Priorities in the Law of Mortgages (continued)

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PRIORITIES IN THE LAW OF MORTGAGES*

(Continued)

IV. ASSIGNMENTS**

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Effect of a Conveyance of the Mortgaged Premises by the Mortgagee.—In Maine,¹ under the "title" theory, the rule seems to be that a conveyance, in one of the modes recognized at law,² by a mortgagee of land (where the mortgage relation is created by a common law conveyance on a condition subsequent), who has acquired possession,³ operates at law to pass the mortgagee's interest in the land to the grantee, enabling the latter to successfully defend against an action of ejectment brought by the mortgagor.

* Prior parts of this paper are contained in the November, 1932, and the January, 1933, issues of the Notre Dame Lawyer.

** The first part of this discussion deals with the methods that mortgagees have used to transfer their interests in the security relation. Some phases of the principles in the law of assignments, such as consideration and delivery, have not been included within the scope of this article.

¹ Cf. Connor v. Whitmore, 52 Me. 185 (1863) (Writ of entry by the mortgagor against one in possession under a deed of release from an assignee of the mortgage; in holding that the mortgagor could not maintain the action, the court said: "The effect of this release was to pass the title of the mortgagee to the tenant. The mortgagee in possession, by a quitclaim deed, passes all his interest in the mortgaged premises. . . . It has been repeatedly settled that the mortgagor cannot maintain ejectment against a mortgagee in possession. The remedy of this plaintiff, if any he have, is in equity." It did not appear as to whether the debt was evidenced by a distinct instrument, or whether the debt had been transferred to the defendant.).

² Where the courts have adverted to the character of the conveyance, in determining its operation as transferring the mortgagee's legal interest in the land, they have said that a deed of release is sufficient for this purpose (Connor v. Whitmore, op. cit. supra note 1; Welch v. Priest, 8 Allen 165 (1864)), or that a warranty deed is sufficient (Woods v. Woods, 66 Me. 206 (1877); Ruggles v. Barton, 13 Gray 506 (1859)); or that a quitclaim deed is sufficient (Ruggles v. Barton, supra; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400 (1833)).

³ Since possession in fact is an important factor in the operation of the rule, it would seem that a mortgagee in possession as a disseizor would have a sufficient possession to enable him to convey his legal interest as against those adverse claimants who cannot show a better title than that acquired by the grantee of the mortgagee. Cf. dictum of Rugg, C. J., in Bon v. Graves, 216 Mass. 440, 103 N. E. 1023 (1914).
PRIORITIES IN THE LAW OF MORTGAGES

But it is now well settled in Maine that a conveyance of the mortgaged land by a mortgagee who has not lawfully acquired possession of the land does not convey legal title to the mortgaged premises, with its incidental rights, to the grantee, unless accompanied by a transfer or assignment of the personal security. The reason, given by the court, is that, until entry or foreclosure, the interest of mortgagee is not an interest in real estate. The real security is regarded as a chose in action; and the interest of the mortgagee in the land, as distinguished from his title to the debt, is not assignable.

4 Wyman v. Porter, 108 Me. 110, 79 Atl. 371 (1911) (Upon writ of entry to recover possession of certain land, the plaintiffs' title was put in issue; the assignee of a mortgage of the locus in quo quitclaimed his interest to the plaintiffs; there was no evidence that the mortgagee or the assignee had made entry before the transfer, or had transferred the mortgage debt to the plaintiffs; it appeared that it was the intention of the assignee to convey the premises themselves, and not to assign the mortgage; held, that no legal title passed to the plaintiffs.); Lunt v. Lunt, 71 Me. 377 (1880) (The assignee of the mortgage conveyed, by quitclaim deed, two-ninths of the mortgaged premises to the defendant; the assignee subsequently conveyed the premises to the purchase-money mortgagee, who paid the mortgage notes and brought a real action to recover possession of the premises; held, that the defendant acquired no title to the two-ninths of the land, as no entry had been made by the mortgagee under his mortgage, and there was no assignment or transfer of the mortgage debt or any part of the same.).

In Johnson v. Leojards, 68 Me. 237 (1878), the mortgagee, before entry to foreclose his mortgage and without possession, gave a quitclaim deed to the defendant's predecessor of all his "right and interest" in the mortgaged premises, but did not assign the mortgage deed or transfer the personal security; subsequently, he assigned the mortgage to the plaintiff and delivered to her the note secured thereby. Upon writ of entry to recover possession of the premises conveyed by the quitclaim deed, it was held for the defendant, the court saying that the mortgagee "having conveyed all his interest in the mortgaged premises . . . by the quitclaim deed . . . had no remaining estate therein to pass to the plaintiff by his assignment. . . ." This decision was overruled in Wyman v. Porter, supra.

5 "He who holds a note, and also a mortgage, holds in fact two instruments for the security of the debt; first, the note with its personal security, which is commercial paper, and, as such, may be enforced in the courts of law, with all the rights incident to such paper; and the other, the mortgage with security on land . . ." Per Caton, C. J., in Olds v. Cummings, 31 Ill. 188, 193 (1863).

Most mortgage contracts create two distinct securities, the mortgage debt and the security of the land mortgaged. Thus if the mortgage is executed in the form of a conveyance on a condition subsequent to secure a separate promissory note or bond, the mortgagee may resort to an action on the note or bond to enforce payment of the mortgage debt, or he may bring an action to foreclose the mortgage. In the absence of a statute providing to the contrary, he may maintain both actions at the same time. In order to keep these situations distinct, in this discussion, the writer has chosen to designate the note or the bond as the "personal security," and the mortgage deed as the "real security."
The rule that a mortgagee in possession can pass a legal interest in the mortgaged real estate, without assigning or transferring the debt, seems to be based upon the proposition that the mortgagee by acquiring possession acquires more than a mere security right. He is considered as acquiring a seisin in fact—a certain interest in the land itself, a defeasible interest, but one that he is entitled to convey. This reasoning is rather curious. Yet a possession in fact acquired by a disseisor is a sufficient possession to enable the disseisor to transfer whatever interest he has as disseisor as against one who can not show a better right to the possession. And a tortious entry, that is, a forcible entry by the mortgagee has been considered a sufficient possession, under the "title" theory of mortgages in New Hampshire, to entitle the mortgagee to take the profits of the mortgaged premises. As far as the possessory rights of a mortgagee are concerned, it would not seem to make any difference as to whether he has taken possession before he makes a transfer of the mortgaged realty, or that there has been a foreclosure by the mortgagee before he transfers the land. If the interest of a mortgagee is to be treated at law as an interest in land by virtue of the mortgage deed, a court of law should recognize and give complete effect to the incidental right to possession. Where the grantee of mortgaged realty is seek-

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6 Smith v. Booth Bros. & Hurricane Isle Granite Co., 112 Me. 297, 305, 92 Atl. 103, 107, 108 (1914). Cf. W. H. Glover Co. v. Smith, 138 Atl. 770 (Me. 1927) (Real action, involving the right to possession of mortgaged premises; the plaintiff was the holder, through a series of mesne transfers, of the equity of redemption; an assignee of the mortgage transferred the premises, by warranty deed, to the defendant; it did not appear that the mortgagee ever took possession of the premises, or that the mortgage debt or any part of it was transferred to the defendant; held, that the plaintiff was entitled to possession.). In the latter case the court said: "It should . . . go without saying that by proper stipulation in a mortgage the mortgagee may be given the right to assign his lien, including his right to possession, in trust to secure the mortgage debt. But, following the earlier cases, we hold that in the absence of such stipulation a mortgagee out of possession cannot effectually convey his mortgage lien without also transferring the mortgage debt."

ing to enforce payment of the mortgage debt, without an assignment or transfer thereof to him, the case involves quite different considerations from those involved in a case where the grantee is merely seeking at law to protect the possessor rights incident to the transfer of the realty to him by the mortgagee. A recognition of these distinct situations in "title" states should not result in any inconsistency.

It has been held in New Hampshire that a mortgagee in actual possession is entitled, without reference to the purpose for which the possession is taken, and without regard to the question whether anything more than mere possession will pass, to convey or transfer that possession by a deed of the premises to another, and that the grantee is entitled to hold it against all persons who cannot show a better title, and is entitled to bring or defend actions in maintenance of that possession. But a conveyance of the mortgaged premises by the mortgagee, who has not acquired possession, conveys no legal title to the property and will not enable the grantee to successfully defend against a writ of entry by the mortgagor to recover the possession thereof.

8 Smith v. Smith, 15 N. H. 55 (1844) (Writ of entry brought against the grantee of the mortgagee, who was in possession of the mortgaged premises before the conveyance; the mortgagee had been put in possession, by virtue of a writ of possession, before he executed his deed. The court said: "He [the mortgagee] was then, if the notes had not been paid, a mortgagee in possession by virtue of a process issued by a court of competent jurisdiction. He had a right to retain the possession as against the mortgagor, and this right might be conveyed, so that his grantee would stand in his place, and would hold whatever right of possession was owned by his grantor.").

9 Ellison v. Daniels, 11 N. H. 274 (1840) (Writ of entry by the mortgagor to recover possession of a tract of land mortgaged by him to E; E had conveyed, by a warranty deed, to G, and G had conveyed, by a similar deed, to the defendant. The evidence did not show that the mortgagee was in possession at the time of the conveyance to G, or a transfer of the mortgage note to G or the defendant. Held, the mortgagor was entitled to recover the possession.).

"... it was also settled in the latter case [Smith v. Smith, 11 N. H. 55 (1844)] that the mere fact that the mortgagee has the right to transfer the debt to his grantee, will not cause the deed to convey an interest in the land, unless the debt be transferred." Per Gilchrist, J., in Weeks v. Eaton, 15 N. H. 145, 148 (1844).

"It is well settled in this state ... that a conveyance by a mortgagee, not in possession of the land mortgaged, will not pass the debt secured by the mortgage, and, consequently, will not pass any interest in the land itself attempted to be conveyed [citing cases]." Per Smith, J., in Clark v. Clark, 56 N. H. 105, 107 (1875).
For the purpose of sale, absolute or conditional, the mortgagee is not considered as the owner of the land mortgaged, without either foreclosure of the mortgage or entry under it.

The New Hampshire cases, in dealing with these problems, proceed upon the theory that the right of a mortgagee to have his interest treated as real estate, extends to, and ceases at the point, where it ceases to be necessary to enable him to protect and avail himself of his just rights, intended to be secured to him by the mortgage; that to enable him to sell and convey his estate, is not one of the purposes for which his interest is to be treated as real estate; that there is no necessity that it should be so treated for that purpose. That can equally be effected in the usual way of assigning and transferring the debt secured by the mortgage. Yet, if the mortgagee has obtained possession of the mortgaged premises, it is recognized in this jurisdiction that he acquires a sufficient interest in the land itself to enable him to transfer his possessory rights by a conveyance of the land.

In Connecticut the view has been asserted that a conveyance by the mortgagee of real property, by way of mortgage, to a third person, and a subsequent delivery of the personal security to such third person, may operate as an

10 Ellison v. Daniels, op. cit. supra note 8, at pp. 280, 281.

11 "He was then, if the notes had not been paid, a mortgagee in possession by virtue of a process issued by a court of competent jurisdiction. He had a right to retain the possession as against the mortgagor, and this right might be conveyed, so that his grantee would stand in his place, and would hold whatever right of possession was owned by his grantor." Per Gilchrist, J., in Smith v. Smith, op. cit. supra note 8, at p. 66.

"... a mere entry by the grantee of a mortgagee, before an entry by the latter ... is of no effect, and his deed will pass no interest." Per Gilchrist, J., in Weeks v. Eaton, 15 N. H. 145, 148 (1844).

12 The rule in Massachusetts, as to the effect at law of a conveyance by the mortgagee, seems to be the same as that prevailing in Maine and New Hampshire. In Hunt v. Hunt, 31 Mass. 374, 379, 380 (1833), it was said: "A mortgagee, especially after entry for foreclosure, is considered as having a legal estate, which may be alienated and transferred by any of the established modes of conveyance, subject only, until foreclosure, to be redeemed by the mortgagor."

13 Dudley v. Caldwell, 19 Conn. 218 (1848).
assignment of the mortgage, and place the legal interest of the mortgagee in the third person so as to enable him to maintain an action of ejectment against the mortgagor. It is said that an intent to assign the personal security may be inferred from the conveyance of the mortgaged land.

In a comparatively recent Alabama case 14 the court says that a conveyance of the mortgaged land by the mortgagee operates as a conveyance of the legal title and as an assignment in equity of the mortgage debt. This decision was in equity in an action for an accounting and redemption. No particular importance is to be attached to the fact that the mortgagee is in possession at the time he conveys the premises, in transferring in equity the personal security, especially when the conveyance is made by a warranty deed. The intention to transfer the personal security is the important factor in such cases, and, as will be pointed out, that intention may appear from a transaction where there is no specific transfer of the debt but only a transfer of the mortgaged premises by the mortgagee. It would probably be easier to show this intention from a conveyance by a warranty deed in a "title" state than in a "lien" state, where the mortgagee might be more apt to think he was transferring his entire interest in the mortgage relation. If the dictum in the Alabama case is to be accepted, then a mortgagee is entitled to transfer the legal title to the mortgaged premises without the necessity of having possession at the time of the conveyance. The court says that if the mortgagor is permitted to remain in possession, his possession "would really be the possession of the mortgagee." This result is in accord with the view previously expressed in this paper that a possession in fact should not be considered as of any importance where the mortgagee, in a "title" state, conveys the mortgaged premises to a third person and the controversy relates to the possession of the property at law.

There is a dearth of authority in "lien" states dealing with the effect, at law, of a purported conveyance or transfer of the mortgaged premises by the mortgagee, where the mortgage relation is created by a common law conveyance upon a condition subsequent. The reasonable and logical rule that, it would seem, should prevail in these states is stated in Kent's Commentaries\textsuperscript{15} to be that "The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use. This is the general language of the courts of law, as well as of the courts of equity; and the common sense of parties, the spirit of the mortgage contract, and the reason and policy of the thing, would seem to be with the doctrine."

There are a few New York decisions that should be noticed. In \textit{Hubbell v. Moulson}\textsuperscript{16} an action of ejectment was brought by the grantees of the mortgagor against the grantees of the mortgagee. The plaintiffs offered to show, in support of their right to possession of the mortgaged premises, that the mortgage debt had been paid by the receipt by the mortgagee, while in possession of the land, of rents and profits sufficient to satisfy the mortgage debt. The court held that this evidence was properly excluded by the trial court, on the theory that the receipt by a mortgagee in possession of rents and profits sufficient to satisfy the mortgage debt does not \textit{ipso facto} extinguish the lien of the mortgage and that ejectment will not lie by a mortgagor against a "mortgagee in possession." This case may be passed without discussion, as neither counsel nor the court questioned the regularity of the possession, and it seems to have been conceded that, by privity, the possession of the mortgagee, however it was obtained, devolved upon the defendants. In \textit{Jackson v. Bronson}\textsuperscript{17} the mortgagor sustained ejectment against the grantee of the mortgagee, and the court said:

\textsuperscript{15} 4 Kent's Comm. (14th ed.) 194.
\textsuperscript{16} 53 N. Y. 225, 13 Am. Rep. 519 (1873).
\textsuperscript{17} 19 Johns. 325 (1822).
"It is now well settled that the mortgagee has a mere chattel interest, and the mortgagor is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond or personal security for the debt, and the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity."

Here, again, the regularity of the possession was not questioned by either the court or counsel; and this decision was made before the Legislature of New York prohibited an action of ejectment by a mortgagee to obtain possession of the premises mortgaged to him. Since the enactment of this statute the law of New York appears to be that the legal title to the mortgaged land remains in the mortgagor, as against the mortgagee and assigns, until foreclosure. The statute has deprived the mortgagee of the only legal method by which he could acquire possession of the mortgaged premises without the mortgagor's consent, prior to foreclosure; and the only way left by which he can lawfully acquire the possession, prior to foreclosure, is by the mortgagor's consent. But, if the mortgagor consents to an entry, whether before or after default, by the mortgagee, the latter is entitled to retain the possession until the mortgagor redeems or, at least, offers to redeem.

As late as 1836, Chief Justice Savage of the Supreme Court of New York argued that the mortgagee had an interest in the mortgaged premises, and that that interest after forfeiture was a legal interest—an interest sufficient to protect him in the possession of the mortgaged premises when obtained in fact. But the later view, expressed by Commissioner Reynolds, in *Trimm v. Marsh*, is the more desirable view. He contended that the mere change of the possession in fact of the real estate would not divest the

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In 1859 Denio, J., said: "Before the Revised Statutes, the mortgagee could maintain ejectment after forfeiture; and now, if he gets into possession he may defend himself upon the title conveyed by it [citing *Phyfe v. Riley*, and other cases]." *Mickles v. Townsend*, 18 N. Y. 575, 584 (1859).

10 54 N. Y. 599 (1874).
legal title of the owner, and that there was nothing in the fact of actual possession by a mortgagee that would work such a result. While the possession lawfully acquired by the mortgagee of the mortgaged premises, in "lien" states is apparently attended with more incidents of legal ownership than any other mere possession, it is still referable to the security interest of the mortgagee. It should be considered as giving an additional security interest to the mortgagee, rather than as having any reference to a change of the legal title. An instrument which confers no right to possession upon the mortgagee, either before or after default of the mortgagor, possesses little of the character of a conveyance, and can hardly be deemed to pass any interest in the land, even though the mortgage is made in the form of a common law conveyance upon a condition subsequent. If the mortgagee has acquired possession of the mortgaged premises, after default and even with the consent of the mortgagor, his conveyance purporting to transfer the legal title should not, in the "lien" states, be effectual for this purpose, and should not be effectual for any purpose without a transfer of the mortgage debt. The mortgagee holds, by virtue of the mortgage, only a lien upon the property, and that is a mere incident of the debt. However, as a mortgagee in possession he should be entitled to transfer his \textit{temporary possessory right}. But his \textit{contract must purport to do this} before it will be effectual to transfer such possessory right. If so, the transferee will be substituted to the mortgagee's position, subject to the same rights and liabilities.\footnote{See discussion in Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765 (1863).}

A diversity of opinion exists in the adjudged cases, mainly in the "lien" states, as to the respective rights of the mortgagor and mortgagee, both before and after condition broken, arising from the different views taken of mortgages at law and in equity, and the more or less extended application
of equitable doctrines to contracts of this description in
courts of law. The judges who had been trained in the rig-
orous school of the common law at first regarded the equi-
table theory of mortgages as an offensive innovation. But as
the equitable theory grew in favor courts of law began to
apply equitable principles, such as the right of the mortga-
gor to redeem after forfeiture. Despite this gradual and
partial evolution, the mortgagee was still regarded as in some
respects the legal owner of the mortgaged premises. He
could maintain ejectment, and assert other legal remedies,
subject only to the mortgagor's right of redemption. Finally,
in some jurisdictions, the rights of the mortgagee at law have
been so whittled down that the only strict legal right that he
has left is to collect the debt secured by his mortgage.

Many considerations connected with the mortgage rela-
tion operated to bring about this diversity of opinion as to
the respective rights of the mortgagor and mortgagee at law
and in equity. Some of these factors are: (1) The fact that
the mortgage relation was ordinarily created by a common
law conveyance upon a condition subsequent; (2) Legisla-
tive abrogation of the mortgagee's right to enter by eject-
ment; (3) The question of whether repayment of the mort-
gage debt after default revedsted the legal estate in the mort-
gagor without a reconveyance by the mortgagee; (4) Stat-
utes restricting the mortgagee's rights to foreclosure; (5)
The question of whether a widow of a mortgagor, who has
died without redeeming the mortgaged premises, is entitled
to dower in the premises; (6) The question of whether the
mortgagee's interest in the mortgaged premises is subject
to execution; (7) The fact that the same court exercises
both law and equity jurisdiction; and (8) "Undertaking to
give effect in courts of law, under proceedings at common
law, to assignments and transfers by mortgagees which are
recognized as good in equity, though directly at variance
with the rules of law." 21

21 2 Washburn on Real Property, 5th ed., 512.
In accordance with the rule that seems to prevail in the "title" states, that a mortgagee out of possession cannot effectually transfer his possessory rights by a mere conveyance of the mortgaged premises without being expressly authorized in the mortgage to do so, it is a logical deduction that a conveyance by a mortgagee out of possession is not effectual for any other purpose at law; and such a conveyance would not operate to transfer the separate personal security, whether the conveyance is made by a quitclaim deed or by a warranty deed. On the other hand, if the mortgagee has obtained possession of the mortgaged premises lawfully before he conveys them, the question arises as to whether the mere transfer of the premises operates as an assignment of the separate personal security. The dicta in a few cases support the rule in the "title" states that if a mortgagee, who has acquired possession of the mortgaged premises, conveys them by a deed with covenants of general warranty, the deed operates, as against the mortgagee-grantor, as an equitable assignment of the mortgagee's interest in the personal security, if the latter is evidenced by a separate instrument, in order to make the title as nearly perfect as can be done by the warranty. The mortgagee-grantor would be estopped, under the warranty, from foreclosing, as against


23 "... our opinion is that a conveyance of the land does not transfer the debt, because, so long as the mortgage is considered as an incident to the debt, it cannot pass without a transfer of the principal." Per Gilchrist, J., in Smith v. Smith, 15 N. H. 55, 65 (1844).

"It is well settled that when the mortgagee has negotiated the note secured by the mortgage to a third person, without assigning the mortgage, he simply holds the mortgage in trust for the holder of the note." Per Virgin, J., in Lord v. Crowell, 75 Me. 399, 403 (1883).


25 "If the fee of John S. [the mortgagee] became perfect at law, freed from the conditions annexed by the failure of the mortgagor to pay the debt, it would have enured to his grantee, and he would have been estopped from setting it up against him. A breach of the covenants of the conveyance [that the grantor-mortgagee was seized of an estate in fee simple] can be avoided only by treating it, as it imports to be, a transfer of the grantor's interest in the lands, and of
the grantee; a tender for the purpose of redemption, to be valid, would have to be made to the grantee;\(^2\) and a bill to foreclose brought by a mortgagee who had conveyed by warranty after he had obtained possession of the mortgaged premises, would be without equity as a bill for foreclosure, if it showed these facts.\(^2\) If the mortgagee in possession conveys by a quitclaim deed, it would seem to follow that only the incidental possessory rights would go to the grantee thereunder. Such a conveyance would not estop the mortgagee-grantor from foreclosing, or entitle the grantee to call for the personal security. The quitclaim grantee would have to bargain expressly for the personal security in order to be entitled to it. Otherwise, it seems that he would hold the bare legal title for the benefit of the holder of the personal security, whether the latter be the mortgagee or an assignee of the mortgagee, especially if the usual form of conveyance is not by a quitclaim deed. But if no separate obligation is given for payment of the mortgage debt, that is, if there is no written evidence of the mortgage debt other than the mortgage deed itself, it has been held in Maine that a quitclaim deed will pass all of the rights and interests of the mortgagee in the **mortgage** and mortgaged premises to his grantee; so that the conveyance will transfer the debt in such a case, and a tender, to be proper, would have to be made to the grantee,\(^2\) rather than the mortgagee-grantor.

\(^2\) Wing v. Davis, 7 Greenl. 31 (1830) (Conveyance in fee by mortgagee, who had entered for condition broken, to defendants. The court said: "We are also of opinion that where a mortgage has been assigned, and the assignee has entered and holds the title and possession, the tender for the purpose of redemption must be made to him. The language of our statute . . . is, 'upon payment or tendering of payment, & c.—to such mortgagee, vendee, or person claiming and holding under them and in possession as aforesaid,' . . . Such is the character and situation of the defendants.").


\(^2\) Dorkray v. Noble, 8 Me. 278, 284 (1832). " . . . if the mortgage had been conditioned for the payment of a sum of money, no security having been given for it other than the mortgage, perhaps a conveyance of the land would transfer the debt." Per Gilchrist, J., in Weeks v. Eaton, op. cit. supra note 11.
The rule that appears to prevail in both the "title" and "lien" states is that whenever the mortgage relation is created by an absolute conveyance, a conveyance of the mortgaged land by the mortgagee operates to pass the mortgage debt and the security of the land to the grantee. It seems to be generally assumed that this rule exists, wherever a case comes within its operation. If the grantee knows of the mortgage relation existing between his grantor and the debtor, he takes the land subject to the right of the debtor-mortgagor to redeem. If the grantee does not know of the mortgage relation, he might become a bona fide purchaser for value and so take the land free and clear of the mortgagor's right to redeem.

29 Hawkins v. Elston, 58 Colo. 400, 146 Pac. 254 (1915) (Action by the heirs of a grantor, under an absolute deed intended to operate as a mortgage, to have the deed declared a mortgage and to be permitted to redeem from the mortgage; the defendant was donee, under a quitclaim deed, of the grantee in the absolute deed. The court held that the quitclaim deed operated as an assignment of the mortgage indebtedness, investing in the quitclaim grantee the right to collect the debt previously held by the grantee in the absolute deed.); Morrow v. Gorster, 217 S. W. 164 (Tex. Civ. App. 1919) (The grantee in a quitclaim deed intended as security quitclaimed the premises to his daughter; the court said that the effect of the second quitclaim deed was to assign the security to the daughter and that she was a necessary party to the action brought by the original grantor-mortgagor to redeem.); Hasley v. Martin, 22 Cal. 645 (1863) (Ejectment brought by purchaser of land at an execution sale; the judgment debtor had conveyed the land by an absolute deed, taking back a written defeasance; the grantee conveyed the property, by absolute deed, to the defendant, but the latter conveyance was made after the plaintiff had attached the land. The court, in holding that the plaintiff was entitled to recover, said that the second conveyance operated to assign the mortgage, and that the grantee-assignee held the land subject to the equity of redemption in the original grantor and those holding under him claiming under the attachment.).

30 As to whether continued possession of the premises, conveyed by an absolute deed intended to operate as a mortgage, by the grantor would operate as constructive notice to a purchaser from the grantee-mortgagor, see a previous part of this paper, 8 Notre Dame Law. 63, 64.

In Oklahoma statutes appear to have abridged the rights of innocent purchasers for value in such cases to the amount of the outlay with interest. The following statutes are pertinent:

"Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such." Comp. Laws of Okla. (1909) § 1196.

"Every instrument explanatory of any deed or other writing purporting to be a conveyance, but intended to be defeasible or as security for the payment of money, shall be deemed a part thereof, and must be filed and recorded therewith;
When, for any reason, a sale of mortgaged real estate under an attempted foreclosure, whether by suit in equity or under a power of sale, is ineffectual to cut off the mortgagor's equity of redemption, the purchaser at such a sale, if he is a third person, succeeds to the title and rights of the mortgagee in the property, and may enforce them, to the extent necessary to reimburse himself for the amount he paid at the sale, if that amount does not exceed the amount due on the mortgage, as the mortgagee could have done had no sale taken place. Or if the mortgagee, or a third person, purchases the mortgaged property at such a sale and then conveys it, his deed, at least, operates as an equitable assignment of the mortgage debt as well as the mortgage title to the grantee. The deed of the mortgagee, and unless such instruments are so filed and recorded together, they and each of them shall have no other effect than an unrecorded mortgage, and the recording of the principal instrument shall secure no rights to the holder thereof." Comp. Laws of Okla. (1909) § 1197.

"Any person purchasing or taking any security against real estate in good faith and without notice from one holding under an instrument purporting to be a conveyance, but intended as security for the payment of money, and which instrument has been duly recorded without any other instrument explanatory thereof, shall be protected to the extent of the purchase price paid or actual outlay occasioned with lawful interest, against all persons except those in actual possession at the time of such purchase or outlay." Comp. Laws of Okla. (1909) § 1198.

"Any conveyance, other than as above provided, by one holding under an instrument purporting to be a conveyance, but intended as security, shall be deemed and treated as an assignment and transfer of the mortgage rights of and indebtedness due the maker thereof." Comp. Laws of Okla. (1909) § 1199.

These statutes are considered to some extent in the following Oklahoma cases: Krauss v. Potts, 135 Pac. 362 (Okla. 1913); Williams v. Purcell, 145 Pac. 1151 (Okla. 1914); Balduff v. Griswold, 60 Pac. 223 (Okla. 1900).

81 Robinson v. Ryan, 25 N. Y. 320 (1862) (Plaintiff, in foreclosure, had purchased the mortgaged premises at an attempted foreclosure by the assignee of the mortgagee, which sale was considered void. Held, inter alia, that the plaintiff thereby obtained all the interests of the assignee.); Lawrence v. Murphy, 45 Utah 572, 147 Pac. 903 (1915) (Held, that a conveyance of mortgaged property by the mortgagee, who had foreclosed the mortgage and secured a sheriff's deed to the premises, where the foreclosure proceedings are void, operates as an assignment of the real and personal security of the mortgage. The court said that the assignee was entitled to foreclose the mortgage; and that the assignee, who was in possession of the premises (apparently without consent of the owner of the equity of redemption), was a "mortgagee in possession" with all rights incident thereto.); Lamprey v. Nudd, 29 N. H. 299 (1854) (Writ of entry brought by the mortgagor. The first mortgagee had foreclosed, by writ
even if it purports to convey only the legal title to the property, operates, in all jurisdictions, to vest in the grantee named therein the title to the real security and the personal security. Clearly there is an intent to pass a

of entry, and the writ of possession had been executed; the mortgagee then conveyed to G., who conveyed to the defendant. In holding that the mortgagor could not maintain his action while the judgment in favor of the mortgagee, which was voidable and reversible on appeal, remained un reversed, the court said that the deed of the mortgagee was sufficient to convey his mortgage interest, though it did not in terms purport to convey the mortgage debt; Stark v. Brown, 12 Wis. 572 (1860) (Ejectment to recover possession of mortgaged land. The plaintiffs claim, one as one of the heirs, and both under the other heirs of the deceased mortgagor. The defendant claimed under mesne conveyances from the purchaser (one of the administrators of the assignee of the mortgage) at the foreclosure sale, instituted after the death of the mortgagor and at which only the administrator of the mortgagor was made a party. Held, that the defendant had acquired the mortgage interest, and stood in the position of a mortgagee in possession after condition broken (though apparently that possession was not obtained with the consent of the owners of the equity of redemption), and could not be ousted by the ejectment. The court also held that, in such a situation, it was not necessary that the deeds, through which the defendant claimed, should have purported to have assigned the mortgage debt; Cooper v. Harvey, 21 S. D. 471, 113 N. W. 717 (1907) (Void foreclosure sale under a power of sale, held to operate as an assignment of the mortgage to the mortgagee, who purchased the premises, and, through mesne conveyances from him, to the plaintiff in this action to quiet title and recover possession.) Clark v. Wilson, 56 Miss. 753 (1879) (Held, that the “purchaser of real estate at an invalid sale under a mortgage or trust-deed, whose money has been paid, and applied to the satisfaction of the mortgage-debt, is entitled to be subrogated to the rights of the mortgagee, so as to fasten a lien on the land for the recovery of his money.”). In Jordan v. Sayre, 10 So. 823, 827 (Fla. 1892), the court said: “... it has been held by many cases, and seems to be sustained by the decided weight of authority, that where a void sale has been made of the entire mortgaged premises under proceedings to foreclose a mortgage, a third party purchasing at said sale succeeds to the title and rights of the mortgagee in said property, and may enforce them as the mortgagee could have done, had no sale taken place.”

In Seller v. Lingerman, 24 Ind. 264 (1865), it was held, in an action instituted by an execution defendant to set aside a sale of his land by the sheriff for irregularity, that the purchaser was entitled to recover the purchase money which had been applied to pay the complainant's debt, and that the court possessed the power to decree a lien for the same upon the land without the necessity of the purchaser bringing a separate action to have the lien declared. The court said that since the power to declare the lien existed in this action it would seem to render a tender of the repayment of the sum, by the execution defendant, unnecessary.

32 In “lien” jurisdictions the rule is that a conveyance of the mortgaged premises by the mortgagee before foreclosure, or at least an attempted foreclosure, unless such conveyance purports to transfer the mortgage debt, and is intended by the parties to have this effect, will be inoperative for this purpose. The mere conveyance by the mortgagee of the mortgaged premises will not per se operate as an assignment of the debt secured by the mortgage.
greater interest. If that fails, there is no objection to the operation of the instrument as an assignment. *Valeat quantum valere potest.*

The general doctrine is that a purchaser at a foreclosure sale, or a grantee of the mortgagee who has purchased at the foreclosure sale of his real security whether the foreclosure be by a suit in equity, or writ of entry, or a sale under a power, will be *subrogated* to the rights of the mortgagee, where the purchase money has been applied towards a discharge of the mortgage, in the event that the sale is ineffectual to extinguish the mortgagor's equity of redemption. In an Indiana case\(^3\) it was said:

Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim; or it arises from the transactions of principals and sureties, and sometimes between co-sureties or co-guarantors. It is not allowed to voluntary purchasers or strangers, unless there is some peculiar equitable relation in the transaction, and, never to mere meddlers. But while this is the rule generally, we think that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor. . . . In the case before us, doubtless James Muir [the purchaser of the land at a public sale conducted by the mortgagee] supposed he was getting a good title to the land by the deed from Holman [mortgagee], and thus extinguishing the mortgage debt; and, although a voluntary purchaser, he is not a stranger to the transaction. We think, also, that the property purchased being real estate, and the purchase-money having been used 'in paying a creditor to whom the inheritance was mortgaged,' the purchaser should subrogated to the rights of the or-

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\(^3\) Muir v. Berkshire, 52 Ind. 149, 151, 152 (1875). Accord: Dutcher v. Hobby, 86 Ga. 193, 22 Am. St. Rep. 444 (1890); Clark v. Wilson, 56 Miss. 753 (1879). In discussing this doctrine, the Supreme Court of Georgia said: "'Such principle has the highest and most persuasive equity as well as common sense and common justice for its foundation.' The cases cited . . . will be found . . . to apply to the doctrine of *caveat emptor*, which applies to sales upon valid judgments, and is usually invoked with reference to sales upon executions issued against the general property of the judgment debtor . . ." Dutcher v. Hobby, *supra*.

Many courts will give a *bona fide* purchaser at an execution sale, who loses his property by paramount title, a redress against the defendant in the execution for the amount paid on his purchase, which has gone to discharge the defendant's debts, by substituting him in the place of the creditor. See discussion in Valle's Heirs v. Fleming's Heirs, 29 Mo. 152, 77 Am. Dec. 557 (1859).
original creditor. . . . Although the deed of Holman did not convey a
good title to James Muir, yet it conveyed all the interest Holman had
in the land at the time; and that interest was the right to foreclose
the mortgage against it and have the mortgage debt paid out of the
proceeds. We think, therefore, that the deed operated as an equitable
assignment of the mortgage to James Muir."

The doctrines of assignment and subrogation apply not
only in favor of a purchaser at an abortive foreclosure sale,
if he be a third person, and the purchaser from the mort-
gagee, if the latter purchases at the sale, but also in favor
of the grantees of such purchasers.34

These principles of assignment and subrogation probably
should be rationalized upon equitable considerations pre-
vailing between the mortgagee and the purchaser, whether
the latter be immediate or remote in the chain of convey-
ances dating from the invalid foreclosure sale. The right to
subrogation obviously does not depend upon a contractual
assignment of the mortgage debt, but it comes about by op-
eration of law. There need not, and is not any intent, in
most, if not all, cases, as a matter of fact, to assign the mort-
gage debt where this doctrine of equitable subrogation ex-
ists as a matter of law. It may be said to be based upon
equitable estoppel where, for instance, the mortgagee has
purchased at the sale and has given a warranty deed to the
purchaser from him who seeks protection under the doctrine.
But, of course, this doctrine would not apply in favor of a
remote purchaser who has to rely upon a quitclaim deed.

As a practical matter, under what conditions and how is
the right to subrogation to be determined and applied? In
a North Carolina case35 the doctrine of subrogation was
applied in an action to "try and determine the title to land,
or to remove a cloud from the title," brought by the owner
(in part) of the equity of redemption. A decision in the trial

court that defendant was equitable assignee of the real security and that the debt due by the plaintiff be ascertained, and that if it was not paid the plaintiff's interest in the land be sold for its payment, was affirmed on appeal. In a Minnesota case\(^3\) an "action to remove cloud from title" was brought by the purchasers claiming under *mesne* conveyances from the purchaser at the abortive foreclosure sale against the claimants of the equity of redemption. Possession of the premises had been surrendered to the purchaser at the sale, thus constituting him a "mortgagee in possession." The right of action to redeem was barred by lapse of time when the controversy over ownership of the premises arose, so the plaintiffs were vested with "absolute legal title" to the premises.\(^3\)

The purchaser, as assignee of the mortgage, would clearly be entitled to foreclose the *mortgage* in order to protect himself against the consequences of the *invalid* foreclosure sale. The sale would not prevent the owner of the equity of redemption from redeeming, and in an action to redeem the assignee would be a *necessary* party. Also, payment of the *mortgage* debt by the owner of the equity of redemption should be made to the assignee.\(^3\)

In *Givans v. Carroll*\(^3\) the operation of the principle of subrogation was considered in detail. An action was brought "for the possession of land and for rents and profits" by the

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\(^{3\text{6}}\) Rogers v. Benton, *op. Cit. supra* note 34.

\(^{3\text{7}}\) "The plaintiff must recover [in an action to quiet title] solely upon the strength of his own title and not upon the weakness of that of his adversary, and so he should have a substantial and subsisting interest in the title to the property. A party in possession having title, or one in adverse possession, and under some statutes one having possession alone, provided that such possession is actual, may maintain the suit... A bill to remove a cloud can be maintained by the holder of an equitable title; but in the absence of statute, legal title is necessary to support a suit to quiet title. Statutes have quite generally extended the right to quiet title to one who has the equitable title, and in some jurisdictions, but not in others, the holder of an equitable title may bring an action against the holder of the legal title." 21 Standard Encyclopaedia of Procedure, 1001-1004.

\(^{3\text{8}}\) See Robinson v. Ryan, 25 N. Y. 320 (1862).

\(^{3\text{9}}\) 18 S. E. 1030, 1032, 1033 (S. C. 1894).
heirs of the mortgagor. The mortgage deed was executed to secure a debt of $1,000. At a void foreclosure sale, the mortgagor, one Weathersbee, acting under a power of sale, sold the mortgaged property to one Bist for $700. Subsequently, Bist died and his heirs at law united in an action of partition, under which the mortgaged tract of land was sold and conveyed to the defendant, one Carroll, at the price of $1,025. After holding that Carroll was subrogated to the rights of the mortgagee under the real security, the court gives us the following discussion of the rights and equities of the parties:

"The second exception seems well taken. Its language is: 'Because his honor erred in holding that the plaintiffs were not entitled to interest on the rents of said land as the same accrued, whereas it is submitted that his honor should have held that the rents should have been applied in the accounting annually to the satisfaction and discharge of the mortgage...' We do not mean to sustain the exception in the form in which it is presented. The underlying idea embodied in the exception amounts to this: If A. is indebted to B. by an obligation bearing interest, and B., at the same time such indebtedness subsists, is indebted to A. for sums of money that accrue and become payable at the beginning of each year, when an account is taken in chancery of such mutual indebtedness, if the sums of money due by B. to A. exceed the interest due on the contract of A. to B., this excess should be applied to the extinguishment of interest, and thereafter to the principal, as far as it will do so. Take this as an illustration of our views: If A. owes B. a debt of $700, evidenced by a note wherein interest is fixed at 7 per cent, at the end of the first year A. owes B. on such debt, $749. But suppose, when the debt is contracted, B. is in the possession of land belonging to A., whose rental value is $50 for that first year, and for any cause this mutual indebtedness is carried into chancery; will not A. be held to have his debt due B., of $749, reduced by the $50 due by B. to A. for rent? Would not the same principle be applied if the debt had run at interest for several years, on the one hand, and the indebtedness for rent had run on for a corresponding period? This would be so, not because the rent bears interest, (the payment of interest is a matter of contract,) but because in equity such mutual indebtedness, accruing and maturing at stated intervals, is subject to such a rule. Now in the case at bar, on the 1st day of January, 1880, the heirs at law owed, so far as the assets of their ancestor descended to them would pay, to Carroll, the defendant,
the sum of $700 at 7 per cent. interest, and therefore this indebtedness on the 1st January, 1881, amounted to $749. But, on the other hand, Carroll, owed these heirs, on the 1st January, 1881, the sum of $50 for the rent of their lands. The true amount of this indebtedness on the 1st January, 1881, was the $749, less the rent of $50, to wit, $699. This last amount of $699, with interest, amounted on the 1st January, 1882, to $747.93, but Carroll owed the heirs rent on that day, $50. The true amount due by plaintiffs to Carroll on the 1st January, 1882, was $697.93. Plaintiffs owed Carroll, on the 1st January, 1883, $746.79, less $50 for rent,—really, $696.79. Plaintiffs owed Carroll, on the 1st January, 1884, $745.57, less $50 for rent,—really, $695.57. Continuing this process . . . down to the 1st January, 1892, the plaintiffs will owe, as the balance of the mortgage debt at that date, $382.55. But at that date the plaintiffs also owed Carroll $173.35 for improvements and taxes. The whole indebtedness at that date would be $555.90, and this sum, with interest to the 1st January, 1893, would amount to $594.81. Applying the rent for 1893 at $90 per annum would leave the lands in the heirs' hands liable to pay Carroll $504.81. The decree in the circuit court should provide that if the heirs at law of Lard (the plaintiffs) do pay to the defendant the sum of $504.81, and the costs of this action, by a day certain, to be named in the decree, the lands should be turned over to the plaintiffs with any rents for the year 1894, but that, in the event of their failure to pay these sums, then the lands in question should be sold, and the proceeds of the sale applied to costs and the debt of Carroll, and thereafter such proceeds as remain be paid to the plaintiffs.”

In holding that Carroll could only enforce the mortgage to the extent of $700, the amount paid by Bist at the “illegal sale,” the court said:

“When Bist paid Weathersbee $700 he thought he was purchasing the land in question at that price as its value. Such price so paid was not an extinguishment of the debt due Weathersbee by Lard, but only such a portion of the debt as was secured by the land pledged to secure the debt. Equity would only subrogate Bist to such a proportion of the debt as was secured by the mortgage. The sale ascertained the portion of the debt so secured by the mortgage . . . it is Weathersbee's contract with Bist which connects Carroll with this mortgage, and in that view $700 was the portion of the debt, as secured by this mortgage, that was assigned by operation of law, by Weathersbee to Bist, and through Bist's heirs to Carroll . . . we are called upon to enforce an equity growing out of a contract, and for which equity the parties themselves made no direct provision. Under such circumstances
it seems to us that such equity should be confined and made oper-
ative within the limits of the transaction of the parties to it."
If the principles of this case are reasonable and just, and
they appear to be, there is a definite limitation on the extent
to which the doctrine of subrogation is applied. It seems
that this limitation should apply in any case, regardless of
who purchases the property at the invalid sale and whether
it is conveyed thereafter, with or without a warranty.

Where the mortgagee or a third person purchases the
mortgaged property at an invalid foreclosure sale, and ob-
tains possession thereof, the question has frequently been
before the courts in the "lien" states as to whether the
owner of the equity of redemption is entitled to maintain
ejectment against him. Or, to put the question another way,
does such purchaser thereby become a mortgagee in posses-
sion, and thus can defend against the owner of the equity
of redemption, or his representative, any action, except one
for an accounting of the rents and profits and to redeem?40
This problem includes within its scope the purchaser through
mesne conveyances from the mortgagee or third person who
has purchased at the invalid sale. Also, it would not seem
to make any difference in the result as to whether the prem-
ises were sold at a judicial sale or under a power of sale
contained in the mortgage.

If the purchaser at the invalid foreclosure sale who obtains
possession of the mortgaged premises, whether he be the
mortgagee or a third person, becomes a mortgagee in pos-
session, he is entitled to defend against an action of eject-

40 This problem cannot be of any importance in "title" states where the
mortgagee may and does make an entry to foreclose, but the foreclosure is in-
effectual, and retains the possession until he conveys the premises. Such were
the facts in Ruggles v. Barton, 13 Gray 506 (1859), where the mortgagee, after
he had attempted to foreclose by an entry, conveyed by warranty to the plain-
tiff. The foreclosure was invalid because the mortgagee omitted to have a certifi-
cate thereof recorded. The plaintiff brought this action, a writ of entry, to fore-
close. There was no assignment of the personal security other than the warranty
deed. During the trial the mortgagee transferred the notes secured by the mort-
gage to the plaintiff, in order to give effect to his warranty deed. The court held
that the plaintiff was entitled to a judgment of foreclosure.
ment brought by the owner of the equity of redemption, or his representative. So the question arises as to when the purchaser at such a sale becomes a mortgagee in possession. In New York the rule prevailing now is that the mortgagor cannot be deprived of his possession, except by a valid foreclosure sale or by his own consent, express or implied.41


"The question whether a mortgagee who has obtained possession without wrong may retain possession until the mortgage debt be paid is allied, historically and analytically, with his right to take possession." Campbell, Cases on Mortgages, 21, footnote 1. "In that case [Madison Ave. Bap. Ch. v. Oliver St. Bap. Ch., 73 N. Y. 82 (1878)], as in Townshend v. Thompson [139 N. E. 152, 34 N. E. 891 (1893)] . . . the element of the mortgagor's consent seems to have been regarded as the controlling factor. If the foregoing decisions have been correctly analyzed, it is obvious that notwithstanding misleading dicta and inaccurate syllabi the cases have quite consistently held to the rule that the mortgagee's entry must be lawful to enable him to defend the mortgagor's action of ejectment, and the last two cases cited (139 N. Y. 152, 34 N. E. 891, and 73 N. Y. 82), as well as Howell v. Leavitt, 95 N. Y. 617, are plainly authorities for the proposition that such entry cannot be lawful, prior to foreclosure, without the mortgagor's consent. That this consent need not be express, but may arise by implication from circumstances, was decided in Gross v. Welwood, 90 N. Y. 638, where it was held to be a question of fact for the jury." Per Werner, J., in Barson v. Mulligan, op. cit. supra note 41.

In a Minnesota case, Rogers v. Benton, op. cit. supra note 34, the court said: "The law as to what constitutes a 'mortgagee in possession' has not been so clearly defined by the decisions as it might be. Sometimes the subject is referred to as if all that is necessary is that the mortgagee should be in possession in fact, regardless of the mode of acquiring it. Sometimes a 'mortgagee in possession' is spoken of as one who has acquired possession 'peaceably,' or again, 'lawfully.' At common law a mortgage conveyed the legal title, defeasible upon payment of the mortgage, and upon breach of the condition the mortgagee became at once entitled to the possession of the mortgaged premises, and having this right, could maintain an action of ejectment. But this has been changed by statute which provides that a mortgage of real property is not to be deemed a conveyance, so as to enable the mortgagee to recover possession without foreclosure: Gen. Stats. 1878, c. 75, sec. 29. It was difficult for the courts at first to free themselves from their old ideas of the nature of a mortgage, or to realize the full extent of the change wrought by this statute. . . . They seemed to think that the mortgagee, after condition broken, still had the right of possession, but that the statute merely forbade its legal enforcement. Hence, if he could somehow get possession, he could maintain it on common law principles. Any such doctrine is utterly inconsistent with all legal principles. If a 'mortgagee in possession' can insist on maintaining it, his right must depend upon his contract, and must be capable of enforcement. . . . The legislature, by the statute referred to, doubtless intended to sweep away every remaining vestige of the ancient common-law rule, which regarded a mortgage as a conveyance of the title, and to make it a mere chattel,—a lien; the fee and right of possession remaining in the mortgagor both before and after condition broken: Kortright v. Cady, 21 N. Y. 543; 78 Am. Dec. 145. . . . It follows . . . that a mortgagee, even after condition
This rule is based upon an early statute denying the mortgagee an action of ejectment, and the progress of judicial decision after the passage of this statute. Yet the old rule that existed in this state, founded upon the "title" theory of mortgages, kept its hold somewhat upon the later New York opinions when the reason which led to it was gone. This inconsistency in the progress of the judicial decisions in New York has had a marked effect upon the judicial development of the law upon this question in other states that have enacted statutes substantially the same as the early New York statute and have followed the New York opinions. In some of the New York cases, that have upheld the right of the mortgagee, who has purchased at an invalid foreclosure sale, to defend an action of ejectment brought by the owner of the equity of redemption, the mode of acquiring possession does not distinctly appear, and in some the rule is stated quite broadly and with little of restriction or limitation.

broken, has no right or remedy except to foreclose his mortgage; that he cannot, merely under his mortgage, either recover or maintain possession of the mortgaged premises. The only logical rule is that, to constitute 'a mortgagee in possession,' the mortgagee must be in possession by reason of the agreement or assent of the mortgagor, or his assigns, that he have the possession under the mortgage and because of it. . . . Having no right to take possession under his mortgage, the mortgagee can get none, except by the agreement or assent of the one who owns that right. This, of course, need not necessarily be express. It may be implied from circumstances. Where the mortgagor expressly abandons possession, his assent that the mortgagee might go into possession under his mortgage might well be implied, especially when he allows him to remain in possession for a considerable length of time without objection."

42 "The theory upon which these cases [Robinson v. Ryan, 25 N. Y. 320 (1862); Smith v. Hitchcock, 130 Mass. 570 (1881); Jackson v. Bowen, 7 Cow. 13 (1827)] seem to have been decided was that the foreclosure proceedings, though void, were equivalent to an entry upon the mortgaged property for breach of the conditions of the mortgage. Except upon this theory, it is impossible to harmonize these cases with others in the same courts, of which no mention is made in the opinions." Per Hoyt, C. J., in Smithson Land Co. v. Brautigan, 47 Pac. 434 (Wash. 1896).

43 "The case of Van Duyne v. Thayre, 14 Wend. 233, is one of the most generally cited authorities for the broad proposition that a mortgagee who obtains possession of the mortgaged premises after forfeiture may defend his possession in ejectment until his mortgage is paid. The headnote is quite as comprehensive as the foregoing statement; but the opinion of Mr. Justice Nelson very carefully limits the rule to a possession obtained, 'either by consent of the
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Where the owner of the equity of redemption is not made a party to the suit to foreclose the real security and the judgment against him is enforced by a writ of assistance which puts the mortgagee, who has purchased at the foreclosure sale, in possession, clearly the mortgagee is not entitled to defend an ejectment action brought by the owner of the equity of redemption. The mortgagee can not be mortgagor, or by legal proceedings. In Hubbell v. Sibley, 50 N. Y. 469, the action was for an accounting to ascertain the amount due on certain mortgages, in which the validity of a deed in foreclosure was the underlying question. Judge Grover stated that since the enactment of the statute ["No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises."] 'a mortgagee in possession can defend his possession in ejectment brought by the mortgagor.' This was not only obiter, but it is true as far as it goes. In Winslow v. McCall, 32 Barb. 241, which was an action upon covenants of warranty and quiet enjoyment, the case turned upon the regularity of proceedings to foreclose a mortgage by advertisement. One Cornwall was in possession under a deed, and also held a junior mortgage, which was not cut off by the foreclosure. Referring to this junior mortgage, the court said that when it became due 'Cornwall was in possession—a possession legally acquired, and of which he had never been legally divested.' This statement requires no comment. If the mortgagee's possession was legally acquired, he could, of course, defend it until his debt was paid. In Bolton v. Brewster, 32 Barb. 389, the plaintiffs claimed as heirs at law. The defendant was the tenant of one who claimed, in the first instance, under an executor's deed, the validity of which was challenged for lack of jurisdiction in the Surrogate's Court in proceedings for the probate of a will. But the defendant's landlord also held a mortgage which, to use the language of the court, was 'a subsisting lien upon the lands claimed, and is held for the purpose of assuring and protecting the title.' In that case, as in other early cases, it seems to have been assumed that the mortgagee was lawfully in possession without stating the facts upon which the conclusion was founded. The case of Hubbel v. Moulson, 53 N. Y. 226, 13 Am. Rep. 519, may be passed without discussion. Although that was an action of ejectment by a mortgagor against one who stood in the shoes of the mortgagee, neither court nor counsel questioned the regularity of possession, and it seems to have been conceded that by privity his possession had devolved upon the defendants." Per Werner, J., in Barson v. Mulligan, 84 N. E. 75, 79, 80 (N. Y. 1908).

In Maine it has recently been held that where the owner of the equity of redemption is not made a party to the foreclosure proceedings, and the owner of the mortgage has not obtained possession of the mortgaged premises, but has conveyed them at the foreclosure sale without purporting to assign the personal security, the former can maintain an action to recover possession of the premises. W. H. Glover Co. v. Smith, 138 Atl. 770 (Me. 1927). This principle is another application of the general rule in this state that a conveyance by a mortgagee, who has not lawfully obtained possession of the mortgaged premises, transfers no legal title to the premises, unless the personal security has also been assigned to the purchaser.

44 "In that case [Howell v. Leavitt, 95 N. Y. 617 (1884)] the owners of the equity of redemption were not made parties to a suit in foreclosure, and the
said to have obtained possession of the premises with the consent of the owner of the equity of redemption when the latter is bound to comply with the writ of assistance. Neither can it be said that by yielding up possession of the mortgaged premises sold under the judgment at the invalid foreclosure sale, without awaiting the issuance of the writ, the owner of the equity of redemption has waived any of his rights. Where the owner of the equity of redemption brings ejectment against the purchaser at the invalid foreclosure sale, to which the owner of the equity of redemption has not been made a party by service of process, the New York Court of Appeals argues that it would be unjust to say that his only remedy against the purchaser is an action for an accounting and for permission to redeem the premises; and that if such were the law, the mortgagee in most cases would only have to await a time when the mortgaged premises were temporarily unoccupied and enter peacefully thereon, and the mortgagor would then be limited to an action to redeem with all the burden of attack and of proof resting upon him. On the other hand, if the mortgaged premises are apparently abandoned when the mortgagee obtains possession of them, or if the mortgagee obtains pos-

judgment against them was enforced by a writ of assistance which put the mortgagee in possession. The court held that the possession of the mortgagee was without lawful authority and amounted to a trespass." Per Cuddeback, J., in Herrmann v. Cabinet Land Co., 217 N. Y. 526, 112 N. E. 476 (1916). The action in Howell v. Leavitt was ejectment.

45 Herrmann v. Cabinet Land Co., op. cit. supra note 44. This case was an action of ejectment, brought by the owners of the equity of redemption who were not made parties to the action to foreclose a mortgage.

In a recent Oklahoma case the mortgagee purchased the mortgaged premises at a foreclosure sale, to which the owner of the equity of redemption had not been made a party, and then brought an action "to clear his title" to the premises, making the mortgagor and his grantee, the latter having purchased the property after the execution of the mortgage but before foreclosure, parties. The court said that the mortgagee "was simply a mortgagee in possession," and his possession could not be disturbed as long as the mortgage debt remained unpaid. It did not appear as to whether the mortgagee had obtained the possession without awaiting the issuance of a writ of assistance or whether the owner of the equity of redemption had assented to the taking of possession by the mortgagee. Page v. Turk, 43 Okl. 667, 143 Pac. 1047 (1914).

46 Herrmann v. Cabinet Land Co., op. cit. supra note 44.
session peaceably, and to the knowledge of the mortgagor, and the latter makes no objection for a reasonable period of time, the mortgagee should be considered a “mortgagee in possession” in New York or any other state that has enacted a statute abrogating the right of the mortgagee to take possession of, or to maintain ejectment for, the mortgaged premises. The Minnesota cases, in considering the scope of operation of a statute similar to that of New York concerning the right of the mortgagee to obtain possession of the mortgaged premises, have adopted the same view as that prevailing in New York.

Under a statute providing that “A mortgage of real estate shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law,” the Supreme Court of Oregon has taken the view that if the mortgagee “obtains possession without force, he is entitled as well since as before the statute to hold it against the mortgagor,” relying upon the earlier New York cases as supporting this principle; whereas, as has just been pointed out, in those cases, when properly analyzed, the element of the mortgagor’s consent seems to have been regarded as the controlling factor in creating the position of a “mortgagee in possession.” In Cook v. Cooper the mortgagee foreclosed, purchased the property and went into possession of the premises. The defendant, in an action wherein it became necessary to consider his liability for removal of certain chattels placed upon the premises, while he was in possession as purchaser through mesne conveyances and in reliance upon an apparently valid title, was considered a “mortgagee in possession.” The heir at law of the deceased

47 See discussion in Rogers v. Benton, set forth in footnote 41.
48 See Rogers v. Benton, op. cit. supra note 34, and cases cited therein.
49 Cook v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709 (1889).
mortgagor had not been made a party to the foreclosure proceedings. The mortgagee and his grantees had apparently obtained possession of the premises without the aid of a writ of assistance but without the consent of the owner of the equity of redemption. The court adopted the view “that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt,” arguing that “this view ... in no manner interferes with the just rights of the mortgagor, and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law, which have sometimes been permitted to prevail, and the mortgagee turned out of possession stripped both of the property and his mortgage debt as well.” True, the mortgagee or other purchaser of the property at the invalid foreclosure sale would not be subjected to the expenses of another action in order to protect his rights as assignee of the mortgage, under this view, but it is going too far to say that his rights would be sacrificed to the “merest technicalities” if he is turned out of possession in an ejectment proceeding, for either is entitled to foreclose the mortgage. If an equitable defense may be made to the action at law to recover possession of the mortgaged premises, it seems that the owner of the equity of redemption should not be entitled to maintain his action of ejectment until he at least tenders the amount due on the mortgage debt, if the mortgagee is the purchaser at the invalid foreclosure sale, or until he tenders the amount paid, or, in some jurisdictions, bid by a third person at such sale. It appears to be assumed that the mortgagee has the right to be considered a “mortgagee in pos-
session" merely because he obtains the possession somehow after condition broken, if he does so without actual force. There is no merit, as to the mortgagee's interest in possession of the premises, in emphasizing the point of time in a "lien" state. If the statute has changed the substantive rights of the parties to a mortgage, and the better view is that the legislature so intended in passing such a statute, the mortgagee who has obtained possession of the premises mortgaged to him can defend the mortgagor's possessory action if, and only if, he has obtained that possession with the express or implied consent of the mortgagor, or as purchaser at a valid foreclosure sale. It seems that the New York Court of Appeals has sufficiently answered any contention to the contrary. And when the Oregon court refers to "merest technicalities," the question arises as to what is meant—rules of courts of equity, or of courts of law, or both? The Oregon court relied upon the New York cases; but the position of the court of last resort in the latter state is now clear and is definitely to the contrary of that reached by Cook v. Cooper. It seems that the Oregon view sacrifices substance to form. Another view, as to the procedural aspects of the question, is that presented in a Mississippi case, wherein the court said:

"Where the extent of the right of the defendant in ejectment is to fix an equitable charge on the property, or, in other words, where the plaintiff has both the legal title and a beneficial interest in the land, the defendant must submit to a judgment in ejectment and seek the intervention of the court in chancery to enjoin its execution until satisfaction is made of his equitable charge."

In a South Carolina case where the question was whether the heirs of the mortgagor were entitled to recover the possession of certain land from the defendants who claimed under a continuous chain of title from one who had entered upon the land, under a deed made in execution of a defective

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51 Bonner v. Lessley, 61 Miss. 392 (1883).
and invalid power of sale contained in the real security, in
good faith and in the honest belief that he was clothed with
the legal title at the time of such entry, the court held that
these facts were a valid defense to the action at law, saying
that equity would postpone the plaintiff's right to recover
possession until he "does equity by paying the amount due
on the mortgage," and that equity would remit the plaintiff
to his equitable right of redemption. The purchaser's right
of subrogation was considered as giving him an equitable
charge upon the mortgaged property, which could be
set up as a bar to the action at law brought to recover
possession of the premises. This view allows the settlement
of the right to redeem and the right to foreclose in one ac-
tion, even though it be an action to recover possession of
the premises sold at the invalid foreclosure sale. Where an
equitable defense may be relied upon as a bar to an action
at law the South Carolina view should prevail.

Where, however, the owner of the equity of redemption
seeks equitable relief, as by bringing a suit to set aside
an invalid foreclosure sale, the maxim that he who seeks
equity must do equity applies; and, before he can secure
such aid, he must at least offer to refund the amount paid
at the invalid foreclosure sale, which has been used to dis-
charge the mortgage indebtedness. 53

Tiffany, in his work on "Real Property," gives a very
concise statement of the law in the "lien" states. He says:

"In states in which the mortgagee has not the title to the land, a
conveyance in terms only of the land or of his interest in the land is
obviously nugatory as such, and such a conveyance has ordinarily been
regarded as not operating to transfer the debt with its accompanying
security, occasionally subject to a qualification to the effect that such
is the case in the absence of evidence of an intention to transfer the
debt, and subject also to an exception, it seems, in case the mortgage
is in the form of an absolute conveyance. But though the cases do
not ordinarily discuss the effect of such a conveyance by the mort-
gagee from that point of view, it would seem that, in most cases, the

53 Bruschke v. Wright, op. cit. supra note 34.
question is whether, when the conveyance is construed in the light of the surrounding circumstances, it shows an intention to transfer the debt secured. That, in the particular jurisdiction, the mortgagee has or has not the title may affect the construction in this regard, but it seems questionable whether, even in those states which adopt the ‘lien’ theory of a mortgage, it should be assumed as an absolute rule of law that a conveyance in terms of the mortgagee’s rights in the land cannot operate as a transfer of the debt.

It has been observed in a previous part of this paper that a conveyance of the mortgaged premises by the mortgagee who has purchased the property at an invalid foreclosure sale and has obtained possession of the premises with the express or implied consent of the mortgagor operates to assign the real and the personal security to the grantee. In this situation it is not necessary that the language of the conveyance by the mortgagee manifest an intent to assign the real and the personal security. The assignment takes place by operation of law; whereas, Tiffany is dealing with contractual assignments. Again, as between the

54 The following cases support this proposition: Noble v. Watkins, 87 Pac. 771, 772 (Or. 1906); Jordan v. Sayre, 10 So. 823, 827 (Fla. 1892); Swan v. Yaple, 35 Iowa 248 (1872); Watson v. Hawkins, 60 Mo. 550 (1876); Peters v. Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134 (1855); Hawley v. Levee, 123 N. Y. S. 4, 66 Misc. Rep. 280 (1910).

The following cases support the proposition that a conveyance by a mortgagee out of possession operates as an assignment of the mortgage held by such mortgagee: Gottlieb v. City of New York, 128 App. Div. 148, 112 N. Y. S. 545 (1908) (overruled in Hawley v. Levee, supra); Maginn v. Cashin, 162 N. W. 1009 (Mich. 1917).


“... where, as in this state, a mortgage on real property does not convey an interest in the lands, but constitutes only a lien or incumbrance thereon ... it is clear that an instrument executed by the mortgagee which purports to convey to a stranger the mortgaged property cannot operate as an assignment of the mortgage as against third persons [in this case the grantee of the mortgagee was claiming as against the prior assignee of the mortgage], unless the language of the conveyance is such as to manifest an intention to that end.” Noble v. Watkins, op. cit. supra note 54 at p. 772.

“It is ... true, under the existing conditions with us in respect to the rights of mortgagor and mortgagee, that a conveyance by the latter of the mortgaged property before foreclosure, or an attempted foreclosure, unless such conveyance contain a grant of the mortgage debt, or unless its terms are sufficient to carry this interest, and it was intended by the parties to have this effect, will be inoperative for this purpose. The mere conveyance by the mortgagee of the mortgaged premises alone will not per se operate as an assignment of the debt secured by the mortgage.” Jordan v. Sayre, op. cit. supra note 54, at p. 827.
grantee of the mortgagee and the mortgagee, the grantee of the mortgaged premises may be entitled to the real and the personal security, though he has not expressly bargained for them, as where the premises have been conveyed to him by a warranty deed. This latter should be true in any jurisdiction.

In an early Minnesota case the court said:

"The mortgagee has no *conveyable* interest in the mortgaged premises until foreclosure sale, or at least until entry after condition broken, and a conveyance of the premises by the mortgagee to a third party, unless, at least, intended to operate as an assignment of the mortgage and transfer of the mortgage debt, is entirely inoperative, and such intention must be made to appear."

In the "lien" states a *mortgage* deed is not regarded, as a general rule, as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. If the mortgage is made in the form of a conveyance upon a condition subsequent, it is difficult to understand how it can operate as a conveyance after condition broken if it does not operate as a conveyance before that time. The only difference is that in the one case the estate conveyed is conditional, and in the other, absolute. But where the mortgagee has obtained possession of the mortgaged premises, with either the express or implied consent of the mortgagor, and relying upon his mortgage to do so, he obtains at least a temporary possessory right, whether he goes into possession before or after default of the mortgagor. And it seems that this possessory right is transferable where the mortgagee has purported to transfer it. It would seem that, if the mortgagee has no right to take possession of the mortgaged premises because his mortgage deed does not operate

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56 Hill v. Edwards, 11 Minn. 22 (1865).
57 Even in Ohio, a state that has been said to subscribe to the "intermediate" theory of mortgages, it was said, in Hill v. West, 8 Ohio 222, 31 Am. Dec. 442 (1837): "A mortgagee has not, even after the condition of defeasance has been broken, such an interest in the mortgaged premises, that he can convey by release or other mode of conveyance, until the equity of redemption is foreclosed, unless he, at the same time, transfers the debt secured by the mortgage."
as a conveyance of the premises, there must be an intent manifested to transfer the possessory right before it will pass to the grantee of the premises. So the mortgagee's interest in the mortgaged premises is in some cases regarded as a legal title, not for the purposes of enabling him to transfer the legal title by a transfer of the premises alone, but for the purpose of protecting and enforcing the equities between the parties to the mortgage. The transferee of the possessory right of the mortgagee would be subject to the same liabilities and would have the same rights as the mortgagee who has lawfully obtained the possession before foreclosure in the "lien" states.

Transfer of the "mortgage," i. e., the real security.—Where a mortgage is executed in the form of a conveyance upon a condition subsequent which purports to secure the debt which is evidenced by a separate instrument two important questions have arisen: Is the mortgage, that is, the real security, assignable? And, if it is assignable, how may it be assigned? This type of mortgage is the one that seems to have produced the most litigation in the law of assignments of mortgages, mainly because of attempts to separate the real and the personal securities and to pass them to different transferees.

It has been said 58 that "A mortgage, being considered in the light of a transaction purely personal, was deemed to be nonassignable at law; but this view has generally, although not invariably, given way to statutes, or to the modern doctrine as to the assignability of choses in action generally. Equity, however, has always recognized the assignability of mortgages." And, in discussing the question of the effect of the assignment of the real security without an assignment of the secured indebtedness, the following principle has been stated:

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58 41 C. J. 661, Title "Mortgages."
"It is the general rule that a mortgage cannot pass without a transfer of the debt to secure which it was given, and therefore an attempted assignment of the mortgage without any assignment or transfer of the secured indebtedness is usually considered an absolute nullity; for the indebtedness is not considered as passing by a bare transfer of the mortgage unless there is something more to show an intention to pass the indebtedness also.\(^5\)

In *Olds v. Cummings*\(^6\) the court discussed the scope of operation of the Illinois statute making certain "chooses in action" assignable:

"By the common law, *chooses in action* were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain *chooses in action* were made assignable, so as to vest in the assignee the legal title, as promissory notes and bills of exchange. We have a statute, also, making certain *chooses in action* assignable, prescribing a particular mode in which they shall be assigned. Our statute provides that any promissory note, bond, bill, or other instrument in writing, whereby one person promises to pay another any sum of money, or article of personal property, or sum of money in personal property, shall be assignable by indorsement thereon. Now, the mortgage to foreclose which this bill was filed, was given to secure the payment of two promissory notes which were assigned by the payee and mortgagee to the complainants. This was, in equity, an assignment of the mortgage. The notes were assignable by the statute, but the mortgage is not, nor was it assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises to the assignee by deed; and upon the question whether this can be done, the authorities are conflicting. Even our statute, authorizing foreclosures of mortgages by *scire facias*, has carefully confined the right to the mortgagee, and does not authorize this to be done by assignees. But it is said that the assignment of the notes carries with it the mortgage, which is but an incident to the principal debt. That is true, in equity, and only in equity."

If, as the Illinois court says, the real security, *i. e.*, the mortgage, is not assignable at the common law or under the Illi-

\(^{5}\) 20 Am. & Eng. Ency. of Law 1033, 1034, Title "Mortgages."

\(^{6}\) 31 Ill. 188, 190, 191 (1863). For a case involving the same type of question, a similar statute, and reaching the same result in practically the same language, see Longan v. Carpenter, 1 Colo. 205 (1870) (Decided by the Supreme Court of Colorado Territory), rev., on appeal, in 16 Wall. 271, 21 L. Ed. 313 (1872).
nois statute, it is obvious that a purported assignment of the real security by the mortgagee can not operate to give the "assignee" any standing in a court of law to foreclose the mortgage. The provision of the Illinois statute on *scire facias* as a method of foreclosure reinforces this conclusion. The "assignee" is not entitled to proceed at law and sue out a *scire facias* to foreclose the mortgage; his remedy is purely equitable. But in a later case, the Illinois Court said that the estate and interest of the mortgagee might be conveyed to a third person, by a deed with apt words of conveyance; and that the grantee, if owner of the personal security, might maintain ejectment in his own name and for his own use. Or the action might be brought in his name for the use of a third party owning the personal security. According to the latter principle, the "assignee" of a mortgage has no remedy upon it at law, except it be treated as an absolute conveyance and the mortgagee convey the premises by an instrument executed with the formalities of an ordinary conveyance of land. If, according to this principle, the "assignee" may maintain ejectment, he can thereby subject the mortgaged premises indirectly to the payment of the mortgage debt at law, whereas he could not directly maintain an action at law to do so by foreclosing the mortgage. In the one case, the mortgage is treated as a conveyance; in the other, as a "chose in action."

The statute of Anne made promissory notes payable to a person, and to his order, or bearer, negotiable like inland bills, according to the custom of merchants. The Illinois statute was to the like effect. The actual decision in *Olds v. Cummings* is that a mortgage is not assignable at law as commercial paper, although given to secure negotiable paper; and that where the *bona fide* assignee of commercial paper so secured seeks relief in equity by the foreclosure of

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61 Barrett v. Hinkley, 14 N. E. 863 (Ill. 1888).
62 3 and 4 Anne, c. 9 (1704).
the mortgage, the mortgagor may successfully interpose any
defense which would have been available against the original
payee or holder of the paper. The court said that the
notes, to secure which the mortgage was given, were still
negotiable paper; and when the remedy is sought upon them
all the rights incident to commercial paper would be en-
forced in the courts of law.

In Jackson v. Curtis,63 an early decision by the Supreme
Court of New York, where the "lien" theory of mortgages
was applied, it was said that "the assignment of the interest
of the mortgagee in the land, without an assignment of the
debt, is considered in law as a nullity." The Supreme Court
of Missouri, misinterpreting this statement, has said:64

"The doctrine is asserted in the books that the assignment of a
mortgage is regarded as a nullity. . . . This, however, must be intended
of cases in which the mortgage alone is assigned, and in which it was
the intention of the parties that nothing but the mortgage, discon-
ected from the debt whose payment was secured by it, should pass.
It cannot be applied to cases in which although an assignment of the
mortgage is in terms made, yet it is clear from the transaction, that
the debt was likewise designed to be transferred. No form of words is
exclusively appropriated to create an assignment of a debt. The con-
tract of assignment is to be construed like all other contracts, and as
in them, the intention of the parties must prevail, so in this."

It is one problem to consider the effect of a transfer by
the mortgagee of the mortgaged land — an assignment of
the interest of the mortgagee in the land — and quite an-
other thing to consider the effect of a purported transfer of
the real security — an assignment of the mortgage — when
questions at law, as distinguished from questions in equity,
are involved. The distinctions between the views prevailing
in the "lien" and the "title" states has been pointed out.
Also, the principle that a "mortgagee in possession" is en-
titled, in "lien" states, to transfer his possessory interest has
been considered.

63 19 Johns. 325 (1822).
64 Thayer v. Campbell, 9 Mo. 280, 282 (1845).
The doctrine asserted by the Missouri court, that an assignment of the mortgage alone may evidence an intention to assign the personal security; and, if so, the assignment would probably be given effect in equity, as between the assignee and the mortgagor, in all jurisdictions. It seems to be a sound principle. On the other hand, the doctrine that is supported by most courts, that have considered the prob-

65 "The assignment of the mortgage deed, without a transfer of the debt, conveys nothing. And so of an absolute conveyance of the land by a separate deed before entry." Per Parker, C. J., in Rigney v. Lovejoy, 13 N. H. 247, 251 (1842); Thayer v. Campbell, op. cit. supra note 64; "In concluding that a mortgagee cannot assign the right to the mortgaged property, without also assigning the debt to which it is an incident, we do not desire to be understood as intimating that it is incompetent for the mortgagee to relinquish, by contract, the possession to a third person, at any time, until the debt is paid. But the defendant does not claim to occupy under such a contract—he insists upon the validity of the assignment to himself." Per Collier, C. J., in Doe v. McLoskey, 1 Ala. 708, 737 (1840); "It would be quite absurd to say that . . . the holder of the evidence of a debt, who is also the holder of collateral securities, could separate or divide the obligation in such a manner as to subject the debtor to two prosecutions for the same debt. This would manifestly be the case if he could assign any rights in such securities, for in such case the holder of the securities could prosecute thereon, and the holder of the principal evidence of indebtedness could also prosecute. It is plain, therefore, that without the assignment of the debt, which is but the evidence thereof, the assignment of the securities confers no rights." Per Bird, V. C., in Johnson v. Clark, 28 Atl. 558, 559 (N. 3. Ch. 1894); "... the contention that a mortgagee can convey the property in disconnection with the debt is . . . a novel one in this state. Such a doctrine would very materially alter the ancient and present practice of searching the public records with respect to the title to real estate. Heretofore no person, in making such an investigation, has deemed it requisite or advisable to look for conveyances made by mortgagees. No clerk has ever certified as to them. No lawyer, in all probability, in the management of foreclosure, has ever thought of the possibility of the existence of such a conveyance. . . . It would clearly conflict with the spirit if not the letter, of the act regulating the recording of the assignments of mortgages. Revision, p. 708, § 34. The effect of that provision is to enable mortgagors to obtain a cancellation of their mortgages, by payment or release, without danger so far as unrecorded assignments are concerned; and for that purpose it requires all assignments of mortgages to be recorded in the appropriate book in the public office." Per Beasley, C. J., in Devlin v. Collier, 22 Atl. 201, 203 (N. J. 1891); "It is a well-settled rule that collaterals cannot be separated from the principal debt; and it has been distinctly held by the Court of Appeals in the case of Merrick v. Bartholic, 36 N. Y. 44, that the transfer of a mortgage without the transfer of the debt is a nullity. . . . If such were not the fact, we would have the obligor of a bond, and the mortgagor in a mortgage to secure the payment of this bond, obligated to two persons to pay the same debt." Per Van Brunt, P. J., in Bean v. Carleton, 4 N. Y. S. 60, 61 (1889); "... the allegation that the said mortgage has been duly assigned . . . must, as against a demurrer, be held sufficient; for there can be no effectual assignment of the mortgage that does not pass the debt it is given to secure. An attempt to assign the mortgage sev-
lem, is that an assignment of the real security alone, where there is no manifestation of an intention to assign the personal security and where the assignment may be made at law or in equity and is in proper form, does not operate as an assignment of the personal security either at law or in equity.

**Necessity of a Formal, Written Assignment to Transfer the Real Security.**—There is a conflict of judicial opinion in “title” states as to “whether a mortgage of real estate is to be regarded as a security and not as a conveyance within the statute of frauds, and therefore assignable at law without any instrument in writing by delivery only.”

In Massachusetts and Maine the rule that has been adopted is that the transferee of the real and personal security is not entitled to maintain an action at law, as a writ of entry, upon the real security unless it is assigned by a writing under the statute of frauds. But an assignment of the real security...
made by a separate deed, without delivery over of the original mortgage deed, would be sufficient, under this view, to pass the legal interest of the mortgagee in the security to the assignee.\textsuperscript{68} A written assignment indorsed on the mortgage deed, is not sufficient to enable the transferee to maintain an action at law on the mortgage, as a writ of entry.\textsuperscript{69}

In New Hampshire it has been held\textsuperscript{70} that "the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt." The New Hampshire court has reasoned further: (1) That the mortgagee has no interest in the mortgaged property for the purpose of transferring it,—the mortgagee being treated as owner of the mortgaged land only for the purpose of enabling him to obtain the full benefit of the security; (2) That the mortgagor is owner of the mortgaged land, for on no other ground could the widow of the mortgagor be entitled to dower; and (3) That the right of the mortgagee in the mortgaged land is extinguished, \textit{ipso facto}, under the New Hampshire statute, by payment, or tender of payment, even after condition broken. The doctrine that is supported by the New Hampshire cases is that the assignment of a mortgage is valid at law without being acknowledged, recorded, or

\textsuperscript{68} Warden v. Adams, \textit{op. cit. supra} note 67, at p. 236.

\textsuperscript{69} Adams v. Parker, 78 Mass. 53 (1858).

\textsuperscript{70} Southerin v. Mendum, 5 N. H. 420 (1831) (Writ of entry to recover possession of the mortgaged premises brought by the \textit{assignee} of the mortgage.)
attested, and may be made by parol upon an assignment of the personal security, so as to enable the assignee, by a writ of entry, to assert his claim to the land in his own name.\textsuperscript{71} \textit{A fortiori} this rule would be applicable in equity.

According to the rule adopted by the courts of Maine and Massachusetts, it may happen that the \textit{legal title} to mortgaged property may be vested in one person, as, for instance, the mortgagee, while another person may have the \textit{legal title} to the \textit{personal security}. Suppose a \textit{mortgage} deed is made to secure a single promissory note and the note is properly transferred by the mortgagee to a third person and the \textit{mortgage} deed is delivered to the latter without any written assignment sufficient to satisfy the requirements of the statute of frauds. While the assignment is not sufficient to transfer the legal title, it would be sufficient to transfer the beneficial interest to the assignee, so as to enable him to maintain a suit in equity to have the legal interest transferred, on the theory that the law will imply an intention of the parties that the legal title is held by the mortgagee in trust for the assignee; or the assignee should be entitled to subject, in equity, the real security to the satisfaction of the mortgage debt. The same result would seem to follow where the real security has not been assigned at all, if there is nothing to show an intention of the parties that the real security was not to be assigned. On the other hand, if a mortgage is given to secure two or more promissory notes, and the mortgagee transfers one of them to a third person, without the expression of any intent, either to retain the mortgage as security for the remaining note or notes, to the security of which alone it may be adequate, or to hold the mortgage for the benefit of the transferee of the remaining note or notes, the question arises as to whether the transferee of the first note is entitled to any benefit from the real

security.\textsuperscript{72} This problem will be considered at length in a subsequent part of this paper.

In Illinois an assignment of the real security must be in the form of a writing under seal in order to operate as a transfer of the legal interest of the mortgagee in the real security.\textsuperscript{73} But a deed of assignment is not necessary in equity to transfer the interest of the mortgagee in the mortgaged premises.\textsuperscript{74} In New Jersey an assignment of the real security must be by a deed of assignment to be effectual at law;\textsuperscript{75} but, in equity, the real security is regarded as a chose in action, and, as such, assignable by mere delivery, and without a writing.\textsuperscript{76} In Missouri the rule seems to be that the real security passes at law with a transfer of the personal security, as an incident to the latter, without the necessity of any formal written transfer.\textsuperscript{77} But sound business practice requires that the real security be assigned by a written indorsement, at the very least. An analogy might well be taken from the law of negotiable instruments. And the policy of the laws providing for the recording of assignments of mortgage deeds requires this formality.

In "lien" states\textsuperscript{78} it seems that a deed of assignment is not necessary to transfer the legal title to the real security,

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\item \textsuperscript{72} See discussion in Young v. Miller, 72 Mass. 152, 154 (1856).
\item \textsuperscript{73} Barrett v. Hinkley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331 (1888).
\item \textsuperscript{74} Mallory v. Mallory, 86 Ill. App. 193 (1899) (Indorsement of the following held sufficient in equity: "Transferred to Wm. Skakel, June 21, 1895. Wm. Riley.").
\item \textsuperscript{75} Denton v. Cole, 30 N. J. Eq. 244 (1878); Galway v. Fullerton, 17 N. J. Eq. 389, 394 (1866).
\item \textsuperscript{76} Mayes v. Robinson, 93 Mo. 114, 5 S. W. 611 (1887); Borgess Inv. Co. v. Vette, 142 Mo. 560, 44 S. W. 754 (1897).
\item \textsuperscript{77} In Fryer v. Rockefeller, 63 N. Y. 268, 276 (1875), the court said: "... there is no legal need of a recording of the assignment, nor any for an assignment in writing. A good assignment of a mortgage is made by delivery only." In Runyan v. Mersereau, 11 Johns. 534, 6 Am. Dec. 393 (1814), the owner of the equity of redemption brought an action of trespass quare clausum fregit. The premises had been mortgaged to one M., under whom the defendant had entered and cut timber. In giving judgment for the plaintiff, the court said: "Mortgages are not considered as conveyances of land within the statute of frauds. ... The assignment of the debt, or the forgiving it even by parol, draws the land after it as a consequence." In Fryer v. Rockefeller, 63 N. Y. 268, 276 (1875), the court said: "... there is no legal need of a recording of the assignment, nor any for an assignment in writing. A good assignment of a mortgage is made by delivery only." In Runyan v. Mersereau, 11 Johns. 534, 6 Am. Dec. 393 (1814), the owner of the equity of redemption brought an action of trespass quare clausum fregit. The premises had been mortgaged to one M., under whom the defendant had entered and cut timber. In giving judgment for the plaintiff, the court said: "Mortgages are not considered as conveyances of land within the statute of frauds. ... The assignment of the debt, or the forgiving it even by parol, draws the land after it as a consequence."
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and, of course, it would not be necessary to transfer the equitable title. There is but very little authority on the former principle, which is obviously due to the fact that most controversies involving the rights of the assignees of mortgages have arisen in equity. According to the “lien” theory of real estate mortgages, the personal security is the principal part of the mortgage contract, and the real security is merely an incident. The real security is given to enable the owner of the personal security to realize the debt. This view prevails both at law and in equity in the “lien” states. While the real security should follow the personal security, at law or in equity, in these jurisdictions, where the personal security is properly transferred, it seems desirable that there should be a written assignment. In Minnesota it has been said that a mortgage on real estate, “though it is, in effect, but a lien or security . . . is, in form, a conveyance of an estate or interest in land, and is so treated and regarded in” the Minnesota statutes; and “as such estate or interest, it must, at law, be created and assigned by deed.” This necessity is said to be further apparent from the statute requiring that to entitle a party to foreclose by advertisement, the mortgage and the assignment, if it shall have been assigned, shall be recorded; and neither the mortgage nor the assignment thereof is authorized to be recorded under the

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70 Morrison v. Mendenhall, 18 Minn. 232 (1872).
80 Morrison v. Mendenhall, op. cit. supra note 79.

"The equitable doctrine above referred to, that a transfer of the debt involves a transfer of the mortgage security, has been applied even when the transferee was at the time ignorant of the existence of the mortgage. A contrary view would involve either a separation of the debt and of the security, which would appear . . . to be impossible on principle, or an extinguishment of the security by reason of such ignorance, which would appear to be unjust and unreasonable." Tiffany, Real Property (2d ed.) 2524. This view seems to be a just one. The mortgage was given with the intention on the part of the mortgagor that it should secure the payment of the mortgage debt; and it would seem to make no difference to the mortgagor as to whether the mortgagee or the transferee of the debt uses the real security for this purpose. No harm can come to the mortgagor if a court of equity passes the real security to the transferee. Also, it is in accord with the principle that the assignor impliedly, at least, promises that he will do nothing to impair the value of the assignment.
Minnesota statute, except it be under seal and duly acknowledged. According to the Minnesota doctrine, where a mortgagee transfers the note, secured by his mortgage, to a third person, but does not transfer the real security by a deed of assignment, the third person is "equitable" owner of the real security, but the mortgagee retains the "legal" title to the real security. While the "assignee," under the Minnesota rule, who has not obtained a deed of assignment of the real security, is the "equitable" owner of the real security, he would not be entitled to foreclose the same by advertisement; yet he should be entitled, in equity to compel the mortgagee to transfer it to him. It would seem that this principle should apply although the "assignee" did not bargain for the real security and was, at the time of the transfer of the personal security, ignorant of the existence of the real security. This result is in accord with the fundamental principle in the law of assignment of contracts that the assignor agrees that he will do nothing to defeat or impair the value of the assignment.81 On the other hand, the Minnesota rule has been stated to be 82 that the mortgagor is entitled to pay the mortgage debt to the mortgagee, whether the mortgage has been assigned or not, if he pays in good faith and without knowledge of the assignment; and even if the real security has been assigned properly and recorded, the recording is not notice to the mortgagor of the assignment. While the lien of the real security may be extinguished in this manner, it is also a part of this doctrine that the mortgagee becomes a trustee of the sum paid for the benefit of the owner of the mortgage debt. If, for instance, the mortgage contained a power of sale, and the mortgagee transferred the personal security to a third person but did not properly assign the real security to such person, the mortgagee would be the proper person to exer-

81 Restatement of the Law of Contracts, § 175.
82 Johnson v. Carpenter, 7 Minn. 176 (1862).
cise the power of sale since he retains the legal title to the real security; but, in executing the power of sale, the mortgagor would be subject to the "equitable" control of the court as to the manner of its execution and the disposition of the proceeds of the sale. So the "assignee" could ultimately reach the proceeds realized upon the real security. Regardless of these principles, the "assignee" could bring an action at law upon the personal security and, under a judgment lien, subject the mortgagor's land to payment of the debt, assuming, of course, that there are no adverse claimants who are entitled to priority of right to the real property or the real security.

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(To be continued.)

83 See Burke v. Backus, 53 N. W. 458 (Minn. 1892).

An assignment on the back of a mortgage stating that "For value received I hereby transfer the within mortgage deed to J. L. Kennedy" was held by the Supreme Court of Georgia not to authorize the transferee to exercise the power of sale contained in the security deed. McCook v. Kennedy, 90 S. E. 713 (Ga. 1916).