896); *Langer v. Meservey*, 80 Iowa 158, 45 N.W. 732 (1890); *Knight v. McCord*, 63 Iowa 429, 19 N.W. 310 (1884); *Hyatt v. Cochran*, 37 Iowa 309 (1873); *Corbit v. Smith*, 7 Iowa 60 (1858).

¹⁴³ Conveyances claimed and held to be mortgages in 1968 were made in 1963 and 1961. *Koch v. Wasson*, 161 N.W.2d 173, 175 (Iowa 1968); *Collins v. Isaacson*, 158 N.W.2d 14, 15 (Iowa 1968).

¹⁴⁴ *Adams v. Holden*, 111 Iowa 54, 82 N.W. 468 (1900); *Crawford v. Taylor*, 42 Iowa 260, 263 (1875). See *Richards v. Crawford*, 50 Iowa 494 (1879); *Green v. Turner*, 38 Iowa 112 (1874).

¹⁴⁵ 144 Iowa 220, 122 N.W. 934 (1909).

tions to this rule" but such exceptions were neither detailed nor present in the particular case.¹⁴⁶

In addition to the statute of limitations, the claim that an absolute conveyance is actually only a mortgage may be estopped by laches, the concept applied in equity to cut off stale claims.¹⁴⁷ In the *Mahaffey* case, the court emphasized the appreciation in the value of the land in the period between the conveyance and the assertion of the claim, in the determination that plaintiff's unreasonable delay in prosecuting the claim barred recovery.¹⁴⁸ Consequently, the lapse of time will eventually bar a grantors' claim that an absolute conveyance of land is a mortgage; however, it is not definite as to what period of time is necessary.

Adverse possession¹⁴⁹ has generally been rejected as a theory in absolute conveyances as security cases. Possession by the grantor is consistent and not adverse.¹⁵⁰ However, the grantee in possession can repudiate the mortgage or trust character of the conveyance and hold adversely to the grantor. At this time, apparently, the statute of limitations begins to run in favor of the holder of legal title.¹⁵¹

V. EFFECT OF A DECREE THAT AN ABSOLUTE CONVEYANCE IS A MORTGAGE

After a court declares an absolute conveyance to be a mortgage, the inquiry turns to dividing a pie, newly conceived to be not single but divisible. All those with an economic stake in the outcome, the parties, their transferees and creditors, demonstrate a lively interest. Generally, each case is considered on its own facts, the varied results showing the power of equity to tailor a decree to the circumstances, even to the extent of upsetting long established expectations.¹⁵²

A. Upon the Parties

When an absolute conveyance is declared to be a mortgage, the grantor naturally gains the rights of a mortgagor and the grantee the duties of a mortgagee. Thus, the grantor becomes entitled to redeem the estate by paying the "debt" plus interest¹⁵³ and may also be entitled to continued possession of the

¹⁴⁶ *Id.* at 226, 122 N.W. at 936.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 226, 122 N.W. at 936. See also *Lerdall v. Lerdall*, 197 N.W. 451, 452 (Iowa 1924).

¹⁴⁹ See generally *Lynch v. Lynch*, 239 Iowa 1245, 34 N.W.2d 485 (1948).

¹⁵⁰ *Crawford v. Taylor*, 42 Iowa 260, 264 (1875).

¹⁵¹ *Mahaffey v. Faris*, 144 Iowa 220, 122 N.W. 934 (1909). But see *Green v. Turner*, 38 Iowa 112, 118-19 (1874).

¹⁵² See, e.g., *Green v. Turner*, 38 Iowa 112 (1874) (The grantee had been in possession for 16 years when the original conveyance was held to be a mortgage, the debt to be paid by rents and profits. The grantor's successor got the land back, free of debt, after 16 years.); *Montgomery v. Chadwick*, 7 Iowa 113 (1858).

¹⁵³ *Tansil v. McCumber*, 201 Iowa 20, 32-33, 206 N.W. 680, 686 (1925); *McGuire v.*

property and the benefit of a statutory foreclosure by judicial sale in case of his default.¹⁵⁴ These provisions prevent the grantee from getting a windfall in the event that the consideration given for the conveyance was less than the value of the property and permit the impecunious grantor time to raise the money necessary to redeem. In cases where litigation has been extensive, the court, in keeping with its flexibility, has shortened the period of redemption¹⁵⁵ or even entered a decree of foreclosure under a prayer for general equitable relief.¹⁵⁶ If the initial conveyance was in the form of a deed accompanied by an option or privilege to repurchase for a specified period of time, the grantor will be permitted to repurchase the property by paying the option price even though the stated period has expired.¹⁵⁷ Conversely, if the original deed and option to repurchase is deemed to have been an absolute conveyance and the time for repurchase has passed, the grantee's title becomes complete.¹⁵⁸

In the situation where the grantor has retained possession of the property, he must simply repay the consideration for the conveyance plus interest¹⁵⁹ less any receipts obtained by the grantee.¹⁶⁰ However, if the grantee, in order to enhance his security and increase the return on his investment, has taken possession of the conveyed property,¹⁶¹ the use of the land as a revenue generating asset creates excruciating problems in computing the amount necessary for redemption. In some situations, the rents and profits realized by the grantee in possession have been held to equal the consideration for the original conveyance and will serve to satisfy the entire "debt,"¹⁶² thus permitting the grantor to regain the property without surrendering any additional assets. More frequently, the grantee in possession has been held accountable for such rents and profits, which are then credited against the "debt" due.¹⁶³ Often the grantee in possession will request that permanent improvements be added to

Halloran, 182 Iowa 209, 219, 160 N.W. 363, 367 (1916); Adams v. Holden, 111 Iowa 54, 82 N.W. 468 (1900); Harrington v. Foley, 108 Iowa 287, 293, 79 N.W. 64, 66 (1899).

¹⁵⁴ Iowa Code §§ 628.3, 634.5 (1966). See also Blum, *Iowa Statutory Redemption after Mortgage Foreclosure*, 35 Iowa L. Rev. 72 (1949).

¹⁵⁵ Greene v. Bride & Son Constr. Co., 252 Iowa 220, 227-28, 106 N.W.2d 603, 608 (1960).

¹⁵⁶ Herring v. Neely, 43 Iowa 157 (1876).

¹⁵⁷ Koch v. Wasson, 161 N.W.2d 173 (Iowa 1968); Tansil v. McCumber, 201 Iowa 20, 32-33, 206 N.W. 680, 686 (1925).

¹⁵⁸ Cold v. Beh, 152 Iowa 368, 132 N.W. 73 (1911); Bigler v. Jack, 114 Iowa 667, 87 N.W. 700 (1901); Trucks v. Lindsey, 18 Iowa 504, 505 (1865).

¹⁵⁹ See cases cited note 153 *supra*. But cf. Kinkead v. Peet, 153 Iowa 199, 210, 132 N.W. 1095, 1098 (1911) (interest allowed but not compounded).

¹⁶⁰ Collins v. Isaacson, 158 N.W.2d 14, 19 (Iowa 1968); McElroy v. Allfree, 131 Iowa 112, 118-19, 108 N.W. 116, 118-19 (1906); Haggerty v. Brower, 105 Iowa 395, 402, 75 N.W. 321, 323 (1898).

¹⁶¹ Fort v. Colby, 165 Iowa 95, 130, 144 N.W. 393, 405-04 (1913).

¹⁶² Green v. Turner, 38 Iowa 112, 116 (1874); Roberts v. McMahan, 4 Greene 34 (Iowa 1853).

¹⁶³ McGuire v. Halloran, 182 Iowa 209, 222-23, 160 N.W. 363, 368 (1916); Kinkead v. Peet, 153 Iowa 199, 206, 132 N.W. 1095, 1098 (1911); Keeline v. Clark, 132 Iowa 360, 370, 106 N.W. 257, 260 (1906); Berberick v. Fritz, 39 Iowa 700 (1874); Montgomery v. Chadwick, 7 Iowa 113, 135 (1858); cf. Koch v. Wasson, 161 N.W.2d 173 (Iowa 1968) (rent charged and credited against debt after notice of intent to reclaim); McElroy v. Allfree, 131 Iowa 112, 118-19, 108 N.W. 116, 118-19 (1906) (grantor in possession; grantee charged for receipts which extinguished debt).

the amount of the debt if the conveyance is declared a mortgage. Apparently, if the grantee is in possession by contract, he will get credit for such permanent improvements.¹⁶⁴ However, under certain circumstances, after the grantee knows the limits of his tenure, permanent improvements may not be added to the debt since the mortgagee in possession "cannot improve the mortgagor out of his estate."¹⁶⁵

Under the proper circumstances, the grantor will make a plea that the grantee, through possession of the land or otherwise, has received not only a healthy return but a usurious return on his "investment." When usury is determined, the transaction will be purged of the usury aspect.¹⁶⁶ To constitute usury, the return need not comprise only the cash laid out by the debtor, for it can additionally include services or the use of valuable property.¹⁶⁷ *Koch v. Wasson*¹⁶⁸ is the most recent case involving a charge of usury and demonstrates two important considerations for asserting usury. The grantees of a deed subsequently held to be a mortgage were in possession of the estate and upon exercise of an "option to repurchase" were to receive their principal sum plus six percent uncompounded interest and reimbursement for taxes and improvements. The grantor called the contract usurious but apparently failed to request that the usury statute¹⁶⁹ be applied. The grantors sought rent during the possession of the grantees, feeling that such would purge the usury from the transaction. However, the facts that the grantee's possession was a condition of the contract and that the land was "run-down" at the time of conveyance and improved at the time of trial convinced the court that the

¹⁶⁴ *Koch v. Wasson*, 161 N.W.2d 173, 179 (Iowa 1968); *McGuire v. Halloran*, 182 Iowa 209, 222-23, 160 N.W. 363, 368 (1916); *Fort v. Colby*, 165 Iowa 95, 133, 144 N.W. 393, 407 (1913); *Montgomery v. Chadwick*, 7 Iowa 113, 135 (1858).

¹⁶⁵ *Kinthead v. Peet*, 153 Iowa 199, 132 N.W. 1095 (1911). This case is the culmination of one of the great sagas of Iowa jurisprudence. See also *Kinthead v. Peet*, 137 Iowa 692, 114 N.W. 616 (1908); *Kinthead v. Peet*, 136 Iowa 590, 111 N.W. 48 (1907). The parties doggedly litigated a transaction of November 1904 and the grantee lost on almost all counts. The cases stand either for the proposition that blockheaded rapaciousness will be implacably put down or for the theory that courts of equity have become guardians of adults and will relieve them from bad contracts by almost any transparent ploy. The last case is the best example of the power of a court of equity to find the equities in adjustment of an absolute conveyance held to be a mortgage (although justifiably hard on the grantee).

¹⁶⁶ *Trasil v. McCumber*, 201 Iowa 20, 206 N.W. 680 (1925); *Brush v. Peterson*, 54 Iowa 243, 6 N.W. 287 (1880) (rule stated); *White v. Lucas*, 46 Iowa 319 (1877); *Johnson v. Smith*, 39 Iowa 549 (1874).

¹⁶⁷ IOWA CODE § 535.5 (1966); Annot., 95 A.L.R. 1231 (1935).

¹⁶⁸ 161 N.W.2d 173, 178-79 (Iowa 1968).

¹⁶⁹ IOWA CODE § 535.5 (1966) provides:

If it shall be ascertained in any action brought on any contract that a rate of interest has been contracted for, directly or indirectly, in money or in property, greater than is authorized by this chapter, the same shall work a forfeiture of eight cents on the hundred by the year upon the amount of the principal remaining unpaid upon such contract at the time judgment is rendered thereon, and the court shall enter final judgment in favor of the plaintiff and against the defendant for the principal sum so remaining unpaid without costs, and also against the defendant and in favor of the state, for the use of the school fund of the county in which the action is brought, for the amount of the forfeiture; and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not.

grantees should not be accountable for rent during the life of the contract but only for the period after the grantors gave notice of their intent to reclaim the estate.¹⁷⁰ This balancing of the equities gave the grantees interest, reimbursement for taxes and improvements plus the use of the 218 acres for five years. The result declares the deed and option to repurchase to be a mortgage but, except for extending the option, leaves the parties where it found them with respect to the conditions of the deed and option to repurchase. Thus, when a form of relief is prayed for, especially usury which involves a forfeiture to the school fund,¹⁷¹ it should be specifically detailed¹⁷² and authority cited. A prayer for general equitable relief or a general statement is apparently not sufficient in this situation, despite the broad equitable powers the court may exercise, in light of the record, to bring about substantial justice between the parties.¹⁷³

B. Upon Third Parties

1. Transferees

The grantor of an absolute conveyance intended for security can transfer his equity of redemption by deed and his transferee can redeem the property from the grantee.¹⁷⁴ The grantor or his transferee can also redeem the property from a transferee of the grantee who takes the title with notice of the security nature of the original deed.¹⁷⁵ However, neither the grantor nor his transferee can redeem from a grantee's transferee who took title without notice of the security nature of the original deed.¹⁷⁶ Furthermore, continued possession of the grantor or his transferee for a reasonable time is not notice of any adverse claim to a recorded deed.¹⁷⁷ Thus, the grantor who makes a deed for security but which is recorded as an absolute conveyance is generally subject to the claim of title of transferees of the grantee unless such transferees have actual notice of the security nature of the deed. However, if redemption cannot be made from the grantee's transferee, a cause of action can be maintained for the value of the equity of redemption against the original grantee.¹⁷⁸

¹⁷⁰ Koch v. Wasson, 161 N.W.2d 173, 178-79 (Iowa 1968).

¹⁷¹ Iowa Code § 535.5 (1966), *supra* note 169.

¹⁷² Koch v. Wasson, 161 N.W.2d 173, 179 (Iowa 1968): "Plaintiffs do not plead, nor do they now argue, the rule should be strictly applied as to work a forfeiture . . ."

¹⁷³ Compare Koch v. Wasson, 161 N.W.2d 173 (Iowa 1968), with Kinkead v. Peet, 153 Iowa 199, 132 N.W. 1095 (1911).

¹⁷⁴ Swartz v. Stone, 243 Iowa 128, 49 N.W.2d 475 (1951); Brush v. Peterson, 54 Iowa 243, 6 N.W. 287 (1880).

¹⁷⁵ McClelland v. Snouffer, 194 Iowa 1387, 189 N.W. 808 (1923); Bradford v. Folsom, 58 Iowa 473, 12 N.W. 536 (1882); Zuver v. Lyons, 40 Iowa 510 (1875); Hall v. Savill, 3 Greene 37 (Iowa 1851); cf. Allen v. Kemp, 29 Iowa 452 (1870).

¹⁷⁶ Davis v. Wilson, 237 Iowa 494, 505, 21 N.W.2d 553, 560 (1946); Fort v. Colby, 165 Iowa 95, 101, 144 N.W. 393, 395 (1913); Alston v. Wilson, 44 Iowa 130 (1876); Wilson v. Patrick, 34 Iowa 362, 375 (1872).

¹⁷⁷ Davis v. Wilson, 237 Iowa 494, 505, 21 N.W.2d 553, 560 (1946). See also Rance v. Gaddis, 226 Iowa 531, 545-46, 284 N.W. 468, 475-76 (1939).

¹⁷⁸ Davis v. Wilson, 237 Iowa 494, 506, 21 N.W.2d 553, 560 (1946); Harris v. Barnes City Sav. Bank, 194 Iowa 492, 188 N.W. 862 (1922); Fort v. Colby, 165 Iowa 95, 101, 144 N.W. 393, 395 (1913); cf. Everist v. Carter, 202 Iowa 498, 502, 210 N.W. 559, 561 (1926).

2. Creditors

When the relationship of the grantor and grantee to a conveyance is eventually settled as mortgagor and mortgagee, the grantor-mortgagor may find his expectations considerably upset if credit has been extended to the grantee in reliance upon the recorded conveyance. As between parties to a security conveyance, the grantor in possession retains his homestead exemption.¹⁷⁹ However, credit extended in reliance upon a recorded deed will be a charge upon the property¹⁸⁰ and apparently a creditor of the grantee of a conveyance subsequently held to be security may foreclose against the homestead of the grantor in possession.¹⁸¹

In a situation that often approaches fraudulent conveyances,¹⁸² a creditor of the grantor can show a conveyance from his debtor to another was for security¹⁸³ and can reach his debtor's equity of redemption.¹⁸⁴ Further, the grantee of an absolute deed may claim it is a conveyance for security and since his interest is personal property, his judgment creditors have no lien.¹⁸⁵ However, such an expedient is not likely to enjoy frequent success.¹⁸⁶

Since the doctrine of an absolute conveyance being a security is uncertain, the situations involving third-party creditors are not easily predictable. Being a lien theory jurisdiction, an Iowa mortgagee has a "lien"¹⁸⁷ on the property involved rather than the "title." However, in spite of early cases to the contrary¹⁸⁸ it is generally held that the grantee of a conveyance for security has the legal title.¹⁸⁹ Although having been attacked as permitting parties in a lien theory jurisdiction to reinstate a title theory of mortgage by contract and seemingly opposite to statute,¹⁹⁰ considering the grantee of an absolute conveyance as security to have legal title appears consistent with the expectations of those who deal with the parties and land in the future. However, whenever the court has felt a lien theory result would be more consistent with justice between the parties, it has not hesitated in decreeing such a result.¹⁹¹ Such

¹⁷⁹ *Kleinsorge v. Clark*, 232 Iowa 313, 4 N.W.2d 433 (1942); *Butler v. Cleland*, 200 Iowa 56, 202 N.W. 557 (1925); *Perry v. Adams*, 179 Iowa 1215, 162 N.W. 817 (1917); *Haggerty v. Brower*, 105 Iowa 395, 75 N.W. 321 (1898); cf. *Reusch v. Shafer*, 241 Iowa 536, 41 N.W.2d 651 (1950); *Keeline v. Clark*, 132 Iowa 360, 106 N.W. 257 (1906).

¹⁸⁰ *Rance v. Gaddis*, 226 Iowa 531, 544-46, 284 N.W. 468, 475-76 (1939); cf. *Welton v. Tizzard*, 15 Iowa 495 (1864).

¹⁸¹ *Clark v. Chapman*, 213 Iowa 737, 239 N.W. 797 (1931); cf. *Fifield v. Gaston*, 12 Iowa 218 (1861).

¹⁸² *Hanneman v. Olson*, 209 Iowa 372, 222 N.W. 566 (1928).

¹⁸³ *Allen v. Kemp*, 29 Iowa 452 (1870).

¹⁸⁴ *Clinton Nat'l Bank v. Manwarring*, 39 Iowa 281 (1874); cf. *Witousek v. Holt*, 224 N.W. 530 (Iowa 1929).

¹⁸⁵ *Scott v. Mewhirter*, 49 Iowa 487, 489 (1878).

¹⁸⁶ *Langer v. Meservey*, 80 Iowa 158, 45 N.W. 732 (1890).

¹⁸⁷ IOWA CODE § 557.14 (1966).

¹⁸⁸ *Robertson v. Moline, M. & S. Co.*, 88 Iowa 463, 55 N.W. 495 (1893); *Hall v. Savill*, 3 Greene 37 (Iowa 1851).

¹⁸⁹ *Baxter v. Pritchard*, 122 Iowa 590, 98 N.W. 372 (1904); *Richards v. Crawford*, 50 Iowa 494 (1879); *Burdick v. Wentworth*, 42 Iowa 440 (1876).

¹⁹⁰ G. OSBORNE, MORTGAGES § 78 (1951).

¹⁹¹ *Kinkead v. Peet*, 153 Iowa 200, 132 N.W. 1095 (1911); *Harrington v. Foley*, 108 Iowa 287, 79 N.W. 64 (1899); *Welton v. Tizzard*, 15 Iowa 495 (1864). See cases cited notes 175, 180 & 185 *supra*.

determinations further support the view that nonconceptual considerations are more important than inflexible doctrine.¹⁹²

VI. CONCLUSION

Since statutory foreclosure in Iowa is complex, expensive and protracted¹⁹³ many creditors prefer not to extend funds upon the security of a regular mortgage. These considerations alone cause some creditors to be grantees of an absolute deed as security.¹⁹⁴ The grantor-debtors seem to go along less because they are overreached, obtuse or lacking in intellectual wherewithal, although many have so been, than because they are desperate but optimistic. They have no choice but hope times will get better and permit them to repay the "debt" and reclaim "their" property. The disadvantages to the grantor are apparent. However, the advantages of the device to the creditor are not without concomitant risks. The relationship is uncertain and many years in the future a deed can be resurrected as a mortgage.¹⁹⁵ Once litigation begins, there is a good chance it will be prolonged and costly.¹⁹⁶ If the grantee has been greedy or refractory, the court may be sympathetic to the contentions of the grantor on the "terms" of the mortgage. If the court thinks the grantee was a rascal, he is given no quarter. There are few sights so awesome as Justice Weaver of the Iowa Supreme Court almost literally nailing a creditor's hide to the debtor's barn after the third appeal on the creditor's grasping little conveyance seven years prior.¹⁹⁷ In the final analysis, using an absolute conveyance as a security device is ill-advised and cannot usually be concealed from the courts. The results may be somewhat less desirable than intended.

¹⁹² "It is one of the evils of the fiction method of growth in the law that many judges take the fiction as gospel truth . . ." G. OSBORNE, MORTGAGES § 14 (1951) (the Iowa court does not do this). Sturges & Clark, *Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691 (1928).

¹⁹³ Blum, *Iowa Statutory Redemption After Mortgage Foreclosure*, 35 IOWA L. REV. 72 (1949).

¹⁹⁴ G. OSBORNE, MORTGAGES § 71 (1951).

¹⁹⁵ See cases cited notes 144-148 *supra* & accompanying text.

¹⁹⁶ *Dolan v. Newberry*, 200 Iowa 511, 205 N.W. 205 (1925); *Rudolph v. Davis*, 239 Iowa 372, 30 N.W.2d 484 (1948).

¹⁹⁷ See note 165 *supra*.

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Notes

ADVANCE LIABILITY INSURANCE PAYMENTS: AN IOWA VIEW

Plaintiff and defense lawyers in the State of Iowa, as elsewhere, are encountering innovations in handling liability claims. The traditional method of handling third party tort liability claims has been to effect a "full and final" release when the insurer and plaintiff have mutually agreed upon the damages. It was traditional to deal at arm's length with the injured in a true adversary setting; making no payment whatsoever until the final settlement, no matter how dire the circumstances of the injured party. Apparently, this concept was predicated on the fiction that the injured party had financial resources to sustain himself during the disability period. The insurer ideally would confer with the injured at the culmination of the disability period and agree upon a final settlement. It was virtually unheard of to offer aid to the adversary, the injured, via advance payments for out-of-pocket expenses.

Such circumstances compelled many injured parties to seek legal assistance prematurely or indeed unnecessarily where the defendant was clearly liable. In many cases, the injured felt an immediate need for a settlement because of pressed financial circumstances and was forced to compromise in the face of outright liability. One study revealed, for instance, that accident disability ranks second only to marital breakups as the leading cause of mortgage foreclosures.¹ Injured parties in dire financial circumstances have been constrained to mortgage their property to sustain themselves during the disability period.

Innovations which insurance carriers have initiated are due perhaps to a myriad of causes, including the rising number of claims and the cost per claim of litigation and investigation. Public dissatisfaction with traditional methods of claim handling, pressure from governmental investigations and the clamor for a "no fault concept"² have also played a role in prompting these changes.

Lump-sum settlement, as we have seen, is a basic tenet of the present system which has both costs and advantages in a cost-focussed analysis; it produces a variety of immoralities. It encourages insurers to scale down claims in return for quick settlements, relying on the pressing need of the litigant. It encourages claimants to refuse rehabilitation and to malingering until a lump-sum settlement has been reached. It leads lawyers to engage in sundry unsavory practices, and it tends to turn the court room into a circus. It has made it necessary for us to accept the contingent fee system, not because it is good, but because it is the least among evils. And it is an evil. The lump-sum settlement system encourages the poker table mentality—the treatment of the tort

¹ The National Underwriter, Nov. 15, 1968, at 1, col. 1.

² R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).