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Recommended Citation

James J. Brown, Mortgage Theory of Ohio, 11 Clev.-Marshall L. Rev. 410 (1962)

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Mortgage Theory of Ohio

James Jay Brown*

THE MISSISSIPPI RIVER, once used as the geographical dividing line between the title and lien theory states,¹ has lost this distinction.

Theory Classifications

States by National Reporter System	A	B	C	D	E	F	G	H
<i>Atlantic</i>								
Maine	T		T		T	T		
Vermont	T		T			T		
New Hamp.	T		T			T		
Connecticut	T		T		T	L		
Rhode Island	T		T			T		
New Jersey	T		T		T	L		
Pennsylvania	T		T			T		L
Delaware	I		T			L		
Maryland	T		T		T	T		
<i>New York</i>	L	L	L	L	L	L		L
<i>North Eastern</i>								
Massachusetts	T		T		T	T		
Ohio	T		T		L	T	I	
Indiana	L	L	L	L	L	L		L
Illinois	T		T		T	T		
<i>South Eastern</i>								
West Virginia	T		T			T		
Virginia	T		T		T	T		
No. Carolina	T		T			T		
So. Carolina	L	L	L	L		L		L
Georgia	L	L	L	L		L		
<i>Southern</i>								
Florida	L	L	L	L		L		L
Alabama	T		T			T		
Mississippi	I		T			T		
Louisiana	L	L	L	L				
<i>South Western</i>								
Kentucky	L	L	T	L	L	L		L
Tennessee	T		T		T	T		
Texas	L	L	L	L	L	L		L
Arkansas	T		T			T		
Missouri	I		T			L		

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¹ 1 Jones, Mortgages, Sec. 59 (7th ed. 1915).

States by National Reporter System	A	B	C	D	E	F	G	H
<i>North Western</i>								
Michigan	L	L	L	L	L			L
Wisconsin	L	L	L	L				L
Iowa	L	L	L	L				L
Minnesota	L	L	L	L	L	L		L
Nebraska	L	L	L	L	L	L		
So. Dakota	L	L	L	L				L
No. Dakota	L	L		L				L
<i>Pacific</i>								
Kansas	L	L	L	L	L	L		L
Oklahoma	L	L		L		L		L
New Mexico	L	L		L				L
Colorado	L	L	L	L		L		L
Wyoming		L		L				
Montana	L	L		L				L
Idaho	L	L		L		L		
Utah	L	L	L	L				
Arizona		L		L				L
Nevada	L	L	L	L				
Oregon	L	L	L	L				L
Washington	L	L		L		L		L
Alaska								
Hawaii								
<i>California</i>	L	L	L	L	L			L

Key:

- T = Title Theory
 I = Intermediate Theory
 L = Lien Theory

Classifications by:

- A 1 Jones, *Mortgages*, Sec. 58 (7th ed. 1915).
 B 1 Jones, *Mortgages*, 60 (8th ed. 1928).
 C 1 Pomeroy, *Equity Jurisprudence*, Sec. 163, nn. 1, 2 (4th ed. 1918).
 D Pomeroy, *Equity Jurisprudence*, Sec. 1188 (5th ed. 1928).
 E White, *Ohio Theory of a Mortgage*, 3 U. Cinc. L. Rev., 405 (1929).
 F Walsh, *Development of the Title and Lien Theories of Mortgages*, 9 N. Y. U. L. Quart. Rev. 280, 300 n. 84, 303 (1932).
 G Campbell, *Cases on Mortgages*, 24 (1926).
 H 36 Am. Jur., *Mortgages*, Sec. 174. See also, Annot., 93 A. L. R. 12, 25, 31.

The states of New York, Michigan, Wisconsin, Indiana, and Florida have made this geographical idea outmoded. Aside from this, the chart raises some interesting variances in the classifications of particular states. Connecticut, New Jersey, and Pennsylvania, long time advocates of the title theory, have become identified with the lien theory. Mississippi and Kentucky fluctuate undecidedly. And Delaware, Missouri, and Ohio have the honor of being identified with all three.

It will be the function of this paper to explore the theory of the real estate mortgage as it is being used in the confused state of Ohio. The theories will be identified and defined. From this academic introduction, practical uses of the theories will be suggested. This will be followed by an analysis of Ohio case decisions since 1929. The conclusion of this analysis will be a determination of whether the state has been consistent in its reasoning and theory.

Theories

The questions of law which are most difficult to answer are the questions of fundamental theory. They are most difficult to answer upon reason because they are so far-reaching in their application as to defy complete understanding and they are most difficult to answer upon authority by reason of the fact that courts, we will not say because of the difficulty of the questions, but because of that commendable conservatism which forbids saying more than is necessary to reach a decision rarely touch upon them.²

In this statement appears a fundamental truth of our legal times. The theory of the mortgage, born and bred in the wisdom of the common law, has been frequently analyzed in its slow growth, and now has acquired what seems to be a solidified form. Relying upon the common law and past form, the courts perfunctorily reiterate the theories without a question or doubt that they represent the contemporary legal status of the mortgagor and mortgagee. These theories are identified by the terms *title*, *intermediate*, and *lien*.

A. Title Theory

With its origins in the common law,³ early American law on mortgages ruled that the mortgagee possessed the title while

² Durfee, *The Lien or Equitable Theory of the Mortgage—Some Generalizations*, 10 Mich. L. Rev. 587 (1912).

³ "At the common law the ordinary mortgage was to all intents and purposes a conveyance of the legal estate. A mortgage in fee immediately

(Continued on next page)

the mortgagor held (a) the legal right to pay thereby revesting title in himself, and (b) the equity of redemption. This status was not altered by the mortgagor's remaining in possession for practical purposes. This theory has been given many individual state interpretations⁴ and qualifications.⁵ Practical considerations have worn away usual form to decide that the real owner was the mortgagor as he had been left in possession of the mortgaged premises.⁶ Although the term owner could be interpreted to denote the holder of title, the mortgagee was left with his right and power to enter into possession at will. In its normal form, however, this theory states that the mortgagee becomes vested with the title to the mortgaged property⁷ upon execution of the mort-

(Continued from preceding page)

vested the mortgagee with the legal title, subject, however, to be defeated by the mortgagor's performing the condition by paying the money upon the prescribed pay-day. If on that very day the mortgagor performed the condition by paying the money, he thereby put an end to the mortgagee's estate; the legal estate was revested in himself, and with it he had the right at once to re-enter upon the land and to recover its possession by an appropriate action at law. But if the mortgagor for any reason suffered the pay-day to go by without paying or tendering the amount due, all his right was utterly and forever lost; the estate of the mortgagee which had before been upon condition, now became absolute, with all the features and incidents of absolute legal ownership." 3 Pomeroy, *Equity Jurisprudence*, Sec. 1179 (4th ed. 1918).

In common law phraseology, the mortgagee had, upon execution, an estate on condition subject to being absolute upon the breach of the condition by nonpayment on the Law Day. Annot., 93 A. L. R. 12, 17. See, the mortgagee had an estate upon condition subsequent; Durfee, *op. cit. supra* n. 2 at 592.

The mortgagor at times has been identified as a tenant: Thunder v. Belcher, 3 East 449 (1803); Doe d. Roby v. Maisey, 8 B. & C. 767 (1828).

"The mortgagor was not a trespasser but he had no estate in the land, for he was not even a tenant at will, and therefore the mortgagee could oust him at any time without notice, quite regardless whether default had occurred on the mortgage debt; and if the mortgagor resisted, the mortgagee was entitled to an action of ejectment." 1 Glenn, *Mortgages, Deeds of Trust, and other Security Devices as to Land*, 189 (1943). See, Doe d. Roby v. Maisey, *supra*. See also, Turner, *The Equity of Redemption*, 103. Critique of tenancy notion: Walsh, *Development of the Title and Lien Theories of Mortgages*, 9 N. Y. U. L. Quart. Rev. 280, 294 (1932).

⁴ "This conception of the mortgage (i.e., title theory) is not so consistent or simple as the lien theory, and it would be difficult to find any two title states which take exactly the same views of the mortgage." (Parenthesis added.) Pugh, *Some Peculiarities of the Ohio Law of Mortgages on Real Property*, 4 U. Cinc. L. Rev. 297, 298 (1930).

⁵ 1 Glenn, *op. cit. supra* n. 3 at 190-192.

⁶ Orr v. Hadley, 36 N. H. 575 (1858); Huckins v. Straw, 34 Me. 166 (1852); Colton v. Carlisle, 85 Ala. 175, 4 So. 670, 7 Am. St. Rep. 29 (1887); Seaman v. Bishee, 163 Ill. 91, 45 N. E. 208 (1896).

⁷ Where the mortgagee becomes vested with title: Childs v. Childs, 10 Ohio St. 339, 75 Am. Dec. 512 (1859); Frische v. Kramer, 16 Ohio 125, 47 Am.

(Continued on next page)

gage instrument. As an incident of that title, the mortgagee has an unqualified right of possession.

B. Intermediate Theory

This theory, named by Professor Campbell,⁸ is an effort to maintain the title theory without any of its consequences. In some title theory states the mortgagee does not acquire title upon the execution. This only occurs when the mortgage condition has been broken.⁹ It is when the mortgagor is in default that the legal title passes by operation of law from the mortgagor to the mortgagee. This point of transfer of title is the distinguishing element between the two theories. What was an offspring of the title notion has now become a clearly developed theory. It states that the mortgagor retains the legal title and right to possession of the mortgaged premises, at least, until the mortgage condition is broken. The mortgagee, until that time, retains a lien as security for his debt. Upon breach of condition, title and right of possession are automatically transferred.¹⁰

C. Lien Theory

From decisions in English Courts of Equity, and under the influence of Lord Mansfield,¹¹ a new theory, called the equitable or lien theory, was carved from the common law. These views

(Continued from preceding page)

Dec. 368 (1847); *Bank of Muskingum v. Carpenter*, 7 Ohio Rpt. 21, 28 Am. Dec. 616 (1835), overruled on another point by *White v. Denman*, 1 Ohio St. 110, 113 (1853).

⁸ Campbell, *Cases on Mortgages*, c. I, Sec. 2; c. XIII, Sec. II n. 1 (1926).

⁹ *Kratz v. Nedelhafen*, 193 Ill. 477, 62 N. E. 239 (1901); *Ortegen v. Rice*, 104 Ill. App. 428 (1902); *Carpenter v. Bowen*, 42 Miss. 28 (1868); *Wilbur v. Jones*, 8 N. J. Eq. 520 (1851); *Hagar v. Brainerd*, 44 Vt. 294 (1872); *Allen v. Ransom*, 44 Mo. 263 (1869). See also Pugh, *op cit. supra* n. 4 at 302; *Rand v. Kendall*, 15 Ohio 671 (1846); *Heighway v. Pendleton*, 15 Ohio 735 (1846); *Frische v. Kramer*, *supra* n. 7; *Allen v. Everly*, 24 Ohio St. 97 (1873); *Williams v. Englebrecht*, 37 Ohio St. 393 (1881); *Sun Fire Office v. Clark*, 53 Ohio St. 414, 424, 42 N. E. 248, 250 (1895); *Hibbs v. Insurance Co.*, 40 Ohio St. 543, 559 (1884); *Kern v. Kern*, 15 Ohio C. C. (ns) 279, 24 Ohio C. D. 22 (1912), *aff'd without opinion*, 87 Ohio St. 481, 102 N. E. 1126 (1912); *Stripe v. National Fireproofing Co.*, 5 Ohio App. 210, 215, 21 C. C. (n s) 551 (1916).

¹⁰ *Bradfield v. Hale*, 67 Ohio St. 316, 65 N. E. 1008 (1902). See Denton, *Right of a Mortgagee to Recover Damages from a Third Party for Injury to Mortgaged Property in Ohio*, 3 Ohio St. L. J. 161 (1936).

¹¹ *Martin v. Mowlin*, 2 Burr. 969 (1760); *Ren v. Bulkley*, Doug. 292 (1779); *Eaton v. Jacques*, Doug. 455 (1780); *King v. St. Michaels*, Doug. 630 (1781).

first found favor in New York.¹² Through wide acceptance in America the term lien is defined as “. . . any hold which one person has upon the property of another as security for a debt or demand.”¹³ The new theory has been adopted by many states¹⁴ and has been developed into definite form.¹⁵ It states that the mortgagor has the title¹⁶ and ownership of the mortgaged property and the mortgagee has no right to possession. For possession by the mortgagee is not an incident of the mortgage contract.¹⁷ Not until foreclosure, sale,¹⁸ and expiration of the

¹² Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145 (1860). See also: Lloyd, *infra* n. 13 at 241; 1 Glenn, *op. cit. supra* n. 3 at 201.

“A mortgage is now nothing but a security for a debt, giving the mortgagee a special lien only, upon the estate mortgaged. It conveys no title to the property. The interest of the mortgagee is a mere chattel interest. The title and seisin remain in the mortgagor until foreclosure, and he is not divested of his title until all the steps required by statute have been complied with.” Bryan v. Butts, 26 Barb. 503 (N. Y. 1857).

¹³ Lloyd, Mortgages—The Genesis of the Lien Theory, 32 Yale L. J. 233, 236-237 (1923).

¹⁴ Durfee, *op. cit. supra* n. 2 at 595.

¹⁵ “While the mortgagee is still regarded at law as vested with the legal title followed by all of its incidents, the following general theory is established as a part of the equity jurisprudence. The mortgagor, both after and before a breach of the condition, is regarded as the real owner of the land subject to the lien of the mortgage, and liable to have all his estate, interest, and right finally cut off and destroyed by a foreclosure. Prior to such foreclosure, he is vested with an equitable estate in the land which has all the incidents of absolute ownership; it may be conveyed or devised, will descend to his heirs, may be cut up into lesser estates and generally be dealt with in the same manner as the absolute legal ownership, always subject, however, to the lien of the mortgage. On the other hand, the mortgage is regarded primarily as a security; the debt is the principal fact, and the mortgage is collateral thereto; the interest which it confers on the mortgagee is a *lien on the land*, and not on *estate in the land*; it is a thing in action, and may therefore be assigned and transferred without a conveyance of the land itself; it is personal assets, and on the death of the mortgagee it passes to his executors or administrators, and not to his heirs.” 3 Pomeroy, *op. cit. supra*, n. 3, Sec. 1181.

¹⁶ Pomeroy lists those states following the lien theory (see chart at front of article). These states vest the mortgagor with legal and equitable title. Pomeroy, *Equity Jurisprudence*, Sec. 1188 (5th ed.).

¹⁷ “The mortgage is nothing more than a lien on the property. No interest in the nature of an estate is created; no title either at law or in equity ever passes to the mortgagee either before or after default nor does he ever get any right to the possession of the land. If the condition subsequent contained in the mortgage be not performed, he may foreclose the lien, have the property sold under order of court and satisfy his claim from the proceeds of the sale. . . . The mortgagee is simply a creditor with a lien on the land to secure payment of the debt.” Pugh, *op. cit. supra* n. 4. For the case development of the problem of possession see Lloyd, *op. cit. supra* n. 13 at 243.

¹⁸ McDougal, Review of Walsh on Mortgages, 44 Yale L. J. 1278 (1935). See also: Osborne, *Mortgages* 34, 311 (1951).

equity of redemption can he go into possession. The condition of default by the mortgagor is of no consequence here. What the mortgagee is given by the contract is a security or lien interest in the property.¹⁹ His lien is protected against and ahead of other claimants upon the property.

Definite as the theory might appear, states are varied in their interpretations of it. Some hold that the mortgage conveys no title; it merely creates a lien; some create a lien by statutory enactment; and others hold that the mortgage creates a conditional conveyance giving title to the mortgagee which is realizable in ejectment proceedings. The result is that the mortgagor is the legal owner for purposes of attachment and execution, while the mortgagee is the legal owner for the purpose of possession after default.²⁰

The effect of adopting the lien theory is to strip the mortgagee of technical legal title (i.e., title theory) and give him a right of security in the property. This security can be realized through the power of sale. Upon default, his remedy is not possession but foreclosure and sale.

In summary, the theories in their usual form are as follows: (1) the title theory refers to the rule that the mortgagee acquires title and is entitled to possession upon the execution of the mortgage. (2) the intermediate theory refers to the rule that the mortgagee acquires title and is entitled to possession only upon default, and (3) the lien theory refers to the rule that the mortgagee does not acquire title or a right to possession until foreclosure and sale.

¹⁹ ". . . the mortgagor retains *all* of the legal title, and the mortgagee has only a lien, which is not title . . .

". . . a . . . mortgage lien can only be some legally recognized interest, or interests, in relation to specific property, which is given as security for the payment of money, or the performance of some other obligation by the general owner." Gavitt, *Under the Lien Theory of Mortgages Is the Mortgage Only a Power of Sale?*, 15 Minn. L. Rev. 147, 149-150 (1931).

". . . while the mortgage does not convey the legal title to the land until foreclosure, it does convey to the mortgagee, at the time of its execution, a present interest in the land, the general ownership of which remains in the mortgagor—an interest which is limited and special, more analogous to an easement than to a general ownership; which is contingent or inchoate, in that default and foreclosure are essential to its ultimate enjoyment; and which is merely collateral to a principal right to receive something of value; but which is a legal interest as distinguished from an equitable interest; a right *in rem* as distinguished from a right *in personam*; a right which, in the terminology of jurisprudence, would be called an 'hypothecation'." Durfee, *The Lien Theory of the Mortgage—Two Crucial Problems*, 11 Mich. L. Rev. 495 (1913).

²⁰ Walsh, *op. cit. supra* n. 3 at 300.

Thus it is that an American law student is introduced to the nature of the American mortgage. The writers of this article are inclined to entertain sympathetically the student's complaint that his instruction in these theories is useful, if at all, only in a way not yet disclosed. From them he has learned little more concerning the law of mortgages than the juxtaposition of the written terms which has been reviewed. The student may well complain that he has been led into a thicket of words, conceivings, theories, doctrine and dogma and left there. Mere generalization concerning the 'total nature and effect of a mortgage' may be condemned as the generalizations of a speculative philosophy. This attempt to report synoptically on the total nature of 'the mortgage', to set forth a conceptual entirety of 'the mortgage,' is the technique of the metaphysician.²¹

When we look at these theories individually, unrelated to practical applications, the truth of the above statement becomes obvious. Apply, then, the theories with the following hypothetical problems.²² The practical importance of these theories will become somewhat clearer and indicate the need for an intelligent use of them.

(I) A, fee simple owner of Blackacre, mortgages it to B in fee simple as security for a lien from B equal to a third of the property's value. X, thereafter, procures a judgment against A in a common law court and attempts an execution against Blackacre. Can a law execution pick up an equity which has been ruled to be no "legal estate" at law in a title theory state? Whereas, in a lien theory state will the execution lie if the mortgagor is regarded as the real owner of the land subject to the lien of the mortgage?

(II) A executes a mortgage, later marries, and then dies with the mortgage unsatisfied. What are the dower rights of A's widow? Will they vary if the mortgagee dies before foreclosure? Under the title theory, the widow might have no right if the legal estate passed to the mortgagee. What would the result be if A's mortgage was a purchase-money mortgage, executed after coverture, in which the wife did not join and where A dies after default?

(III) A, the mortgagor, and B, the mortgagee, expressly agree that A shall remain in possession during the term of the

²¹ Sturges and Clark, *Legal Theory and Real Property Mortgages*, 37 *Yale L. J.* 691, 701 (1928).

²² For case citation see: Sturges and Clark, *id.* at 704-709.

mortgage. Would the rights and duties of the parties vary (1) in states having no statutes permitting possession, (2) in states following one of the three theories?

Ohio Cases

1929, remembered for other reasons, was the last time in which Ohio's mortgage theory was studied.²³ The conclusion of that work was that Ohio should be re-classified as a lien theory state. Do the cases since 1929 support this conclusion?

Norwood Savings Bank v. Romer:²⁴ In this case concerning lien rights on after-acquired chattel property, the plaintiff-mortgagee, Norwood, sought the collection of rent arising after execution of the mortgage. All rents and profits were pledged as security under the contract terms. When Norwood brought his petition before the foreclosure and appointment of a receiver, the Court of Appeals of Hamilton County ruled against him. They stated that he was not entitled to rents and profits *prior* to the filing of foreclosure proceedings and the appointed receivers taking possession of the mortgaged property. It appears from this holding that the mortgagee has no rights in the property, at least, prior to foreclosure. This clearly coincides with the lien theory.

Judge Hamilton found support for his conclusion in the following:

It is settled law that a mortgage is a mere security in the hands of the mortgagee and does not convey any interest in the land itself. After mortgage conditions have been broken, the mortgagee may bring an action for possession, or an action in foreclosure, resulting in judicial sale. There is no question that, after condition broken, the mortgagee, upon bringing an action for foreclosure and making a showing to the court of the condition broken, has a right to have a receiver appointed for the property, and the receiver by virtue of his possession as receiver, is entitled to the rents and profits that may issue by reason of such possession for the benefit of the mortgagee. *Kerr v. Lydecker, Admr.*, 51 Ohio St. 240, 37 N. E. 267, 23 L. R. A. 842 (1894).²⁵

²³ White, *Ohio Theory of a Mortgage*, 3 U. Cinc. L. Rev. 405 (1929).

²⁴ 43 Ohio App. 224, 12 Ohio L. Abs. 472, 183 N. E. 45 (1932). Followed in *Metropolitan Life Ins. Co. v. Begin*, 59 Ohio App. 5 (1938).

²⁵ *Norwood Savings Bank v. Romer*, *supra* n. 24 at 226. Reliance upon the *Kerr* Case is unusual as that case held that upon condition broken the mortgagee was invested with legal title. Possession of title at this point identifies the intermediate theory. *Kerr v. Lydecker, Admr.*, 51 Ohio St. 240, 250, 37 N. E. 267, 23 L. R. A. 842 (1894).

It has been stated that, even after condition broken, the mortgagor is entitled to the rents and profits so long as he retains possession. *Fidelity Mortgage Co. v. Mahon*, 31 Ohio App. 151, 166 N. E. 207 (1929).²⁶

In re Blum Bros. Co.:²⁷ although bankruptcy was the point in issue, this case also involved a surviving spouse's undivided one-half interest in mortgaged property. The spouse was co-mortgagor on the mortgage executed as security for a family-held corporation bond issue. She petitions the bankrupt corporation for reimbursement of her undivided half-interest in the property which had been foreclosed and sold.

As security for the payment of the debt, the trustee upon the default of January 1, 1928, became seized of the legal title to claimant's (spouse's) interest and the right of possession, with the option to either foreclose against the equity of redemption or acquire possession through ejectment. *Bradfield, et al. v. Hale et al.*, 67 Ohio St. 316, 65 N. E. 1008.²⁸ (parenthesis added.)

Now, if "the trustee" (for the mortgagee's interest) "became seized of the legal title upon default" not upon foreclosure and sale, then the court has put itself squarely on point with the intermediate theory.

Stafford v. Collins, Admr.:²⁹ at the time of the mortgagee's death, no action of foreclosure or rejection had been instituted against the defaulting mortgagor. The mortgagor subsequently dies and the administrator of his estate attempts to sell the subject property free and clear of encumbrance. An heir-assignee of the mortgagee counters this claim by trying to maintain a right of title in the property traceable to the mortgagee. The Second District Court of Appeals in Clark County, relying upon Ohio General Code Sec. 10509-68 (Sec. 2113.45, Revised Code),³⁰ ruled for the petitioner-administrator. An heir-assignee

²⁶ *Norwood Savings Bank v. Romer*, *supra* n. 24 at 227.

²⁷ 55 F. 2d 723 (Ohio Dist. Ct., S. D.), cert. den. 290 U. S. 630, 78 L. Ed. 549, 54 S. Ct. 49 (1932); rev'd on another point 63 F. 2d 212.

²⁸ *In re Blum Bros. Co.*, *supra* n. 27 at 724, *Bradfield* has held that as between the mortgagor and mortgagee in a real estate mortgage, after condition broken, the legal title to the mortgaged premises is in the mortgagee. *Bradfield v. Hale*, *supra* n. 10.

²⁹ 16 Ohio L. Abs. 621 (1933).

³⁰ See *Eastwood v. Capel*, 126 N. E. 2d 343, 347 (1955): "Unquestionably, it was the purpose of the legislature to provide that the mortgage lien should not be separated from the debt in the process of administering the estate."

does not acquire a real property interest in the mortgaged property, but acquires, merely, a personal property interest. For upon the death of the mortgagee, who has not instituted foreclosure proceedings, the real estate interest becomes a personal asset. The right of ejectment would be, therefore, in the mortgagee's executor or administrator and not his heirs.

The heir-assignee's case was based upon the argument that the mortgagee has, upon condition broken, title sufficient to enable him to secure possession.³¹ The Court rejected this intermediate theory argument but in doing so may have rejected all theories entirely. About title it said: "In the instant case the mortgagee, *although he had legal title to the real estate described in the petition*, never went into possession under his right of possession."³² Notwithstanding this statement, the Court concluded that even after condition broken, if the mortgagee has taken no legal steps to realize his security, he does not become vested with a title which would descend to his heirs. It would appear from this conclusion that a title absolute, descendable to heirs, could only be acquired in foreclosure or ejectment proceedings. If the rule still exists in Ohio that title absolute in real property is descendable to the heirs of the title holder, then what kind of legal title did the Court find in the mortgagee? If the mortgagee never had title absolute during his lifetime, then, after condition broken and until foreclosure proceedings, would the mortgagor have had it? If the case must be ruled according to statute, is it futile to look for one of the theories?

Union Joint Stock Land Bank of Detroit v. Hurford:³³ Union Joint Stock was the mortgagee of land which was appropriated, in part, by the county for highway purposes. Union was never informed of this situation nor did it receive notice of a settlement between the mortgagor and the County Commissioners. At issue was whether Union was an owner of land within the contemplation of statute. Sec. 6870 Ohio General Code (Sec. 5553.11 Revised Code). The Trumbull County Court of Appeals held that notice of appropriation and settlement need not be given to a mortgagee for he is not an owner. They support this decision on the following basis:

³¹ Kerr v. Lydecker, *supra* n. 25; Bradfield v. Hale, *supra* n. 10; Stockwell v. Gambell, 16 Ohio C. C. (n. s.) 427, *aff'd* without opinion; Wilson v. Stockwell, 78 Ohio St. 394, 85 N. E. 1135 (1908).

³² Stafford v. Collins, Admr., *supra* n. 29 at 624.

³³ 53 Ohio App. 116, 22 Ohio L. Abs. 232, 6 Ohio Ops. 572, 4 N. E. 2d 276 (1935).

A mortgage of real estate is regarded, in equity, as a mere security for the performance of its condition of defeasance, and where that condition is the payment of a debt, the security is regarded as an incident of the debt. *Swartz v. Leist*, 13 Ohio St. 419.³⁴

. . . the legal title to the mortgaged premises remains in the mortgagor, as against all the world, except the mortgagee, and also as against him until condition broken, but after condition broken the legal title as between the mortgagor and mortgagee is vested in the mortgagee. *Allen v. Everly*, 24 Ohio St. 97; *Ely v. McGuire*, 2 Ohio 223; *Hibbs v. Insurance Co.*, 40 Ohio St. 543, 559; *Martin v. Alter*, 42 Ohio St. 94.³⁵

The Court is in effect restating the intermediate theory when it finds title in the mortgagor "against all the world . . . and also as against the (mortgagee)" until condition broken. Obvious in the holding, is the fact that a breach had not occurred. If one had occurred, who would have received notice of the appropriation, if, according to the statement, between the mortgagor and mortgagee the latter retains title whereas against all the world the mortgagor, has title? The Court, by relying on these past decisions, is perpetuating a two-pronged title dilemma. They create two legal title holders of the same property when the mortgage condition is breached.

Hover v. Clayton:³⁶ This case, decided in the Common Pleas Court of Logan County, involved mortgaged premises for which a lease was entered subsequent to the institution of foreclosure proceedings but prior to actual sale. The lease, executed by the mortgagor without the consent of the mortgagee, also involved the sale of certain equipment pledged as security for the mortgage. The first major issue decided was what equipment was part of the realty and what was a fixture. Secondly, the Court ruled that since the mortgagee was no party to the lease and sale, the lessee-purchaser could be enjoined from removing such fixtures from the premises. Finally, under the terms of Ohio General Code Sec. 11303 the Doctrine of *Lis Pendens* prohibited third parties from acquiring an interest in the subject of the action. The dictum preceding the second issue is interesting because it establishes a court preference for the intermediate

³⁴ *Kerr v. Lydecker, Admr.*, *supra* n. 25 at 248.

³⁵ *Union Joint Stock Land Bank of Detroit v. Hurford*, *supra* n. 33 at 124.

³⁶ 29 Ohio L. Abs. 410, 15 Ohio Ops. 245 (1939).

theory. In *Tooker v. Grotenkemper*³⁷ and *Frische v. Kramer*,³⁸ "the Court finds that *after condition broken*, the mortgagee has the right of possession against a lessee under a lease made after the mortgage is made . . ." ³⁹ (Emphasis added.)

Taylor, Admr. v. Quinn:⁴⁰ The petitioner, Taylor, institutes ejectment proceedings against the defaulting mortgagor. At issue in this case was whether the remedy of ejectment was available for a breach of condition. The Court of Appeals of Lucas County held for the petitioner. It based its decision, in part, upon the following:

The owner and holder of a mortgage securing debt . . . has two remedies. . . . He may bring an action in foreclosure of the mortgage . . . Or, he may, after condition broken, assert title under the mortgage and bring ejectment, etc. *Bradfield v. Hale*, 67 Ohio St. 316, 323, 65 N. E. 1008.⁴¹

Since *Bradfield v. Hale* is a leading Ohio case in the theory of mortgages, it should be explained. In so doing, the theory in the case at hand ought to be identified. The mortgage in the *Bradfield* case contained a condition of defeasance which stated that the mortgage deed would be voided upon payment of all the installments. Failure to comply would vest title in the mortgagee. That court found, in the law predating the Ohio Civil Code, that under such mortgage conditions the mortgagee had the remedies of foreclosure and ejectment. It concluded that as the Civil Code had not destroyed these remedies, they were still available. In its statement (above) that court put no qualification upon foreclosure but injected "after condition broken" upon ejectment. Did they mean to say that the mortgagee could bring foreclosure regardless of condition broken? Apparently not, for it went on, in light of its previous reasoning, to cite *Doe v. Pendleton*⁴² and *Kerr v. Lydecker, Admr.*⁴³ They stand for the proposition that upon condition broken, title vests in the mortgagee until satisfaction. Satisfaction is a broad term which would encompass all available remedies. Therefore, putting the

³⁷ 13 Ohio Dec. Rep. 433 (1905).

³⁸ 16 Ohio 126 (1847).

³⁹ *Hover v. Clayton*, *supra* n. 36 at 413.

⁴⁰ 68 Ohio App. 164, 22 Ohio Ops. 292, 39 N. E. 2d 627 (1941).

⁴¹ *Taylor, Admr. v. Quinn*, *id.* at 166.

⁴² 15 Ohio 735 (1846).

⁴³ *Kerr v. Lydecker, Admr.*, *supra* n. 25.

statement and these cases together it must be concluded that ejectment and foreclosure are only available after condition broken. As Bradfield states the intermediate theory, *Taylor, Admr. v. Quinn* must also do so.

Bruml v. Herold:⁴⁴ This case, arising in the Common Pleas Court of Geauga County, is a basic affirmation of the *Taylor* case above. For the Court relies upon *Doe v. Pendleton* and *Kerr v. Lydecker, Admr.*⁴⁵ The case, therefore, holds to the intermediate theory. Of special interest is the definition the Court made of the action of ejectment.

An action in ejectment is purely a possessory action, and the elements necessary to constitute a cause of action for Julia Herold (mortgagee) are three only:

That Julia Herold has a legal estate in the real property; That she is entitled to the immediate possession thereof; and

That Fred Bruml (mortgagor) is unlawfully keeping her out of possession.⁴⁶

Does the mortgagee have a legal estate in the property under the intermediate or the lien theory? This question will be discussed in the section below.

McAdams v. Bolsinger:⁴⁷ The surviving spouse as co-mortgagor seeks to exercise the equity of redemption by purchasing the mansion house at its appraised value from the inventory of the estate. The Probate Court of Hamilton County had this to say as part of its reasoning:

We feel that it is unnecessary to enter into an extended discussion concerning the exact nature as to the estates and rights of a mortgagor and mortgagee since legislation views of those rights differ materially in the various states and even within the confines of the same state. Generally speaking, for the purposes of this case, a mortgage is a conveyance of an estate or pledge of property, as security for the payment of money or performance of some other act, conditioned to become void upon such payment or performance.

A mortgagor, in Ohio, is commonly said to retain legal title as to all the world, at least while he remains in possession, until foreclosure, or until the title is passed to a purchaser at a foreclosure sale.

⁴⁴ 29 Ohio Ops. 146, 14 Ohio Su. 123 (1944).

⁴⁵ *Bruml v. Herold, id.* at 148.

⁴⁶ *Bruml v. Herold, id.*

⁴⁷ 71 Ohio L. Abs. 531, 57 Ohio Ops. 338, 129 N. E. 2d 878 (1950).

The mortgagor has seisin in law.⁴⁸

If the mortgagor retained title from condition broken until foreclosure, then, the Court is holding with the lien theory.

Levin v. Carney:⁴⁹ Can a mortgagee of land submitted for tax sale be termed a "former owner?" To determine the owner of the subject property, the Court attempted to determine where title was between the mortgagor and mortgagee. It reiterated the previous statements from *Bradfield* and *Kerr*. From *Martin v. Alter*⁵⁰ it quoted:

In the case of a mortgage in the usual form the *legal estate* remains in the mortgagor in possession, even after condition as to all the world, except the mortgagee.

The *legal title remaining in the mortgagor* is liable to levy and sale on execution . . .

The latter (mortgagee) may maintain ejectment or take other legal steps to obtain possession after condition broken, but until he does so, the mortgagor is at law owner of the fee. (Emphasis added.)

The court continued in its own words.

The law recognizes two kinds of ownership, equitable and legal.

An 'equitable owner' is one who is recognized in equity as owner of the property, because the real and beneficial use and title belong to him, although the bare legal title is invested in another.

A 'legal owner' is one in whom the legal title to real estate is vested, but subject to the rights of any equitable owner.

. . . It has been held that a mortgagor in possession has both the legal and equitable title. On this theory, this Court, in *Commercial Bank and Savings Co. v. Woodville Savings Bank Co.*, 126 Ohio St. 587, 186 N. E. 444, ruled that a mortgagor in possession is entitled to the rents and profits of the real estate, as an incident of possession of the equity of redemption. In effect, the court also held in that case that a mortgagor in possession holds the *legal title*.

. . . It is somewhat difficult to reconcile all the foregoing pronouncements relating to the ownership of and title to mortgaged real estate. In order to determine the question of ownership it would appear that the following principles may be deduced from the authorities just cited:

⁴⁸ *McAdams v. Bolsinger*, *id.* at 535.

⁴⁹ 161 Ohio St. 513, 53 Ohio Ops. 390, 120 N. E. 2d 92 (1954).

⁵⁰ *Martin v. Alter*, 42 Ohio St. 94 (1884).

1. A mortgage of real property in the usual form is a mere security for a debt, or for the performance of some other condition.

2. The legal and equitable title to mortgaged real estate remains in the mortgagor so long as the condition of the mortgage remains unbroken.

3. After condition broken, the legal title as between the mortgagee and mortgagor is vested in the mortgagee, subject to the equity of redemption.

4. Ordinarily, where the relation of mortgagor and mortgagee exists, a mortgagor in possession has not only the right of possession, but this right continues after condition broken until the period of redemption expires or until the mortgagee lawfully gains possession.

. . . Applying these principles to the problem to be resolved, it would appear that until a mortgage is foreclosed and a sale consummated, or until a mortgagee obtains possession by ejectment proceedings, the fee to mortgaged real estate, as stated in *Martin v. Alter, supra*, remains in the mortgagor. He is the person with the right to the use and enjoyment of, and the dominion over, such real estate. The real and beneficial use belongs to him . . . Until he is divested of his fee, he is the owner of the property.

. . . It must, therefore, be held under Section 5746, General Code (Section 5723.03, Revised Code), that the term "former owner or owners" does not include a mortgagee of mortgaged property where the mortgagor has not been divested of his fee by the legal proceedings.⁵¹

By their holding the Court makes a clear statement of the lien theory. But why is their holding in opposition to the third deduction from the past Ohio cases when the mortgagor is in tax default?

Eastwood v. Capel:⁵² This case, involving an appeal on the basis of conflict, involved questions of law about the review of prior cases. However, part of Judge Skeel's analysis involved the right and title of the mortgage.

Under the admitted facts of this case, and the law of the foregoing case (*Lessee of Ely v. McGuire*, 2 Ohio 223), and those which follow (*Bradford v. Hale*, 67 Ohio St. 316, 65 N. E. 1008 and *Rands v. Kendal*, 15 Ohio 671), title had passed from the mortgagor to the mortgagee by reason of

⁵¹ Levin v. Carney, *supra* n. 49 at 517-521.

⁵² 126 N. E. 2d 343 (1955).

the breach of the obligation secured by the mortgage.⁵³
(Parenthesis added.)

The opinion further relied upon the *Bradfield* case to state that ". . . upon default of the obligation of the mortgage debt, the legal title is in the mortgagee as security for the debt. . . ." ⁵⁴ The Court is clearly following the intermediate theory.

Commentary

The cases presented comprise the most important, if not all, of the applicable cases on Ohio's mortgage theory since 1929. White's lien theory conclusion obviously has not been accepted or followed. Of the ten cases, six followed the intermediate theory, three followed the lien theory, and one was controlled by statute. The only common factor was a firm reliance upon the classic cases which were hammered out of Ohio's early legal history. Without doubt, those cases were excellent for their socio-economic-political times. But should they govern today? Do they best reflect the contemporary legal relation of the mortgagor and mortgagee? Can there be a single theory to fit all mortgage problems? These questions become important when we reflect upon the ten decisions. In almost each instance, the theory issue was of secondary or tertiary importance. The Court discussions of theory usually formed mere dictum. If, after thirty-three years, ten cases represent "the pronouncement of Ohio's theory," then the results of Ohio's rich legal past have either been taken as settled or have been nearly forgotten.

Notwithstanding the reasons for this situation, the intermediate and lien theories, as they have been used, have weaknesses. Where the intermediate theory has been re-stated, the Court⁵⁵ breaks down the ownership of the property between the mortgagor and the mortgagee. They create separate legal title holders of the same property for different purposes.⁵⁶ Whether this can be justified on legal and equitable grounds is immaterial because, in the words of the Court, there are two legal title

⁵³ Eastwood v. Capel, *id.* at 346.

⁵⁴ Eastwood v. Capel, *id.* at 347.

⁵⁵ See Union Joint Stock Land Bank of Detroit v. Hurford, *supra* n. 33.

⁵⁶ The molecule of "ownership" has been broken into at least 2 atoms. This process has been criticised as presenting the incongruous position that one person may be the legal owner for one purpose, and at the same time another person may be the legal owner for another purpose. Wilkins v. French, 20 Me. 111, 117 (1841); Ellison v. Daniels, 11 N. H. 274 (1856); Stevens v. Turlington, 186 N. C. 191, 194, 119 S. E. 210, 211 (1923). See also 1 Jones, Mortgages, *op. cit. supra* n. 1 at Sec. 14.

holders.⁵⁷ The incongruous nature of this conclusion, although apparently not detrimental to the litigants, commends itself for re-appraisal on the basis of reason. Instead of perpetuating this intermediate dilemma, would it not be more logical to label the mortgagee's property interest for what it actually represents in the financial community? It is not "legal" title but a security interest or "security" title. Then for all purposes, the mortgagor would be recognized as the legal title holder in possession.

A weakness in the use of the lien doctrine concerns the mortgagee's right of ejectment against the defaulting mortgagor. In the three lien cases previously discussed, legal title remained in the mortgagor after condition broken until foreclosure and sale or until ejectment. Is the latter action available to the mortgagee? Ejectment was one of the common law remedies, which has remained in Ohio law,⁵⁸ and has been altered in other states. Ejectment has been restricted to usage following foreclosure and sale⁵⁹ or has been prohibited entirely.⁶⁰ Ohio's

⁵⁷ "An action to recover the title to real property, in Ohio at least, is an action in equity and an action to recover possession is an action at law. As between the parties, upon default the legal title to the mortgaged premises is in the mortgagee, but as to third persons it is in the mortgagor until foreclosure and sale. It is true that the mortgagee is thus vested with the title only for the purpose of enabling him to take possession of the land and hold it as security for his claim." Pugh, *op. cit. supra* n. 4 at 317.

This quality is not new. It has been a problem in title states holding the mortgagor the legal owner.

"The inconsistency involved in the cases in these states holding that the mortgagor is owner at law as well as in equity in cases not involving the enforcement of the mortgagee's right of possession or not arising between mortgagee and mortgagor, but insisting on the technical legal title of the mortgagee in the cases arising directly between them, is obvious. If the mortgagee is held to create a legal lien as security only in these states for nearly every purpose, of importance, it is quite absurd to revert to the discarded title theory merely to give the mortgagee a possession of little or no practical use to him in fact, since he is chargeable for all benefits derived from such possession in equity. If the modern conception of a mortgage so adopted in such states at law for most purposes is sound, it should be consistently applied in all cases, eliminating this distinction between so-called 'title' and 'lien' states." Walsh, *op. cit. supra* n. 3 at 303-304.

⁵⁸ Willis v. Eastern Trust and Banking Co., 169 U. S. 295, 42 L. Ed. 752, 182 S. Ct. 347 (1898); Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142 (1824); Sears, R. and Co. v. Camp, 142 N. J. Eq. 403, 1 A. 2d 425, 118 A. L. R. 762 (1938); Kerr v. Lydecker, Admr., *supra* n. 25.

⁵⁹ Moncreiff v. Hare, 38 Colo. 221, 87 P. 1082, 7 L. R. A. (NS) 1001 (1906); Vaughn v. Schmalsle, 10 Mont. 186, 25 P. 102 (1890); Douglass v. Thompson, 35 Nev. 196, 127 P. 561 (1912); Cooke v. Cooper, 18 Ore. 142, 22 P. 945, 7 L. R. A. 273 (1889); Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765 (1863); Grether v. Clark, 75 Iowa 383, 39 N. W. 655, 9 Am. St. Rep. 491 (1888); Nielsen v. Heald, 151 Minn. 181, 186 N. W. 299, 26 A. L. R. 29 (1922); Holmes v. Gravenhorst, 263 N. Y. 148, 188 N. E. 285, 91 A. L. R. 1230

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statute⁶¹ has not qualified this remedy. However, past cases have stated that the writ is available after condition broken.⁶² This writ, a possessory action at law, is taken out by the holder of the legal title to recover possession from one holding the premises under an invalid title.⁶³ The subject of the action is to try the title to the property.⁶⁴ To be entitled to bring ejectment, the mortgagee's action must meet the following elements:

(1) The property in question must be real, a corporeal hereditament,⁶⁵

(2) The mortgagee must have the legal title and right of possession in himself,⁶⁶ and

(3) The mortgagor must be unlawfully withholding possession from the mortgagee.⁶⁷

If the mortgagor retains the legal title after default and while he is in possession, how can the mortgagee's action fill element two? He has the burden of establishing more than an equitable

(Continued from preceding page)

(1933); *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606 (1887); *Thornley v. Andrews*, 40 Wash. 580, 82 P. 899, 1 L. R. A. (NS) 1036 (1905).

⁶⁰ *Durfee*, *op. cit. supra* n. 2 at 603 n. 8 citing *New York and Michigan*.

⁶¹ Ohio Rev. Code, Sec. 5303.03 (Gen. Code, Sec. 11903).

⁶² *Bradfield v. Hale*, *supra* n. 10; *Stripe v. National Fireproofing Co.*, *supra* n. 9; *Kern v. Kern*, *supra* n. 9; *Stockwell v. Gambell*, *supra* n. 31.

⁶³ *Bartlett v. Bishop of Nevada*, 91 P. 2d 828, 834 (Nev. 1939); *Brown v. Eckel*, 259 Mich. 55, 244 N. W. 160 (1932).

⁶⁴ *Davis v. Robinson*, 374 Ill. 553, 30 N. E. 2d 52, 54 (1940); *McCormick v. McCormick*, 221 Ala. 606, 130 So. 226, 227 (1930); *Dice v. Reese*, 342 Pa. 379, 21 A. 2d 89, 92 (1941).

⁶⁵ *Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452 (1832); *Kingsnorth v. Baker*, 213 Mich. 294, 182 N. W. 108 (1921); *Walters v. Sheffield*, 75 Fla. 505, 78 So. 539 (1918); *Wachstein v. Christopher*, 128 Ga. 229, 57 S. E. 511, 119 Am. St. Rep. 381 (1907).

Ejectment will lie for the recovery of a building: *Sullivan v. Lawler*, 222 Ala. 628, 133 So. 911 (1931); *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422 (1892); *White v. White*, 16 N. J. L. 202, 31 Am. Dec. 232 (1837).

⁶⁶ *Barton v. Morris*, 15 Ohio 408 (1846); *Baker v. Gittings*, 16 Ohio 485 (1847); *Thompson v. Green*, 4 Ohio St. 216 (1854); *Turnbull v. Xenia*, 80 Ohio App. 389, 36 Ohio Ops. 91, 69 N. E. 2d 378 (1946); *Bruml v. Herold*, *supra* n. 44; *Maddox v. Reser*, 110 Ohio App. 213, 13 Ohio Ops. 2d 8, 168 N. E. 2d 923 (1959).

⁶⁷ *Maynard v. Cable*, *Wright* 18 (1831); *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52, 3 S. Ct. 495 (1884); *Linnerty v. Dorway*, 175 Ill. 508, 51 N. E. 809 (1898); *Butler v. Frontier Telegraph Co.*, 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (NS) 920, 116 Am. St. Rep. 563 (1906); *White v. Guirons*, *Minor* (Ala.) 331, 12 Am. Dec. 56 (1824).

The same elements appear in Ohio Rev. Code Sec. 5303.03 (Gen. Code Sec. 11903).

title,⁶⁸ and more than a mere naked title without a right of possession.⁶⁹ He should try to prove a perfect legal title,⁷⁰ although courts have ruled that proof of some kind of legal title was sufficient.⁷¹ But, under the lien theory the mortgagee does not and never had some kind of legal title. He could have legal title if he relied upon some of Ohio's intermediate theory cases. But this would subvert the lien doctrine. As Ohio vacillates between theories so readily, the solution to this legal quandary lies not in action by the mortgagee, but in judicial decree and/or legislative enactment.

Prior statutory enactments have not helped to clarify Ohio's theory. They merely characterize the mortgage as a lien.⁷² But characterization is not the establishment of a rule. The use of the word does not, and has not, dictated a theory.

If Ohio is not strictly an intermediate or lien theory state, then it has the opportunity of forging a new theory. One which reflects the economic interests and social ideals, conflicting though they be, of today's mortgage problems. A theory which reflects what the people are doing.

⁶⁸ *Brockschmidt v. Archer*, 64 Ohio St. 502, 60 N. E. 623 (1901).

⁶⁹ *Barton v. Morris*, *supra* n. 66; *Cincinnati v. White*, *supra* n. 65.

⁷⁰ *William v. Burnet*, Wright 53 (1832); *Turnbull v. Xenia*, *supra* n. 66.

⁷¹ *Thompson v. Green*, 4 Ohio St. 216, 224 (1854); *Williams v. Veach*, 17 Ohio 171, 49 Am. Dec. 453 (1848), a will vested the executor with fee simple title; *Stripe v. National Fireproofing Co.*, *supra* n. 9 at 215, title was found in the holder of the equity of redemption.

⁷² Ohio Rev. Code, Secs. 5301.39 to 5301.41 (Gen. Code, Secs. 8552 to 8555) are procedural and use the terminology "... a mortgage or other lien . . ."; Rev. Code, Sec. 5301.31 (Gen. Code, Sec. 8546-3), also procedural, states "... shall transfer not only the lien of said mortgage. . . ."