Conditional Sales and Mortgages—The Fixture Problem

"The books are full of decided cases upon the subject of fixtures, from the yearbooks down to the present time, and, strange to say, after all the ability that has been displayed upon this subject, no rule can be found of universal application that clearly defines the line where an article loses its legal quality as a chattel and assumes that of real estate."¹ It is probable, however, that much of the confusion on the subject springs from the desire for a rule of universal application and the failure to recognize the need for a different approach to the subject as the factual picture changes. This note will discuss some of the problems that arise when chattels are sold under conditional sales agreements and are annexed to realty which

¹ Capen v. Peckham, 35 Conn. 88, 92 (1868).
is, or becomes, subject to a mortgage. The latter part of the discussion will attempt to indicate the approach of the Pennsylvania court to the problems under discussion, with special attention to the Pennsylvania statutes.

The American courts have very largely accepted the three-fold "intention" test as stated in *Teaf v. Hewitt*, the leading American case on the subject, as the proper criterion of a fixture. The factors to be considered under this test are as follows: (1) actual annexation to the realty, (2) appropriation to the use or purpose of the realty to which it is connected, (3) the intention of the parties making the annexation to make the article a permanent accession to the freehold; this intent to be determined by objective standards, usually by the application of the first two tests.

The intention test is satisfactory where the issue is between a buyer and seller of land, or between a mortgagor and mortgagee, but when the rights of third parties are involved it breaks down. Where the issue is between the conditional seller of the object and the mortgagee of the land, to decide whether the object is realty or personalty seems to avoid the issue. Consequently it is to be expected that there would be a certain amount of sloughing off from the "intention" test and the setting up of new standards designed more to answer the specific question as to who is entitled to the article in controversy. To what extent this sloughing off process has taken place and to what extent legislative action has aided in this, will be brought out below.

Manifestly there are certain objects which under any standard would be considered chattels or realty no matter how the question arose. For example a brick in the wall of a house would be categorically "realty", furniture in the house "personalty". Between the two there are articles that could be considered realty for one purpose, and personalty for another. It is within this latter group that the cases conflict and it becomes especially necessary to look more closely to the real nature of the dispute.

**Where the Mortgage Is Subsequent to the Conditional Sale**

There are two major classifications in which cases involving the conflict of interest between mortgagee and conditional vendor can be grouped. One where the mortgage is subsequent to the attachment of the chattel, and secondly, where the mortgage has been taken prior to the annexation.

Where the mortgage is subsequent to the annexation of the object, and the mortgagee has notice of the reservation of title, he will be in no better position than the original buyer.

Where the mortgagee has no notice, the problem is whether the subsequent party reasonably believed from all the circumstances that the object in question was included in the lien he was buying. This question has been answered by using the *Teaf v. Hewitt* standard of objective intent. If under this test a given thing is determined to be part of the real estate, a "fixture", the owner of the land has the power to cut off the conditional vendor's right by conveying to a bona fide purchaser, or mortgaging to a mortgagee without notice. If, using an objective test, one would not reasonably expect the article in question to be included in a sale or mort-

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gage, the owner of the land has no power to cut off the vendor's rights. In this instance then the *Teal v. Hewitt* doctrine seems applicable and has generally been given effect by the courts. Fundamentally the principle seems to be that when one of two innocent parties must suffer, he who made the loss possible should bear the burden. A contrary doctrine has, however, been expressed by a few courts in protecting the vendor on the theory that since the mortgagee's rights are derivative, he can gain no rights the vendor did not have.

Practically the best way to avoid the disputes arising in this field is to provide an effective means of giving notice to prospective mortgagees. In a number of states, recording a conditional sale as such is not considered as notice, the courts hesitating to place what they deem a burden on the mortgagee or purchaser. As a matter of actual fact the burden is largely a figment of the imagination, since the recording statutes generally provide that conditionally sold chattels be recorded in the county in which they are to be used. Thus in the case of fixtures the record would be in the same office as the real estate records.

The Uniform Conditional Sales Act §7, and statutes similar to it, have provided what is probably the best solution by requiring the conditional sale contract to be filed with the real estate record, thus insuring effective notice. A failure to comply with the statute will ordinarily make the reservation of title ineffective as against a subsequent mortgagee or purchaser, although if the article is clearly personalty, the vendor will be protected even though he fails to record.

**Where the Mortgage Is Prior to the Conditional Sale**

When the mortgage is taken prior to the annexation of the article in question it seems unnecessary to apply any objective intention standard since there is no question of protecting a subsequent party who has relied on appearances. There is a totally different problem, that of protecting the security interest of the mortgagee. The problem becomes more one of accession than of fixtures. If the security that the mortgagee bargained for will be impaired by removing the object, the mortgagee, being the prior lienor, should be protected. A majority of courts so hold. The

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9. 2 U. L. A. 12: "If the goods are so affixed to reality, at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed as against any person who has not assented to the reservation. If the goods are so affixed to the reality at the time of a conditional sale or subsequently as to become a part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the reality for value and without notice of the conditional seller's title, unless the conditional sale contract or a copy thereof, together with a statement signed by the seller briefly describing the reality and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the reality would be recorded or registered to affect such reality."
decisions lack uniformity because of the disagreement over what constitutes impairment of security. This disagreement is due somewhat to the changing concept of what is necessary to classify a given article as a fixture, some indicating that incorporating the article into the plant as a functioning unit is enough.\(^1\) The applicability of this standard to the problem of the prior mortgagee will be discussed below.

When the article sold by the conditional vendor is to replace an article which was included in the prior mortgage, it would seem that the argument that the mortgagee's security was being impaired would carry weight, but thus far the courts have given the point only passing mention.\(^2\) It is generally conceded, however, that an after-acquired property clause is of no avail.\(^3\)

A small minority of jurisdictions have applied the *Teaf v. Hewitt* test with logical severity even in the case of the prior mortgage.\(^4\) The question of whether the article was a fixture or not is determined from the standpoint of appearances, oblivious of the conflicting interests. If the object is considered "realty" it is part of the mortgagee's security since he has a prior lien on all the real estate. This doctrine has been explained by the courts as a logical carry-over from the "title" theory of mortgages,\(^5\) a poor rationalization since the same "logical" result could be, and was,\(^6\) reached in a lien theory jurisdiction. Fortunately this rule is not used when the mortgagee is not on record,\(^7\) but even so it has played havoc with the precedents in the minority jurisdictions, since the courts to avoid hardship have held that heavy and immoveable objects are not fixtures.\(^8\)

The Uniform Conditional Sales Act § 7 was designed primarily to enable a conditional vendor to protect himself against a subsequent pur-

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\(^{1}\) cites various cases.


\(^{3}\) *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. (2d) 273 (1939).


\(^{6}\) *Vorse Co. v. Gilkey*, 132 Me. 311, 320, 170 Atl. 722, 726 (1934); *Greene v. Lampert*, 274 Mass. 386, 174 N. E. 669 (1931); *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698 (1901). Under the minority view the prior mortgagee would be protected regardless of whether any damage would be inflicted, according to one case. *Gaunt v. Allen Lane Co.*, 128 Me. 41, 145 Atl. 255 (1929).

\(^{7}\) *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. (2d) 273 (1939).

\(^{8}\) *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934).


\(^{10}\) *Vorse Co. v. Gilkey*, 132 Me. 311, 320, 170 Atl. 722, 726 (1934); *Greene v. Lampert*, 274 Mass. 386, 174 N. E. 669 (1931); *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698 (1901). Under the minority view the prior mortgagee would be protected regardless of whether any damage would be inflicted, according to one case. *Gaunt v. Allen Lane Co.*, 128 Me. 41, 145 Atl. 255 (1929).

\(^{11}\) *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. (2d) 273 (1939).

\(^{12}\) *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934).

\(^{13}\) *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. (2d) 273 (1939).

\(^{14}\) *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934).

\(^{15}\) *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. (2d) 273 (1939).

\(^{16}\) *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934).

\(^{17}\) *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934).

\(^{18}\) *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. (2d) 273 (1939).

\(^{19}\) *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934).

chaser or mortgagee by recording. It was not the purpose of the Act to change the law as to prior parties, hence the first sentence of the Act perpetuates some of the common law limitations on the power of the conditional seller to remove a fixture. This was to insure that the Act would not empower a conditional vendor to remove a chattel that had so lost its identity as to become part of the realty. Thus, "If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof, and not to be severable wholly or in part without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation." This section, although not so designed, did serve as an excuse for the Wisconsin court to depart from the minority or Massachusetts view, a desirable but not necessarily a logical result.

It is to be remembered that under the Teaf v. Hewitt test, the second factor was "appropriation to the use or purpose of the realty to which it is connected." Many courts so emphasized this factor that it became the prime test with which to decide the cases and physical annexation was somewhat disregarded. The first sentence of §7 of the Uniform Conditional Sales Act quoted supra sets the standard of "material injury to the freehold" as the test for removability. This sentence is broad enough in scope to apply to either prior or subsequent parties, but is the only part of the section applicable to prior parties. The question to be answered under the Act then is whether or not there will be "material injury to the freehold". The majority of the courts before the Act considered physical injury the proper criterion in the case of a prior mortgagee and looking at the Act as a whole it seems certain that such was the intent of the commissioners. Despite this the New Jersey court has construed "material injury" broadly to cover injury to the operating plant. Commonly termed the "institutional" view, this interpretation is an extreme application of the second test laid down in Teaf v. Hewitt, i.e., appropriation of the chattel to the use of the premises. Thus if an article which, although not attached physically to the premises, is indispensable to the purpose to which the premises has been dedicated, it is a "fixture". This test may be entirely proper in determining the rights of the original parties, but as pointed out before, the problem when there is a prior mortgagee is more one of accession than of fixtures. It is unfortunate then that such a construction was given to the act.

The Act has been twisted in some instances to permit even a subsequent mortgagee to take advantage of the institutional view. The second sentence of the Act which is designed to protect subsequent purchasers when the sale is not recorded, is broad enough in scope to cover objects such as heating plants, mail chutes, etc. which would be considered "fixtures" under the institutional view. But when the sale is perfectly recorded and no physical injury will result from removal, the vendor is

25. A case so holding under the Act is Myrhe v. Michigan Silo Co., 220 Wis. 593, 265 N. W. 703 (1936).
protected since the subsequent party has been given effective notice. The New Jersey Court in this situation has permitted the subsequent mortgagee to bring the case under the first sentence of the Act using the institutional view.\textsuperscript{27} This construction has been severely criticised.

Although, as has been shown, the Act has not been satisfactory in all regards, it is a vast improvement over the common law in that an effective system of recording is provided. The gaps and ambiguities can to some extent be remedied by amendments such as the one adopted by Pennsylvania.\textsuperscript{28}

**THE PENNSYLVANIA LAW**

To understand clearly the position of the Pennsylvania courts in relation to the foregoing sections, certain fundamental peculiarities of Pennsylvania law must be kept in mind. The attitude of the courts of this state has been steadfastly adverse to the conditional seller, and when the equities of third parties intervene, the vendor's lien was held inferior.\textsuperscript{29} To overcome this disadvantageous position the bailment lease was resorted to by the seller. When correctly drawn the bailment lease is considered as something entirely different from a conditional sale,\textsuperscript{30} although its purpose is the same. Here the bailor is protected even against innocent third parties.\textsuperscript{31} It is for this reason that until the Conditional Sales Act, as adopted by Pennsylvania, gave the vendor a way to protect himself, the bailment lease was more popular. This will explain the paucity of case law on the conditional vendor-mortgagee relationship before 1925. It is also of the utmost importance to keep in mind that the bailment lease was not included in the Conditional Sales Act when adopted by the Pennsylvania legislature, thus the two devices exist side by side, one regulated by the common law, and one by statute.

In accord with the majority of American jurisdictions the Pennsylvania court uses the "intention" test as the criterion of a fixture.\textsuperscript{32} Thus a bailment lease is valid regardless of recording or notice as against a subsequent mortgagee, if by means of the "intention" test the article is found to be personalty.\textsuperscript{33}

The section of the Uniform Conditional Sales Act dealing with fixtures has been amended several times in this State, but the latest amendment (1935) has yet to be judicially interpreted. The litigation thus far has arisen under the 1925 and 1927 amendments,\textsuperscript{34} which are similar as

\textsuperscript{27} Smyth Sales Corp. v. Norfolk B. & L. Ass'n, 116 N. J. L. 293, 184 Atl. 204 (1936). Justice Holmes took issue with the institutional view as follows: "The question is not whether they were attached to the soil, but we repeat, whether the fact that they were necessary to the working of the brewery gives a preference to the mortgagee. We see no sufficient ground for that result. The class of need to use property belonging to another is not yet recognized by the law as a sufficient ground for authority to appropriate it." Detroit Steel Cooperage Co. v. Sistersville Brewing Co., 233 U. S. 712, 717 (1914).


\textsuperscript{29} Ryle et al. v. Knowles Loom Works, 87 Fed. 976 (C. C. A. 3d, 1898); Ott v. Sweatman, 166 Pa. 217, 31 Atl. 102 (1895).


\textsuperscript{32} Vail v. Weaver, 132 Pa. 363 (a prior mortgagee case; the case is specifically set out on pages 366-368).


\textsuperscript{34} Pa. Stat. Ann. (Purdon, 1931) tit. 69, § 404, containing the 1927 Amendment. The 1925 Amendment is to be found in 1925 P. L. 722.
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regards prior and subsequent mortgagees. It is probable from the nature of conditional sales agreements that there will yet be litigation arising under the two earlier amendments. The first paragraph of this section is the one applicable to subsequent mortgagees and purchasers. It provides that the reservation of title will be void if the goods are so attached "as to form a part" of the realty, unless the record is filed in the prothono-
tary's office. The statute as worded seems to eliminate any possibility of a subsequent mortgagee preventing removal when there is proper re-
cording, as was possible under the Uniform Conditional Sales Act as interpreted by the New Jersey court. No extreme case has as yet arisen under this section, however.

Where the mortgagee is a prior party, what few Pennsylvania com-
mon law cases there are seem in accord with the Massachusetts view, i.e., a blind application of the *Teaf v. Hewitt* test to a situation calling for a test designed to protect the mortgagee's security interest rather than merely deciding whether the object is "realty" or "personalty." The 1925 and 1927 amendments are in accord with the proposition that the problem is one of damage and of protecting the mortgagee's security. The second paragraph provides that unless assented to, such reservation shall be void as against a prior party if the goods are not severable without material injury to the freehold, unless such injury, although material, be such as can be completely repaired and the seller gives a bond for such repairs before removing. The provision for repair by the seller would seem to make the test of what is "material injury" a question of physical dam-
age purely, but this has not been so interpreted by the courts who chose to adopt the institutional idea of damage as did the New Jersey courts.

In so doing, the courts relied on cases not decided under the Act and thus failed to give effect to what seems was the obvious intent of the legis-
lature. The Act provides for a bond for repair; thus, if material injury is construed as injury to the plant or property as a going concern and

35. *Pa. Stat. Ann.* (Purdon, 1931) tit. 69, §404: "First. As against a subsequent purchaser, subsequent mortgagee, or other subsequent encumbrancer of the realty, for value and without notice of the reservation of the property in the goods, such reserva-
tion shall be void as to any goods so attached to the realty as to form a part thereof, unless the conditional sale contract, or a copy thereof, shall be filed, as required in section six, [in prothonotary's office in county in which goods are first kept] before such purchase is made or such mortgage is given or such encumbrance is effected. 'Subse-
quent,' as used in this paragraph, refers to the time of attaching goods to the realty."

36. Note 27 *supra.*


38. Wickes Bros. v. Island Park Association, 229 Pa. 400, 78 Atl. 934 (1911); Bullock Electric Mfg. Co. v. Lehigh Valley Trac. Co., 231 Pa. 129, 80 Atl. 565 (1911). While these cases were not decided the same way, they indicate the same approach to the problem as used by the Massachusetts court.

39. *Pa. Stat. Ann.* (Purdon, 1931) tit. 69, §404: "Second. As against an owner, a prior mortgagee, or other prior encumbrancer of the realty, who has not assented to the reservation of property in the goods, if any of the goods are so attached to the realty as not to be severable without material injury to the freehold, the reservation of property in the goods so attached shall be void, notwithstanding the filing of the contract or a copy thereof, unless such injury, although material, be such as can be completely repaired, and the seller, before retaking such goods, furnishes or tenders to such owner, prior mortgagee, or prior encumbrancer, a good and sufficient bond con-
ditioned for the immediate making of such repairs. 'Prior,' as used in this paragraph, refers to the time of attaching the chattels to the realty."


41. Although there was some indication that the institutional view applied only to manufactories, the more recent decisions do not bear this out. Holland Furnace Co. v.
it is decided that the object is an indispensible part of the plant, to completely repair would mean that the fixture would have to be replaced. The purpose of the Act to protect the vendor was thereby defeated.

It was with this in mind that the Act was amended in 1935. The amended section states in effect that if the conditional sale is recorded before annexation, the chattel shall not be considered as a part of the realty or a part of the operating plant, and it shall be subject to removal against any mortgagee. It provides further that if a prior encumbrancer shall require it, the vendor shall put up a bond to protect said encumbrancer from damage caused to the physical structure or improvements. This clearly makes the test one of physical damage and is stated in such unequivocal terms that there is little doubt that the legislative intent will be carried out. The result of this amendment should be that there will be much less litigation in this field since it does away with ambiguities and necessitates only recording on the part of the vendor to protect himself.

G. N. G.

Concurring Verdicts as a Limitation Upon Grant of New Trial for Insufficiency of the Evidence

In situations where the court may neither direct a verdict nor enter a compulsory nonsuit because there is a disputable question of fact to be decided by the jury, it still retains a measure of control over the case by reason of its ability to set aside a verdict of the jury as supported by insufficient evidence. Although this power of the court is recognized as necessary to the proper operation of contemporary jury trial which employs the general verdict, nevertheless jurists have been conscious of the fact that: "Setting aside the verdict as against the weight of the evidence, is


42. "Goods to be affixed to realty shall not become a part of the said realty, or of the freehold to which they are attached or are to be attached, or of any operating plant of which they may form a part, but shall be treated as severable and subject to removal as against . . . any mortgage . . . until the unpaid balance due . . . has been paid, if, prior to the said affixing or attaching of the goods to the realty, the conditional sale contract . . . shall have been filed in the office of the prothonotary for the county in which the said realty is situate: Provided, however, if an owner or prior encumbrancer of the said realty shall demand a bond to protect him against loss, resulting from damage which may be caused to the land or to the physical structure of the buildings or other improvements to which such goods are attached by the removal of the said goods . . . the conditional seller . . . shall deliver to the said owner or prior encumbrancer a good and sufficient bond, conditioned for the immediate making of such repairs. . . . If the amount cannot be agreed upon by the parties, upon petition by any party at interest the amount shall be fixed by the common pleas court of the county where the conditional sale contract is filed at the sum necessary to repair the damage to the land or to the physical structure of the buildings or other improvements to which such goods are attached. . . ." PA. STAT. ANN. (Purdon, Supp. 1940) tit. 69, § 404.

not the daily bread but the extreme medicine of the law, and like other powerful remedies, should be very sparingly administered. A fear that the court will substitute its judgment for that of the jury and a hesitant recognition of the fact that the power of the judiciary to set aside a verdict as against the weight of the evidence is an encroachment on the constitutional guarantee to trial by jury have led to certain limitations upon the power of the court to set aside verdicts as against the weight of the evidence. It is the purpose of this note to examine some of these limitations.

I. COMMON LAW LIMITATIONS

It often occurs that in ruling upon a motion for new trial the court is confronted with the fact that the verdict requested to be set aside is the second, third, or fourth verdict in the case for the same party. While it is well settled that where there has been an error of law at trial or the verdict is contrary to the charge of the court on a question of law a new trial will be granted innumerable times, confusion arises as to the number of times a verdict for the same party may be set aside as against the weight of the evidence. Much of this confusion arises because the courts fail properly to distinguish between the duty of trial courts and that of appellate courts in passing on motion for new trial on the ground that the verdict is against the weight of the evidence. The trial court is in a position somewhat similar to that of a juror. It has observed the conduct and appearance of the witnesses, has heard the testimony, and is acquainted with the jury. It is obligated to exercise its discretion in weighing the evidence and if clearly satisfied that the verdict is against the weight of the evidence must grant the motion. The appellate court merely decides as a matter of law whether there is any substantial evidence to support the verdict. Thus a decision that an appellate court will refuse to grant a motion for new trial after a number of concuring verdicts does not necessarily indicate that the same limitation is placed upon the trial court.

Cases which involve concuring verdicts fall into distinct categories as follows: (1) cases where application is made to an appellate tribunal either on a rule to show cause why the verdict below should not be set aside, or upon a similar procedure giving the appellate court original hearing upon the motion; (2) cases where motion for new trial has been denied by the trial court or where such a motion has not been presented, but approval of the verdict has been shown by entry of judgment below;
(3) cases in which the trial court has granted a motion for new trial because the verdict is against the weight of the evidence and appeal is taken on the ground that the grant of a new trial was error.\textsuperscript{12}

In the first two categories, the law is comparatively well settled that where there have been two or three concurring verdicts the appellate tribunal will not decree a further new trial for insufficiency of the evidence.\textsuperscript{3}

The reason for this result in the second category is apparent. All that the appellate tribunal need find to allow the verdict to stand is that there is some substantial evidence to support it.\textsuperscript{14} The same result in the first category does not seem so well supported, for here the appellate tribunal is not exercising its usual function as court of review. Having original hearing upon motion for new trial, the appellate tribunal should in this situation be governed by the same rules as those which control a trial court in passing upon a motion for new trial. So governed, its scope of inquiry is not limited to a mere determination of whether there is evidence to support the verdict.

In view of these considerations, a different result might well be expected in the second category from that in the first. That the conclusions are similar is less surprising if consideration is given to the fact that in neither category has the court seen the witnesses, a fact which indicates that a weighing of testimony would be impractical in the second category as well as the first.

In the third category of cases, the attitude of the courts is completely divergent. As a general proposition, appellate courts are extremely reluctant to disturb the trial courts' grant of a new trial for insufficiency of the evidence,\textsuperscript{15} and many jurisdictions hold that, in cases where upon the same or substantially similar evidence the jury upon new trial returns a verdict for the same party and the trial court again grants a motion for new trial on the ground that the verdict is against the weight of the evidence, the second grant of a new trial will not be disturbed.\textsuperscript{16} However, the authority is divided as to whether the trial court may continue to set aside as against the weight of the evidence concurring verdicts for an indeterminate number of times without intervention by the appellate court.

Indication is that in some jurisdictions the trial court might set aside as against the weight of the evidence innumerable concurring verdicts.\textsuperscript{17} However, to avoid this type of protracted litigation\textsuperscript{18} several states have

\begin{itemize}
\item \textsuperscript{13} See notes 10 and 11 supra.
\item \textsuperscript{14} See note 9 supra.
\item \textsuperscript{15} Hall v. Desser, 8 Cal. (2d) 29, 56 P. (2d) 689 (1936); Davis v. Johnson, 332 Mo. 417, 58 S. W. (2d) 746 (1933); Martin v. Parkins, 55 N. D. 359, 213 N. W. 574 (1927); Carter Oil Co. v. Doyal, 147 Okla. 70, 294 Pac. 633 (1930); Ivanicki v. Metropolitan Life Ins. Co., 60 R. I. 498, 199 Atl. 611 (1938).
\item \textsuperscript{16} Davis v. Central States Fire Ins. Co., 121 Kans. 69, 245 Pac. 1062 (1926); Clark v. Jenkins, 162 Mass. 397, 38 N. E. 974 (1894); Park v. Electric Thermostat Co., 75 Minn. 349, 77 N. W. 988 (1899); cf. McCabe v. Lindberg, 99 Wash. 430, 169 Pac. 841 (1918).
\item \textsuperscript{17} See Davis v. Central States Fire Ins. Co., 121 Kans. 69, 245 Pac. 1062 (1926); Clark v. Jenkins, 162 Mass. 397, 38 N. E. 974 (1894).
\item \textsuperscript{18} See Hazzard v. Mayor of Savannah, 77 Ga. 54, 56 (1886); McLucci v. DeCubellis, 12 A. (2d) 216, 218 (R. I. 1940).
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developed the concurring verdicts rule. The rule, if such it may be called, is a crystallization of the common law providing that after a certain number of concurring verdicts the trial court will no longer be allowed to grant a motion for new trial and judgment will be entered upon the last verdict.

In recent times the rule has been applied after the fourth or third concurring verdict, but there is some indication that in Rhode Island it was at one time applied after the second. Although indicated as having a certain flexibility in that it does not apply to verdicts which are "clearly wrong," a careful examination of the cases cited for this proposition indicate that what is meant by "clearly wrong" is that there was no evidence upon which the verdict could be predicated as a matter of law. This then is no exception to the rule, but a mere restatement of the proposition that the verdict cannot stand if against the law.

Proponents of the rule justify its existence upon several grounds: it tends to end protracted litigation, it prevents the possibility that by a continual setting aside of concurring verdicts the parties to the suit will be denied the right to trial by jury, and it takes proper recognition of the principle that in deciding questions of fact laymen are inclined to be as able as the judiciary.

Antagonists of the rule adopt the position "a wrong committed, no matter how often, never makes a right" and indicate that to deny review of a case is in disregard of powers expressly conferred upon courts of appeal. In addition a cogent argument might be made to the effect that here as well as upon a grant of first new trial the opinion of the court below should be given great weight since it presided at the trial.

II. STATUTORY LIMITATIONS

At least four states, Illinois, Kentucky, Missouri, and Ohio have had statutory limitations upon the number of new trials which may

21. See note 19 supra.
25. Ibid.
27. See note 18 supra.
35. Ohio Code Ann. (Throckmorton's Baldwin, 1940) § 11577.
be granted. Both the Illinois and Kentucky statutes have been repealed.

However, it seems wise to include some discussion of at least the Kentucky statute as comparative legislation inasmuch as it contained an express provision with regard to the number of new trials which might be granted upon the ground that the verdict was against the weight of the evidence. This provision was,

"... nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence".

Construction of the statute was severe, the established rule being that even though the first two grants of a new trial were for errors of law a third grant for insufficiency of the evidence would not be permitted to stand, provided that the verdicts were concurring. Thus the party complaining did not receive even one new trial for insufficiency of the evidence although under the statute he was entitled to two. Even though it has been recognized that the legislative intent in repealing the statute was to "liberalize" the practice with regard to the granting of new trials for insufficiency of the evidence, recent enunciation by the Supreme Court of Kentucky indicates that the rule set forth still obtains.

The Ohio statute is somewhat similar to that of Kentucky, and provides,

"The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case ... ."

Although here only one new trial is permissable as compared to two in the provision previously mentioned, this limitation is only that the same court shall not grant more than one new trial. Thus a litigant might obtain as many new trials for insufficiency of the evidence as there were courts.

However, early interpretation was inimical to this proposition. If the trial court had granted one new trial on the ground that the verdict was against the weight of the evidence and then declined to set aside a second verdict for the same party on the same ground because barred by statute, the position of the reviewing court taken in Cleveland R. Co. v. Trendel was that since the trial court could commit no error in refusing to grant a second new trial, the reviewing court could not reverse the trial court's ruling and grant the motion.

Recent application of the statute has been more liberal. In Werner v. Rowley the Trendel case was expressly overruled. The court here stated that although the trial court's power to grant a new trial because of insufficiency of the evidence to support the verdict might be exhausted by one grant, nevertheless the reviewing court would consider the entire

36. ILL. PRACT. ACT (1933) § 68.
38. See note 33 supra.
41. Ibid.
42. See note 35 supra.
43. 101 Ohio 316, 128 N. E. 136 (1920).
44. 129 Ohio 15, 193 N. E. 623 (1934).
45. See note 43 supra.
NOTES

record and, if the verdict was found unsupported, reverse the trial court and grant a new trial.

The Missouri statute differs slightly in form from the two previously mentioned. It provides:

“Only one new trial shall be allowed to either party, except: First, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehaviour . . .” 46

and again

“The court may award a new trial of any issue, upon good cause shown; but not more than one new trial of the same issue shall be granted to any one party”. 47

These provisions have been construed to mean that a trial court’s power to award a new trial because the verdict is against the weight of the evidence is exhausted after one grant, so that a court of review will not reverse a denial of second new trial. 48 However, this interpretation has been liberalized to the extent that a trial court may set aside as against the weight of the evidence a second verdict for the same party provided that such action is taken upon its “. . . own motion . . . and during the same term of court.” 48

Further liberal construction of the provision is shown in that no limitation to the effect that after two grants of new trial because of errors of law the trial court may not grant a further new trial for insufficiency of the evidence if there have been three concurring verdicts, obtains in Missouri. 49 Here the rule is that:

“. . . a proper construction of the statute gives the trial court the right to grant to either party one new trial on the ground of the insufficiency of the evidence to support the verdict of the jury, regardless of the number of new trials that may have been granted to such party upon other grounds.” 50

The repeal of the statutory limitations in Illinois and Kentucky and the increasingly liberal interpretation of the provisions in Missouri and Ohio would seem to indicate that there is even greater need for judicial control over the jury than heretofore. Such action also indicates that if the desired control is to be obtained, the power to grant a new trial on the ground that the verdict is against the weight of the evidence must be reasonably unhampered by legislative enactment.

CONCLUSION

The underlying reasons for the existence of the limitations discussed is that they offer a cure for the evil of protracted litigation, and tend to add another buttress to the already unshakeable institution of trial by jury. In vacuo these are eminently desirable policies. Upon a basis of relative evaluation they would seem to justify the self-imposed limitations of appellate tribunals as to the effect of concurring verdicts upon their

49. See Ewart v. Peniston, 233 Mo. 695, 709, 136 S. W. 422, 425 (1911).
50. See page 88 supra.
51. Kreis v. Missouri P. Ry., 131 Mo. 533, 544, 33 S. W. 64, 67 (1895).
rulings for new trial. They indeed may be said to justify statutory limitations upon the power of such tribunals. However, it is problematical as to whether these considerations justify either the concurring verdicts rule or a statutory limitation upon a trial court’s power to grant a new trial on the ground that the verdict is not supported by sufficient evidence.

Of its essence, the power of the trial court to grant a new trial for insufficiency of the evidence is discretionary. It allows a competent party, accustomed to evaluating testimony and who was present at the proceedings to have a measure of control over the prejudices, passions and misunderstandings of the jury. Retention of flexibility in the number of times this discretion may be exercised seems of very real practical importance.

J. W. S., Jr.

Remedies of a Mortgagee Who Pays Taxes

INTRODUCTION

Under early mortgage law a mortgagee who paid taxes on the mortgaged land was probably not entitled to recover from the mortgagor. Since the mortgage deed purported to convey the fee, the mortgagee was considered the owner, and any taxes assessed against the owner were assessed against the mortgagee. In paying taxes, he was merely satisfying his own obligation and there was no problem of restitution. Covenants were generally made between the parties providing that the mortgagor pay the taxes; if the mortgagee paid them, he could recover in an action on the express promise. Equity first, and then the law courts, took the final step. They realized that the mortgage deed was merely for security purposes, that the mortgagor was still the real owner, and so the tax obligation should remain his. Thus, at present, when a mortgagee pays taxes accruing on the mortgaged land, he should be entitled to restitution from the tax-debtor on the theory that, both at law and in equity, a person who, not being officious, satisfies the obligation of another is entitled to restitution from that other.

If the mortgagee is not a volunteer in paying taxes on the mortgaged property, he is entitled to recover the amount paid. There still remains, however, the problem of the remedy by which he may do so. This seems to vary with the parties involved as well as with the jurisdiction. The variance depends not only upon theoretical analysis but also upon practical considerations.

1. See Clopton v. The Philadelphia & Reading Rr. Co., 54 Pa. 356, 359 (1867): “As such owner . . . the mortgagee was chargeable with the land tax, . . .”


3. 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 599, p. 2360 and n. 5.

4. 3 COOLEY, TAXATION (4th ed. 1924) § 1263, p. 2515: “Where the land is taxed, the mortgagor should pay the taxes on mortgaged land unless the statute provides otherwise; and the mortgagee is not liable for the taxes; . . .”

5. RESTATEMENT, RESTITUTION (1937) §2, comment a; Hope, Officiousness (1929) 15 CORN. L. Q. 25, 205.
Mortgagee's Privilege to Pay Taxes

Real property taxes are not liens upon the land unless made such by statute. Actually, they are generally made first liens even though the tax was assessed subsequent to the recording of a mortgage. Generally, then, a sale for non-payment of taxes would divest a mortgagee of his lien. To prevent this it is often necessary for him to pay the taxes upon the mortgagor's failure to do so. Under such circumstances, the mortgagee is not a volunteer or officious intermeddler and is therefore said to have a privilege to make the payment.

Where a sale under the tax lien will not divest him of his security, the mortgagee would seem to be a volunteer if he took it upon himself to pay the taxes. However, if the mortgagee pays the tax under the belief that it is on property covered by his mortgage, when in fact it is not, he may still recover, for had the facts been as he thought they were he would have had the privilege to pay.

Of course, the above result is reached by the application of general quasi-contract law, and there is nothing about it peculiar to taxes and mortgages. However, the instant facts give additional reasons for the rule because the debt satisfied is one owed to the state or other governing body. Since governments are dependent on taxes as their chief source of revenue, it is desirable that they be paid promptly. Thus, not only is it easy to understand why the courts sometimes go out of their way to encourage payments by the mortgagee, but it is difficult to see why they often go out of their way to discourage the practice.

When Payment Is Before Foreclosure

Ordinarily then, the mortgagee is privileged to pay the taxes when the mortgagor fails to do so, and may recover the amount so expended from the mortgagor whose duty it was to pay.

Under the law of quasi-contracts the mortgagee would apparently have a remedy in general assumpsit. And, according to the rules of equity, he should be subrogated into the rights of the original creditor. However, in spite of the fact that his recovery is based upon the same equities as recoveries by quasi-contract and subrogation, he is generally denied these rights. The majority of jurisdictions argue that, since the privilege to pay the taxes is given to him because of his status as mortgagee, he should be allowed recovery only in that status. Thus, although some

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6. 3 Cooley, Taxation (4th ed. 1924) §§ 1230 (and n. 2 thereto), 1240 n. 65.
7. Id. at 1240 n. 65.
9. See note 5 supra.
10. Central Wisconsin Trust Co. v. Swenson, 222 Wis. 331, 267 N. W. 307 (1936). The case is decided on the basis of Restatement, Restitution (Tent. Draft No. 1, 1936) § 38 (1). This is § 43 of the official draft.
11. This is in accordance with the general rules of quasi-contracts (Woodward, Quasi-Contracts (1913) § 10) and subrogation (Harris, Subrogation (1889) §§ 340, p. 224).
12. See notes 10 and 11 supra.
15. Walsh, Mortgages (1934) § 24, p. 175.
16. Monroe v. Busick, 225 Iowa 797, 261 N. W. 82 (1932); McCrossen v. Harris, 25 Kan. 178, 26 Pac. 883 (1886); Vincent v. Moore, 51 Mich. 618, 17 N. W. 81 (1883); Hill v. Townley, 45 Minn. 167, 47 N. W. 653 (1891) (decided on basis of a special statute of limitations for mortgages and a statute expressly allowing recovery for taxes in an action to recover the mortgage debt); Horrigan v. Wellmuth, 77 Mo.
of the majority jurisdictions do speak of subrogating the mortgagee to the rights of the state, in fact they only permit him to attach the amount of paid taxes to his mortgage debt. This means that the mortgagee can only recover for the tax payment when he recovers on the mortgage. Often the mortgage debt will not be due for a considerable time, and the mortgagee must wait for repayment of the amount advanced, thus enabling the mortgagor to force the mortgagee to give an additional loan on the same security. The harshness of the result may be alleviated by the insertion of an acceleration clause permitting foreclosure when the mortgagor is behind in his taxes. This would not be unfair to the mortgagor since nonpayment of taxes is generally a sign of tremendous decline in the value of the property and weakened credit of the mortgagor.

It frequently happens that the mortgagee does not add the amount of paid taxes to his deficiency judgment after foreclosure. Later, he discovers his error and wishes to secure a second judgment for that sum. In this case a refusal to allow the second action may be justified by the undesirability of permitting a plaintiff to assert his claim in two suits when one will suffice.

Often the mortgagee is desirous of securing the state's preference when the debtor-taxpayer is insolvent. Since this would merely be subrogating the mortgagee into already existing rights for the amount of the taxes, creditors would not be adversely affected. However, some states will not allow subrogation to this right on the theory that the preference is given to the state as a sovereign and that no one may be subrogated to it. In view of the policy mentioned above, it seems a different result would be desirable so as to give the mortgagee a greater inducement to pay the taxes. And this is especially so where, as in this instance, no harm is done anyone by conferring the right upon him.

**When Payment Is At Foreclosure**

The amount due for taxes is generally paid first, out of the proceeds of the foreclosure sale under the mortgage. This amounts to payment by the mortgagee since it reduces the amount he realizes from the sale, and should entitle him to be subrogated to the rights of the state. The mortgagee does secure recompense through an increase in the amount of the deficiency judgment awarded him and, where the tax-debtor is the mortgagor, the result is theoretically good. Of course, if the mortgagor is insolvent, which is probably the usual situation, any remedy against him is worthless.

If the mortgagor has conveyed his interest to an assuming grantee, the above situation becomes more complex. In such an instance the tax debt may be one arising when the mortgagor was in possession, or it may be one accruing after the grantee received the land. Where the tax accrued before the transfer, the mortgagor remains liable for the tax. The additional complication arises out of the fact that the grantee is primarily liable


18. To the effect that this priority is independent of statute see 3 Cooley, *Taxation* (4th ed. 1924) § 1231.

for the mortgage debt. Under the "recovery for taxes and mortgage debt in the same action" theory, this is generally taken care of by a joint judgment against both the mortgagor and his grantee. The same reasoning is involved when the tax is one accruing after the transfer, although the grantee is liable for the tax while the mortgagor-grantor may not be.

If the mortgagor has conveyed his land to a non-assuming grantee, it makes considerable difference whether or not payment out of the proceeds of the foreclosure sale is looked upon as payment by the mortgagee. If it is not considered payment by him, then limiting the mortgagee to recovery from the mortgagor on the deficiency judgment is the logical result. Since a tax debt accruing after the transfer is the personal liability of the non-assuming grantee, the mortgagor would probably then be permitted recovery from him. In view of the general desire to avoid circuity of litigation, it would seem much simpler to say that payment out of the proceeds is payment by the mortgagee and give him a separate action for that amount against the non-assuming grantee. Refusal to permit the separate action would really work a hardship in those cases where the mortgagor is insolvent, in which event the mortgagee goes supperless to bed.

WHEN PAYMENT IS AFTER FORECLOSURE

When land is sold under a mortgage foreclosure, the proceeds may or may not be applied first to the payment of prior tax liens. In the latter case, the land is conveyed "under and subject to" the lien and becomes in effect the primary debtor. In the former case, the lien may be divested in full or only to the extent that it is paid.

Let us consider the possibilities of recourse when, the sale having been "under and subject", the taxes are subsequently paid by the purchaser to protect his title. The general rule, whether the purchaser be the mortgagor or an outsider, is that the bid at the sale equalled the value of the land less the amount of the accrued taxes. Thus, when the tax is finally paid, there is no recovery from the tax-debtor. The situation is analogous to that where a non-assuming grantee pays the mortgagor an amount equal to the value less the mortgage. The land being the principal debtor, recovery after paying the debt would be from his own land. A party cannot purchase land at a reduced rate because there are liens upon it and then claim from the seller the amount paid to satisfy the liens. This would, in effect, be making the seller pay twice.

Supposing, however, the proceeds of the sale are to be applied to the payment of taxes. The situation is now a trifle more complex. The sale may yield more or less than the tax lien. Or it may result in a sum just equal to it. If the lien is fully satisfied, the situation reduces itself to that considered when payment is at the foreclosure sale.

It is possible that the property will be sold for less than the tax debt. As to the amount that is received, the mortgagee is in the same position as

20. For a discussion of this liability see Note, Related Problems in the Assumption of a Mortgage Debt (1940) 88 U. of Pa. L. Rev. 611.
21. See Note (1935) 83 U. of Pa. L. Rev. 780, 785, for a discussion of attempts by the mortgagor to relieve himself of the burden of taxation when the land becomes worth less than the taxes. The conclusion is reached that unless he rids himself of all interests by the transfer of title, he will not be relieved of the duty of paying taxes.
23. See Note (1935) 83 U. of Pa. L. Rev. 780, 785, for a discussion of attempts by the mortgagor to relieve himself of the burden of taxation when the land becomes worth less than the taxes. The conclusion is reached that unless he rids himself of all interests by the transfer of title, he will not be relieved of the duty of paying taxes.
24. Semans v. Harvey, 52 Ind. 331, 334 (1876).
before. But, if the purchaser pays the rest of the taxes, may he recover the amount from the original tax-debtor? Is the answer any different if the purchaser is the mortgagee?

The answers depend on the meaning of the bid at the sale. We saw before, that where none of the proceeds are to go for taxes, the bid represents the value of the land less the amount due for taxes. If the sale is one in which all prior liens are divested, whether or not they are fully satisfied, then the bid represents the value of the land. Which of the two meanings should this bid have? Or should it have neither of them? In the first case, when the tax equals the value of the land, the bid could be nothing but zero. In the situation now under discussion either a bid of zero or a bid equal to the value of the land could be logically supported. Our problem arises, of course, only when the bid is less than the taxes, but more than zero. It might be that this sum represents the total value of the land, free and clear, to the purchaser. Or it might mean that the land is worth the full amount of the taxes but that the purchaser does not have the ready cash to pay it all. Under the first interpretation, recovery should be permitted when the taxes are finally paid; under the second, it should not.26

The courts do not appear to make the above distinctions. In general, the mortgagee cannot recover the amount. The result is based on the assumption that the amount of the lien is deducted from the value of the land when the bid is made and that the judicial sale is without warranties. Thus, the purchaser takes whatever the debtor had to sell. If he wants more, he must pay the additional sum required to free the land of the tax lien.27 The same result will probably be reached by these courts if the purchaser at the sale is an outsider.

Pennsylvania, however, allowed recovery in this situation against a non-assuming grantee who was personally liable for the taxes.28 The court did not even consider the possibility that the mortgagee might have decreased his bid because of the lien. Obviously, the result is correct so long as the bid is interpreted to equal the absolute value of the land, free and clear of the lien. Since the court relied upon the fact that the mortgagee could have paid the taxes before the sale and then have recovered the amount paid, it is possible that, when the purchaser is other than the mortgagee, a different result will be reached.

When Payment Is by Purchase at Tax Sale

In addition to being personally liable for the taxes the mortgagor owes a duty to the mortgagee not to permit the land to become encumbered so as to impair the mortgagee's security. Therefore, the rule that he cannot set up a tax deed to cut off the mortgage lien is logical and salutary. Such a purchase upon a tax sale by the mortgagor is considered merely a payment of the taxes.

26. Going back to the analogy of the non-assuming grantee, we find little to help us. It is just as difficult to interpret a purchase price equal to more than the value of the equity of redemption. As between the mortgagor and his grantee, is the land the primary debtor or is the mortgagor? The same possibilities are open to us here as in the tax situation.

Of course, a discussion of this nature must be based on the theory of free bidding. It is admitted that in fact there is probably little or no free bidding.


At least two states, however, have permitted transactions apparently
designed to circumvent this result. Thus, in Wisconsin, the wife of
the tax-debtor bought the tax title and entered into possession with her hus-
band acting as her general manager. Because she purchased the title with
her own funds, the court said that the fact that her husband could not buy
a good title would not bar her from doing so. Although the court did
require that the purchase be in good faith, just what facts would indicate
bad faith, if the instant situation did not, is not at all clear. And, in Iowa,
the wife, who joined in the mortgage deed but did not make herself liable
for taxes, purchased the title from the holder of the tax deed. Although
the husband would only be considered as having redeemed the land from
the tax sale, the court held that the wife received a title free from the
mortgage lien. Here also the court required the parties to act in good
faith. Once again, however, the question arises as to what would be
necessary to prove bad faith. Perhaps there should be a presumption that
the parties acted in bad faith. At least one case stated the wife's incapacity
to purchase good title at such a sale as a matter of law.

The mortgagee is under no duty to pay the taxes. That he has the
privilege of so doing would not seem sufficient to bar him from buying a
good title at a tax sale. However, to discourage the mortgagee from wait-
ing until the sale before paying the taxes, most states will not permit
him to buy a clear title. This "purchase", therefore, only amounts to pay-
ment of the tax debt and the mortgagee is in the same position he would
have been in had he paid without a sale. Tiffany says:

"The courts do not clearly explain the grounds upon which this
view is based, and not infrequently say little more than that since the
mortgagor and mortgagee have a common interest in the payment of
taxes and in the protection of the property against tax titles, it is
in equitable for one to acquire such a title and to assert it against the
other, without, however, explaining why it is inequitable for the mort-
gagee, who owes no duty to the mortgagor to pay the taxes, thus to
take advantage of the mortgagor's default in this regard. Occasionally
the courts speak as if there were some sort of trust relation be-
tween the parties, which, however, is not the case. The more satis-
factory ground upon which to base the doctrine of these decisions
appears to be that, it being for the advantage of the state that taxes
be promptly paid, and the right to purchase at tax sale being unneces-
sary for the protection of the mortgagee, it is against public policy to
allow the mortgagee . . . to acquire a tax title . . . ." 33

Since the mortgagor himself cannot buy a good tax title, his grantee,
if he assumes the mortgage, is generally held unable to do so, and this
result seems to be both logical and desirable. However, a grantee who
takes under and subject to, but not assuming, a mortgage has been per-

Rev. 583.
32. Cases from 18 states have been found on this point; 11 of these states, Ark.,
Conn., Ill., Iowa, Mich., N. H., R. I., S. D., Wash., W. Va., Wis., will not permit a
mortgagee to buy a good title; Fla., Kan., La., N. Y., Okla., Penna., Tenn., will let
him do so. See 5 TIFFANY, LAW OF REAL PROPERTY (3d ed. 1939) § 1425 n. 3 and n. 6.
33. 5 TIFFANY, LAW OF REAL PROPERTY (3d ed. 1939) § 1425, pp. 340, 341.
34. Union Central Life Ins. Co. v. Parks, 134 Ore. 144, 92 Pac. 304 (1930). Sim-
ilar decisions have been handed down in Iowa, Kan., Me., Md., Mich., Minn., Nev.,
Wis. See 5 TIFFANY, LAW OF REAL PROPERTY (3d ed. 1939) § 1425 n. 1.
mitted to purchase a title free and clear at the tax sale. Such a result allows the non-assuming grantee, by his own fault, to divest his land of a lien otherwise on it, although the reason preventing the mortgagor or his assuming grantee from buying is still present. The different result is based on the theory that, there being no privity between the non-assuming grantee and the mortgagee, the grantee owes no duty to the mortgagee to pay the taxes.

Of course, if the mortgagee cannot buy a good title, the use of a strawman will not be allowed. But if there is no fraud or collusion, he can acquire clear title from a purchaser at such sale, even if the transaction occurs immediately after the tax sale. The use of this insulation does not seem justified. If the courts permit it, they should go all the way and allow a direct purchase. Since they do not wish to do so, and consider a direct purchase as payment of the taxes, the logical result here would be to say that the indirect purchase is merely a redemption from the tax sale.

When There Is More Than One Mortgagor

As may be expected, some of these states which permit the senior mortgagee restitution only by way of tacking also limit a junior mortgagee's right in the same manner. Such a ruling may be bad where the tacking results in giving the senior mortgagee one lien for both sums, rather than two liens which he could assert independently; but the rule is more harsh as applied to a junior mortgagee, since it gives him a junior lien for the total amount when part of the amount was originally a first lien. This refusal to permit a prior claim for the taxes is sometimes based on the theory that the junior mortgagee has contracted for a lesser security for taxes as well as for the mortgage debt. However, limiting a junior mortgagee in this way seems to give the senior one an advantage which he neither bargained for nor expected. Realizing that this rule is not logical and that it discourages a junior lien holder from paying taxes, some jurisdictions allow him to be subrogated to a lien of the same rank as the tax lien and New York permits him to exercise his two liens independent of one another. No matter how many mortgages there are on the property, the mortgagor is considered the owner and, as such, remains liable for the taxes. Ordinarily a tax sale will destroy all mortgage liens, and therefore all mortgagees have the right that the mortgagor pay the tax. Although no mortgagee has the right that another should pay, each mortgagee has the privilege, in order to protect his own interests, of doing so.

36. Id. at 273, 140 Pac. at 855.
37. This reasoning might still be outweighed by the desire to encourage the mortgagee to pay the taxes at an earlier date.
38. Cases so holding from Ill., Iowa, Mich., Miss., N. H., and Wash., are cited in 5 TIFFANY, LAW OF REAL PROPERTY (3d ed. 1939) §1425 n. 11.
42. Nocker v. Howry, 119 Mich. 626, 78 N. W. 669 (1899); McKenzie v. Evans, 96 Mont. 1, 29 P. (2d) 657 (1934); Chrisman v. Hough, 146 Mo. 102, 47 S. W. 941 (1898); Fiacre v. Chapman, 32 N. J. Eq. 463 (1880).
However, if payment by the junior mortgagee prevents the senior one from foreclosing under an acceleration clause, the junior mortgagee is limited to recovering the amount so paid only after the senior mortgagee has received his share.\footnote{44} If the only purpose of the acceleration clause were to prevent defaults which would impair the security, this result would not be very laudatory. When it is realized, however, that a tax default may be an indication of financial irresponsibility of the mortgagor or a sign that the land is declining in value, this right to accelerate is seen to be extremely important.\footnote{45} Furthermore, payment in this situation is not primarily to prevent a tax sale, but to prevent the senior mortgagee from destroying the value of the junior mortgagee’s lien by accelerating the maturity. Thus the result is justifiable.

Just as the mortgagor cannot set up a tax title against a senior mortgagee, he cannot do so against a junior one. And, if the senior mortgagee cannot assert a tax title against the mortgagor, he may not assert it against the junior mortgagee.\footnote{46}

The same reasoning that precludes a senior mortgagee from buying a good tax title is applicable to a junior mortgagee.\footnote{47} However, not all jurisdictions permitting the senior mortgagee to buy a good tax title allow the junior mortgagee to do so. This result is reached on the theory that the junior mortgagee, having an interest in the equity of redemption only, is in a position similar to that of the mortgagor.\footnote{48} This limitation upon the junior mortgagee has been carried to the point where he may not buy a good tax title, even after foreclosure by the senior mortgagee has destroyed his lien, so long as the statutory period of redemption has not run.\footnote{49}

\textbf{THE SITUATION IN PENNSYLVANIA}

This problem has been treated differently in Pennsylvania. Since \textit{Hogg v. Longstreth},\footnote{50} in 1881, an action in general assumpsit was available to the mortgagee for taxes paid. This case involved taxes accruing while the equity of redemption was owned by a non-assuming grantee of the mortgagor. The mortgagee foreclosed and purchased the title at the sale for less than the amount of the accrued taxes. Subsequently, to prevent his title from being divested, the mortgagee paid the outstanding accrued taxes and was permitted to recover that amount from the non-assuming grantee. The court used general quasi-contract language to permit the recovery: “He who is compelled to pay another’s debt, because of his [the debtor’s] omission to do so, may recover on the ground that the law infers that the debtor requested such payment.”\footnote{51} Although the facts of this case present the mortgagee’s claim for an independent action in general assumpsit in its strongest light,\footnote{52} the language of the decision is broad enough to allow such a recovery in a great variety of situations.


\footnote{45.} Ibid. and (1934) 29 ILL. L. REV. 123.

\footnote{46.} 5 \textsc{ Tiffany, Law of Real Property} (3d ed. 1939) § 1425 n. 10 and text thereto.

\footnote{47.} Chrisman v. Hough, 146 Mo. 102, 47 S. W. 941 (1898).

\footnote{48.} (1929) 29 COLO. L. REV. 93. Even though bought from a third person who bought at the sale, the title could not be set up against the first mortgagee.


\footnote{50.} 97 Pa. 255 (1881).

\footnote{51.} Id. at 260.

\footnote{52.} Assuming of course that the bid represents the full value of the land.
Subsequent cases broadened the application of this doctrine. The mortgagee in these cases was permitted to recover in general assumpsit, even though the tax payment was made out of the proceeds of the foreclosure sale, the proceeds being sufficient to pay the accrued taxes in full.53 Once again the defendants were non-assuming grantees, and hence not liable for the mortgage debt. This situation did not present as many equities in the mortgagee’s favor as the Hogg case because here he did not make a direct payment from his own pocket. These decisions, moreover, did not stress the fact that the defendant was a non-assuming grantee. Thus, when the situation arose where the defendant was other than a non-assuming grantee, the courts continued to apply the same rule.54

Finally, in Sloan v. Hirsch,55 it was argued that Hogg v. Longstreth and the cases following it were unique since they arose under a statute applying to Philadelphia which allowed the taxing body to sue in assumpsit for the taxes, and that the mortgagee was allowed the taxing body’s rights on the theory of subrogation rather than on an independent contract right. This argument was refused; the court held that so long as the tax statute made the tax a personal liability of the registered owner,56 general assumpsit would lie. On this basis, a mortgagee, attempting to secure a double recovery, brought assumpsit against the registered owner (a non-assuming grantee) after having been paid by the mortgagor the full amount of the mortgage debt and tax expenditures.57 As would be expected, the court held that one payment barred a second recovery.

When it was clear that the grantee was an irresponsible person to whom title had been transferred to relieve the mortgagor of the tax burden, Pennsylvania has even allowed recovery against the mortgagor or his grantee at the mortgagee’s option.58 However, where the transferee is the naked holder of the title with the mortgagor remaining the real owner so far as receipt of benefits are concerned, a mortgagee knowing the facts could not recover from the registered owner.59 Just why the court reached this result is not too apparent. The case has been criticized60 because the grantee is the prima facie owner and it would seem to be his own fault if he were held liable for the taxes. The uniqueness of the case is on its facts because it is seldom that such transferees have anything worth suing for.

But where the transferee was given the title for security purposes and also had the right to possession, the court held that this was not such a naked ownership as would relieve him of liability.61


54. Peoples-Pittsburgh Trust Co. v. De Lucia, 86 P. L. J. 328 (C. P. Allegheny Co. 1938). Of course, in this situation, the policy of settling all claims in one action becomes so strong that the result reached by the Pennsylvania courts is open to criticism.

55. 30 D. & C. 163 (Pa. 1937).

56. For a case holding that general assumpsit will not lie if the debt is not a personal liability upon the registered owner, see Theobald v. Sylvester, 27 Pa. Super. 362 (1905).


60. See opinion of Justice Kephart in the Bergson case, cited note 58 supra, at 56, 159 Atl. at 35.

Although an action in general assumpsit does not give the mortgagee either a lien or a preferred claim on the land, the mortgagee usually does not suffer thereby because often he was the purchaser at the foreclosure sale. The mortgagee is permitted to recover in a convenient manner against the party primarily liable for the taxes, independent of recovery of the mortgage debt. Furthermore, when the situation arises where the mortgagor desires subrogation, the Pennsylvania courts will allow it. No case has arisen in Pennsylvania where a first mortgagee wanted to be subrogated to the state's lien without tacking the lien to his mortgage debt. In every case that has arisen, he has been content to recover for taxes and debt in one proceeding. But there seems to be no Pennsylvania policy which would require him to combine both liens.

The fundamental policy is to encourage the payment of taxes. Therefore, a rule should be adopted which tends to encourage payment by anyone who has an interest therein. Pennsylvania, by permitting the mortgagee to recover within the bounds of general quasi-contract and equitable principles, has given this encouragement and therefore seems to have developed the best solution to this problem.

N. H. A.


62. See Pennsylvania Co., etc. v. Bergson, 397 Pa. 44, 55, 159 Atl. 32, 35 (1932), and cases cited therein.

63. It has been pointed out in §103 of the Pennsylvania Annotations to the Restatement of Restitution that the Pennsylvania cases make no reference to statutes under which the ordinary tax sale will not divest otherwise prior mortgages, recorded before the tax became a lien. The question is raised as to whether under these statutes the mortgagee is not a volunteer when he pays taxes. Perhaps the answer can be found in Note Divestiture of Liens in Pennsylvania [(1940) 89 U. of Pa. L. Rev. 373, 383] where reference is made to a 1923 statute [PA. STAT. ANN. (Purdon, 1931) tit. 53, §2051], which provides a specific method for a tax sale which will divest all liens. The subsequent acts do not seem to have repealed it. Thus, sale under a tax lien still has the power to divest a previous mortgage lien. See, also, City of Erie v. A Piece of Land, etc., 14 A. (2d) 428 (Pa. 1940), (1940) 89 U. of PA. L. Rev. 119.