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# Credit Transactions

Maynard Jackson

CREDIT TRANSACTIONS

69¢

NORTH CAROLINA COLLEGE

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# Credit Transactions: Outline (partial)

## I. Property Security

### A. Land Mortgage (L/M)

1. History

a. The common law mortgage was a conveyance by deed of real property in fee simple defeasible on a condition subsequent (repaymt. of loan).

b. Harshness of c/l mortgage gave rise to the land mortgage through the courts of chancery.

(A.) L/M v. C.L. mtge: the L/M provides for an equity of redemption (the mtgor's interest in the property) and an equity of foreclosure (the sum total of the mtgee's interests in the mortgaged property). The C.L. mtge. does not.

2. Rents and Profits: Receivers

a. General Rule – the right to receive rents and profits is an incident to the right to possession.

(A.) Lien theory states – the mtgee has no right to rents and profits until foreclosure.

(B.) Title theory states – mtgee may reach rents before foreclosure, but until foreclosure he will be held STRICTLY LIABLE

for an ACCOUNTING.

6. RECEIVERS - a receiver is an indifferent person between the parties to a cause, appointed ~~by~~ the court to receive and preserve the property or fund in litigation, and receive its rents, issues, and profits, and apply or dispose of them at the discretion of the court when it does not seem reasonable that either party should hold them.

(A) In the U.S., unless the right to a receiver is based on statute (as in 20 states, including Georgia), the mortgagee, in title states, must establish (1) a right to the property to be taken over by the receiver, and (2) a reason strong enough to make equity intervene and embark on the formidable task of caretaking and management involved when property is taken over by a ct. receiver, and (3) that there is no adequate legal remedy.

(B) The basis for apptmt of a receiver in a lien state is not wholly clear. The best explanation is that it will be granted on the security is inadequate in the first be-

tween the start of the foreclosure action and its completion. Many jurisdictions stress waste as a basis.

(C.) A very few other lien states accept the full implications of the lien theory and deny the mtgee rents and profits on the ground that they "do not enter into or form any part of the security." Wagar v. Stone, 36 Mich. 364, 366 (1877)

(D.) The TRUE BASIS OF RECEIVERSHIP, however, generally speaking, is the pending inadequacy of the security which threatens to frustrate the normal expectations of the mtgee*. Schreiber v. Carey, 48 Wis. 208 (1879).

(1.) Lien and title states require adequate showing of need for R^er. Discretionary w/ ct.

(E.) GENERAL RULE - pending foreclosure, a mtgee can reach rents and profits only if a R^er is appointed.

(F.) Receivership clause and Assignment of Rents clause, in lien states especially, help mtgee to easily reach the rents pending foreclosure.

* "... and the mtgee must show that his expectations of the security were justified. So, mtgee must show a compelling equity.

(1.) Some states say that Receivership clause compels the ct to appoint a R^er. Some states contra. Osborne: Receivership clauses do not bind the courts but, combined w/ the pledge clause, generally make it easier to get an appointment.

(2.) A clause pledging rents and profits gives no rights to collect rents prior to the receivership.

(G.) Pre-mtge leases - a R^er cannot disaffirm leases made before the mtge. All rents accruing after his appointment belong to him. The same should be true of rents accrued at the time of appointment, but some authorities make it depend on clauses pledging rents and profits.*

* The R^er cannot get any rent other than that provided by the leases.

(H.) In determining the R^er's rights to affirm or disaffirm leases made after execution of the mtge., the chief question is whether the particular rents and profits are part of the mtgee's security. Title and lien

concepts have influenced the court's answers.

(1.) Title states - the Rer may disaffirm all leases subsequent to the mtge and collect from the tenant the reasonable rental value of the premises for occupancy after the Rer's appointment. The sound view also gives him the option to affirm them. The tenants are deemed to take subject to notice that the mtgee has reasonable expectations that he will derive fair rental value.

(2.) Lien states - until a sale under judgment of foreclosure, the obligations of an agreement for the occupancy of the premises survive, though the agreement is subordinate to the lien of the mortgage. The mtgee has no paramount title which would justify eviction

of the occupants or abrogation of the agreements. The ct, therefore, on application of the Rec appted. in the foreclosure action has no power to determine the fair and reasonable value of the use and occupation of the premises on the rental provided in the lease is less than the reasonable value thereof.* Prudence Co. v. 160 W. 73 St. Corp., 260 N.Y. 205, 183 N.E. 365, 86 A.L.R. 361 (1932).*

(I.) Mtgor in possession - on the defaulting mtgor is in possession, the better view (says Osborne) permits the appointment of a receiver who may collect an occupational rental if necessary to the adequacy of the security.

(J.) Mtgee is entitled only to the net rents since Rec must pay taxes, assessments, etc., accruing or falling due during Receivership.

(1.) But an inferior lienor (junior

*... Thus, it has been held that regardless of pre-dated or post-dated leases, a Rec stands in the shoes of the mtgor, subject to his rights and limitations.

*... "Standard N.Y. clause" has eliminated this as a problem to the mtgee.

mtgee) is entitled to gross rents and profits on such inferior lienor himself procures services of a Rec. Rationale: Superior lienor should have protected his claim by a more timely seeking of receivership, and the inferior lienor should not be penalized for his diligence.

(K.) If Rec acts per instructions of the ct, he is protected and cannot be surcharged.

c. A mtgee has no right to direct the disposition of rents and profits until he (mtgee) goes into possession.

3. The Accounting

a. Definition – a judicial balancing which determines exactly how much is owing from mtgor to mtgee.

b. A mtgee in possession in title states is held strictly accountable to the mtgor.

(A.) Must account for rents and profits actually received and for rents and profits that would have been received if he (the mtgee) had exercised reasonable diligence.

(1.) Minority Rule (Mich.) says that mtgee must account for nothing

SOME REFLECTIONS ON THE

LAW OF MORTGAGES

IN THE

STATE OF GEORGIA

Respectfully submitted,

Maynard H. Jackson, Jr.

Returned from Prof. Shimm on 5/7/64.

PROLOGUE

This is a paper about real property security transactions in the State of Georgia. The cast of characters, however, includes not only the mortgage, for two types of security instruments are in common use in that state. Besides mortgages -- instruments which "clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect"[1] -- there are deeds conveying absolute title for the purpose of security, but accompanied by a separate bond for reconveyance. Where a mortgage is used, the common law rule that legal title passes to the mortgagee is not followed. Instead, legal title is held to remain in the mortgagor, and a mere lien in favor of the mortgagee is created. As a consequence, the Georgia courts find that the mortgagor has such an interest as can be sold under execution, the purchaser taking the property subject to the lien of the mortgagee.[2] The mortgagee's lien is apparently beyond the reach of an execution.[3]

Thus, although the right of redemption remaining after legal title has been vested in another for security is still not subject to levy in Georgia,[4] judgment creditors in Georgia appear to be in the same position as judgment creditors in "title" theory states when the property levied upon is mortgaged either by or to their debtors.

This apparently anachronistic device, the security deed, is peculiar to Georgia.[5] In fact, an absolute deed coupled with bond for title is seemingly more

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[1] Ga. Code Ann., sec. 67-102.

[2] Sims v. Jones, 158 Ga. 384, 123 S.E. 614 (1924); Ga. Code Ann., Sec. 67-101.

[3] Missouri Real Estate and Loan Co. v. Gibson, 282 Mo. 75, 220 S.W. 675 (1920).

[4] Robinson v. Clifton, 36 Ga. App. 188, 136 S.E. 90 (1926).

[5] 1 Jones, Mortgages (8th ed., 1928) sec. 354.

frequently used in Georgia real property security transactions than a mortgage, and it is "not a mortgage" by Georgia law.[6] When this means of security is used, legal title passes to the creditor -- grantee.[7] However, for recording purposes, inter alia, the security deed is treated as a mortgage. Ga. Code Ann., sec. 67-1305, provides that such deeds are postponed to all liens obtained prior to recordation. Though the debtor-grantor has an interest which he can sell[8] or mortgage,[9] he does not have an interest which can be levied upon.[10] However, there does not have to be a reconveyance to the debtor to restore such an interest to him; mere payment of the debt is sufficient.[11] Further, the interest of a grantee in a security deed, unlike that of a mortgagee in Georgia, can be sold under execution.[12]

The security deed has been said to be a "higher and better security" than a mortgage.[13] In Bennett Lumber Co. v. Martin,[14] some of its advantages are pointed out: the grantee's security title is superior to the right of the debtor's wife to dower and the right of his family to a year's support; no homestead can be set aside; unrecorded material men's liens are cut off. Also, the grantee in a

even if she does not join in conveyance? not in mtg also?

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6 Ga. Code Ann., sec. 67-1301, is statutory recognition of this device. See Smith.

7 West v. Bennett, 59 Ga. 507 (1877); Royal v. Edinburgh-American Land Mortgage Co., Ltd., 143 Ga. 347, 348, 85 S.E. 190 (1915).

8 Williams v. Foy Mfg. Co., 111 Ga. 856, 36 S.E. 927 (1900).

9 Citizens Bank of Moultrie v. Taylor, 155 Ga. 416, 117 S.E. 247 (1923).

10 Moss v. Stokeley, 107 Ga. 233, 33 S.E. 61 (1899).

11 Citizens Mercantile Co. v. Eason, 158 Ga. 604, 123 S.E. 883 (1924).

12 Parrott v. Baker, 82 Ga. 364, 9 S.E. 1068 (1889); Duke v. Ayers, 163 Ga. 444, 136 S.E. 410 (1927).

13 Bleckley, J., in Gibson v. Hough and Sons, 60 Ga. 588 (1878).

14 132 Ga. 491, 64 S.E. 484 (1909).

security deed is entitled to possession after default,[15] while a mortgagee is not.[16] While there is no obvious advantage in respect to foreclosure, it is accomplished by this novel method: the grantee reduces his claim to judgment, reconveys the property to the grantor, and then levies an execution on it.[17] The reconveyance puts title in the debtor only for the purpose of levy and sale, and except for such purpose is declared to be a "mere escrow." Liens of third parties, therefore, do not attach.[18]

very unusual!

Other than the differences aforementioned, the security deed in Georgia has substantially the same legal effects as the mortgage in Georgia; and the following material will be treated in a fashion consistent with that conclusion.

## I.

TO WHAT EXTENT, IF ANY, MAY THE MORTGAGEE REACH THE RENTS AND PROFITS OF THE MORTGAGED PROPERTY PENDING FORECLOSURE OF HIS LIEN? AND, WHAT MEANS MAY HE EMPLOY TO DO SO?

Generally speaking, the person who holds the right to possession of the mortgaged land is entitled to the rents and profits therefrom. In Georgia, such person is most usually the mortgagor because Georgia is a lien theory state.[19] Thus, a mortgage in Georgia is only security for a debt, and passes no title.[20] The mortgagor holds the title until dispossession by foreclosure; hence the rents, profits and issues are the mortgagor's, and are not embraced or covered by the

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15 Thaxton v. Roberts, 66 Ga. 704 (1881).

16 Elfe v. Cole, 26 Ga. 197 (1858).

17 Ga. Code Ann., sec. 67-1501.

18 Carlton v. Reeves, 157 Ga. 602, 122 S.E. 320 (1924).

19 Vason v. Ball, 56 Ga. 268 (1876).

20 Ga. Code Ann., sec. 67-101. See Alropa Corp. v. Goldstein, 69 Ga. App. 168, 25 S.E. 2d 116 (1943).

mortgage, unless expressly stipulated for in the mortgage.[21] Even where income accrues from property while in the hands of a receiver, a mortgagee out of possession has no better lien on such income.[22]

Who is entitled to R+P?

In Penn. Mutual Life Ins. Co. v. Larsen,[23] the owner of property, before entry by the holder of a security deed, assigned a rent note to the appellee, an attorney, in satisfaction of his fee for handling an action by the owner-grantor to enjoin the sale of the land. The court held that the appellee acquired good title to the rent note; that the owner of property subject to a security deed is entitled to rents prior to entry by the security deed holder, though the security deed provide that the holder-grantee, in case of default, might enter and collect the rents and that the grantor should be the tenant of the grantee.

Naturally, the parties may agree by contract that the mortgagee shall be able to reach the rents and profits before foreclosure and while out of possession. E.g., where the grantor of a duly recorded security deed has assigned in that deed the rent to the grantee-creditor, the latter is entitled to that rent assigned.[24] Generally, however, and in the absence of a contract provision to the contrary, a mortgagee in possession of real estate of the mortgagor collects rents as trustee and agent for the mortgagor and applies them to the extinguishment of the mortgage debt.[25]

The cries of the mortgagee out of possession are not unheeded by equity, however, where to turn a deaf ear thereto would work an unconscionable hardship.

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21 Vason v. Ball, supra note 19.

22 See Lubroline Oil Co. et al. v. Athens Savings Bank et al., 104 Ga. 376, 30 S.E. 409 (1898).

23 178 Ga. 255, 173 S.E. 125 (1934).

24 Padgett v. Butler, 84 Ga. App. 297, 66 S.E. 2d 194 (1951); Ga. Code Ann., sees. 85-1801, 85-1803.

25 West v. Flynn Realty Co., 53 Ga. App. 594, 186 S.E. 753 (1936).

Thus, where a loan of money is secured by a conveyance of real estate, and subsequently the property depreciates in value so that the same is worth less than the debt, the lender, if the borrower is insolvent, has an equitable claim to the rents of such property, especially when the lender is delayed in the prosecution of his remedies by a claim filed by a third party, and the litigation is protracted.[26] Further, in a claim case, the plaintiff in execution may file in aid of his levy, an equitable amendment to the joinder of issue, setting out his claims to the rents.[27] Consequently, mortgagees who have failed to secure a pledge of rent generally can have rents applied to their debts only by petitioning a court of equity for a rent receiver, this being a remedy in sheep's clothing in view of the fact that in lien theory states an equity rent receiver is frequently not available until after foreclosure.

It may be concluded, therefore, that in the absence of stipulation to the contrary, the mortgagee in Georgia has no right to the rents until after a valid foreclosure sale, and actual delivery of the referee's deed.[28]

II.

WHAT ARE THE INCIDENTS OF THE MORTGAGOR'S EQUITY OF REDEMPTION?

The mortgagor or anyone with an interest in the property in privity of title with the mortgagor, in order to protect his interest, and whose interest would be prejudiced by foreclosure,[29] has the right to discharge the rights of the mortgagee in the property.[30]

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[26] Wilkins v. Gibson, 113 Ga. 31, 38 S.E. 374, 84 Ann. St. Rep. 204 (1901).

[27] Ibid.

[28] See 2 Wiltsie, Mortgage Foreclosure (5th ed. 1939) sec. 560

[29] Shumate v. McLendon, 120 Ga. 396, 48 S.E. 10 (1904).

[30] The grantee in a security deed is a mortgagee within the statute providing that, if possession of the property is given to the mortgagee, the mortgagor may redeem within ten (10) years from the last recognition by the mortgagee of the right of redemption. Ga. Code Ann., sec. 67-115.

Redemption can be accomplished only by payment of the secured debt in full; and lapse of time, even to the extent that all legal remedies of the creditor would be barred, would not operate as a redemption.[31] However, tender of the debt, generally, will be effective though made after the creditor has recorded possession of the premises by action.[32] In fact, it was recently held in Georgia that where the grantee had been and was then in possession of premises described in a security deed and had received and was receiving rents and profits therefrom, and where the grantor prayed for an accounting and that the correct amount due the grantee be declared and set up, no formal tender of the actual amount due was necessary.[33]

The equity of redemption may be exercised at any time within the limits set by statute. Thus, where the grantee in a security deed enters into possession of the property conveyed by such deed, the right of the grantor to redeem by the payment of the debt is never barred, so long as the grantee recognizes a right to redeem; and equity by analogy would decree that the right to redeem would in no event be lost until after the expiration of 10 years from the date of the last recognition by the grantee of the right to redeem.[34] However, it has been held that if the grantee in a security deed is in possession under an illegal sheriff's deed, such a deed being color of title, may bar the grantor in seven (7) years,

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31 Shumate v. McLendon, supra note 29.

32 Broach v. Barfield, 57 Ga. 601 (1876).

33 Gilbert v. Carson, 213 Ga. 387, 99 S.E. 2d 105 (1957).

34 Gunter v. Smith, 113 Ga. 18, 38 S.E. 374 (1901); Ga. Code Ann., sec. 67-115.

if acquiesced in by him for that length of time.[35] Where the mortgagee remains in possession without recognition of the mortgagor's rights for the 10 year period after such possession, the law will presume a sale of the equity of redemption, either under foreclosure or by the act of the parties.[36]

The mortgagor's equity of redemption may be barred or lost in several ways. Where the mortgagee goes into possession and holds adversely to the mortgagor after the mortgagor's default for the required period, the mortgagor's equity of redemption will be barred.[37] Foreclosure sale bars this equity,[38] as well as sale under powers contained in a security deed.[39] The equity of redemption may be extinguished by merger in the mortgagee with his interest, as where a mortgagee purchases the equity under a junior lien.[40] The mortgagor can waive the benefit of the ten-year redemption period where he, as a grantor under a security deed, agrees that on default the grantee could enter onto the premises, collect rents, and auction other property.[41]

Under Georgia law, the equity of redemption of a grantor under a security deed may be sold or mortgaged;[42] but until there is a redemption by the debtor,

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35 Benedict v. Gammon Theological Seminary, 122 Ga. 412, 50 S.E. 162 (1905). An action brought to set aside the sale in six years is not too late. Ibid.

36 Horton v. Murden, 117 Ga. 72, 43 S.E. 786 (1903).

37 Morgan v. Morgan, 10 Ga. 297 (1851).

38 Suttles v. Sewell, 105 Ga. 130, 31 S.E. 41 (1898).

39 Cummings v. Johnson, 218 Ga. 559, 129 S.E. 2d 762 (1963).

40 Pitts Banking Co. v. Fenn, 160 Ga. 854, 129 S.E. 105 (1925).

41 Livingston v. Hirsch, 172 Ga. 854, 159 S.E. 253 (1931).

42 Supra notes 8 and 9.

or by someone claiming under him, he has no such interest in the land as would be subject to levy.[43] On the other hand, the equity of redemption in a mortgagor in Georgia, as distinguished from a grantor in a security deed, may be levied upon and sold.[44]

As far as the equity of redemption is concerned, it may be concluded, the differences between the mortgage and the security deed are somewhat insubstantial.

III.

WHAT ARE THE INCIDENTS OF THE MORTGAGEE'S EQUITY OF FORECLOSURE? WHAT METHODS OF FORECLOSURE MAY BE EMPLOYED? WHAT SAFEGUARDS, IF ANY, BOTH STATUTORY AND JUDICIAL, HAVE BEEN ADOPTED TO GUARD AGAINST OPPRESSIVE FORECLOSURES?

Where a mortgagor defaults in the payment of a debt secured by a mortgage on realty, the mortgagee, in whose favor a lien exists, has the right to cut off the mortgagor's equity of redemption by subjecting the mortgaged property to sale for the payment of the demand for which the mortgage stands as security.[45] This equity of foreclosure inheres in a mortgagee, a grantee in a security deed or in their privies.[46] The foreclosing party has a right to so much of the proceeds of a sale of the security as will satisfy his interest; "and when there shall be any surplus after paying off such mortgage and/or other liens, the same shall be paid to the mortgagor or his agent."[47]

Foreclosure of a mortgage may be had by a proceeding at law under Ga. Code Ann., sec. 67-201, whereby a petition is made to the superior court of the county

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43 Shumate v. McLendon, supra note 29; Smith v. Fourth Nat. Bank, 145 Ga. 741, 89 S.E. 762 (1916).

44 Sims v. Jones, 123 S.E. 614 (Ga. 1924).

45 Alropa Corp. v. Goldstein, 69 Ga. App. 168, 25 S.E. 2d 116 (1943).

46 See Montgomery v. King, 123 Ga. 14, 50 S.E. 963 (1905).

47 Ga. Code Ann., sec. 67-501.

wherein the mortgaged property is situated. But, if the mortgaged premises consist of a single tract of land divided by a county line, such mortgage may be foreclosed on the entire tract in either of the counties in which part of it lies; provided, however, that if the mortgagor resides upon the land, the mortgage must be foreclosed in the county of his residence. The court then grants a rule nisi directing that the principal, interest and costs be paid into court on or before the first day of the next term immediately succeeding the one at which the rule is granted, which rule is published twice a month for two months, or served on the mortgagor or his special agent or attorney at least 30 days previous to the time at which the money is directed to be paid into court. If served, service must be by the sheriff.[48] At the term at which the money is directed to be paid, the mortgagor may set up and avail himself of any defense which he might lawfully set up in an ordinary suit instituted on the debt secured by such mortgage.[49] Third parties and the court itself, ex mero motu, are incompetent to interpose defenses.[50] Upon failure of the mortgagor to pay the required amount, and upon his failure to successfully defend against the foreclosure of the mortgage, the rule will be made absolute, judgment for the amount due will be given, and the mortgaged property will be ordered sold in the same manner as sheriff's sales under execution.[51]

Where the mortgagee is without an adequate and complete remedy at law, there may be foreclosure in equity according to the practice of courts in equitable

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[48] Falvey v. Jones, 80 Ga. 130, 4 S.E. 264 (1887); Ga. Code Ann., sec. 67-201.

[49] Ga. Code Ann., sec. 67-301.

[50] Id., sec. 67-302.

[51] Id., sec. 67-401.

proceedings.[52] Unlike foreclosure pursuant to statute, equitable foreclosure permits of a personal decree against the mortgagor in addition to the foreclosure, provided there is jurisdiction in personnam over the mortgagor.[53] No special grounds of equitable interference need be alleged by the mortgagee who wishes to resort to equity for foreclosure.[54] No parties to the suit are necessary other than the mortgagor and mortgagee. If the rights of other persons are prejudiced, they are not allowed to interpose any claim in the suit, but may have their remedy when the mortgage execution is sought to be enforced against the land.[55] An example of when the proceeding may be in equity was found in DeLay v. Latimer,[56] where property had been set apart as a homestead and afterwards sold, and the lien was transferred to land in which the proceeds were invested and on which the mortgagee sought to foreclose the mortgage. Further, it is well established that a security deed may be foreclosed as an equitable mortgage.[57]

The third method of foreclosure recognized in Georgia is foreclosure by exercise of power of sale. Ga. Code Ann., sec. 37-607 provides:

> Powers of sale in deeds to secure debts, mortgages, and other instruments shall be strictly construed and shall be fairly exercised. In the absence of stipulations to the contrary in the instrument, the time, place and manner of sale shall be that pointed out for public sales. Unless the instrument creating such power specifically provides to the contrary,

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52 Id., secs. 67-601, 37-120. However, there can be but one foreclosure of a mortgage or security deed in Georgia. Strickland v. Lowry Nat. Bank, 140 Ga. 653, 79 S.E. 539 (1913). See Swift & Co. v. First Nat. Bank of Barnesville, 161 Ga. 543, 132 S.E. 99 (1926), for sole but rare exception.

53 Block v. Allen, 99 Ga. 417, 27 S.E. 733 (1896); Clay v. Banks, 71 Ga. 363 (1883).

54 DeLay v. Latimer, 155 Ga. 463, 117 S.E. 446 (1923).

55 Jackson v. Stanford, 19 Ga. 14 (1855).

56 DeLay v. Latimer, supra note 54.

57 Lively v. Oberdorfer, 216 Ga. 673, 119 S.E. 2d 27 (1961).

> a personal representative, heir, heirs, legatee, devisee, or successor of the grantee in a mortgage, deed to secure debt, ... or other like instrument, or an assignee thereof, or his personal representative, (etc.), may exercise any power therein contained. A power of sale not revocable by death of the grantor or donor may be exercised after his death in the same manner and to the same extent as though such grantor or donor were in life; and it shall not be necessary, in the exercise of such power, to advertise or sell as the property of the estate of the deceased, nor to make any mention of or reference to such death.

Generally speaking, a sale under power contained in a mortgage or security deed is a contractual remedy which the parties have seen fit to provide; and subject to the usual requirements of notice and fair exercise, sale thereunder, whether in a mortgage or a security deed, is equivalent to one under decree in equity,[58] or to a legal foreclosure.[59] The power of sale granted to a creditor by a security deed is part of the security and is recognized as the usual mode of enforcement of the security. It has even been said to be "but an incident of a security deed."[60]

Special provision has been made for foreclosure of a security deed where the purchase money or secured debt has been reduced to judgment by the payee, assignee, or holder of said debt. In that case, the grantee in the security deed must, without order of any court, make and execute to the defendant in fi. fa. a quitclaim conveyance to the property, and file and have the same recorded in the clerk's office; and thereupon the property may be levied upon and sold as other property of the defendant, and the proceeds then are applied to the payment of such judgment.[61]

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[58] Mathis v. Blanks, 212 Ga. 226, 91 S.E. 2d 509 (1956).

[59] Mackler v. Lahman, 196 Ga. 535, 27 S.E. 2d 35 (1943).

[60] Ibid.

[61] Ga. Code Ann., sec. 67-1501, Jewell v. Walker, 109 Ga. 241, 34 S.E. 337 (1899), held that rights under that Code section's identical predecessor could be enforced even though no bond for reconveyance had been given.

The mere fact that the note or other evidence of debt is barred does not prevent the creditor thereafter from availing himself of the mortgage or other security unless the mortgage or other security is barred.[62]

The advent of abusive and oppressive foreclosures, or the fear of same, presaged the need for safeguards against them, and these safeguards exist in Georgia both statutorily and judicially.

Where foreclosure by action is sought, Ga. Code Ann., sec. 67-201, enunciates specific requirements with which there must be substantial compliance; and among these requirements are that there must be a rule nisi granted by the court, and an opportunity given to the mortgagor to defend against the foreclosure,[63] any issue raised thereby to be submitted to and tried by a jury.[64] Naturally, to the mortgagor there must be adequate notice reasonably calculated to apprise him of the fact and nature of the foreclosure action, and such notice must comport with the minimal requirements, at least, of due process.[65]

Where a judgment and decree of foreclosure is rendered, the rendering court, upon motion and payment of costs, may set the same aside,[66] and the obligation upon which such judgment was rendered, as well as the security deed or mortgage securing the same, will be fully restored in all respects to their original status.[67]

The equity of redemption of a mortgagor will not be cut off where there has been as irregular or wrongful sale upon foreclosure, and any purchaser at such

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[62] Ga. Code Ann., sec. 67-116; Reid v. Flippen, 47 Ga. 273 (1872).

[63] Ga. Code Ann., sec. 67-301.

[64] Id., sec. 67-303.

[65] Id., secs. 67-201, 39-202.

[66] Id., sec. 110-801.

[67] Id., sec. 110-803.

sale would succeed only to such rights and interests as the mortgagee had.[68] In such case, the mortgagor may move equity to set aside the sale and enjoin interference with his possession of the realty conveyed.[69] However, the debtor must pay or tender the principal and interest due on the debt secured by the mortgage before he would be entitled to the offer motive equitable relief sought.[70] So, too, where the price brought upon sale under a power is grossly inadequate and is connected with fraud, mistake, misapprehension, surprise or other circumstances tending to bring about such inadequacy to the injury of interested parties, the sale may be set aside in equity.[71]

It is the all-pervading rule that any power of sale will be strictly construed, and the courts will closely scrutinize any sale thereunder to determine whether fair play was the beacon of the transaction.[72] The mortgagor, at any rate, runs the risk of subjecting himself to an action at law by the mortgagee to recover damages for a wrongful foreclosure, or for improper execution of a rightful foreclosure,[73] or to an accounting.[74]

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68 Dutcher v. Hobby, 86 Ga. 198, 12 S.E. 356 (1890); Ga. Code Ann., sec. 67-403.

69 Georgia Baptist Orphans Home v. Moon, 192 Ga. 81, 14 S.E. 2d 590 (1941).

70 Redwine v. Frizzell, 184 Ga. 230, 190 S.E. 789 (1937).

71 Croft v. Sorrell, 151 Ga. 92, 106 S.E. 108 (1921).

72 See Ga. Code Ann., sec. 37-607.

73 Garrett v. Crawford, 128 Ga. 519, 75 S.E. 792, 119 Am. St. Rep. 398 (1907).

74 W. A. Ward Realty & Investment Co. v. New England Mut. Life Ins. Co., 181 Ga. 768, 184 S.E. 613 (1936).

IV.

TO WHAT ABERRANT TRANSACTIONS HAVE GEORGIA COURTS ATTACHED THE INCIDENTS OF MORTGAGE?

An equitable mortgage has been defined as a security transaction which was intended to be a mortgage transaction despite non-compliance with the usual formal or legal requirements of legal mortgage.[75] The court will look through form to substance to determine whether it was the unequivocal intent of the parties that their transaction be a mortgage transaction.[76] If that finding is affirmative, all of the incidents of mortgage attach, provided that there be some debt, liability or obligation secured.[77]

Many aberrant transactions have met the above definition of equitable mortgage. Thus, generally speaking, an agreement to give a mortgage or security on certain property, not objectionable for want of consideration, is treated in equity as a mortgage, upon the principle that equity will treat that as done which by agreement is to be done;[78] but equity will not recognize as a mortgage an agreement to execute a mortgage in praesenti, the execution of which fails through inadvertence.[79] An equitable mortgage has been held to result from an agreement to hold property recovered in litigation as security for advances.[80] Also, a conveyance to one who advances money for the benefit of another, under an agreement of the latter to purchase at a certain price, may be regarded as a mortgage to the latter for the amount of the purchase -- money which the purchaser may foreclose.[81]

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75 Shimm, "Equitable Mortgages," lecture, February 6, 1964; and see Manget Realty Co. v. Carolina Realty Co., 169 Ga. 495, 150 S.E. 828 (1929).

76 Purser v. Thompson, 132 Ga. 280, 64 S. E. 75, 22 L.R.A. (N.J.) 571 (1909).

77 McLaren v. Clark, 80 Ga. 423, 7 S.E. 230 (1888).

78 1 Jones, Mortgages (8th ed., 1928) sec. 226.

79 Price v. Cutts, 29 Ga. 142, 74 Am. Dec. 52 (1859).

80 Jackson v. Carswell, 34 Ga. 279 (1866).

81 Id., note 78, sec. 228; Fleming v. Georgia R. Bank, 120 Ga. 1023, 48 S.E. 348 (1905).

Equitable mortgage has been found where a mortgage was attested by two witnesses, though neither witness was an official authorized by law to attest mortgages and the mortgage was improperly probated and recorded;[82] where the amount secured was not stated and the time for redemption was fixed;[83] and, where intended as security despite contrary language.[84]

Assignments sometimes give rise to equitable mortgage. In Guaranty Investment & Loan Co. v. Athens Engineering Co.,[85] it was held that if the assignee of a bond for conveyance, assigned by way of mortgage, subsequently obtains the legal title to the land by virtue of the bond, and surrenders that, he will hold the land subject to the right of his assignor to redeem. If the assignment is absolute in form, it may still be shown to have been intended as security only.[86]

At common law, an equitable mortgage may be created by deposit of the title deeds of a legal or an equitable estate as security for the payment of money,[87] but not in Georgia.[88] However, a deposit of title deeds accompanied by a written memorandum of an agreement that they shall be held as security for a debt will make the transaction a mortgage in equity.[89]

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82 Benton v. Baxley, 90 Ga. 296, 15 S.E. 820 (1892).

83 Missouri State Life Ins. Co. v. Barnes Construction Co., 147 Ga. 677, 95 S.E. 244 (1918).

84 Manget Realty Co. v. Carolina Realty Co., supra note 75.

85 152 Ga. 596, 110 S.E. 873 (1922).

86 Renitz v. Williamson, 149 Ga. 241, 99 S.E. 869 (1919).

87 1 Jones, Mortgages (8th ed. 1928) sec. 245.

88 Davis v. Davis, 88 Ga. 191, 14 S.E. 194 (1891).

89 Webb v. Carter, 62 Ga. 415 (1878).

In Purser v. Thompson,[90] it was held that, where a deed under seal was made, conveying title, in order to secure an indebtedness represented by a promissory note, and on its face it recited the debt and the purpose to secure it, although suit on the note became barred by the statute of limitations, the creditor could foreclose the deed as an equitable mortgage within 20 years from its execution. That a deed executed to secure a debt may be foreclosed as an equitable mortgage is well settled in Georgia.[91] This doctrine extends to deeds absolute in form that contain no reference to the debt, as well as deeds in form similar to that found in Purser v. Thompson.[92] But, a deed absolute in form cannot be foreclosed as an equitable mortgage after the debt secured thereby is barred by the statute of limitations, where it did not in any way refer to the debt, or furnish evidence of its existence.[93] Neither can such a deed be foreclosed as an equitable mortgage where void as to title for usury.[94]

When a maker of a deed absolute in form remains in possession of the property, such deed may be shown to have been made to secure a debt,[95] and proof thereof may be made by parol evidence.[96]

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[90] Supra, note 76.

[91] Kitchens v. Molton, 172 Ga. 690, 158 S.E. 570 (1931).

[92] See Wofford v. Wyly, 72 Ga. 863 (1884); Clark v. Lyon, 46 Ga. 202 (1872).

[93] Duke v. Story, 116 Ga. 388, 42 S.E. 722 (1902).

[94] Broach v. Smith, 75 Ga. 159 (1885).

[95] Neal v. Dover, 217 Ga. 545, 123 S.E. 2d 760 (1962).

[96] Williamson v. Floyd County Wildlife Ass'n., 215 Ga. 789, 113 S.E. 2d 626 (1959).

CREDIT TRANSACTIONS
MR. MELVIN SHIMM
FALL, 1963

MAYNARD H. JACKSON, JR.
N. C. C. SCHOOL OF LAW
DURHAM, NORTH CAROLINA

OSBORNE - MTGES.
WALSH - MTGES.

SURETYSHIP

# 26 SEPT. 63

C/T called Security in some law schools. Deals w/ the various techniques a Cor has to insure that the debt will be satis when it falls due. e.g. Mortgages. — [we will deal here only w/ real prop. mtges.]

Cor can have assurance of pymt. by having a third party assure it. This is known as a SURETY, and the third party is surety.

So, we will cover land mtges. and suretyship.

Reg. assignment: 30 pages daily.

## * LAND MORTGAGE (L/M) *

Earliest known real prop. security device like the modern L/M was the C.L. mtge: a conveyance by deed of real prop. in F/S defeasible on a cond. subsequent. This was best mechanism for the time because the C.L. took cognizance of the literalistic nature of C.L. — the actual transfer of the res,

cond. subsequent = repymt. of loan by Mtgor. to Mtgee.

a tangible thing; it helped to circumvent the ecclesiastical laws against usury by allowing the creditor to take any profits and rents from the land during the time the Cor held it; it gave the Cor the security he needed and wanted.

The C.L. mtge later declined in use because of the harshness and inequities of it. Two factors operated in the debtors' favor:

1. Growth of courts of Chancery wh mitigated harshness of the C.L. courts and wh were interested in expanding their jurisdiction. So, the modern mtge. evolved over the course of several hundred years.

L/M v. C.L. Mtge.

The L/M differs from the C.L. mtge in that the L/M provides for EQUITY OF REDEMPTION, the mtgor's interest in the property, and the EQUITY OF FORECLOSURE, the sum total of the mtgee's interests. So, it was no real change in form but only

EQUITIES:
(1.) OF REDEMPTION
(2.) OF FORECLOSURE

in the incidents. Thus, the title remained w/ the mtgor under the equitable mtge.

In many states (½ approx.), the old form of conveyance by deed has been abandoned, and they follow the LIEN THEORY of MTGE. (N.Y.) The remaining states follow the old form and are TITLE THEORY OF MTGES. (e.g., N.C.)

But, the net effect is about the same, and cts. give them about equal interpretation.

* One of the real diffs. between lien and title theories is in the area of rents and profits.

THEORIES OF MTGES.
(1) LIEN - Mee only gets a lien on the security.
(2) Title - Mee gets defeasible title to security.

*RENTS AND PROFITS*

Dow v. Memphis & Little Rock R.Co. (p. 91)
Mtgee v. Mtgor. Issue: whether the mtgee had the better claim to monies accruing between time of demand by mtgee (1/1) and the time of receivership (4/1)?? = Held, yes. The right to receive rents & profits is an incident to the right to poss. So, you

Rule of Law

must always deter. the question of poss. first before you may deter. the question of right to rents and profits.

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Eq. gave Mor a bundle of rights called the EQUITY OF REDEMPTION, and gave the Mee a bundle of rights called the EQUITY OF FORECLOSURE.

Lien v. Title Theory

whether a state follows the lien theory or the title theory of mtges makes no difference in effect and substance, but only in form. However, the dichotomy is clearest in the area of rents and profits. But, even so, the results will be the same in either type of state because courts of equity agree that until foreclosure, title actually remains, for all intents and purposes, in the mtgor. Title states say hereto that the mtge. may

Rents and Profits – Title Theory States: Accounting

assert his legal right to rents + profits, but that until foreclosure he will be held strictly liable for an accounting. So, in effect, the mtgr. is discouraged from asserting his right.

From the mtgee's pt. of view: assume the mtgor., after default, is guilty of extreme waste during pendency of foreclosure. What can we do for mtgee in title states? The relief is in RECEIVERSHIP.

## * RECEIVERSHIP *

A receiver insulates mtgee from liab. for accounting. Receiver liable on his bond, and he acts as an officer of the court of equity. Mtgee needs receiver in lien states because he would have to have a Rec. Title in lien and title theory ~~states~~, as a practical matter, never really resides in the mtgee. Even in title theory states,

any excess after forced sale goes to the mtgor.

In title states, all that the mtgee really has is a security interest, a "security title."

Historically, Eq. would appoint a receiver only as an ancillary remedy in aid of a primary equitable remedy. ✱ Two requirements:
(1.) a right to a specific piece of prop. being sought before Equity.
(2.) That this is necessary to satis. of that right and that ∃ is no adequate legal remedy.

In lien states, #1 is lacking. But, even in those states, R^ers are still appointed in certain conditions.

REQUIREMENTS FOR RECEIVERSHIP

Hazeltine v. Granger (p. 96)

There can be no receiver appointed until after default, foreclosure and expiration of redemption period, an Amt between the parties for R^er notwithstanding.

The agreement in the mtge K for a R^ship was contra to the statute allowing for R^ers only **after** foreclosure. **This is** contra to the whole history of mtges wh cut down on the overreaching of the more powerful mtgors.

The effect of the agreement for a Rec. here = an Agt to ~~work~~ avoid in advance a work a c. i. forfeiture. Eq. will not enforce this because it is contra to the purpose and policy of the act of 1843, to wit: to secure the Mor in his poss. until a foreclosure has become absolute.

This was a lien State (Mich.), but a title State would have probably reached the same result by using different reasoning.

Union Guardian Trust Co. v. Rau (p. 98)

Rather than overrule Hazeltine Case, interested parties got the legis. to pass laws on the DEED of TRUST where the mtgee will be able to get the rents and profits pending foreclosure and after default. There is a third party, the trustee, in whom legal title resides to the benefit of the mtgee.

So, the unequivocal language of Hazeltine remains as far as regular mtges are concerned.

Exception to Hazeltine holding: DEED OF TRUST

Applicability of Hazeltine

Schreiber v. Carey (p. 104)

The true basis here, despite loose language is: the pending inadequacy of the security will threaten to frustrate the normal expectations of the mtgee. will justify receivership.

TEST OF NECESSITY FOR RECEIVERSHIP

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Rule

Cond. Precedent to Receivership

Pending foreclosure, a mtgee can reach rents and profits only if a R^er is appld. In lien and title theory states, this applies equally, and both states require adequate showing of nds for R^er.

Courts gen. react negatively to applications for R^ers. They will appoint on the following is shown: a compelling equity, i.e., on the security promises to fail to meet the expectations of the mtgee. Mtgee must show that his expectations of the security were justified.

In lien states esp. is found the RECEIVERSHIP CLAUSE and ASSIGNMENT OF RENTS. These help to abrogate the old rule that for R^ship must be a showing of a right to the prop. sought to be reached. Thus, by these clauses, the right of the mtgee, in lien states esp., to the rents and profits pending foreclosure, is estab.

R^ship is discretionary w/

Prudence Co. case (p. 113) — Until a sale under a judg. of foreclosure, the obligations of an Amt for the occupancy of the premises survive, tho' the Amt is subordinate to the lien of the mtge.

In the absence of fraud, Amts theretofore made by some of the Ds in an action to foreclose a mtge., whereby they obtained from the owner the right to occupy apts in the mtgd. premises in return for a stipulated pymt., are valid & subsisting so long as the mtgd. premises

have not been sold under a judg. of forecl. The mtgee has no paramount title wh would justify eviction of the occupants or abrogation of the R^mts.

The ct, therefore, on application of the R^er appt. in the forcl. action, has no power to deter. the fair + reas. value of the use + occupation of the premises or part thereof occupied by a party ?, on the rental provided in the subordinate lease or R^mt under wh such person holds poss. is less than the reas. value thereof.

Pre-mortgage Leases

Ct. of Eq. But, the R^shp clause compels apptmt. of R^er.

The R^shp clause has diverse effects depending on the juris. hearing the case. Some cts. say the clause does not compel appointment of R^er.

[CHECK YOUR OWN JURIS. TO DETER. ON WHAT GROUNDS R^er WILL BE APPTD., AND WHAT EFFECT WILL BE GIVEN TO THE R^shp CLAUSE.]

Q. What rents and profits can a R^er reach, assuming R^shp is granted? ?=

Assume that the mtged premises are rented out by leases to Ts. ——

If the leases pre-date the mtge, the R^er cannot get ~~the~~ any rent other than that provided by the leases, and any sale at foreclosure will not affect the rights of Ls nor terminate them. They are incumbrances on the prop. The R^er would stand in the mtgor's shoes.

N.Y. Cts. held, however, that a reas. rental could be required from Ts on the

leases post-dated mtge. The Ts are deemed to take subject to ~~the~~ notice that the mtgee has reas. expectations that it will be fair rental value derived. — Then came the Prudence case wh changed the rule re leased & rents) post-dating mtge.

Prudence v. 160 W. 73rd St. Corp. (p. 113)
(See p. 8, notes) Ct. would not violate lien theory by saying that Rec was due poss.

Held, regardless of pre-dated or post-dated leases, Rec stands in shoes of mtgor, subject to his rights and limitations.

Leases: General Rule

Holmes v. Gravenhorst (p. 120)

Issue: whether, upon the appointment of a receiver in an action brought to foreclose a mtge containing a receivership covenant, a mtgor-owner may be required to pay rent to the receiver or be evicted

Softened Prudence Co. case. This case and Title Guar. Trust Co. case (n. p. 127) can be justified: if the courts of N.Y. will violate the lien theory so far as to appoint a Rec, the Rec should have the power to carry out his job.

from the premises PRIOR TO A SALE under a judg. of foreclosure and sales HELD, NO.

holding: Holmes case says that (mtgor.-in-poss. case) the cts. will not exercise their powers to expand concept of rents and profits in a case where they would not have appt'd. a Rec but for the K clause; and here, the only reason a Rec was appt'd. was because of K clause.

Standard N.Y. Clause: In N.Y. now, a standard clause is, that in the case of default and the premises ab owner-occupied, the mtgor. will relinquish poss. or pay the fair rental value pending foreclosure.

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hypo: Rec appt'd. to receive rents and profits at behest of Mee. Rec collected $100ea per mo. for 12 mos. During that time, taxes and other expenses and assessments accrued. Must Rec pay these? i.e., Is Mee entitled only to the NET rents? Probably so.

In re Kings Cty. Real Estate Corp. (p.129)
Assume 2nd Mee gets Rec on 1-1-63 to collect rents and profits.

On 4-1-63, 1st Mee sues lessee to foreclose and for R'ship. — It is admitted that the 1st Mee takes precedence over all subordinate Mees, and from 4-1-63, 1st Mee is entitled to all rents and profits. — Quaere liability for current expenses (taxes, assessments, etc.) between 1-1-63 and 4-1-63?

Right of Inferior Lienor to Gross Rents and Profits

Held, on any inferior lienor procures Services of Rer to receive rents and profits, that lienor is entitled to all profits and rents, not merely net profits and rents. Rationale: Superior lienor should have protected his claim by a more timely seeking of R'ship and the inferior lienor should not be penalized for his diligence. Thus, as to the inferior lienor (2nd Mee), "rents and profits" means gross rents and profits.

Rule

A Mee has no right to direct the disposition of rents and profits until that Mee gets into poss.

If a Rer acts per

instructions of the Ct., he is protected and cannot be surcharged.

## CHAPTER III ✕ THE ACCOUNTING ✕

Def. An accounting is a judicial balancing wh deter. exactly how much is owing from Mor to Mee.

Questions involved:
1. Interest rate may change after default and would have to be determined.
2. Whether pymts. made were pymts. on interest or on principal.
3. Tax liabilities.
4. Insurance.
5. How much was debt originally, and when did default occur?

In title state, Mee has right to take poss. at any time even though, really, the Mor is the true owner. But, on such Mee does so, a very, very strict requirement of accounting is imposed on that Mee.

So, Mee in poss. in the

accounting must account for rents and profits actually rec'd and the rents and profits that would have been rec'd if Mee had exercised reas. diligence.

So, a Mee in poss. in title states is held strictly accountable to the Mor. In fact, in Mich. (strict state against Mee), wherein Hazeltine v. Granger arose, the fair rental value is the minimum amt. for wh Mee is accountable, and any amt over that must also be accounted for. (Minority Rule).

If fair rental value exceeds that amt. owing in actual agreed-upon rental pymts., the Mee in poss. is liable for the fair rental value.

Rights and Duties of Mee in poss.

Mee in poss. in title states must also maintain the prop. (not out of his own pocket) to the extent that the rents and profits allow. Further, he (Mee) cannot benefit from any improvements. The Mee is to be credited w/ expenditures for repairs (supposing the expenditures to be prudent) but is not to be credited w/ any outlay for improvements.

RECEIVER

To avoid these strict rules, Mge will often (and usually) get a Rer. The Rer will usually be treated the same as the Mge w/ one big exception: on the K's acts, per Ct. instructions, he cannot be held personally accountable.

And see p. 20 infra

So, the real difficulty comes in on the Mge goes into poss. because he are then concerned w/ more than merely accounting (like, C.P.A.) concepts, but also w/ judgment (liability) concepts.

Only in a very few cases is a Mge in poss. protected by his good faith.

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(Chap. IV) ✱ REDEMPTION ✱

One of the most important aspects of the whole area of mtge.

Dfn. - the right of Mor to discharge the rights of Mee in the prop. (lien stated); or the

right of a Mor to regain title from the Mee (title states).

Quaere: How much must Mor pay?

Suppose Mor wants to pay off the debt before the "law day". Can he? = Yes, but the Mor must pay the full amt. and full interest up to the law day, provided that the mtge. does not provide for acceleration or premium pymt., etc.

Quaere:

If Mor fails to pay by law day, and more time passes, what are the rights of Mor and Mee? In cts. of law in old days, the Mor would have been held to the strict letter of the law & could not have gotten "redemption." So, the Mor went to Equity and the Equity cts. looked at the harshness of the situation. Thus developed the EQUITY OF REDEMPTION.

HYPO:

Suppose law day was Jan. 1st and Mee had great opportunity to sell THEN. Mor offered to redeem on 4-1. Mee says that Mor should

be forced to pay Mge a premium for forcing Mee to forego the said opportunity.

American: Universal rule: the Mee cannot compel premium here because the Mee only had a security interest and it was not in the contemplation of the parties that the Mee actually get title and be able to sell the res.

English. If the Mor defaults, he must then, in order to redeem, give the mtgee 6 mos. notice or interest for that period in lieu of notice.

England requires here the giving of 6 mos. notice of failure to make timely payt., and that the Mor must pay rent for any time after law day that the Mor possesses w/o paying.

Quaere: Who can redeem? = Anyone w/ an interest in the prop. in privity of title w/ the Mor in order to protect his interest, and whose interest would be prejudiced by foreclosure.

Rule: ("I know that my Redeemer liveth!...")

Opdyke v. Bartles (p. 145)

Here, W had dower and did not join in the mtge. So, her dower was good, but redemption was not allowed because foreclosure

would not have prejudiced her interest since her interest was superior and all takers would take subject to her dower.

Mackenna v. Fidelity Trust Co. (p. 146)
Here, H bought prop. already subject to mtge. So, P (who indicate dower right) was allowed redemption because foreclosure would have prejudiced her right since her dower was acquired after the mtge. and was therefore inferior.

Same reason would not allow a first mtgee. to block foreclosure against second mtgee ... [??]

The Mtgr is not entitled to redeem before the law day unless the mtge specifies that he may do so.

Right of Mtgee

Mtgee is entitled to the full security until the full amt. of the debt is paid.

Rule: Parties

Any person not made a party to a foreclosure proceeding is not bound thereby! Thus, in Mackenna case, wife had interest in the res which would have been prejudiced by foreclosure,

Mackenna v. Fidelity Trust Co. of Buffalo (p. 146) – a W not made a party to an action foreclosing a mtge on premises ordered by her H; by reason of her inchoate right of dower therein, has the right, after a sale & during his lifetime, to redeem them, and may maintain an action v. the purchaser (in this case the holder of the mtge.) for that purpose. She & in such an action is entitled to the adequate protection of her rights, but no more. She cannot speculate at the expense of the purchaser by waiting until the lands have materially increased in value and then seek to redeem as matter of right, provided the purchaser offers or the ct. requires him to fully protect her in some other way. Or, i.e., the action was brought nearly two years after the sale, during wh time the lands had materially increased and wh was not foreclosed because she was not joined in the foreclosure proceding.

A (wife) sat on her rights for two years and allowed the Mee and purchaser at foreclosure to improve B/A & increase the value of B/A, and then she sought enforcement of her equity of redemption. Ct. said that he who seeks equity must do equity; that the Mee cannot let to pay Mor or one in priority thereto (P) the value of the interest, or about P to redeem a proportionate part of the rest. If Mee declined to do either, the court would allow P to redeem the full amt.

So, generally speaking, laches involves a characteristic balance of equities in which, as applied to any given case, there is room for every fact that to the chancellor seems relevant.

in value, a decree giving her the right of election between a release of her dower right from the lien of the mtge under which the purchaser took title, or the pymt. to her of the value thereof, w/ the right to full redemption, if the purchaser does neither, accords to her exact justice; & she is not entitled to a conveyance of the prop: upon pymt. of the amt. of the mtge, interest thereon & taxes to the day of redemption.

A modification of such decree, however, requiring the P as a cond. of redemption to pay to the purchaser the amt. of a deficiency judg. obtained by him in another foreclosure, relating to other prop., or to deduct the amt. from the sum to be paid if she elected to accept the value of her inchoate right of dower, is erroneous; the circumstances not requiring any gen. adjustment of equities as between the parties, but only such as are directly connected w/ the land in question & for wh the

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The E/R could be passed on to one in privity w/ the Mor.

E/R can be cut off by foreclosure.

Estoppel may be invoked to prevent enforcement of the E/R. See Mackenna v. Fidelity Trust Co., supra.

Passage of long period of time, even barring other considerations, may serve to bar assertion of E/R. e.g., S/L or the equitable doctrine of LACHES (where the court of eq. will balance the equities under the facts of the case).

Accounting requirements may be relaxed on E/R is asserted, but on it may be inequitable to put strict requirements of accounting on the Mee.

## ✕ AGREEMENTS AGAINST E/R ✕

Can the parties agree for non-assertion of the E/R? Suppose the Mor agrees in the mtge. K to refrain from asserting his E/R upon default, even tho the parties agree on a time period after default allowing pymt. of the debt? NO! The mtgor. is in the

purchaser would be entitled to hold it as security.

better and predominant position; "Necessitous men are not, truly speaking, free men, but, to answer a pressing exigency, will submit to any terms that the crafty may impose upon them."

No clogs on the E/R

Thus, the gen. rule is that a K wh is a mtge. cannot place any limitations on the E/R.

Peugh v. Davis (p. 152)

Here, P(mor) got additional $500.00 from the D(mee) and seemed to sell D the E/R for the $500.00. At the time of the orig. mtg. the res was worth about $2000.00 but at the time of the $500.00 loan, the value of the land had trebled.

Gen. rule: you cannot clog the E/R.

Cts. will look at the facts and circumstances of the transaction despite the apparent form. Close scrutiny by the cts. will be applied, and if mee can show there was no oppression of the mor and that $ was adequate consideration, o.k. Cts. of eq will

So, good faith of the mee will perhaps sustain a finding of valid release of E/R.

(p. 158) Holden Land & Live Stock Co. v. Inter-State Trading Co.

The Mor may, at any time after the execution of the mtge, sell to the Mee outright all his interest in the prop., by a conveyance operating at once, and in that sense release his right to redeem. But he can not, even after the mtge has been made, bind himself by an agreement that if he does not pay his debt by a certain time in the future he will forfeit all right to the property.

not tolerate attempts to avoid the rule against clogging the E/R.

Cts will not sanction a future release in lieu of foreclosure now, and escrow will make no difference.

No force will be given to a stipulation in a mtge. (or in a deed intended as a mtge.) by which the Mor agrees that if he fails to make pymt. by a stated time the Mee shall become the absolute owner of the prop. It is equally well settled that no effect will be given to such an agreement made separately from the mtge., but at the same time. This principle renders ineffectual the deposit of a deed in escrow by the Mor at the time he gives the mtge., for delivery to the Mtgee if he fails to meet his obligation promptly; otherwise the rule could be readily evaded.

Clancy v. Trombley (p. 163)

McC tried to find way to avoid difficulties of E/R. So, y was a cond. sale K w/ an option to repurchase.

Despite the fact that the parties may cloak the transaction in another form, if it was a security transaction, or y was a loan of money secured by realty, that will be found by the court of Eq. to be a mtge. Once it is a finding of mtge., all of the incidents of mtge attach (sic), and the E/R is one of the prime incidents.

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Cts. will not allow the parties themselves to limit the incidents of mtge. e.g. the equity of redemption.

Cts. will look thru form at substance, and sham contrivances will not fool the Cts. The name given the transaction will not be governing.

Quaere: What factors will a Ct. consider to deter. whether this was a cond. sale or a mtge.? ?=

(1.) The price paid for the prop. i.e., adequacy of the consideration.

(2.) Existnce of continuing personal obligation.

(3.) Pre-existing relationship between the parties.

(4.) The party who held poss. during the period in question.

(5.) Character of grantee (e.g., is he a money lender, or is he a prop. buyer).

(6.) Financial difficulties of the grantor.

The above list is not exhaustive, but merely suggestive. Some factors will apply on there is a deed absolute on oral defeasance, but this is more difficult. In fact, Equity will be more hesitant to grant eq. relief because the grantor who seeks to have the transaction declared a mtge. may not have done Equity because he may have prejudiced other creditors who had the land put out of their

grasp. "He who seeks eq. must do equity."

## (CHAPTER V.) FORECLOSURE

The other side of the coin of redemption.

If the Mge initiates the action, foreclosure.

He ct. is called upon to find that $ was a debt, how much there was paid, how much remains owing, and warn the Mor that if he fails to pay he will stand foreclosed of his right to redeem and the Prop. will be sold to satisfy the debt.

### Types:

(1) STRICT FORECLOSURE - the orig. form. No longer used in U.S.; but still used some in England. — Upon foreclosure, the land will be sold and Mge will get all of the proceeds and Mor will get no surplus. Only three (3) states have "strict foreclosure": Vt. N.H. and Ill. But those states have many safeguards for Mor.

Vt. N.H. Ill.

(2.) FORECLOSURE BY SALE UNDER POWER OUT OF COURT -
This is where the Mor agrees in the title that the Mee may sell upon default after advertising. Followed in only 1/3 of the states, including N.C.

(3.) EQUITABLE FORECLOSURE BY SALE -
The most common form followed in the U.S. The whole procedure takes place under judicial supervision. There is less possibility that Mor will be hurt ~~and~~ or ~~that~~ the Mee will be accused of fraud. - The land is sold by judicial sale, the debt is paid and the surplus, if any, is given to the Mor. If the land brings less than the amt. of the debt, the Mee gets a deficiency judg. The purchaser at the sale gets a firmer title.
Some disadvantages:
1. Expense
2. Time delay
3. You never get full value for prop. sold at forced sale.

(See p. 314)

## Prerequisites of foreclosure:

1. DEFAULT

There may be fore. for partial default.

FORECLOSURE FOR INSTALLMENT: ACCELERATION

Morgenstern v. Klees (p. 183)

Rule of Law

Where a mort. is given to secure sums of money falling due at different periods, the creditor may foreclose by bill as they severally fall due.

An action at law may be maintained to recover interest on a debt, specifically made payable before the maturity of the principal, at any time before the debt matures.

Two views re successive defaults and successive foreclosures: (PARTIAL FORECLOSURES)

(1.) Majority view - yes.

(2.) Minority view - no, once you foreclose, you may never again fore. on that security!

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Partial Sale

Ordinarily, under the majority rule, on ft is partial foreclosure ps are certain mechanical difficulties. Court may order sale of part of the prop. suff to satisfy the defaulted part of the debt.

But quaere on the prop. is indivisible or where the parts of the prop. are not equal in value to the whole? Some cts. may order sale of the whole and give the balance to the defaulting mor.

ACCELERATION CLAUSE

To avoid these difficulties, an acceleration clause is used. It is a clause providing that upon default of any part, the mee may (automatically) treat the full mtge. debt as due and payable. The most commonly found type say that upon default of part, the mee has the right to have the full debt DECLARED due and payable after the expiration of an option period [called ELECTIVE TYPE: mee may elect to have full

debt become due.]

Upon acceleration, the Mge can only demand the full principal and the interest accrued up to that time.

Graf v. Hope Building Corp. (p. 185)
Period of grace defeats typeof acceleration clause. Mge did not try to collect (make demand) nor did he accept tender even though late. The Mor was in no financial difficulty and only got in trouble due to an error of calculation.

Holding

Allowed foreclosure by strict construction of the K. "In the absence of bone act by the Mee with a ct. of equity would be justified in considering unconscionable, he is entitled to the benefit of the covenant. The K is definite and no reason appears for its reformation by the courts."

CARDOZO, J., dissented, saying that "It may be unconscionable to insist upon adherence to the letter on the default is ltd. to a trifling balance, on the failure to pay the balance is the product of mistake, and on the Mee indicates by his conduct that he appreciates the mistake

and has attempted by silence and inaction to turn it to his own advantage.

The court really probably decided as it did because of the difficulty of applying a loose, flexible standard to each case arising. They would have to inquire into motives of Mor and Mees & may be that the danger of opening up a Pandora's box of difficult and administratively unrealistic standards. So, O'Brien's opinion is probably the better one because it will be used as precedent and permits of smooth operation of courts and legal transactions.

## * (Sec. 3) PARTIES TO EQUITABLE SUIT TO FORECLOSE *

Necessary party = an indispensable party, one or anyone who owns any part of the equity of redemption sought to be cut off.

Mor + 2nd Mee

A Mor and a second Mee are necessary, not merely

proper parties. Ou Mge sells all to X, X = necessary ~~party~~ ~~prop party~~; Mge = proper party (helps clear any possible clouds on the title).

Tax Lienor

A superior tax lienor ≠ a necessary party because the foreclosure will not affect the tax lien. But the lienor = proper party.

Lessee

Lessee — depends: if he leased after mtge., he would be necessary; if he leased before mtge., only proper.

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Parties: Deeds of Trust

In N.C., ~~mtge~~ deeds of trust are used, the trustee and the ~~mtgee~~ beneficiary are necessary parties, i.e., the mtgee and his trustee would be necessary parties P in a foreclosure.

Multiple Mees

If Mee-1 assigns ½ interest to X, and Mee-1 wants to foreclose but X does not, Mes-1 can join X as a party D.

Foreclosure does not affect the rights of any superior lienor. (e.g. 3-1-63, mtge to A ($1000ee). 3-5-63, mtge. to B ($500ee).

hypo:

Mor defaults, and B forecloses. X buys in at for. sale, but A is not prejudiced because X taked subject to A's lien wh. is superior.

In most juris. today an inferior mor can't compell joinder of even superior liens pursuant to the "Doctrine of Completeness." This was consistent w foreclosure by sale because it was and is desirable to resolve all possible contingencies so that the sale wound finalize matters.

Superior Mor = non-necessary party.

NONJOINDER

What is the effect of the non-joinder of necessary parties? If before judg. at for. it is discovered that a necessary party was not joined, the Mor can move the court to have the P (Mee) to join the necessary parties by amending his pleadings the overriding interest of the Mor and the court

is to get the highest possible price at sale upon fore, and that cannot be done if ∃ remains an outstanding claim.

On the necessary party cannot be found, the decree will be granted anyway even though this mor may be prejudiced.

General Rule

Any party not joined is not bound by the fore. decree, and any taker at sale takes subject to those claims. Thats the gen. rule, but ∃ are certain ⊗ exceptions.

Exceptions

(1.) Suppose the ⊗ non-joined party had a recordable interest wh he did not record: a BFP would take free of the unrec'd interest. Under the recording acts, a purchaser at foreclosure sale = BFP. — But, anyone w/ actual notice will not be heard to say that he is not barred.

Exception to Exception: Race Statute

N.C. has race statute, and the first one to get ∃ wins and has title. Under this stat. type, actual

of a bona fide purchaser
notice, absent recordation will not matter, and the bona fide purchaser will still prevail if not joined. the party is

Rationale: creates higher duty of biz dealings and eliminates necessity of courts inquiring into subjective intent or knowledge

(2.) DOCTRINE OF LIS PENDENS — where one acquires interest in prop. during pendency of an action concerning that prop. that person takes w/ notice of the action and will get only what his transferor (involved in the action) gets.

Fuller & Scribner (p. 209)

Lis pendens will apply on any D ~~person~~ w/ a part of the E/R is served (under N.Y. stat. making service of process suff for notice), and the particular D. who transferred his part of the E/R to the complaining party need not be served under lis pendens.

Thus, even after commencement of suit for foreclosure & one takes an interest, the commencement of the suit = constr. notice to all (LIS PENDENS).

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Indispensable Parties

An indisp. party who has not been joined can still pursue, after foreclosure, his E/R. The fore. had no effect on that party's E/R. That party could go against the buyer at the sale; and if the buyer at the fore. sale gets the rights of the senior mtge., the buyer would be wearing two legal hats.

Rodman v. Quick (p. 215)

STATUTORY REDEMPTION (S/R)

Stat. redemption v. Equitable redemption.

In 1/2 of U.S States, you are stats, saying that even after fore! (cutting off the E/R) u remains **for a period of time an opportunity** to redeem the mtge. Called a STATUTORY REDEMPTION.

This second mtgee, was Ltd.

to his E/R because he had not already been foreclosed.

E/R v. S/R Rule

E/R and S/R are different. S/R can be used only on the E/R has been cut off.

Amt. Required for Redemption

When you redeem in S/R, you pay off the amt. of the pride of the land at the sale. When you redeem in Equity, you pay off the first mtge.

You can fore. a second mtge. on land or prop. subject to a first mtge.

Quaere: What about the buyer at the fore. sale or the fore. was not effective against an unjoined indispensable party?

Murphy v. Farwell (p. 223)

Ultimately, the right to redeem is the mtgor's, and his successors in interest take that right.

Parker v. Child (p. 230)

A strict fore. here.

Strict fore. will be entertained by courts only on it is obvious that no legitimate interest will be prejudiced.

Gen. Rules

Gen, only parties to a legal proceding are bound! If a necessary party is not bound, his rights will persist. He can pursue any course he could have pursued before foreclosure because he will remain unaffected.

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Quaere: What is the nature of a purchaser's title at a foreclosure sale? = Are interests of parties to the suit who were bound thereby. Any party not a party to the suit and who would not be bound by the decree, therefore, would have no interest of his passed.

Any party to the suit is bound by the decree.

Purchaser Pendente Lite

Any person who acquires an interest in a piece of prop. pendente lite, takes subject to the outcome of the suit regardless of his being joined.
So, if Mee forecloses v. Mor, and, before judg, X buys from Mor, X takes subject to Mee's rights & the judg.

## (SEC. 4) EQ. FORECLOSURE; TITLE OF PURCHASER

### Littlefield v. Nichols (p. 243)

It is universal that a prior lien gives a prior claim, & is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, wh shall postpone him in a court of law or equity to a subsequent claim. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered

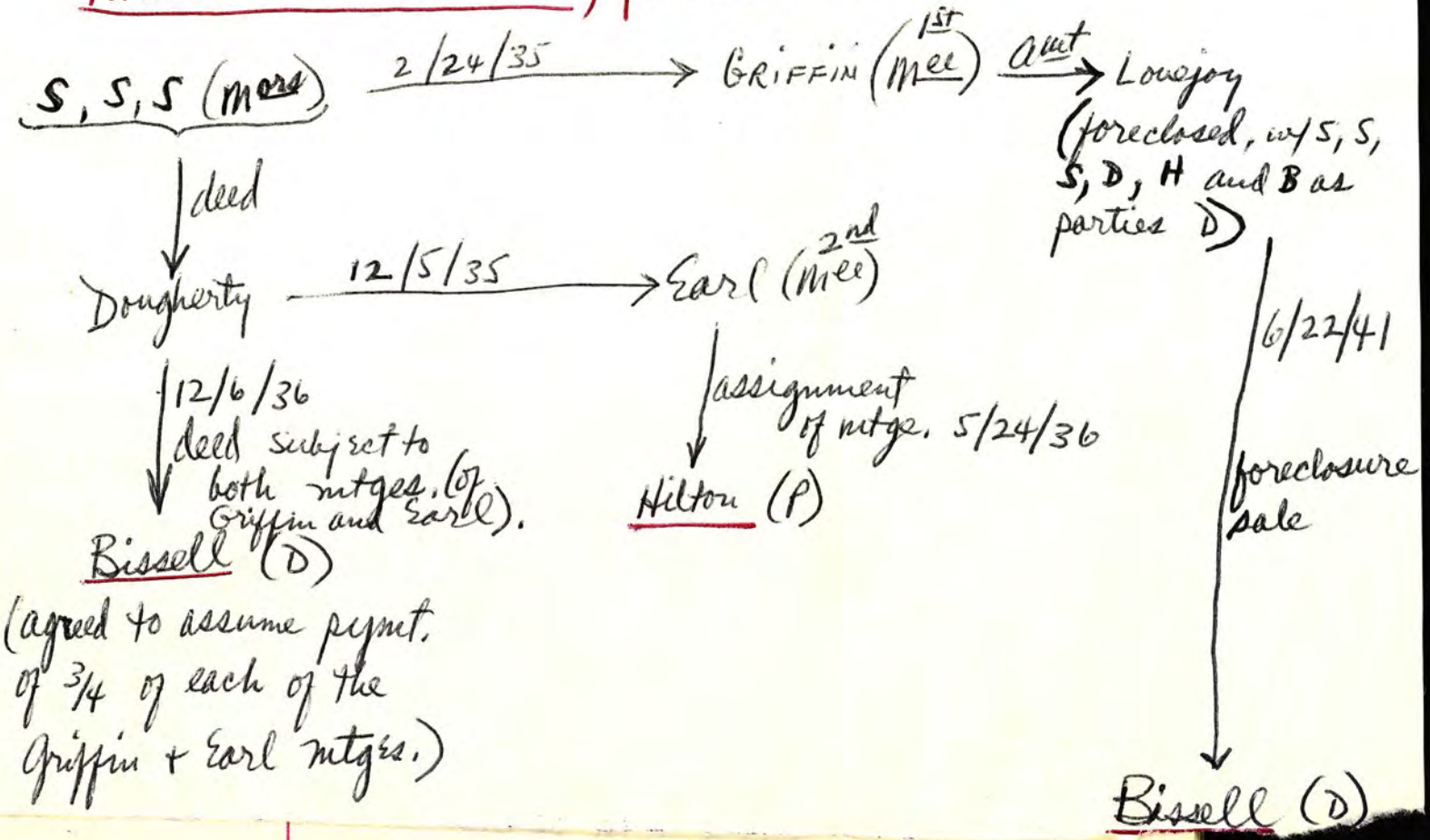
as such an act.

The lien in who the P's title originated being thus the older in its origin, a title derived thereunder is prima facie superior to a title from a common source, purporting to be derived under a judg. lien junior in point of time.

Hilton v Bissell (p. 247)

Mor owned two mtges.,

HILTON V. BISSELL, p. 247 Durfee.



as such an act.

The lien in wh the P's title originated being thus the older in its origin, a title derived thereunder is prima facie superior to a title from a common source, purporting to be derived under a judg. lien junior in point of time.

Hilton v. Bissell (p. 247)

Mor owed two mtges., one to A and one to B. Mor intentionally defaulted so that he could bid in at fore. sale and buy for enough to discharge A, but concurrently discharge B w/o satisfying B. The Court did not allow this because the Ct. of equity will look through form to substance and will not permit a party to profit from his own wrong.

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C.L. mtg. was dead absolute defeasible upon a cond. subsequent being performed by the Mor (payment of debt).

Mees wanted to avoid, long delays of foreclosure in ct. of equity. Hence, developed POWER OF SALE. expenses and

(SECTION 5.) SALE UNDER A POWER: PROCEDURE, THEORY AND EFFECT

Many cts. used to, and still, consider a power of sale as an attempt to clog the eq. of redemption.

But, some states do allow, by STATUTE, (about 25 states) foreclosure by sale under a power. However, it is often misused because the title is thought suspect. About 1/3 of the states use this method predominantly (N.C., eg.).

Strict Duties on Mee

Yare implicit dangers to the debtor here; so cts. look carefully at all of these foreclosures under a power of sale. A careful balance

of the urge to protect the Mor and the advantages of this type of foreclosure has been effected. The Mee is under the same strict duties of a fiduciary, and is sometimes called a Tee. K provisions must be strictly adhered to.

Mee = "Trustee"

Requirements

Thus, y must be proper notice, exercise of the power in good faith, specification of the power in the conveyance and often a period of time allowing Mor a chance to redeem before the power attaches. i.e. The Mor is bound by the terms of the instrument, and cts. will rigorously scrutinize the K and its provisions and the manner in wh the Mee carries out the terms.

Fowle v. Merrill (p. 255)

Mee had power to sell entire mtged. premises. But, Mee advertised in such a way as to lead prospects to believe that only the E/R was being offered for sale; a misdescription of the prop.

offered for sale. This could have depressed the price at sale!

Rule: Harmless non-compliance by Mtgee.

Cts. will not demand absolute compliance by Mge or to do so would hurt the Mor. Therefore, if Mge has not strictly complied, but has not harmed the Mor, the ct. will not invalidate the sale under the power because this would tend to make buyers hesitant to bid in at the sale, thereby depressing prices.

Rationale

Reading v. Waterman (p. 265)

Thus, only substantial compliance will be required.

Remember: the desired end is the conduction of the best price possible for the Mor.

(p. 250) Princeton Loan & Trust Co. v. Munson

Although the Mge, exercising his power, will be held to the [illegible] safeguards

HOLDING

of the K, where the Mge meets those standards and safeguards, and on the stat. does not require more than the parties agreed to, the sale under the power will be upheld.

RULE: STATUTORY STANDARDS

But, on a statute sets out certain standards, agreements wh tend to abrogate the stat will be held ineffective. The parties cannot bargain away the Mor's protections set by the Legislature.

USUAL STATUTORY SAFEGUARDS

Q. What sort of safeguards do the stats. propose for the mor? They are mainly:
(1.) Publicity
(2.) Fair and open bidding.
These mainly insure that the foreclosure under a power be fair and just.

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On y is only a minor and inconsequential error in the mtge. or the fore. sale, the ct. will not set aside the sale. Rationale: to set aside such sale would dissuade people from bidding in and generally hurt mtgors. e.g., Assume the error = misspelling of a name on the identity of the person is otherwise clear.

The statutes require NOTICE. The extent and form of notice vary from juris. to juris.

NOTICE must consist of:

1. Time of sale.
2. Place of sale.
3. Description of prop.
4. Fact of public sale. But, this is not required in England; and in England, the Mee cannot bid in, thereby giving incentive to the Mee to get the highest possible price. But, in America, public sale is important.

Statutes, in addition to requiring notice and public sale, try to guaran-

tee a fair and impartial sale. This is done by denying the Mee the right to bid in UNLESS the Mor consents. Obviously, therefore, a standard provision in Mtges. in the states allowing fore. under power of sale is that the Mee have the power to bid in.

Mee "Bid-in" Clause

The dangers of allowing Mee to bid in are rigged bidding and depressed sale prices. However, most cts. allow the K clause empowering the Mee to bid in because the Mee most often will force the bidding to as high a price as possible to insure the satis. of the debt owing to the Mee.

Bon v. Graves (p. 273)

Foreclosing Mee had complied w/ the letter of the stat., but not w/ the spirit of the stat. Prop. sold for 1/2 of the value of the debt owing. Mee bid in himself. Mee referred two parties, known to be interested, to his lawyer, the Mee knowing that the sale was only two days away.

while the ct. admitted that no one fact could be used to show bad faith of Mss, the ct. looked at the totality of the circumstances and decided that it was a breach of fiduciary duty by the "trustee" (Mss).

Gadreault v. Sherman (p. 276)
Prop. sold for $250.00; ~~[illegible]~~ fair value of the prop. at sale was $1,200.00.

Although the facts here show more bad faith by Mss than in Bon v. Graves (same state), the result was opposite. The sale here was not set aside.

This may have represented a second thought on the part of the Mass. cts., after Bon v. Graves, to insure more stability in fore. sales and avoid depressed prices. The test laid down in Bon v. Graves may have been considered too nebulous for practical application to insure stability.

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In Gelreault, the Mge was not comporting himself as one would expect a Dee to comport himself.

*(SEC. 6.) THE PROBLEM OF FAIR PRICE.*

Forced sales traditionally ~~to~~ bring low prices. But, y is a price below which one is wont to wonder re the fulfillment by the sale of the function it was designed to perform: the conversion of the res into money adequate to satisfy the debt and present to the Mor as much surplus as possible. The idea is to get the fair market value, or as close as possible, of the res.

PURPOSE OF FORECLOSURE SALE

If the sale brings a price wh seems oppressive to the Mor, what will the court do?

Fair Value

⊗ The standard seems not to be the market value, but the fair value of the property.

Policy Consideration

If the fore-sale is to serve its func effectively, the sale should not be set aside

for trifling reasons because of the desirability of finality of sales and encouragement of bidding.

Gen. Rule (and see p. 51, infra.)

The courts have generally formulated the rule that mere inadequacy of sale price will not warrant the setting aside of the sale unless the inadequacy shocks the conscience because of some sort of imputed fraud. However, because of the desirability of stability of foreclosure sales, the courts will gen. try to find another peg on which to hang their decision to set aside the sale.

* Requirement of Imputed Fraud

Thus, gen. courts will not set aside a sale for inadequacy of fore. sale price. Nor will courts postpone fore. sale because the mor may be suffering a temp. liq-

EFFECT OF BIZ RECESSION ON MORTGAGOR:

But cf. Colum. Theo. Sem. case infra p. 50a

recession and would not realize as much from the prop. as if sold under better market conds.

"Inadequacy plus..."

So it must be "inadequacy plus" in order for the court to upset or set aside the sale.

RATIONALE

Although the Mor may be saddened courts will comfort themselves by saying that the Mor will benefit in the long run because more bidders will be active due to the stability of fore. sales.

REAPPRAISAL OF GEN. RULE DUE TO 1929 DEPRESSION: "DEPRESSION JURISPRUDENCE"

However, the depression of 1929 forced the courts to re-examine their reasoning. You could not impute fraud in such a phenomenon because it was a universal disaster. The Mee got less [redacted] than the debt owed from the sale and still had a deficiency judg. v. the Mor.

So, in the 1930's the courts began looking into inadequacy of price more closely.

they began to postpone foreclosures out of fairness to the mor.

(1932) Columbia Theological Sem. v. Arnette (p. 310)

NEW RULE: POSTPONMENTS

where unforeseeable events (like a depression) occur, the courts will not penalize the mor for lack of foresight, and will not allow the sale until market conds. improve. The court allowed a postponment here.

(1933) Fed. Title & Mtge Guar. Co. v. Lowenstein (p. 313)

what = fair price?

The Ct. had to abandon the "fair market value" as a standard because during the "great depression" there was no market.

The Ct. estimated the fair value of $20,000, a very conservative estimate.

The Ct. said the old gen. rule was not serving the intended purpose, to wit: encouraging bidding. No one there was bidding much of anything. So, the Ct. said

Holding

it would allow the sale if the Mee would credit against the debt the difference between the sale price and the fair market value. Thus would Mee-bidders be encouraged to bid nearer the fair value of the property to up the bid. So, the purpose of this holding was to urge Mees to bid up to up the sale price near the fair value. The Mee would not want to have his deficiency judgment lessened by the diff. between the sale price and the fair value.

Savings State Bank v. Gisse (p. 319)

Ct. said there are several alternatives open to the ct. of equity. This attitude is a great departure from the former reticence of courts of eq. to set aside fore. sales on basis of inadequate sale prices.

Legislation even cropped up here to help the Mee.

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General Rule

It is the uniform rule in this country, as in England, that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience or if any additional circumstances against its fairness, such as chilled bidding.

The depression caused courts of equity to re-assess their powers and to create new procedures. Precedents were of no value during this crisis.

Moratorium Legislation

Legislatures took action and many enacted "moratorium legislation." The moratorium stat. provided, e.g., that there will be no foreclosures until such and such a date.

Characteristics:

(1) The stats. were self-limiting: in force only for X no. of years.

(2) Mge allowed to get rent from Mor during the moratorium.

(3.) Vested broad discretion in cts. to vary the terms of a mtge upon very broad limits.

The constitutionality of moratorium legis. was upheld. Today, there is no state of this type of legis. But, the path thereof remains with us today so that upon a recurrence of extreme economic emergency conds., this legis. will probably be revived.

Barring of Deficiency Judgments: "Anti-Deficiency" Legislation

One category of this type of legis was "anti-deficiency" legis. Forms of this type of legis. varied, but they all sought to prevent the Mge from bidding in at the fore. sale and still maintain the right to collect the full debt from the Mor.

Gelfert v. National City Bank (p. 321)

Mge said that he had a vested right in the statutory procedure originally set up; that the subsequent stat. violated the K clause and due process clause of the

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U.S. Const.

Held, "the stat. in question cannot fairly be said to do more than restrict the Mgs to that for wh he contracted, namely, pymt. in full. The stat. does no more than limit that right so as to prevent his obtaining more than his due."

N.C. and some other states had anti-deficiency legis. of the type that barred all deficiency judgments.

This case is an example of law born of an exigency: "depression jurisprudence."

"Economic calamity is a great lawmaker."

Assign: Priorities

7 JAN. 1964

(CHAP. VI.) *

## PRIORITY *

Rules of priority developed at C.L. and via stats. e.g., Recording acts are stats. re priorities.

However, it is a special

class of priorities unique to mtge. law.

## * (Sec. 1.) PURCHASE MONEY MORTGAGE *

This is a security device to insure an unpaid vendor of land that he will be paid.

**Definition** P.M. mtge. given "substantially contemporaneously" w/ the deed as security for the unpaid portion of the purchase price.

Stewart v. Smith (p. 356)

Need not be actual simultaneous exchange of deed and mtge. "Some lapse of time must necessarily intervene between the two acts. ... The REAL TEST is not whether the deed + mtge were in fact executed at the same instant, or even on the same day, but whether they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties."

**Third Parties** Although a third party can be a P.M. mtgee, he must show that he

as evid. of the fact, such previous agreement would have equal probative force to show that both acts were but parts of the same continuous transaction.

Re how much delay is allowed between the transfer of deed and transfer back of p.m. mtge, reasonableness seems to be the test.

PRIORITY OF P.M. MTGEE.

lent the mtgor-vendee money to buy the land w/a contemporaneous agreement that the vendee-mtgor would give back to the third party a p.m. mtge and that the money lent would be used only to buy the land contemplated and that the vendee-mtgor used that money to buy the land in fact.

The unique feature of the p.m. mtge. is that it gives the p.m. mtgee precedence (SIC) over all claims against the mtgor-vendee even antecedent claims.

Gilliam v. Moore (p. 353)

Ejectment action by P claiming to be a p.m. mtgee against D, mtgor's widow who claims dower.

Held for P. Ct. took the C.L. literalistic approach and said mtgor was only instantaneously seized, the land was merely in transitu, and never vested in mtgor-husband.

M.H.J.

NORTH CAROLINA COLLEGE AT DURHAM
DURHAM, NORTH CAROLINA

Schoch v. Birdsall  p. 362 (C.T. cbk.)
48 Minn. 441 (1892)

Action: to quiet title.

Facts: Mr. + Mrs Bothman borrowed $400.00 from D and gave back a mtge. on B/A which the Bothmans intended to later buy from P (all on 5-24-1887). Recorded 5-25-1887. Then, Mrs. Bothman spent $375 (as part pymt. on B/A's $750.00 price) and tendered same to P, owner of B/A, on 5-26-1887. On same day, Mrs. Bothman gave back p.m. mtge. to P. Recorded 5-28-1887. Mtge. to P defaulted and foreclosed. P claims clear title in fee.

Issue: [Whether D's mtge attached to B/A after conveyance of B/A by P to Bothman and before P's mtge. attached, thereby giving D's mtge. priority?

Holding: No. Between the time P deeded B/A to Bothman and the time Bothman gave back to P a p.m. mtge., the seizin in Bothman was only "instantaneous", and the lien of P's mtge. took precedence of any general or specific lien created by Mrs. Bothman.

P had no notice of D's mtge. "because, under the circumstances, P was not bound to search for conveyances made by his grantee while the latter was a stranger to the title, and before execution of his deed."

J/P/affirmed.

Mtgor. was never seized of R/A during coverture subj to outside D to dower. The instruments were part of the same transaction.

Thus, the vendor's purchase money mtge. has priority over the dower right of purchaser's wife!

Rule: p.m. mtgee v. widow's dower

What happens between two p.m. mtgees? See Schoch v. Birdsall, p. 362.

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Schoch v. Birdsall (p. 362)

(see abstract.)

P had no obligation to check for prior liens because it would be unreasonable to require P to check for liens on prop. wh P had not yet transferred.

Even if P had had actual notice, the result would have been the same due to the instantaneous seizin only in the vendee - mtgor., Boothman.

Thus, a p.m. mtgee - Vendor

P.M. Mtgee - vendor
v.
3rd party p.m. mtgee.

has absolute priority over a third-party p.m. mtgee.

A p.m. mtge. is retrospective in effect because it gives precedence over prior lienors, creditors, etc. But, as to subsequent creditors and lienors, the usual rules of priority attach.

Thorpe v. Helmer (p. 358)

The p.m. mtgee. failed to properly record and this gave the previous judgment lien assignee (gloss) priority here.

The classical explanation for the p.m. mtgee's priority is "instantaneous seisin." But, that theory breaks down in lien theory states and where there is a lapse of time between the transfer of the deed and the transfer back of the mtge. — Or, it could be argued that the p.m. mtgee retained a security interest. →

However, these are rationales after the fact.

Rationale for giving priority to p.m. mtgees

The reason courts give a p.m. mtgee priority is "based on equity and justice." The p.m. mtgee has parted with prop. and should be satisfied first. The p.m. mtgee relied on his security to justify transferring his property. Thus, the vendor-p.m. mtgee should not be made to rely to his eventual detriment.

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## * (Sec. 2.) MTGS. FOR FUTURE ADVANCES *

Definition

A. F. F. A. – a present conveyance of security title to secure money to be advanced in the future.

Often used on the mtgor. will need sums of money over a period of time but would not need nor want all or most of the money now. Used, eg., to secure a line of credit (a running account); to ~~secure~~ ~~repayment of~~ indemnify a surety; to secure

construction loans.

Undesirable to re-finance the mtge each time money is needed and loaned / because of expense and inconvenience involved. The debtor won't have unneeded interest to pay and the creditor can use the amts. not immediately needed. Also, creditor can protect himself by refusing further advances if the debtor becomes a risk after some of the advances, provided the M.F.F.A. is optional.

Requirements

Form:

(1.) Mtge. indicates intent to secure future advances.

(2.) A limit on the indebtedness to be secured (a maximum sum should appear on its face).

However, the two features above are ideal and sometimes a mtge. may qualify as one for future advances w/o them on

third parties have not been prejudiced.

What are the advantages in terms of priority to a mtgee for future advances?

hypo: Agreement that 1 bea M.F.F.A.; that $1000 be loaned immediately + $1000 each month thereafter not to exceed $10,000. Mtg is on 12/1/62. 1st mtgee. pays mtgor $1000 on 1/1/63 & 2/1/63. On 2/15/63, 2nd mtgee. for future advances comes in. Then, 1st mtgee. makes further advances on 3/1/63, 4/1/63 and 5/1/63. Then, mtgor. defaults on both mtgs. Both mtgees knew of each other. The 1st mtge was for OPTIONAL advances. — Now, M-1 v. M-2. Who prevails between these two mtgees? See Hopkinson v. Rolt, p. 370.

(i.) OPTIONAL ADVANCES

Hopkinson v. Rolt (p. 370)

Held, 2nd mtgee. for future advances would prevail.

The equities of both mtgees are fairly equal. Thus, the true rationale of this decision and vast

Majority rule is that the mtgor should not be tied down so that he could not borrow further money and use this property as security for further loans. If the M-1 were allowed to prevail, while knowing of M-2, any later money-lender would be hesitant to lend mtgor anything because the security would be tied up w/ M-1's mtge. i.e. if M-1 were allowed priority, a $15,000 mtge. could possibly tie up a mtgor's security (prop.) worth $100,000.

Naturally, the Hopkinson case is based on the idea that M-1 could have protected himself because he had actual notice of M-2.

Actual Notice of Mee-1

Quaere suff of construc-tive notice to justify the same finding?

Ladue case, p. 371, takes a legal fiction — constructive notice — too far. Thus, the

Majority Rule

Majority rule is represented by Ackerman v. Hubsicker, (p. 376) — The issue is whether the mtge. is a paramount lien to the judgments, as to that part of the mtge debt arising out of endorsements made after the judgments were docketed. The only claimed notice to mtgee. was the docketing of the judgments in the county on the mtged premises were situated. HELD, J/P - mtgee. The gen. principle of construction of the registry laws upon the point of notice, is that the registration of incumbrances is notice to subsequent incumbrancers only. They are prospective, and not retrospective, in their operation. ... The mtge was a potential lien for its full amounts, of wh subsequent purchasers ~~of~~ or incumbrancers had ~~full~~ notice.

A party who takes a mtge to secure further optional advances, upon recording his mtge, is protected against intervening liens, for advances made upon the faith and w/in the limits

of the security, until he has notice of such intervening lien. And the recording of the subsequent lien is not constructive notice to him. The opposite rule imposes the burden of notice and vigilance upon the wrong person.

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The rule of Hopkinson v. Rolt, giving the second mtge priority over the first mtge, is posited on the finding that the first mtgee had actual notice of the second mtge when the first mtgee made further advances (voluntary).

However, Ackerman v. Hunsicker, contra to Ladue case, held that the first mtgee will prevail in this case where there is only constructive notice by recordation of the second mtgee's mtge. Ackerman rule is the better and majority rule. The Ladue rule destroys

much of the attractiveness of the U.F.F.A. to mtgees. Further, Ackerman rule implements the underlying theory of Hopkinson v. Rolt, and implements the policy of recording statutes.

The Hopkinson rule is implemented by Ackerman rule because the ~~the~~ burden of giving the first mtge actual notice is placed on the second mtge.

## (ii) Obligatory ADVANCES

(p. 380) Landers etc. v. Ambassador Holding Co.

Here, first mtgee will prevail because since he was obligated by K to make the pmts even after the intervening liens, he had to; and the reasoning behind the Hopkinson v. Rolt rule would not appropriately apply.

Here, however, even if the advances by D (mtgee #1) were not obligatory, he would still prevail. "The authorities are to the effect

that advances made under a deed of trust given to secure an issue of public bonds or mtgd, EVEN IF NOT OBLIGATORY, have priority over all incumbrances arising subsequent to the recording of the trust deed; and that the rule which applies on voluntary advances are made by the mtgee to the mtgor under an ord. mtg does not apply where the mtg secures coupon bonds which are payable to bearer and pass by delivery and have been sold to B.F.P.s. The FEDERAL cts. give such bonds priority as of the date of the mtg securing them although other liens had attached before they were sold. Same for State courts.

Bearer Bonds Secured By Mtge.

* (Sec. 4) OPEN-END MTGE. *

Definition

Def.- a mtg given to secure the pymt. of an unltd. amt. of bonds

that may be issued under it, and as new bonds are issued, additional security is put up, and all bonds are as well secured as were the first ones when they were issued.

The corp. officers certify that the income from the securing property will be at least twice as much as the interest pymts. to coupon holders will total.

Purpose

* The idea is to protect the early bondholders against dilution of their security.

hypo: Series A bonds, in 1917 to A secured by $750,000 worth of property. Series B bonds in 1920 to B secured by $750,00 worth of property. In 1923, X, a judgment creditor, attaches by getting the judgment. In 1926, C gets series C bonds. —

X v. C = J/C. The general rule is that subsequent open-end [redacted] bondholders' title as against intervenors, relates

back to the date of the orig. issue (1917).

Bondholder v. Bondholder

As between bondholders, ~~y~~ are no priorities. They are all on equal footing regardless of the issue of bonds they hold.

Note, that X would not be prejudiced because the issue of series C bonds would have to be secured by additional security anyway wh would be more than adequate to secure the amount of the bonds in series C.

*(Sec. 5.) Discharge: Revival: Subrogation: Merger: Subordination Agreements

* Subordination agreements are commonly found on the security is deteriorating and the first mtgee sees a chance to enhance the value of the security by letting a second mtgee lend the mtgor money wh to make improve-

ments, and the second mtgee would do so if he can have the priority thru a subordinating agreement. Thus, the first mtgee steps down in favor of the "second mtgee" and assumes an inferior position, but the first mtgee's security is enhanced thereby.

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Inter-party Adjustment of Priorities

Thus we see that the parties themselves may adjust their priorities.

Quaere: Can a subordination agreement affect the rights of a third party, and if so, what can third party do re the agreement?

Typo: 1-1-64 = first mtge. 2-1-64 = intervening lien. 3-1-64 = 2nd mtge. — Can the lienor do anything about a subord. agreement between mtgee-1 and mtgee-2?

Kellogg Bros. Lumber Co. v. Mularkey (p. 392)
The 2nd mtgee only wanted a

rearrangement of priorities on the first mtgee. They agreed to satisfy the first mtge and renegotiate the second mtge. The mechanics lienor, who was P here, claimed that they had no intent to, nor did they, discharge the debt; that the first mtge was not released as against mtgor because M-1 and M-2 did not so intend.

H The authorities in this country are overwhelming to the effect that such a satisfaction as is here involved is not conclusive as to the discharge of the mtge or the pymt. of the indebtedness secured thereby, and that in the absence of paramount equities, it will not be held to have resulted in a subordination of the security of the senior lien to an existing junior lien UNLESS the circumstances

of the transaction indicate this to have been the intention, or unless such intention is shown by extrinsic evidence.

General Rule of Construction

The court of equity will look thru form to substance and look at the intention of the parties to the mtge.

The lienor was not damaged at all because he did not rely on anything to his detriment and still retains his position of inferiority to the first mtge and superiority to the second mtge. The ct. reinstated the mtge.

Hypo.

If M-1 has $5000.00 mtge, and M-2 has $10,000 mtge, if M-1 is subordinated to M-2, M-2 could collect only $5000.00 upon default by mtgor and foreclosure because any larger recovery would prejudice the lienor. The lienor came in as a $5000.00 mtge, not a $10,000.00 mtge.

Also, lienor will not be heard to complain that he is "prejudiced" by the full $5000 despite the fact that M-2 takes first. Lienor did not take subject to M-1; lienor took subject to a prior $5000 debt owed by Mor.

Hypo: M-1 = $5000 mtge. Next comes lienor w/ $2,000 lien. M-2 has $2,000 mtge. M-1 + M-2 execute subord. Agmt. Then, foreclosure. — M-2 gets $2,000, M-1 gets $3,000. Reasoning: Since lienor came in subject to only a $5000 mtge, he cannot be prejudiced any more than $5000. Now, M-1 would not lose his other $2000 ($5000 − $3,000 = $2,000) but only be deprived in satisfaction out of that property. M-1 could still get a deficiency judgment.

## * (Chapter VII) Equitable Mortgages *

Def. — An equitable mtge is a security transaction which was intended to be a mtge transaction despite non-compliance w/ the usual formal or legal requirements of legal mtge.

Legal mtge —

Requirements for Legal Mortgage

(1.) Written, delivered instrument.
(2.) Describing property.
(3.) Indicates nature of transfer and parties.
(4.) Grants security interest to assure pymt. of a debt.

Rule of Law

Where the court finds that it was the unequivocal intent of the parties that their transaction be a mtge transaction, = eq. mtge.

One class of cases often giving rise to eq. mtges is where the creditor gets more than he bargained for, or more than the debtor intended to give the creditor. Thus, the cts. will look at the true intent of the parties and find that it was a mtge transaction, and all incidents of mtge will attach.

Often, cond. sales Ks are the instruments in-

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volved. But, cts will look beyond form to substance.

Russell v. Southard p. 424

P was in dire financial straits, needing $2000 immediately. P's prop. worth $12,000. P gave deed to D, a money lender, for about $2000 cash and two suit claims of dubious worth. (Was a contemporaneous written agmt that D agreed to resell to P if P repays the ~~loan~~ money within a certain period of time. Was this a sale or a mtge?

Held, this was an equitable mtge. Inadequacy of "price" raises an inference that mtge was intended. "When no fraud is practiced, and no inequitable advantage taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is

justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold."

Constructional Preference

In doubtful cases the Ct leans to the conclusion that the reality was a mtge, and not a sale.

"The (written) memorandum does not contain any promise by D to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mtge. ... And consequently it is not only entirely consistent w/ the conclusion that a mtge was intended, but in a case on it was the design of one of the parties to clothe the transaction w/ the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security,

effectually defeat his own attempt to avoid the appearance of a loan."

Decision

"The conclusion at wh we have arrived ... is that the transaction was in substance, a loan of money upon the security of the farm, and being so, a ct of eq is bound to look thru the forms in wh the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mtge!"

Omit Part II (i.e., after Eq. Mtges., go on to Surplusage.)

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Eq. mtges often arise from two broad categories of cases:

(1.) where mtgor claims the instrument created more than mtge, and mtgor asks the ct. to "cut down" the matter to mtge only.

(2.) where mtgor claims the instrument created less than mtge, and mtgor asks the ct to look at the intention of the parties

to have mtge and to declare same to be mtge.

May take various forms:

(1.) Mtgee may ask mtgor to cast the transaction in the form of a cond. sale K including option of repurchase.

(2.) Apparent outright deed w/ oral Amt to reconvey upon pymt. of debt.

The problem often arises where mtgor comes in to court and seeks to redeem. Thus, the ct. must first find mtge before P will be allowed that incident to mtge — power of redemption.

Russell v. Southard (cont'd.) (p.424)

The memorandum w/ accompanied the absolute deed showed inferentially that the grantor did not intend to fully divest himself of all right in the prop., but did intend to retain a continuing interest in the prop. Thus, the ct. could

Also, The parties had negotiated before the transaction.

consider this and the small amt. of the "loan", and the necessitous circumstances of the grantor (P), and the fact that D (grantee) was in the business of lending money — all combined to justify the ct. in finding no sale, but mtge instead.

Intention of the Parties

⊗ Cts of eq. are never bound by form, but may look to the substance of the transaction by looking at the manifest intention of the parties.

Continued occupancy by the grantor bespeaks mtge strongly.

Meighen v. King (p. 436)

If ct. can find transfer of security interest only, they will jealously guard all incidents of mtge.

Once a party-grantee is deemed a mtgee, he is subject to all the rules re mtges; and he cannot seek and get poss. of the res until after foreclosure. Thus, this P failed in his attempt to maintain ejectment.

The question of eq. mtge sometimes arises where the Cor feels he has less than he bargained for, and wants to be declared a mtgee.

Herman v. Hodges (p. 440)

P seeks Sp. perf. of K to make a mtge.

Ct. held that D would have to execute a mtge, "unless the D was prepared to pay off the advance at once."

Actually, the cts usually say that, despite the Cor having less than a mtgee's interest, the ct will impress the prop. w/ a mtge lien in favor of the Cor.

TRUE TEST: INTENT OF PARTIES

The real test of Eq. Mtge. is the intent of the parties.

There is a difference between legal and equitable assets. ⊛ Quaere attempt to mtge an eq. asset ?= An attempt

to create a legal mtge in ~~equitable~~ assets will be ineffective as a legal mtge. But, cts. of eq. will say that in eq., since the parties intended to create mtge, an eq. mtge will be found and impressed upon the assets.

Quære uncertain intent ?= To what will courts of equity look to deter. intent ?= Barking Assn v. Davis

(p. 442) Hibernian

Informal security — Every expressed executory agreement in writing by wh King parties sufficiently indicate an intention to make a particular property therein described or identified a security for a debt creates an equitable lien upon the prop. so described or indicated.

The debtor did not promise to sell the prop. upon failure to pay the ~~cors~~ (D). Thus, no mtge.

But, if debtor had promised to sell the prop. if she failed to pay, and therefrom satisfy the debt, the ct would have found eq. mtge. If ~~y~~ be an obligation to sell, the mdller will ord. be construed to be mtge. But intention must

appear clearly and unequivocally.

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Knott v. Shepherdstown Mfg. Co. (p. 447)
Appellee agreed to insure the appellee's prop. and to make appellant - P (creditor) the beneficiary.
Ct held that this was a mere personal covenant and would not suffice to impose a security lien (mtge) on the property in question. J/D.
This was a close case and could have (maybe should have) gone the other way. It would be reas. to find that the ins. was intended only as substitute security, the assumption being that there was a security lien on the prop. insured. Also, P could have restrained by injunction the subsequent mtge. to others. It could well be found that the court's decision flew in the face of the parties' intention.

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Conn. Co. v. N.Y., N.H. and H.R.Co. (p.450)

Whether debtor created an equitable lien in the property by agreeing via covenant that the creditor would participate in the security of any mtge that may subsequently be made by some third party.

Court held that it was the intent of the parties that the Cor have a mtge upon the happening of the cond. (a mtge to a third party); that this intent was clear and definitely stated; and that in EQUITY the Cor will be a mtge. J/D (Cor).

(p.454) Hickson Lumber Co. v. Gay Lumber Co.

Gay (Mor) gave mtge w/ ~~pwer~~ after-acquired prop. clause. Recorded 1. Then, Gay gave Hickson mtge on five tracts of land acquired after 1st mtge and before Hickson mtge.

Hickson (2nd mtgee) tried to get priority by claiming it was a purchase

money mtgee and, therefore, had superior equities. — Ct. said no because there was no contemporaneous agreement showing such to have been the intent of the parties.

Priorities of Mtgee Under AAP Clause

Further, the gen. rule is that a mtgee prior in time, whose mtge has an after-acquired prop. clause, will prevail, over subsequent mtgees unless the latter have superior equities.

Here P (Hickson) was not a BFP. The Pou mtge (1st mtge) had been recorded and P was put on notice of the after-acquired prop. clause.

* **After-acquired Prop. Clauses**

A mtge. on the whole prop. of certain kinds of biz is more valuable than several mtges on each component.

A subsequent mtgee will not be prejudiced because the mtge w/ an after-acquired prop. clause may be

Business Custom: Notice

recorded. But, even if not recorded, the fact that certain kinds of businesses (e.g., railroads) habitually use AAP clauses in their mtges. and that this is general knowledge, would put the later mtgees on notice.

Requirements for After-Acquired Property Clauses

U are certain limitations on AAP clauses however. ① The AAP clause must not be so vague and ambiguous as to make unclear the intent of the parties. ② Prop. must be sufficiently described to identify the prop. & put third parties on notice as to what prop. will be impressed w/ the lien. ③ The AAP must be such as would be normally functionally used in conjunction w/ the now-acquired prop. ④ And, there may be a need for a mtge of presently owned prop. to serve as a juridical stepping stone to the future property.

A successor to the mtgor who has mtged w/ an AAP clause will stand in the shoes of the mtgor as to the mtgee, even where the successor acquires the future property.

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# CASES ON SECURITY

## * BOOK II. SURETYSHIP *

Suretyship is another type of security. It gives the Cor additional security for the repayment of the debt by having a third party assure the repayment.

Suretyship may arise by operation of law (sometimes called quasi-suretyship), but the will not cover this aspect.

Note the relationship between suretyship law and K law.

For our purposes, suretyship is K-based, and the obligations are K'ual. U must be offer, acceptance, consideration, etc.

The consideration is often a premium that the surety is paid for his risk, most often being found among professionals. However, the basic consideration for all surety transactions is the reliance of the Cor on the sureties promise, and that reliance must be bargained for.

Consideration: Reliance

Pratt et al v. Hedden (p. 652)

The extension of credit was not contingent upon Hedden's assurance, nor was that contemplated by the parties. Thus, Hedden was not a surety and was not liable. ~~therefore~~

Co-sureties are equally liable. Thus, if A, B & C are co-sureties, and A is called on to pay the full debt upon debtor's default, A may look to B & C for contribution.

Offer

There must be an offer of surety by a "surety" which must be accepted (by a promise or an act of acceptance). Suppose a standing promise by S to assure pymt of debt by debtor; must a Cor notify S upon later

NOTICE OF ACCEPTANCE

extension of credit? = i.e., must the S be notified upon acceptance of the offer by the Cor?? =

Split of Authority:

(1.) Old Federal Rule - on S required an act as consideration for the K (to wit: giving the loan), the requirement of notice is required: (a min. rule) Rationale: S would be damaged beyond his expectations otherwise.

(2.) Mass. Rule - performance of the required act will make the K, and Cor must notify the S only w/in a reas. time if it is not reas. to expect that the S will get notice. (A min. rule.)

Rest. Sec. Sec. 86

(3.) Majority Rule - K arises as soon as the act of acceptance (extension of credit) by Cor is performed. No notice required. - This rule is codified by Restat. of Security, sec. 86.

The law has a solicitous approach to sureties and re-

solves ambiguities in favor of S. But, the Majority rule represents the trend away from that solicitude due to amateur nature of S to a stricter standard. Reason: great bulk of sureties are professional and even draft the suretyship Ks.

(p.656) Midland Nat. Bank v. Security Elevator Co.

REVOCATION

A S may revoke the offer per a provision in the surety-ship K.

Amer. Chain Co. v. Arrow Grip Mfg. Co. (p.663)

LAPSE OF OFFER

Will death of S lapse the offer before Cor has accepted by extending credit ?? =

Under ord. K rules yes. Some under rules of suretyship. There must be an offer to be accepted, and death lapses the offer. The clause of the K promising that S's estate would be liable upon S's death could not change the

This case represents the vast not/authority.

The phrase in the guaranty that the heirs, etc., would be bound, could not change the fact that, as a matter of law, after the S's death, all unaccepted offers lapse.

C = Credetor
P = Principal debtor
S = Surety

operation of law which would lapse the offer upon death of the offeror before it has been accepted. — Majority Rule.

Royal Ins. Co. v. Davies (p.669)

C v. S's administrator. This was not a continuing guarantee w/ a series of offers so that death would lapse the offers not accepted. This was a situation where the ct found S (his admin.) liable even after death, however.

Reason: the offer was "if you like P we (S) will guarantee his faithful performance." Then S died. Then P absconded w/ some funds. However, the latter, though coming after death of S, was not the act of acceptance. The loaning of P in reliance on S's promise was the acceptance. Thus, Khaving been made, S's death will not end S's liability as surety.

Note: this case in no way alters the rule that death of offeror will lapse an unaccepted offer. Death here occurred after K had been made.

90 ad hoc? peculation

P/D = principal debtor

Consideration

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The consideration to the S need not be beneficial to S. It must be, however, the bargained for consideration. It may be the loan by C to P/D. But, under any circumstances, the consid. must be bargained for.

On the S is a non-professional surety the usual consid. flowing to S is the loan by C to P/D.

* What is the scope of a surety K?

Intent — This will depend on the intent of the parties just as in K law.

In times past, a S was a favorite of the law. S was usually a private amateur. Further, any ambiguities will be resolved in favor of S.

Hypo: 1960, S guarantees repymt. of debts thereafter incurred by P/D. C extends credit

to P/D. Then P/D goes bankrupt and C knows it. C thereafter extends more credit. P/D defaults on the after-bankruptcy debts. C v. S = J/S. Held could not reasonably be said that S intended to indemnify an insolvent P/D, and C acted despite the known risk. If C did not know of P/D's bankrupt state D/C: that's exactly the type of situation C thought to guard against by getting S to guarantee the debt.

Problems often arise in trying to determine what the parties intended. How will ambiguous language be construed?

Whitney & Schuyler v. Groot (p. 677)

Did S intend to guarantee only one extension of credit, or did S intend to make a continuing guarantee? =

Rule of Construction: Since the language was ambiguous, it

was resolved in favor of S.
Cts historically favor S. S will be held to any clear expression of intent, however.

Professional v. Amateur Sureties

Note: This legal solicitude for S does not extend to professional sureties, and Cts. recognize this difference between the type of sureties.

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Suretyship and guaranty are often used interchangably.

The law has solicitude for the voluntary S. But for the intent is clearly evidenced in the K, the Ct will follow the K.
Ambiguities are construed in favor of S historically.

An offer made to a specific person = "special guarantee." A special guarantee may be accepted

only by the specific person to whom it was made.

Today, the solicitude of the law for S has lessened considerably because of the fact that the majority of sureties today are the big professional sureties. Thus, there have developed two sets of rules depending on the nature of S.

Nye-Schneider-Fowler Co. v. Roeser (p. 685)

But, here the materialmen were given a substitute security by requiring that the constructor give a bond guaranteeing pymt. of materialmen.

Usual statutory materialmen's liens don't apply on the bldg. being constructed is a public bldg.

State statute required here a bond running to the materialmen.

C = materialmen
P/D = contractor + D-1
S = D-2

P/D got the wrong kind of bond from S by mistake; but, the ambiguity was NOT construed in favor of S, but against S. Ct said that the reas.

intent of the parties was that C would be indemnified and that the parties intended ∫ K in reference to the statute.

The ct read into the K the provisions of the statute even though no reference thereto was made.

"This result was the only socially justifiable result that could have been reached." (M.G.S.)

This only requires that S do what S reasonably foresaw that he would have to do upon default of P/D.

S may limit his liability:

(1.) Stating a max. amt that he will guarantee; or

(2.) Giving to C prop.; or holding prop. to insure pymt of the debt, and thereby limiting the amt of S's liability to the value of the prop. (a PLEDGE).

(3.) Interposing certain conditions!

Sources Used to Determine Intent

The surety-ship K should always be looked to to deter intent. If intent is expressed in the K, that controls. If the intent is not expressed in the K, we must fall back on the rules of construction in addition to the surrounding facts and circumstances.

## * (Sec. 2) SECONDARY LIABILITY *

The reas. expectation of S is that P/D will pay, but that upon P/D's default, S will pay.

Action of Indemnity

If S must pay, he may then seek reimbursement from P/D in an action of INDEMNITY. It may be said that a tacit promise may be found by P/D to hold S harmless, and that's the reas. 'expectation.

Holcombe v. Fetter (p. 690)

Bill in Exoneration

Another remedy is A BILL IN EXONERATION which seeks an injunction compelling P/D to pay C.

The real basis of this bill is not the absence of a legal remedy, but the fact that pursuit of that legal remedy may irreparably damage him, e.g., S may have to liquidate some of his own prop. (at forced sale rates) to pay C, assuming that S pursues his legal remedy (either indemnification).

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Action of Contribution: Co-Sureties

Os y are co-sureties and on one has to pay C, that one may have thereafter an action of CONTRIBUTION against the other co-surety. But, the same reasons that make a bill in exoneration insuff make an action of contribution insuff to make the paying S

whole.

Collateral

C has no duty to collect first from collateral prop. before going against D. C may gen. go against S right away, and S would then be subrogated to C's rights against any existing collateral.

C has no duty to protect the S. However, on the right of S to be subrogated to C's rights, after C has collected from S, would be valueless, Thus, in Meade v. Grigsby's Admirs. (p.694) C was enjoined from going against S before C went against the collateral (Trust fund set up for Creditors). Reason: C [redacted] owed rent to P/D and could not have collected debt from P/D if he (C) had sued [redacted]

← ... then C will be compelled to go against P/D first. This is an exception to the gen. rule that the C is under no obligation to look to the P/D or to his prop.; he is not bound to exhaust his remedies v. the latter before resorting to S.

McIntyre v. McGovern (p. 696)

Guaranty of Collection

a guaranty of pymt is different from a guaranty of collection. Whereas both require that the debt have fallen due and is unpaid, the guar. of coll. also requires that the debt be uncollectable. Thus, C must show that he has exhausted all available remedies designed to implement collection before he can go against the guarantor of collection.

Thus, a guarantor of collection K's to pay C only if the debt becomes uncollectable from P/D.

However, a guar. is absolute and one of pymt. unless it is by its terms made conditional.

Duties of C against S

The C only owes to S the duties specified or covered in the K.

In a guar. of coll. the reas. expectation of the parties is that the C will undertake affirmative action to collect

from P/D by use of ord. diligence. If C allows by negl. the usual collateral remedies to escape him, the S is discharged to that amt. (pro tanto) or fully, depending how much of the debt the C has failed to collect.

However, except for the guar. of collection, C owes the S no duty to protect S. Thus, in NELSON V. 1ST NAT. BANK OF KILLINGLEY, (p. 705) held that S was not released from his liability on the note by the mere failure of the bank to press its action v. the maker of the note (P/D). "Mere passiveness on the part of the C, even when cont'd. until the S/L has run in favor of P/D, does not operate to discharge a S."

Pain v. Packard (p. 707) A mere delay by C in calling on P/D for payment will not discharge the surety. But, on S specifically

Pro tanto Discharge of S (Min. Rule)

informed C that, unless C proceed against P/D immediately, P/D will become insolvent and C won't be able to get sates. from P/D, then noncompliance w/ S's request will discharge S pro tanto.

Majority (and Better) Rule

The Majority rule states that even under the above facts C would not have to go against P/D and will not discharge S upon failure to go v. P/D.

18 states by stat. & 3 by judicial decision have adopted Pain rule.

But, the better rule = maj. rule because:

(1.) It is more consistent w/ the reas. expectations of the parties at the time of the K and

(2.) It does not deprive C of the benefit of the bargain.

Aetna Ins. Co. v. Fowler (p. 709)

(See notes following case)

Here C exercised bad faith by failing to notify S of the Ee's (P/D) speculation after C learned actually of Ee's unfaithfulness.

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C owes a duty of good faith to S.

while C owes S duty of g/f, and while that is so. True throughout suretyship, the problem almost invariably arises in fidelity bond cases.

On P/D's default is a casual one, and C learns of same, C need not apprise S of such delinquency. But, if the default is a serious one under the fidelity bond, C sd notify S as C knows of such.

Fidelity Bonds: Duty of C to notify S upon serious breach.

Exception: If P/D's misconduct in no way affects his ability to meet the K, C need not notify S of anything done by P/D, no matter how serious.

QUAERE: Can C be grossly negl. in safeguarding himself against P/D's speculation? =

Typo: C (Err) pays P/D (Ee) $40.00

per wk. S covers P/D w/ fidelity bond. C sees P/D driving new T-bird, playing the horses, keeping company w/ flashy companions. C says to himself "Well I'm covered, & I will sit tight since I'm covered anyway." In fact, P/D is dipping into the till, & when C finds out later, C V. S. S says he was discharged by the gross negl. of C. It may be said that while C owes S no duty to investigate nor correct a suspicious situation, C does have to act reasonably under the circumstances and consistent w/ the reas. expectations of the parties at the time of K'ing. C should notify S of his suspicions about P/D; then S may do what he wishes.

Thus, the general rule remains that

affirmative

C owes no duty to S to protect ~~the~~ S.

QUAERE: * What defenses can S raise? = Failure of consideration? = Yes. If C fails to perform as to P/D, S will not be liable to C when P/D consequently fails to perform. Thus, S can raise failure of consideration as to P/D & to S.

## DEFENSES OF S

Generally, any defenses ord. available under K law would be available in suretyship.

⊛ Quaere partial failure of consideration? (e.g. for diamond sold by C to P/D was warranted to be 1 ~~carat~~ carat, brilliant, flawless, but, it turns out to be .98 carats. Barring allegation by P/D that he wanted only a full carat diamond, P/D would still be bound for .98 of the price.) Thus, ord. a partial failure of consid from C to P/D will not totally relieve P/D. HOWEVER, S will be relieved of his liability because the partial failure can be reas.

Partial Failure of Consideration

said to have increased the risk of non-performance by P/D and that this was not upon the reas. contemplation of the parties. — This is consistent w/ the old solicitous attitude of Cts. toward ~~to~~ S. It is inconsistent w/ gen. K law and peculiar to Suretyship, however.

McKee v. Harwood Automotive Co. (p. 796)

P/D = minor. P disaffirmed K for purchase & sale of car 7⅓ months after delivery of car.

Gen. The incapacity of P/D will afford no defense to S except on P/D has put C back in status quo fully.

Here, car was returned 7⅓ mos. used and that was not complete restitution to C. Thus, J/C against S.

This gen. rule is consistent w/ the intentions of the contracting parties, that

To allow S discharge here would deny the C the benefit of the K for which C bargained.

Note: S cannot go against P/D because after S pays C, S would stand in C's shoes and be subrogated only to those rights the C may have had against P/D (e.g., in quantum meruit if C sold P/D - minor some necessities). Thus, since C could not have sued P/D for breach of K due to P/D's minority, S cannot sue P/D for indemnification.

C be protected against the risk of a minor's disavowal.

Here, S refused to accept the car back, and S's liability was lessened pro tanto the value of the car then.

## *Negotiable Instruments*

On is guaranty on an instrument that is negotiable, the problem raised is whether to apply N.I. laws, or whether to apply Surety law.

On there is definitely a surety problem, the coincidental involvement of a negot. instrm. is immaterial. Thus, there wd not have to be immediate notice to S by C of P/D's default.

If, however, "S" is not really a S, but is an indorser, then negot. instrm. law will govern. Under N.I.L., an indorser for accomodation will be discharged if not immediately notified of the ~~P/D's~~ accommodated party's

default. See O'Neal v. Bader, cbk. 711; Home Savings Bank v. Refior, cbk. 714.

## 17 March 64

Star Grocery Co. v. Bradford (p. 731)

P(c) v. Ds (Ss) on fidelity bond which P/D had not signed. Ds say the incompleteness of the bond on its face renders them not bound.

However, Ss never conditioned their liab. on P/D's signature; and this ct said the blank space did not put C on inquiry notice.

non-signing P/D

The rule/author is that "the Ss are bound by such an instrument, if the P is bound by law or his special K for the debt or default for wh the sureties have obligated themselves."

S would not be prejudiced, in that case, if S is still held liable, because S could still seek indemnification

or exoneration from P/D.

However, if P/D had signed, the action of S over against P/D for exoneration or indemnification would be greatly facilitated (from an equitable or procedural standpoint). ~~if P/D had signed.~~

NOTE, however, if a co-S fails to sign, the signing S will be held not liable. Reason: the signing S signed contingent upon the other Ss signing, and C knew, or should reas. have known, that this was the case.

Quaere to what extent the signing S would be discharged? The better reasoning would be that, since S would have been bound by no more than his ratable share ultimately if all Ss had signed, the signing S should be bound for that ratable amt. and discharged only as to any excess.

## Ettlinger v. National Surety Co. (p. 734)

C perpetrated fraud on P/D. When debt fell due, P/D had not taken any action against C. (P/D could repudiate or affirm the K because fraud only renders the K voidable at the option of the defrauded party). Thus, C v. S, and S sets up the fraud as a defense.

Held, the defense of fraud is personal to P/D and S cannot set it up in an action by C against S. To allow such would be to force P/D to an election.

Defense of Fraud: Personal to P/D

BUT...

However, many cts. are contra; and the better rule is that the fraud on P/D is also fraud on S; that the fraud of C has enhanced the likelihood of S's liability, and that this was not reasonably contemplated by S. Restat. of

Security, sec. 118 in accord: S is not liable to C (due to C's fraud) ~~because~~ unless S knew of the fraud or duress at the time he made his promise. "The theory is that the surety has a defense because of the unfair risk imposed upon him by the C. The S's defense ... does not depend upon rescission by P."

Trotter v. Strong (p. 738)

Discharge of P/D by C

If C discharges P/D, C cannot compel S to pay. Rationale: prejudicial to S because S, after payt., would only have rights of indemnification ~~and~~ or exoneration against P/D and S would be subrogated ≠ only to such rights of C against P/D as C would have; in that case, since C had discharged P/D, S would be deemed, ofter subrogation, to have discharged P/D.

See p. 740 for exceptions.

An Exception: on C = HIDC of a negot. instrument

Note, however, the special situation on a negot. instrm. is involved and falls into the hands of a H.I.D.C. In that case, it would not be fair to say that S is discharged from liab. to the HIDC on grounds may for HDC to know of the private discharge by C of P/D. —

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Discharge by C of the P/D is discharge of the S.

Release of Co-Surety —

On C has taken some action that prejudices the S, then to that extent the S is discharged. Thus, on a C, w/o a S's assent releases a co-S, the ~~co-S~~ S is only discharged to the extent that his contributive share has been damaged

(PRO TANTO DISCHARGE). -(END.)

* Extension of Time *

Quaere effect of extension of time? P/D will discharge S because the extension by C may have disabled S from going against P/D because P/D may become bankrupt. This assumes that S did not agree to the new and binding agreement between C & P/D.

POST v. LOSEY (P. 744)

P/D discharged in bankruptcy. Subsequently, C & P/D agreed that P/D would pay the debt that was discharged in bankruptcy and good consid. was passed. S did not know of nor assent to this new K.

Held, the creation of a new K between P/D and C will discharge all parties to that K; and, on the P/D later defaults under the new K, S is not liable because S was not a party to the K.

Rule: creation of new K (but see over)

Quaere this result because really S was

not prejudiced. When P/D went bankrupt, S was then liable to C. However, by negotiating the new K (C and P/D), S's position was really improved. Thus, S took advantage of a mere technicality.

Modern Rule
i.e., Exception to Gen. Rule

Rules, courts today say that under the Post v. Losey facts, a professional S will be discharged only on he shows that he was prejudiced or damaged by the new K.

See p. 748 for other exceptions

Only is a general guaranty of indebtedness, and not any particular indebtedness, any indebtedness incurred subsequent to the execution of the new K

Missed class 4/2/64



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This varies from Guild v. Butler (p. 755) (127 Mass. 386); but, there the incentive of P/D to perform was not lessened. Thus, it was held that S was discharged only pro tanto. Collateral was involved.

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On C releases the P/D, to that extent S is discharged.

In O'Neill case, p. 765 the S was completely discharged, not only pro tanto, because the removal of the incentive increased the likelihood of non-performance by P/D.

In O'Neill case, the court saw no reason to lean over backwards since the S was a professional & had been paid for its risk. Also, since S drafted the K, any ambiguity in the K will be construed against the S.

Zeigler v. Hallahan (p. 771)

Ins inserted -w/o- S's - knowledge clause was held to discharge S completely because S had not agreed to it. Court said that the fact that S was not prejudiced nor harmed in any way was immaterial.

This case would

probably not be followed today: too doctrinaire.

Amer. Bonding Co. v. Pueblo Invest. Co. (p. 775)

K Alterations

Despite alteration of K w/o S's consent or knowledge, Ct took a more realistic view by saying that the alteration did not change the reas. expectations of S nor materially alter his reasonably expected obligation.

This case represents the new wave of legal realism and disregard of minute immaterial alterations which had no possibility of injuring S.

Requirement of MATERIAL alterations

General Rule

If there is any reas. possibility that S would be injured in any way he could not have reas. anticipated, the Ct will find that S was completely discharged. You need not show that S WAS prejudiced, only that there was a possibility that S would be prejudiced.

## Hinton v. Stanton (p. 779)

This reps. an elaboration of the rule of Amer. Sanding Co. v. Pueblo etc.

Here, the court said that the case would have to be remanded for decision re whether the construction of the PORTE COCHERE involved a material change in the K upon wh appellee was S, and, if so, whether the S consented to the change in the contract.

## Chandler Lumber Co. v. Radke (p. 784)

K for sale of lumber to P/D, Schutte, to which K Radke was the S. The C sent the lumber but sent it C.O.D., and P/D was unable to pay just then. C.O.D. terms had not been agreed upon by the S.

Held, S was discharged because the possibility of [redacted] injury to S and the risk of non perf. by P/D were increased.

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Johnston v. May (p. 787)

The court leaned over backward in a manner consistent with the historical favoring of sureties. But, says Shimm, this case is really unrealistic because S was not hurt, but really helped due to the alteration.

Negotiable Instruments

The next three cases deal w/ negotiable instruments law; and where such arises and conflicts w/ normal suretyship law.

Generally, on action is on the note, negotiable instrm. law will be held to govern. But, the law is really unsettled.

Shimm says cts. will look at the form of the action. Thus, on the main nature of the action is suretyship, the negotiable instrm. defenses that conflict

will be barred. Vice versa.

Don't be too concerned, but be aware of the peculiar problems in this area.

## CHAP. II — EMPHASIS ON SURETY'S RIGHTS & REMEDIES

On P/D defaults, and S pays C, will S then be subrogated only to those exact rights that C had against P/D, or will S have certain rights that are tempered by equity?

### (Sec. 1) As Against C, P/D, C^ors of P/D and Transferees of P/D

Amer. Surety Co. v. Bethlehem Nat. Bank (p. 810)

SUBROGATION

Ct held that when S paid C, S stepped into the shoes of C and was entitled to get from P/D the full amt. loaned by S to P/D. — Good result because no other creditors would be prejudiced since they had anticipated that the

full debt would be asserted against P/D. (Note: the question arose because S had to pay the full debt to C; but, C had gotten part of the debt as a dividend from P/D's estate.)

Dissent: Black and Douglass, JJ., said that S should only get that portion owing to C after S pays C. However, that is weak in one area: the amount that S would be able to recover from P/D would be made to depend on the fortuity of when S decides to go against P/D.

Equitable Concept of Subrogation

Subrogation is an eq. concept. Thus, if are eq. considerations which ~~otherwise~~ inveigh or militate against subrogation, such should be denied. Thus, or S has/it clean hands, or on S pays C as a pure volunteer and takes no assignment from C of the claim (See Matthews v. Aiken).

Exception to General Rule of Subrogation

Therefore, to the gen. rule there is the exception that S will not be subrogated to C's rights where it would be inequitable to do so.

Assignment —

Assuming that S now stands in C's shoes, what rights would S have against certain property of P's?

Read 30 pages per class.

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Extent of S's Rights Against P/D After Subrogation

On subrogation does apply the rights of S are exactly co-terminus w/ the rights of the ~~P/D~~ C against P/D.

Downey v. Washburn (p. 818)

Independent of any stat provision, it is the undoubted right of ~~the~~ a S or indorser, or any one standing in a like relation to the P/D, if compelled to pay the debt, to be subrogated to the rights of the C, and in case the creditor (C) has a judg., to use that judg. for the purpose of coercing payment by the P/D.

— Shinn thinks that the dissent is the better view because it does not put restraints on the alienation of prop.

Indiana seems to lean over backwards to protect the surety.

Bittick v. Wilkins (p. 821)

After S paid P/D's ~~obligation~~ obligation, S stepped in C's shoes and could reach debts owing to P/D.

Rule: Extent of Subrogation

A S, by paying the debt of his P/D, becomes entitled to be substituted to all the rights of the C, and to have the benefit of all the securities w/h the C hold for the pymt. of the debt, w/o any exception; and is entitled to all his rights to any fund, lien, or equity, against any other person or property, on account of the debt.

S stands exactly in the shoes of C after paying the debt.

S prevailed over other materialmen w/ liens re free assets only because S moved faster ~~that~~ than they did. That is the only reason that S would get priority over materialmen under similar circumstances.

Glades County v. Detroit Fidelity + Surety Co. (p. 826)

Remember the 10% "retained pymt." in public bldg. construction cases.

Equity of Exoneration

As between the surety and the P/D a surety arises w/o pymt by the S and w/o his having even been sued an equity of exoneration.

Subrogation

To have subrogation a S must have discharged in full the obligation for wh he is bound, and he then seeks to recover for himself the subject of the suit.

Exoneration

In case of exoneration he proceeds before payment quia timet, and seeks to have pymt made to the Cor. If the P/D is solvent, the decree need not go further than to require the P/D to pay, but, when he is fraudulent, insolvent, or has absconded, the equity of exoneration needs and may have further protection. ... Assuredly eq. will require to be applied to the obligation a

covered Stand. Oil Case, p. 829. check this!!

fund sob by the very K of suretyship stands as a security for performance.

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Westinghouse etc. v. Fidelity + Deposit Co. (p. 840)
The dividend should be applied against the full claim of C, not only against the amount secured by S. This ct. adheres to the logic of Citizens + Southern Nat. Bank case.

Madison Nat. Bank v. Weber (p. 842)
S ltd. his liab. to $10,000. Actual debt incurred by C was $11,500.
Remember that S is a favored character. Thus, for the ct can find any peg on wh to hang favored treatment, it usually will.

Knaffl v. Knoxville Banking + Trust Co. (p. 845)
After S has paid full amt of his security, though C remain outstanding a part of the overall debt (bond for $25,000; debt for $60,000), S still cannot claim pro tanto subrogation. Reason: S's job is to protect C, and to allow S to be subrogated pro tanto to participate in the dividend from the bank—

rupt would make S complete w/ C.

The obligation of S is to protect C, and S will not be allowed to assert rights wh will prejudice C.

Jenkins v. Nat. Surety Co. (p. 849)

P/D independently covenanted to save S harmless. Sues after default. S volut against ■ P/D's estate on that basis, not on ground of subrogation. Held, S cannot do indirectly what he could not do directly; and to allow S's claim here would allow S to compete w/ C. This case is an extension of Knapp case.

* (Sec. 2) As Between Sureties *

CONTRIBUTION

S may go against Co-S for contribution of a ratable share.

Thus on S v. P/P S can recover full amt. On S v. Co-S, S may get only a ratable share.

MADISON NAT. BANK v. WEBER (Cbk. 842) — on a guarantor in writing guarantees the pymt. of $5 and credit thereafter to be extended, such guaranty is a continuing guaranty and by its terms limits the credit to be extended to a fixed sum, and the Cr extends credit in excess of the amt. stated in the K of guaranty, and the Dr becomes insolvent & in course of administration of his estate by the court a dividend is paid upon the entire claim of the Cr, the dividend so paid should be

Jenkins v. Nat. Surety Co. (cbk. 849) - S in indemnity Amt executed by bank as security for deposit of county funds, having paid amt. of bond after insolvency of bank, HELD not entitled to allowance of claim & pymt. of dividends pro rata w/ other gen. Cors, in that result would be a species of double proof, detrimental to P/D's other Cors, since secured Cr would, under applicable equity rule, still

applied pro rata upon the secured and unsecured portions thereof.

be entitled to dividends on
entire original claim.

## Pace v. Pace (p. 857)

Here, S was allowed to recover full amt. from Co-S, because S was subrogated to C's rights against either for the full amt. C & S could have been sued by C for the full amt. But C chose to go against S because Co-S was insolvent. No Cor of Co-S would be prej judiced ~~to~~ by S getting full amt from Co-S because C could have gone against Co-S for full amt. anyway.

Further, other Cors of Co-S would not be given a windfall and the amt. they could recover would not be made to depend upon the fortuity of whether C chose to go against S or Co-S.

"So, a Claim for full amt of debt may be filed w/ the understanding that only the contributive share be recovered" by the S against the Co-S.

Exam on May 20, 1964
— three hours. Keep answers succinct and strictly relevant. Clarity of analysis, accuracy and brevity are prime. Take ½ the time to read and organize before writing. — OPEN-BOOK EXAM. — Preparation: make outline of course.

Def. of "Co-Sureties"

# 28 April 64

This right of contribution exists between co-sureties. Thus, we must first determine who are co-sureties.

Young v. Shunk (p.859)
Two separate guaranties, and the sureties did not know of each other.
Held, this was immaterial. If persons are bound for the same performance of the same P/P, they are co-sureties; therefore, the right to demand contribution does not seem to rest upon K, but upon this natural principle of equity, that on the same burden is assumed equally by several, and one of them is compelled to discharge it, the others ought to contribute each his share, so as to preserve equality.

Baldwin v. Fleming (p. 861)

Fleming is alleging that he is S only for Silas Baldwin, and not a co-S w/ any other assignor of the note.

All were sureties, but they were not co-S because they did not assure the perf. of the same P/D. Since they had different P/Ds, they were not co-S. Since u can be contribution between co-S only, there could be no contribution here.

Holding

Rule

Hanner v. Douglass. (p. 869)

Our sureties assure ~~the~~ performances of the same P/D, but assure DIFFERENT PERFORMANCES (i.e., Obligations), they are not co-sureties

Extent of Contribution

To what extent can be contribution? = Generally, there is ratable contribution.

Thompson v. Dekum (p. 871)

Ct decreed ratable contribution between the co-S, and that means per capita.

However, on penal bonds where there are maximum amts. of liability, there shall be per stirpes contribution (assuming there to be unequal numbers of sureties). e.g., ——

Hypo: Bond A – max. amt. $3,000 – $S_1$ + $S_2$
Bond B – " " $3,000 – $S_3$ $S_4$ $S_5$
Bond C – " " $6,000 – $S_6$

Default in amt. of $6,000. $S_6$ pays C $6,000. Then, $S_6$ sues contribution. The following pymts. are per stirpes:

Sureties on Bond A liable for 1/4.
" " " B " " " .
Surety " " C " " 1/2.

Thus, Bond A = $1500; Bond B = $1500; Bond C = 3,000.

—However, so in each penal bond there shall be per capita contribution; so that $S_1$ and $S_2$ each owes $750; $S_3$ $S_4$ + $S_5$ each owes $500; $S_6$ owes $3,000.

i.e., depends on relation that the particular bond bears to the total indebtedness. e.g.,
Bond A = $\frac{12,000}{3,000} = 1/4$

## Steel v. Dixon

Gen. Rule: a surety is entitled to share his Co-surety's securities, Steel v. Dixon to the contrary notwithstanding.

(p. 879)

Many cts. say, to the contrary, that Co-S do not share the benefits of security held by some but not all of the sureties.

However, this case held that sureties #3 & #4 could share in the security held by sureties #1 and #2.

Finis!

Required Course Paper in Credit Transactions.

Prepare & submit on or before April 2, 1964, a paper describing and analyzing the conveyance of the pieces in which you intend to practice, adverting particularly to the following topics:

1. The extent, if any, to which the mtgee may reach the rents and profits of the mtged prop. pending foreclosure of his lien; and the means that he may employ to do so.

2. The incidents of the mtgor's eq. of redemption.

3. The incidents of the mtgee's eq. of fore.; the methods of foreclosure that may be employed; and the safeguards, if any, both statutory and judicial, that have been adopted to guard against oppressive foreclosures.

4. The aberrant transactions to which courts have attached incidents of mtge. (i.e., the eq. mtge.)

The above enumeration is not intended to be an exhaustive or exclusive outline of your paper. It merely indicates certain important and indispensable topics that should be covered.

Result: paper submitted. Found generally good, but in need of more editing.

CREDIT TRANSACTIONS

M. H. J.