THE MORTGAGE THEORY OF PENNSYLVANIA.

"A dull topic," observed a literary member of the bar when informed of the title of this paper. But dullness, like other things mundane, is relative; and in this day of drab short stories and dreary long ones, even a form book may be a pleasant oasis in a desert of realism. Mortgages, however, have something of the sombre quality characteristic of present day literature. No one would think of resorting to this prosaic, this sordid method of replenishing his treasury if he could induce some romantic friend to loan without security; the deacon and his mortgage add that necessary element of chastening gloom to the motion picture scenario, which adds zest to the final triumph of virtuous poverty over the machinations of vicious wealth. Much might be said for the human side of mortgages, but this is a technical magazine not given to such frivolities. Nevertheless anyone who has lingered on "Main Street" or climbed "Riceyman's Steps" need not fear a momentary glance at this depressing subject.

As is well known, there are in the United States two views as to the nature of a mortgage. By the common law doctrine, or so-called "title theory" a mortgage is, strictly speaking, at law a conveyance to the mortgagee subject to a provision that if the debt is paid on a prescribed day the mortgagor may re-enter. But in equity the debt is the principal thing and the conveyance a mere accessory, so that while the legal title is in the mortgagee, it can be used only for the purpose of enforcing his debt against the mortgagor. By the second, or so-called "lien theory," the title to the mortgaged land remains in the mortgagor and the mortgage is nothing but a security or lien for the debt, passing no estate to the mortgagee and giving him no right to possession until after foreclosure. The beginnings of this second doctrine, which owes its extensive adoption chiefly to the influence of some early cases in New York, the writer has discussed elsewhere.[1] An examination of the cases shows in

[1] Mortgages—The Genesis of the Lien Theory, 23 YALE LAW JOURNAL 233 (1923).

many instances confusion of thought and contradiction of views, and it cannot be said that either doctrine is upheld in its full logical consequences in the jurisdictions that profess to support it. Indeed as Judge Jones has pointed out there are some incongruities in both theories and entire success has never attended attempts to state a harmonious and complete system with regard to mortgages in this country.[2] It is not therefore in a spirit of criticism that the conflicting dicta on the nature of a mortgage in Pennsylvania are here gathered together; such inconsistencies may be plentifully illustrated in other jurisdictions, but rather that, so collected, the data may possibly be of use in throwing light on the subect, should occasion arise.

That lack of harmony exists may be illustrated by statements made but two years apart in the Supreme Court of the United States. "Courts of Equity," says Mr. Justice Strong in *Brobst v. Brock*,[3] "have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition may enter, or maintain ejectment for the land. And having entered he cannot be dispossessed by the mortgagor so long as the mortgage continues in force." On the other hand, it is said by Mr. Justice Field: "The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court." [4] Such contradictory impressions of the state of the law are justified if, aside from their context, the statements of the state judges are placed in juxtaposition. Perhaps the strongest statement of the title theory is that of Chief Justice Agnew in *Tryon v. Munson*: [5]

[2] Jones on Mortgages (7th ed.), Sec. 14.
[3] 77 U. S. 519 (1870) at p. 530.
[4] State Tax on Foreign Held Bonds, 82 U. S. 300 (1872) at p. 322. See also Savings & Loan Society v. Multnomah Co., 169 U. S. 421 (1897).
[5] 77 Pa. 250 (1874).

"The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made. He may, therefore, enter at pleasure, and take actual possession—use the land and reap its profits. Now this title or lawful right to possess, and actual *pedis possessio,* are not ideal or contemplative merely, but are real and tangible. True, the right is conditional, and will cease on payment of the debt; but until the condition is performed, the title and possession are as substantial and real as though they were absolute. The evidence of this is that the mortgagee may dispossess and hold out the mortgagor until he performs the condition, or until the perception of the profits reaches the same result. Thus we perceive an interest or estate in the land itself, capable of enjoyment, and enabling the mortgagee to grasp and hold it actually, and not a mere lien or potentiality, to follow it by legal process and condemn it for payment."

In contrast it is said by the court in *McIntyre v. Velte*: [6] "The mortgage is but a security for the payment of money with a right of lien upon the mortgaged premises to enforce payment. It is not stamped with the character of real estate, but is a bare incumbrance or charge." In *Wilson v. Shoenberger's Executors,*[7] it is said: "It is settled law in Pennsylvania that though in form a conveyance of the title, it is in reality, both at law and in equity, only a security for the payment of money or performance of the alleged contract."

Such contradictions would seem to justify the dictum of Judge McPherson in a case referred to later that a mortgage in Pennsylvania is held to be "either an estate or a lien as the equities of the particular case may require." Yet there is nothing particularly abstruse or difficult about Pennsylvania mortgage law. On the contrary its methods of conveyance and procedure have been settled for many generations. The form in

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[6] 153 Pa. 350, 25 Atl. 739 (1893).

[7] 31 Pa. 295 (1858), Woodward, *J. Accord:* Asay v. Hoover, 5 Pa. 21 (1846); Witmer's Appeal, 45 Pa. 455 (1863); Lennig's Estate, 52 Pa. 135 (1866).

common use since colonial days,[8] a simplification of the form used in the mother country, may seem elaborate when compared with the brief statutory forms of other states, but it enjoys the advantage of a background of authority, and its sufficiency is attested by the fact that it has, in ordinary transactions, never been supplanted by the trust deed form as has occurred in so many jurisdictions.

The mortgage law of Pennsylvania, it is needless to say, has been profoundly affected by the colonial Act of January 12, 1705[9] for the taking of land in execution for debts. This act, after dealing with ordinary executions, went on to explain that, through the death, insolvency and neglect of mortgagors, mortgages have ceased to be an effectual security, "considering how low the annual profits of tenements and improved lands are here, and the discouragements which mortgagees meet with by reason of the equity of redemption remaining in the mortgagors," and therefore provided that, after default, a writ of *scire facias* should issue against the mortgagor his heir, executors or administrators and after judgment a writ of *levari facias* should issue to sell the mortgaged premises at public sale, the purchaser to enjoy the same "freed from all equity and benefit of redemption and all other encumbrances made or suffered by the mortgagors." This act on submission to the Queen in council was allowed to become a law, the attorney general having reported to the Lords Commissioners for Trade and Plantations that he found nothing therein prejudicial to the Crown.[10] As the insecurity of debts in the provinces was long a grievance of the English merchants, the act was, probably, a welcome one, however wide its departure from English practice; for foreclosure by bill in equity was impossible, as there was at that time no court of chancery in Pennsylvania. There are certain advantages in this statutory procedure which afford the mortgagee a remedy

[8] See Graydon's Forms (1811) 114; Dunlap's Forms (1852) 459 and compare West's Symboleography (1632) Sec. 409, *et seq.*; the Compleat Clark (1664) 714. There is a strong resemblance between the Delaware, New Jersey, and Pennsylvania forms.

[9] 2 Statutes at Large (Pa.) 244, Sec. 3; 1 Smith's Laws of Pa. 57, Sec. 6.

[10] 2 Statutes at Large (Pa.) 527.

closely resembling that of an ordinary execution creditor; it avoids the slow, elaborate and expensive procedure by bill in equity, with the necessity of making subsequent lienors parties to foreclose their right. Seemingly drastic, it has in fact some of the characteristics of the modern foreclosure by power of sale which has superseded equitable foreclosure in many jurisdictions. One disadvantage was that the writ could not issue until twelve months after the last payment became due thereby driving the mortgagee in many instances, especially in the case of instalment mortgages, to an action of ejectment. To avoid this it became the practice to insert in the mortgage a provision that in case of default in payment of the principal debt or of interest for the space of thirty days after any payment had become due, the mortgagee might sue out a *scire facias* forthwith and proceed to judgment and execution.[11] The remedies, therefore, open to the mortgagee on default were an action at law on the bond or other evidence of debt usually accompanying the mortgage; the statutory action under the act of 1705 for the sale of the land and ejectment for the purpose of obtaining possession of the land.[12] There is, however, aside from the act of 1705 no general provision for the foreclosure of the equity of redemption.[13]

That ejectment would lie by the mortgagee against the mortgagor to obtain possession of the mortgaged lands may be taken as conceded; it is so stated as early as 1789 in *Levinz v. Will*[14] by Chief Justice McKean. In *Smith v. Shuler*,[15] a mortgage was given to secure thirteen hundred pounds by yearly instalments of one hundred pounds each. Three of these instal-

[11] 2 Troubat & Haly's Practice (Wharton's Ed. 1853) 307.

[12] McCall v. Lenox, 9 S. & R. 302 (1823); Smith v. Shuler, 12 S. & R. 240 (1824); Scott v. Fields, 7 Watts 360 (1838); Irwin v. Shoemaker, 8 W. & S. 75 (1844). As to proceedings in equity on trust deed mortgages, see Ashurst v. Montour Iron Co., 35 Pa. 30 (1860); Youngman v. Elmira R. Co., 65 Pa. 278 (1870).

[13] Dorrow v. Kelly, 1 Dall. 142 (Pa. 1785). But as to trust deed mortgages see Ashurst v. Iron Co., 35 Pa. 30 (1860); Norristown Trust Co. v. Montgomery Transit Co., 276 Pa. 488, 120 Atl. 452 (1923).

[14] 1 Dall. 430 (Pa. 1789). See also Lessee of Simpson v. Ammons, 1 Binney 175 (1806); Moliere v. Noe, 4 Dall. 450 (Pa. 1806).

[15] 12 S. & R. 240 (1824).

ments were due and unpaid and ten were not yet due when the mortgagee brought ejectment. It was contended that the act of 1705 precluded a recovery. "There would be good ground for this argument," said Chief Justice Tilghman, "if the mortgagee were to extinguish the equity of redemption by his recovery in ejectment. But it is not so, upon his entry after judgment, he is accountable for the profits; and the mortgagor would be entitled to repossession on payment or tender of so much of the principal as was due, all arrears of interest and the costs of suit." In the present instance, he went on to say, it would be ten years before the last payment was due and it would be unjust if the mortgagor could keep and enjoy the land all this time without paying principal or interest. In *Knaub v. Esseck*,[16] it was said: "As to the form of action, it has always been held that ejectment lies on a mortgage, because the act which provides a *scire facias* gives no remedy where the object is not to turn the land into money."

According to Judge Jones,[17] the practical distinction between the title and lien theories of mortgage lies in the fact that under the title theory the mortgagee is entitled to immediate possession of the mortgaged property as an incident to the title, whereas, under the lien theory the mortgagee is not entitled to possession until foreclosure. How do the cases meet this test? In *Youngman v. Elmira R. Co.*[18] it is said by Mr. Justice Sharswood: "That a mortgagee or his assignee may maintain ejectment and recover possession of the mortgaged property before the condition is broken, unless there is a stipulation in the instrument to the contrary, is too well settled in this state to be any longer a subject of question." And in *Tryon v. Munson*[19] Mr. Justice Agnew, as quoted above, states the same principle

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[16] 2 Watts 282 (1834). See also Twitchell v. McMurtrie, 1 W. N. C. 407 (Pa. 1875); Bower v. Fenn, 90 Pa. 359 (1879); Estate of Hirst, 38 Leg. Int. 276 (Pa. 1881).

[17] Jones on Mortgages (7th Ed.) Sec. 15.

[18] 65 Pa. 278 (1870).

[19] Note 5, *supra*. In Mallissee v. Keown, 226 Pa. 74, 74 Atl. 1128 (1909) a mortgagee out of possession who had taken a lease from the owner was, after default under the lease, ousted from possession.

even more emphatically. In *Fluck v. Replogle*[20] ejectment brought by the assignee of a mortgage was sustained, Mr. Justice Rogers saying: "That the mortgagee has a right to recover possession immediately on the execution of the mortgage, results from the nature of the instrument itself. A mortgage is the absolute conveyance of the mortgaged premises to be defeated only on payment of the money at the day stipulated by the parties. Unless there is an agreement to the contrary, the mortgagee has a right to the immediate possession . . . The possession of the mortgagor is the possession of the mortgagee." It seems almost unnecessary to labor the point. The title of the mortgagee is recognized by Chief Justice Lewis in *Martin v. Jackson*,[21] and by the court in *Nerpel's Appeal*.[22] Mortgages are, says Mr. Justice Strong in *Britton's Appeal*,[23] "in form defeasible sales, and in substance grants of specific security, or interests in land for the purpose of security. Ejectment may be maintained by a mortgagee or he may hold possession on the footing of ownership, and with all its incidents. And though it is often decided to be a security or lien, yet so far as it is necessary to render it effective as a security, there is always a recognition of the fact that it is a transfer of the title." This doctrine is applied in *Hoskin v. Woodward*,[24] where the mortgagor sold a lathe, which was a fixture of the mortgaged machine shop, to a purchaser with notice of the mortgage who removed the lathe to other premises. There it was levied on by the mortgagee and the levy was sustained by the court. The transaction, said Chief Justice Lowrie, was a fraud on the mortgagee who had "a right to follow the removed property, and assert his right over it." But, he added, a mortgagor may sell lumber, ore, fruit or grain until stopped by the mortgagee,

[20] 13 Pa. 405 (1850).

[21] 27 Pa. 504 (1856).

[22] 91 Pa. 334 (1879. See also Datesman's Appeal, 127 Pa. 348, 17 Atl. 1086 (1889); Cridge v. Hare, 98 Pa. 561 (1881); Peebles' Estate, 157 Pa. 605, 27 Atl. 792 (1893); Sweeney v. Arrowsmith, 43 Pa. Super. 268 (1910).

[23] 45 Pa. 172 (1863).

[24] 45 Pa. 42 (1863). Compare Witmer's Appeal, 45 Pa. 455 (1863). See 1 Jones on Mortgages (7th Ed.) 664, Sec. 453-4; Schalk v. Kingsley, 42 N. J. L. 32 (1880); Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. 206 (1890).

"for these things are usually intended for consumption and sale, and the sale of them is the usual means of raising money to pay the mortgage." The same principle was applied in *Gill v. Weston*,[25] where the mortgagee was permitted to maintain trover for the removed fixture against the person into whose hands it had come after removal. In *Erny v. Sauer*,[26] an agreement by a mortgagor to surrender the premises to the mortgagee and make a deed of conveyance for the same on condition of being released from further liability was held without consideration. The mortgagee, said Mr. Justice Mestrezat, could have entered at pleasure, taken actual possession, and if the mortgagor had refused to give possession could have ousted him by an action of ejectment. If these were all the cases the subject would hardly be worth discussing. There remain to be considered a number of cases where the mortgage is described as a mere lien or security.

An early case is *Schuylkill Navigation Company v. Thoburn*.[27] There proceedings were brought to assess damages sustained through the erection of a dam for the improvement of the navigation of a river. The property was subject to mortgages and it was contended for defendant that the existence of the mortgages precluded the plaintiff from recovering damages or, at most, limited him to the amount that the damages exceeded the mortgages. The mortgagees were not parties to the suit and had set up no claim against the defendants and it was held that whatever claim they had could be enforced only on motion to take the money out of court. Mr. Justice Gibson observed that he was not aware that the older view by which the mortgagor was treated as little more than a tenant at sufferance was entertained in Pennsylvania. New York decisions had gone far in supporting the equitable view, and he quoted Chief Justice Kent to the effect that when the mortgagee's interest was not in question, "the mortgagor before foreclosure, or entry under the mortgage, is considered, at law, as the owner of the land." Such, indeed, is the result of the New York cases where

[25] 110 Pa. 312, 1 Atl. 921 (1885).
[26] 234 Pa. 330, 83 Atl. 205 (1912).
[27] 7 S. & R. 411 (1821).

the lien theory of mortgages received its first development. But upon the special question involved, that is, whether a mortgagee is a necessary party, to condemnation proceedings, the authorities are conflicting.[28] The cases dealing with this problem in Pennsylvania will be referred to later.

In *Rickert v. Madeira*,[29] it was held, following earlier decisions in Massachusetts and New York,[30] that the interest of the mortgagee, whether legal or equitable could not be levied on and sold on a judgment against the mortgagee. In the course of his opinion, Mr. Justice Rogers, following closely the language of Lord Mansfield in *Martin v. Mowlin*,[31] declares that a mortgage "although in form a conveyance of land, is in substance but a security for the payment of money." This is very true in Equity, and, as at this time there was no court of Equity in Pennsylvania, a lack of careful discrimination between legal and equitable theories is characteristic of the period. The interesting point in the case is that, although both legal and equitable interests in land were admittedly subject to execution in Pennsylvania, the court refused to extend that principle to the mortgagee's interest on practical grounds of expediency. The next case is notable even if no longer important on its facts. In 1829 it had been held that a sale on a judgment discharged a prior mortgage.[32] The decision had met with some criticism as to its soundness and had led to the passage of the Act of April 6, 1830[33] preserving the lien of a mortgage from discharge by judicial sale when prior to all other liens. In the following year the question arose again on a sale before the Act of 1830. The case, *Presbyterian Corporation v. Wallace*,[34] was fully argued as if *res integra*, and the prior decision adhered to. It is clear

[28] Nichols on Eminent Domain, Sec. 176; Jones on Mortgages (7th Ed.) Sec. 681a.

[29] 1 Rawle 325 (1829); See also Myers v. White, 1 Rawle 353 (1829).

[30] Blanchard v. Colburn, 16 Mass. 346 (1820; Jackson v. Willard, 4 Johns. 41 (N. Y. 1809). The American cases are generally in accord.

[31] 2 Burr. 969 (1760).

[32] Willard v. Norris, 2 Rawle 56 (1829).

[33] P. L. 293. After various amendments now supplied by the act of May 8, 1901, P. L. 141, Sec. 1.

[34] 3 Rawle 109 (1831).

that the court did not favor the policy of the Act of 1830 and the learned and vigorous opinions of Chief Justice Gibson and Mr. Justice Houston are largely a defense of what they regarded as the ancient practice in the State. Both judges strongly support the view that a mortgage while in form a conveyance was "unquestionably treated at law here, in the way it is treated in equity elsewhere, as a bare incumbrance and accessory of a debt." Both agree that the intention of the Act of 1705 was not merely to afford a remedy to the mortgagee but to treat the mortgagee as an incumbrancer and not as an owner. Mr. Justice Houston frankly regretted that ejectment could be brought by the mortgagee. It was, he thought, contrary to the spirit of the Act of 1705 as well as oppressive. This case is strong authority for the lien theory and has been frequently quoted in its support. It would no doubt have been even more influential if it had kept its place in current law. But on the principal point actually decided, the practice it advocates was altered by the Act of 1830 and on a secondary point it has been overruled by later decisions.[35] Chief Justice Gibson's influence was no doubt strong in supporting the position that a mortgage was no more than a "bare security" for the payment of money, a position resting partly on the court's reading of the Act of 1705 and partly on the liberal application of the equitable doctrines of chancery administered in common law forms. More than one of the judges questioned the propriety of permitting ejectment by the mortgagee and if the point had arisen at this time it is possible that the earlier cases might have been overruled. Speaking for the court Mr. Justice Kennedy thought it "ought not to have been allowed here since the act of 1705 came into operation." [36] In this connection there are some interesting remarks in *Guthrie v. Kahle.*[37] There a mortgagee in possession had compelled a trespasser to pay for timber cut, and it was held that the mortgagor on being restored to possession could not recover from

[35] Cowden's Estate, 1 Pa. 267 (1845); Carpenter v. Koons, 20 Pa. 222 (1852).

[36] Craft v. Webster, 4 Rawle 242 (1833), (later overruled). See Pepper's Appeal, 77 Pa. 373 (1875).

[37] 46 Pa. 331 (1863).

the trespasser for the same timber; his remedy was against the mortgagee as for profits received. But Mr. Justice Thompson goes out of his way to criticize the statement in *Fluck v. Replogle* [38] that a mortgagee has a right to recover possession immediately on the execution of the mortgage. The suit, he observed, was on a mortgage long overdue. "In such a case nobody doubts but a recovery could be had in this form to enforce payment of the mortgage money. But that is a different thing from recovering possession of the mortgaged premises before anything was due, as is said might be done."

In *Long's Appeal* [39] an amicable partition had been made by four tenants in common of a tract held by them as heirs of a deceased parent. One of these heirs had previously mortgaged her undivided interest in her father's real estate which was subsequently sold under the mortgage to the mortgagee who now brought proceedings for partition. It was held that the mortgagee of an undivided interest was not entitled to be made a party to partition proceedings. When partition was made the mortgage attached to the part awarded to the mortgagor in severalty. The mortgagee could object to a fraudulent division affecting his interests but if the partition was fairly made he could not gainsay it. This result would seem to give support to the lien theory. In England a tenant in common who has mortgaged his share cannot enforce partition against the will of the mortgagee except upon the terms of paying off the encumbrance.[40] But in this country there has been a conflict in the practice upon the point; and there are cases in accord with *Long's Appeal,* in states admittedly adhering to the title theory.[41]

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[38] *Supra,* note 20.

[39] 77 Pa. 151 (1874). *Accord,* Stewart v. Allegheny Bank, 101 Pa. 342 (1882); Lawrence v. Korn, 184 Pa. 500, 39 Atl. 295 (1898).

[40] Gibbs v. Haydon, 30 Weekly Reporter, 726 (Eng. 1882); Sinclair v. James (1894) 3 Ch. 554.

[41] Upham v. Bradley, 17 Me. 423 (1840); Wright v. Strother, 76 Va. 857 (1882). *Contra,* Colton v. Smith, 28 Mass. 311 (1831); Loomis v. Riley, 24 Ill. 307 (1860). See under statutes, Taylor v. Blake, 109 Mass. 513 (1872); Houten v. Stevenson, 69 N. J. Eq. 626, 64 Atl. 1094 (1904), and Freeman on Cotenancy and Partition, Secs. 478, 479.

In *Angier v. Agnew*[42] the action was case by the assignee for creditors of the mortgagee against one who had purchased all the timber on the mortgaged land from the mortgagor. There was no evidence of a conspiracy to strip the land and the inquiry narrowed down to whether the mortgagor could sell the timber and his vendees take possession of and sever the timber from the land on which it was growing. This, it was held they could do, following the dictum in *Hoskin v. Woodward*.[43] "Mortgages, and judgments," said Mr. Justice Gordon, "are alike liens and nothing more, and they differ only in the methods prescribed for their collection." *Talbot's Appeal*[44] has sometimes been cited for the lien theory. But that case merely holds that the mortgagor or his grantee, so long as he remains in possession may take the rents and profits to his own use and is not accountable therefor to the mortgagee, a view that prevails generally throughout the country irrespective of theory.[45] In *McIntyre v. Velte*,[46] a material alteration was held to avoid the mortgage absolutely. There was no analogy, said the court, between this case and that of a grantee of land who alters or destroys his title deed. In such case the instrument is avoided but not the estate. But a mortgage is not stamped with the character of real estate but is a bare incumbrance or charge. This, too, is the generally accepted principle irrespective of theory.[47]

Although not a state case, *In re Lukens*[48] in the District Court of the United States is an interesting contribution to the discussion of this question. In bankruptcy proceedings a mortgagee whose mortgage had not been recorded claimed payment out of the mortgagor's bankrupt estate in preference to general creditors and the referee decided in his favor. The decision was reversed by Judge McPherson who after reviewing the au-

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[42] 98 Pa. 587 (1881). See also the strong dicta in Knoll v. Railway Co., 121 Pa. 467, 15 Atl. 571 (1888).

[43] *Supra*, note 24.

[44] 2 Walker 67 (Pa. 1885).

[45] 2 Jones on Mortgages (7th Ed.) 221. Sec. 771, and cases cited.

[46] 153 Pa. 350, 25 Atl. 739 (1893).

[47] 1 Jones on Mortgages (7th Ed.) 113, Sec. 94.

[48] 138 Fed. 188 (1905).

thorities held that the interest of the mortgagee was not an estate in the land in the ordinary sense but a lien within section 67a of the bankruptcy act which failed for want of recording. It had been held in Pennsylvania that an unrecorded mortgage was good against the mortgagor's assignee for creditors.[49] And, if the validity of a lien is to be determined according to local law,[50] it is difficult to reconcile the decision with the principle that then prevailed by which a trustee in bankruptcy was vested with no higher right or title than belonged to the bankrupt.[51] The problem, however, is now materially altered by an amendment to the bankruptcy act[52] giving the trustee the status of a lien creditor.[53]

The eminent domain cases remain to be considered. As stated above, the Supreme Court decided in *Schuylkill Navigation Company v. Thoburn*[54] that in such cases the mortgagor, as owner, was the proper claimant. In *Knoll v. New York Railway Company*[55] the property was not taken but was injured by the construction of the railroad in front of the premises and the company had paid a small sum to the mortgagor in possession in settlement of all claims for damages. The mortgagee then brought an action on the case against the railroad to recover damages for the injury to his security. There was a nonsuit, which the Supreme Court sustained. It was not at all clear that the interest of the mortgagee had been impaired, but, irrespective of this, Mr. Justice Williams declares that for such consequential injuries the right of action is in the owner of the freehold alone; although, if he should refuse to move or should act fraudulently

[49] Mellon's Appeal, 32 Pa. 121 (1858). Cf. Nice's Appeal, 54 Pa. 200 (1867).

[50] Humphrey v. Tatman, 198 U. S. 91 (1905); In re Mosher, 224 Fed. 739 (1915); Hanson v. Blake, 155 Fed. 342 (1907).

[51] York Manufacturing Co. v. Cassell, 201 U. S. 344 (1906); Davis v. Billings, 254 Pa. 574, 99 Atl. 163 (1916).

[52] June 25, 1910, Chap. 412, Sec. 8; 36 U. S. Stat. at Large 838, 840; Comp. Stat. Sec. 9631.

[53] Fairbanks Shovel Co. v. Wills, 240 U. S. 642 (1916); Hayes v. Gibson, 279 Fed. 812 (1922); Compare Carey v. Donohue, 240 U. S. 430 (1916); Martin v. Commercial Bank, 245 U. S. 513 (1918).

[54] *Supra*, note 27.

[55] 121 Pa. 467, 15 Atl. 571 (1888).

the court on application of lien creditors would no doubt treat him as trustee and require him to act or permit his creditors to do so in his name. *Philadelphia and Reading Railroad v. Pennsylvania, Schuylkill Valley Railroad,*[56] was a petition by the defendants for leave to pay into court a sum awarded against it as compensation for land taken for railroad purposes which was bound by the liens of certain judgments and mortgages. The application was resisted by the owner and the court below dismissed the petition principally because the lien creditors had not asked for any disposition of this money nor alleged that payment to the owner would prejudice the value of their security. This order the Supreme Court reversed holding that it was within the equity powers of the court, for the protection of all parties interested, to order the money paid into court on application of the railroad alone.[57] In *Shields v. Pittsburg*[58] the question was, can an owner of land in good faith prior to the passage of an ordinance changing the grade of a street, in consideration of benefits to be derived from the improvement, give a release of damages that will, without notice, bind the holder of a mortgage on the land? The court below answered the question in the affirmative, holding that the owner by virtue of his ownership had the *jus disponendi* of the property when acting in good faith, and the judgment was affirmed by the Supreme Court without opinion. The eminent domain cases therefore have supported Chief Justice Gibson's view with fair consistency but they add little to mortgage law. For when the cases in the other states are examined a surprising amount of conflict will be found in the authorities where views are frequently enter-

[56] 151 Pa. 569, 25 Atl. 177 (1892).

[57] Accord: Reese v. Addams, 16 S. & R. 40 (1827); Deckert's Appeal, 5 W. & S. 342 (1843); Woods Run Avenue, 43 Pa. Super. 475 (1910). See also Phila. v. Dyer, 41 Pa. 463 (1862); Platt v. Blight, 29 N. J. Eq. 128 (1878); In re Road in Upper Dublin Township, 94 Pa. 126 (1880); Keller v. Pittsburgh & L. E. R. Co., 29 Pitts. L. J. (O. S.) 316 (Pa. 1882); State Line R. Co. v. Playform, 14 Atl. 355 (Pa. 1888), s. c. 10 Sadtler 467; Shields v. Pittsburgh, 201 Pa. 328, 50 Atl. 820 (1902); Dollar S. F. & T. Co. v. Bellevue Bor., 230 Pa. 240, 79 Atl. 496 (1911); Irons v. Pittsburgh, 64 Pa. Super. 126 (1916).

[58] 252 Pa. 74, 97 Atl. 124 (1916). See also Jackson v. Pittsburgh, 36 Pa. Super. 274 (1908).

tained as to the necessity of making the mortgagee a party to condemnation proceedings that cannot be reconciled with the theory of mortgage law prevailing in the particular jurisdiction.[59] There are lien states that hold the mortgagee a necessary party and title states that hold just the opposite. It is generally conceded, however, that where the mortgagee is not a necessary party, the mortgage lien, in equity, follows the fund which may be applied upon the mortgage debt.[60]

Such then are the principal cases that discuss the nature of a mortgage in Pennsylvania. A cursory glance at the authorities might lead the observer to infer that the lien theory prevailed. But in spite of divergent dicta the fundamental character of the transaction remains undisturbed and is likely to continue so as long as the right of the mortgagee to dispossess the mortgagor is recognized. This right imposes burdens on the mortgagee that will be assumed only in rare instances, in view of the inexpensive and expeditious remedy provided by the Act of 1705,—a remedy that would be regarded as severe in many jurisdictions, but to which the people of the state have been long accustomed. There was in the second quarter of the nineteenth century a strong tendency on the part of the Supreme Court to regard a mortgage as a mere security, but the tendency spent itself without acquiring sufficient strength to overrule the earlier cases and there has been no legislation, as in so many states, depriving the mortgagee of the right to possession. The mortgage is certainly in form a conveyance and, as between the parties, the title is in the mortgagee in so far as it is necessary to render the instrument effective as a security. As to all other persons, the mortgagor is regarded as the owner, and the mortgage a mere incumbrance and accessory to the debt. If this seems illogical it must be remembered that the charge of inconsistency

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[59] Compare Sherwood v. Lafayette, 109 Ind. 411, 10 N. E. 89 (1887); Gray v. Case, 51 N. J. Eq. 426, 26 Atl. 805 (1893); Oneida Street, 22 N. Y. Misc. 235, 49 N. Y. Supp. 828 (1897); Hagerstown v. Groh, 101 Md. 560, 61 Atl. 467 (1905); with Farnsworth v. Boston, 126 Mass. 1 (1879); Smith v. Detroit, 120 Mich. 572, 79 N. W. 808 (1899).

[60] 2 Lewis on Eminent Domain (3 Ed.) 947; Sec. 523. See also note 28, *supra*.

attaches to the decisions in jurisdictions adhering to the lien theory where it is sometimes necessary in order to secure the equitable rights of the parties to treat the interest of the mortgagee as a title.[61] After all, the mortgage contract is *sui generis;* and, as Lord Denman once said, "it is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other, in any other terms than those very words." [62]

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[61] Mickles v. Townsend, 18 N. Y. 575 (1859); Hubbell v. Moulson, 53 N. Y. 225 (1873).

[62] Higginbotham v. Barton, 11 Ad. & El. 307 (Eng. 1840).