mortgage, however, has disadvantages. It is recorded by the mercantile agencies in the credit records and reports upon which prospective creditors place so much reliance and it is regarded as an indication of financial weakness, perhaps because a blanket chattel mortgage is so often used by a distressed borrower primarily to give additional security for old advances. It also almost universally requires recordation, which delays considerably the operation of arranging credit. The use of devices technically giving the mortgagee legal possession, such as the placing of signs with the mortgagee's name on the merchandise and the segregation of the goods, indicate the dislike of the necessity of recordation. The conditional sale is not viewed with suspicion by the credit authorities, but it, too, quite generally needs recordation. Where conditional sales do not require recordation, that fact is often sufficient to result in the use of that device. The universal acceptance of the proposed uniform laws would aid in clearly determining the fields to which each of the security methods is best fitted.

CONSIDERATION FOR PROMISES BY A GRATUITOUS BAILEE

The New York Court of Appeals has just held in *Siegel v. Spear & Co.* (1923) 68 N. Y. L. Jour. 1847, that a gratuitous bailee is bound to pay damages for breach of his promise to effect insurance on the articles in his care. The plaintiff was a purchaser of furniture on the installment plan, the defendant being the seller with a chattel mortgage as security. For the convenience of the plaintiff, the defendant undertook to store the furniture free of charge during the summer and promised to have it insured for the plaintiff's benefit, the cost thereof to be paid later by the plaintiff. The furniture was burned without having been insured.

The court held that the surrender of possession of the goods was a sufficient consideration for the promise, and on this ground distinguished several cases in which promises to insure were held to be without consideration and void.[1] This distinction has been thought to be of little weight, inasmuch as the surrender of possession in the gratuitous bailment is not exchanged for the defendant's promise to insure.[2]

[1] Thus in *Thorne v. Deas* (1809, N. Y.) 4 Johns. 84, one of two joint owners of a vessel promised the other to have it insured. He failed to keep his promise, and the vessel was lost at sea. In *Brawn v. Lyford* (1907) 103 Me. 362, 69 Atl. 54, a vendor promised his vendee to have certain insurance policies then in the vendor's possession properly assigned to the vendee. The promise was not kept, and later the buildings were burned. In these cases there was no bailment of goods.

[2] Thus Professor Williston, *Contracts* (1920) sec. 138, says: "Allowing another to act as a gratuitous agent, bailee, or trustee, is a detriment which may support the promise of the agent, bailee, or trustee. The difficulty, however, is that the parties ordinarily in a gratuitous transaction do not in fact exchange the promise for this permission."

In all these cases alike there was action or forbearance in reliance upon the promise, fully as important in character as any mere surrender of possession. Of course, a gratuitous bailee has certain duties in the absence of any promise, the bailee being suable in an action of tort. The bailee has been said to be liable only for a misfeasance, not for a nonfeasance. This distinction is not worth much either,[3] because negligence is usually nonfeasance; and yet a bailee is liable for negligence causing injury to the property. He must, of course, have taken the article into his possession, for otherwise he does not become a bailee. It has sometimes been believed that a gratuitous bailee's duties are not contractual and that they cannot be increased by mere promissory words;[4] but there is ample authority in support of the contrary view.[5]

[3] See the remarks of Collins, L. J., in *Turner v. Stallibrass* [1898] 1 Q. B. 56, 59.

[4] 2 Street, *Foundations of Legal Liability* (1906) 49: "Upon principle the distinction appears to be this: The mandatary is liable for a misfeasance of the mandate if the right of action can be brought within the principle of actions for negligence, but not otherwise . . . . the right of action for negligence is limited to situations where damage is negligently done to person or property. It follows that the right of action for misfeasance on the part of a mandatary is limited to situations where his misfeasance results in physical hurt or damage to property. If I deliver my liquors to a man to convey from one place to another and he is to do it for nothing, he will be liable for breaking one of the casks if he is chargeable with negligence. *Coggs v. Bernard* (1703, K. B.) 2 Ld. Raym. 909. So a carrier of passengers is liable for a negligent injury to a passenger, although the latter is being conveyed without compensation." Williston, *loc. cit. supra* note 2: "The discussions in regard to this question show that the true nature of the liability is not contractual, for, if it were, the only question would be—what was the defendant's promise."

[5] In *Wilkinson v. Coverdale* (1793) 1 Esp. 75, a buyer sued the seller for breach of a promise to have certain existing insurance transferred to the buyer, the seller having brought about a defective transfer. Lord Kenyon thought that the case fell within the "misfeasance" doctrine and allowed the case to go to the jury. In *Whitehead v. Greetham* (1825, C. P.) 2 Bing. 464, the plaintiff deposited £700 with the defendant and the latter promised to buy therewith a well-secured annuity. The defendant was adjudged to pay damages for buying an annuity that failed through insolvency. In *Robinson v. Threadgill* (1851) 35 N. C. 39, an action was sustained for breach of a gratuitous promise by the defendant to collect notes put into his possession by the plaintiff. See also *Hart v. Miles* (1858) 4 C. B. (N. S.) 571; *McCauley v. Davidson* (1865) 10 Minn. 418; *Clark v. Gaylord* (1856) 24 Conn. 484. In *Carr v. Maine Central Ry.* (1917) 78 N. H. 402, 102 Atl. 532, the defendant promised that if the plaintiff would execute the necessary papers the defendant would forward them to the Interstate Commerce Commission in time for the allowance of a rebate. For breach of this promise the court sustained "Case for negligence." The court said that the declaration "sounds in tort"; but in fact the only "tort" committed was that for which special assumpsit was invented—the breach of an express promise relied on by the plaintiff.

Sir William Anson (*Contracts,* Corbin's ed. 1919, sec. 133) agrees entirely with the instant decision. He recognizes that the action must be *ex contractu* and suggests that such cases are exceptions to the "universal application" of the English doctrine of consideration. It is believed, however, that the "doctrine" should be so expanded in its statement as to include such "exceptions."

In the instant case the defendant's duty can be regarded as contractual only. A mere gratuitous bailee is under no duty to insure. It is believed that the decision is sound, but that it must rest upon the principle that certain types of reliance upon a promise make it binding without any other consideration. A surrender of possession is one of these types, but the principle should not be restricted to cases of bailment of goods.[6]

A. L. C.

EFFECT OF STATUTE OF LIMITATIONS ON EQUITABLE MORTGAGE

Despite the common occurrence of mortgage transactions, the courts are still confused as to what legal relations arise from a mortgage.[1] Confusion increases, moreover, when a mortgage transaction involves other questions of law.

In the case of *Pratt v. Pratt* (1922, Wash.) 209 Pac. 535, a son purchased land taking title in the name of his father by a deed absolute on its face. In fact the deed was given as security for a debt not evidenced by writing, owing from the son to the father. The statute of limitations for such a debt in Washington is three years. The father, after the debt was barred, brought suit against the son's widow, to have the deed declared a mortgage and foreclosed. It was held (four judges *dissenting*) first, that the conveyance was intended as security for a debt and hence that the deed should be considered as a mortgage; secondly, since a mortgage is merely security for a debt, it is a mere incident thereof and therefore, the debt being barred, the mortgage is barred also. The court therefore denied any relief to the plaintiff.

The case presents a threefold complication: (1) a deed absolute intended as a mortgage; (2) a debt barred by the statute of limitations; and (3) relief sought by the mortgagee.

The instant case is in accord with the general rule, both in jurisdictions where a mortgage conveys legal title and in those states where it creates merely a lien, that a deed absolute on its face will be declared to be a mortgage[2] if there is clear and convincing evidence[3] that the par-

[6] It might well include *Thorne v. Deas* and *Brawn v. Lyford, supra.* See Anson, *op. cit. supra* note 5, sec. 127, note 1. Indeed, in the present case the court says of *Thorne v. Deas:* "Whether or not we would feel bound to follow it today must be left open until the question comes properly before us."

[1] Lloyd, *Mortgages—The Genesis of The Lien Theory* (1923) 32 YALE LAW JOURNAL, 233.

[2] Title states: *Linkemann v. Knepper* (1907) 226 Ill. 473, 80 N. E. 1009; *Cullen v. Carey* (1886) 146 Mass. 50, 15 N. E. 131. Lien states: *DeLeonis v. Walsh* (1903) 140 Calif. 175, 73 Pac. 813; *Teal v. Scandinavian-American Bank* (1911) 114 Minn. 435, 131 N. W. 486; 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) 2840; see L. R. A. 1916 B, 18-610, note.

[3] 3 Pomeroy, *op. cit. supra* note 2, 2846, note; (1913) 23 YALE LAW JOURNAL, 185.