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MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME XV

JANUARY, 1931

No. 2

UNDER THE LIEN THEORY OF MORTGAGES IS THE MORTGAGE ONLY A POWER OF SALE?

By BERNARD C. GAVIT*

I.

THE shock to legal theory which followed the intervention of equity and the legislature into the field of real estate mortgages has left the courts and writers altogether inarticulate and uncertain as to the results. It has been accepted as axiomatic that the ruins cannot be explained or classified under any of the common law concepts as to estates or interests in real estate; that the mortgage has become *sui generis* without relative or friend.

"How, then may a mortgage at the present day be defined? Baron Parke, speaking of the mortgagor, said: 'He can be described only by saying he is a mortgagor.' In the same way it may be said that the most accurate and comprehensive definition of a mortgage is that it is a mortgage."¹

But now that the conversion has become quite complete and settled, and equitable rules have been accepted as the common law or statutory rules on the subject, is it not possible to extract from the situation a re-definition of the mortgage which will be both accurate and illuminating? It is submitted that that

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¹Jones, *Mortgages*, 8th ed., 21. Mr. Tiffany makes no attempt to define "Mortgage." See, 3 Tiffany, *Real Property*, 2nd ed., p. 2358 et seq. Professor Durfee reaches the conclusion that under the "lien" theory the mortgagee has a "legal interest" in the land, but he makes no attempt to fit it into any previous classifications of legal interests in land. See Durfee, *The Lien Theory of the Mortgage—Two Crucial Problems*, (1913) 11 Mich. L. Rev. 495, 505; and also Durfee, *The Lien or Equitable Theory of the Mortgage—Some Generalizations*, (1912) 10 Mich. L. Rev. 587. See a criticism of these articles (and the general language employed by the courts) by Sturges and Clark: *Legal Theory and Real Property Mortgages*, (1928) 37 Yale L. J. 691.

is possible and that in the so-called lien theory states the *conventional* mortgage is either a common law or statutory power of sale; no more, and no less.

II.

It is submitted, too, that so to regard it will result in the removal of much of the confusion which is inherent in the present language of the courts. It is said, for example, that the debt is the principal thing and the mortgage but an incident; that the mortgagee has no estate or interest in the land; that his interest in the security is personal property. On the other hand it is said that nevertheless subsequent purchasers take subject to the mortgage; that it is a contract concerning an interest in real estate within the statute of frauds;² that the law of merger of interests operates against it; that the statute of limitations governing causes of action in regard to real estate applies.

The first confusion arises out of the erroneous conclusion that because the law of descent and distribution disposes of the mortgagee's interest as personal property that therefore it is not an interest in real estate. The obvious answer is that a number of interests in real estate are distributed in that manner, not because they are personal property, but because they are not *inheritable* interests in real estate. A lease for ninety years is obviously an interest in land, but it was a chattel real and passed to the next of kin, rather than the heirs.

The courts today have rather abandoned the nomenclature concerning *chattels real* and erroneously have said that because the mortgage interest descended to the next of kin rather than the heirs that, therefore, it was personal property. Quite obviously one can answer: "non-sequitur." All that can be truthfully said is that it passes the same as personal property. Surely it can still be an interest in real estate despite that.

It is certainly unnecessary to go into detail to prove that it is an interest (of some sort) in real estate. The instances cited above as to the statute of frauds, the statute of limitations,

²Browne, Statute of Frauds, 5th ed., sec. 267. The authority which the learned author cites is meager, and does not fully sustain the conclusion. It is submitted that the mortgage comes within statutes requiring all conveyances of land or any interest therein to be in writing rather than within the statute as to contracts for the sale of lands. See 3 Tiffany, Real Property, 2nd ed., sec. 603.

the law of merger, and the law of bona fide purchaser are really quite conclusive on the score.³

III.

Probably greater than the confusion which arises out of calling the mortgage interest personal property (or what is worse, calling it "only a chose in action") is the confusion which is inherent in the accepted language of the courts to the effect that the mortgagor retains legal title and the mortgagee has only a lien. Again the authorities have been too literal in their application of this supposed rule. This language has been, in effect, remodeled to read, "the mortgagor retains *all* of the legal title, and the mortgagee has only a lien, which is not title."

To begin with, "lien" is, at least historically, a misnomer. Today, however, it seems to have at least three distinct meanings. Originally a lien was only a right to possession.⁴ For no very good, or apparent, reason here it has been extended to mean something quite different. It is suggested that possibly the confusion arose out of saying that, for example, a bailee had a lien for his charges for services: the lien (or right to possession) therefore was security for his debt. It was then assumed, or said, that every security was a lien, regardless of whether the right given as security was a right to possession, a right to use or sell to satisfy the debt, or all of them. Today, therefore, when in this connection the courts talk of one having a lien they mean that he has a security for his claim.⁵

If the parties are dealing with tangible personal property which is delivered to the mortgagee or if they are dealing with real property and the mortgage is put in possession it is apparent that the latter has both actual possession and the right to continued possession as security. But actual possession is after all

³See Durfee, *The Lien Theory of the Mortgage—Two Crucial Problems*, (1913) 11 Mich. L. Rev. 495. This is further illustrated by the fact that in the event the property is taken by eminent domain the mortgagee has a claim to the proceeds. Mills, *Eminent Domain*, 2nd ed., sec. 74.

⁴Jones, *A Treatise on The Law of Liens* 3, 13.

⁵A "lien" may therefore be a right to possession as security; it may be some other interest as security. It is also said, for example, that the beneficiary of a trust may follow the trust property into the hands of one (at least) who is not a bona fide purchaser, and that he has a lien upon the property in the hands of such a third person. "Lien" here has a third connotation and means "equitable title."

only the present enjoyment of the right to possession of the property in question as against the general owner, the public generally and the state. It is only a right in relation to that property as against others. He became the owner of that right (or interest) by reason of a lawful consensual act on the part of the previous owner. It is clearly true, then, that in any case a so-called 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.

What the interest, or interests may be, is the question. Are they a transfer of existing legally recognized interests, or are they the result of the creation of some new legally recognized interests? As stated above they must consist of interests in relation to specific property. (The property may be either tangible or intangible, but we are concerned here only with real property.) If the mortgage be security, and it is some legally recognized interest in the real estate which is the security, it follows that the mortgagee acquires it solely because, through an intentional act (which is the equivalent of a deed when a grantor transfers all of his interests to a grantee) the mortgagor intended the mortgagee to have that interest as security. It is obvious, therefore, that ordinarily the security would have to be at least one interest which was a part of the mortgagor's interests in the property. Although in a few instances the law allows the owner of real estate to create new real property rights, as, for example, in the law of covenants running with the land,⁶ normally the rights are traditional, and are treated in law as existing component parts of the owner's "title." The rights, privileges, powers, and immunities which the law creates in favor of an owner in respect to a specific piece of property constitute his title or ownership.⁷

What one does then when he gives another his real estate as a security for a debt is that he transfers one or more of his interests in regard to the real estate to the mortgagee. How many he transfers depends upon the intention of the parties and the law. Under the common law he transferred practically all of

⁶Bigelow, *The Content of Covenants In Leases*, (1914) 12 Mich. L. Rev. 639; Gavit, *Covenants Running with The Land*, (1930) 24 Ill. L. Rev. 786, (1930) 5 Ind. L. J. 432, (1930) 9 Ore. L. Rev. 347.

⁷American Law Institute *Restatement of the Law of Property*, Tentative Draft No. 1 (1929) pp. 11, 17-23.

them, retaining only the possible right of re-entry. Under the law of mortgages today he transfers more or less of them, depending upon how far the law of a particular jurisdiction has departed from the original common law.

Instead, therefore, of it following that because the mortgagor retains the legal title that the mortgagee has only a lien, it necessarily must be that the mortgagor retains practically all of the legal title, and he gives the mortgagee some, or one, of the rights, privileges, powers and immunities which the law recognizes as real property interests.

IV.

The inquiry then narrows itself down to the question as to whether the mortgage interest is one of the traditional real property interests, or estates,⁸ rather than a new interest or estate.⁹

There was no reason originally why an owner of real property could not convey all of his interests, as owner, as security for the payment of the debt. The original mortgage was such a transaction. Because the entire title was given as *security*, and not absolutely, it was given conditionally; that is, if the grantor paid the debt he was to have his title back. This was simply what the law of real property called a condition subsequent, and the transaction was given that effect. However, in substance the transaction was a forfeiture of the grantor's title in satisfaction, or partial satisfaction of his debt. Equity intervened and created the equity of redemption, but allowed it to be "foreclosed." That is, the chancellor set a time beyond which the mortgagor could not redeem. The sole result of that was that in equity the time for the performance of the condition subsequent was not that agreed upon by the parties, but the one fixed by the chancellor. But it still operated, under the extension of time by the chancellor, as a condition subsequent, and if unperformed by the grantor the grantee's fee simple estate became indefeasible.

But guided by what probably was at least a remnant of the ec-

⁸An estate in land is an aggregate of certain interests measured by the time element, or other conditions or events. "The most distinctive feature of the law of land as established in England, and from there brought to this country, is the doctrine of estates, by which the duration of one's right to possession of the land, with the incidental rights of user, is made dependent on the character of the estate which he has in the land." 1 Tiffany, Real Property, 2nd ed., p. 35.

⁹See note 1, *supra*.

clesiastical suspicion that the lending of money was immoral, the courts and legislatures came to the conclusion that it would do no harm to put a few more stumbling blocks in the path of one who would insist on security for his debt. So the law took away the owner's power to convey his whole title as security, and finally said he can only give a "lien." As we have seen this means that he gives a security and the question remains what does he give as security? What part of his title is it that is the security?

V.

Clearly it is not an estate. The only one of the common law estates which might fit in is the estate on a condition precedent, that is, a fee simple to begin in the future, upon the default in payment of the debt. Today the law of seisin would in most states not prevent such a legal estate,¹⁰ but the decisive objection to it is that it would be an inheritable interest in land, whereas the mortgage interest is not inheritable.

Conceivably the mortgagor might give as security only the right to possession; the right to use; the power to sell; the right against trespass; the right to the rents and profits; or a combination of any or all of them, as well as others; and he might give them presently, or conditionally in the future. Obviously some of the legally recognized interests which constitute his title would as a practical matter be of little value as security. This would be true, both intrinsically and from the view point of negotiability and marketability. For example, the right against trespass is intrinsically of little value on the market; the right to possession might well be intrinsically valuable, but as a practical proposition its market value might be quite speculative.

If one were concerned in looking after the interests of the mortgagee, and at the same time protecting the mortgagor by allowing the use of as small a portion of his title as security as possible, what single interest, if any, would he choose? The ready answer is the power of sale. If the mortgagor gives the mortgagee a power of sale, does not the latter have as complete protection as if he had all of the title on a condition precedent? Obviously he has. In effect he may acquire all the title, or the market value of all the title, although owning only a very small part of the title.

¹⁰¹ Tiffany, *Real Property*, 2nd ed., pp. 261, 547.

It is submitted that by judicial decision and legislative enactment the interest of the mortgagee has been limited to that, in the conventional mortgage in the lien theory states. So when AB "mortgages and warrants to CD the following described real estate," the only lawful intent expressed by those words is that AB "grants and conveys to CD a power of sale of the following described real estate as security for a loan of \$10,000.00."

We would emphasize the fact that we are talking about the *conventional* mortgage, and its normal results. A good many of the states allow other interests to be given as security, for example, the present or the conditional future right to the rents and profits, and to possession. But in the absence of any specific mention of other rights the conventional mortgage normally transfers only a power of sale. The mortgage may also provide for insurance,¹¹ and for the participation in the management of the mortgagor's business. It is submitted, however, that these additional rights are purely contractual; that such agreements do not create a real property right in favor of the mortgagee. Thus it seems well settled that the agreement by the mortgagor to insure is not a covenant running with the land.¹²

As to participation in the management no case has been found which decides the point. It seems quite likely, however, that a court would hold that a transferee of the mortgagor's interests in the land would not be bound by the agreement.¹³

If, under the conventional mortgage, the mortgagee gets some interest in the property beyond a power of sale then the conclusion is wrong. He does not have the right to possession;¹⁴ nor the right to the rents and profits;¹⁵ nor the right against tres-

¹¹In the absence of such a provision there is no right to it. 3 Tiffany, Real Property, 2nd ed., sec. 617.

¹²1 Jones, Mortgages, 8th ed., p. 636, note 11. This must rest upon the intention of the parties, for there should be no objection to the creation here of a real property right by covenant, or contract. It is well settled that such a covenant between landlord and tenant does run with the land. 1 Tiffany, Landlord and Tenant, sec. 145b.

¹³As illustrating the reluctance of the courts to hold that a covenant in a mortgage runs against a transferee of the mortgagor's interest see, Guaranty Trust Co. of N. Y. vs. New York & Q. Co. Ry., (1930) 253 N. Y. 190, 170 N. E. 887. It was there held that a covenant as to after acquired property did not bind a merging corporation.

¹⁴3 Tiffany, Real Property, 2nd ed., p. 2427.

¹⁵Tiffany, Real Property, 2nd ed., p. 2433 et seq. If the mortgagee later recovers the rents and profits under a receivership, normally he does so not because they were granted (either presently or in the future) to him as a part of his security, but because the security

pass.¹⁶ The truth is that the normal result of the conventional mortgage is solely that the mortgagee has a power to sell the property for the satisfaction of his debt. His power to sell is in fact usually limited to a sale under a decree of court; but essentially the sale is still under the power transferred to the mortgagee by the mortgage, and the sale is simply under the direction of the court, and through the instrumentality of the sheriff.¹⁷ That is, here the law requires a judicial recognition of the power, and its extent or measure before the mortgagee can exercise it; but that does not keep it from being a power of sale, any more than the fact that the right to specific performance must receive judicial recognition before it is finally enforceable keeps it from being a right to specific performance. The requirement as to the judicial recognition of the power before its exercise is merely in keeping with the general policy of the law which with few exceptions has abolished the old law of "self-help" and which requires one to seek the aid of the courts and the executive in the recognition and enforcement of his legal rights. The policy here is obvious,

which was granted is insufficient; it would seem that the theory is that the receivership as to the rents and profits is an incident of the collection of the debt, upon the grounds of insolvency, rather than the enforcement of additional security. See 3 Tiffany, Real Property, 2nd ed., p. 2442, et seq. It will be noted that in some states statutes allow a receivership without insolvency. The substance of that is, of course, that in those states the mortgage is also a conditional future transfer of the rents and profits.

As to the first proposition it is said in 2 Clark, Receivers, 2nd ed., sec. 958, "Ordinarily a receiver other than a receiver in a foreclosure case distributes property and funds *pari passu* among all those who become parties to the proceeding and the party at whose instance a receiver is appointed has no advantage over the others. But the mortgage or other lien holder at whose instance a receiver is appointed secures an equitable lien on the unpaid rents and profits." The learned author cites for this proposition only the case of *Rider v. Bagley*, (1881) 84 N. Y. 461, 465. The case does contain language to that effect but any sound basis for it is difficult to establish, if as in New York a receiver can be appointed only on proof of insolvency. See 3 Tiffany, Real Property, 2nd ed., p. 2442.

¹⁶3 Tiffany, Real Property, 2nd ed., 2459 et seq. The mortgagee is entitled to damages for impairment of his security, and to some extent he is entitled to control the use of the property; but this is because his interest is a real property interest in relation to that specific property, and like any other property interest it is protected against unlawful invasion. But it is a non-possessory interest and therefore it must be protected by an action on the case, or some equitable proceeding.

¹⁷"Occasionally the statute expressly requires that any sale made by an executor shall be approved by the probate or other court, and the effect of such a requirement is to control any discretion intended to be vested in the executor as regards a sale." 1 Tiffany, Real Property, 2nd ed., p. 1053.

for it prevents the abuses incident to the private exercise of the power, and at the same time gives the mortgagee the advantages of the doctrine of *res-judicata* as to the resulting title.

If the mortgagee may realize on his security by a strict foreclosure in equity, then again the conclusion is wrong. The lien theory states are listed by Mr. Jones as follows:¹⁸ Arizona, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. The same authority¹⁹ lists the states in which a strict foreclosure is prohibited, and there may only be a sale of the property to satisfy the debt. Of the states listed above the following are not listed, and there is presumably no authority directly on the point: Arizona, Georgia, Idaho, Kansas, Louisiana, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, Wyoming.

Of the other states Minnesota²⁰ and Wisconsin²¹ seem to be the only ones which permit a strict foreclosure in the technical sense of those words; but it is also asserted that the usual practice is to foreclose only by sale in Minnesota.²² The others either by judicial decision or legislative enactment have a definite rule to the effect that the mortgagee's sole remedy is a sale.²³ There are older cases in some of those states²⁴ saying that if a foreclosure suit omitted a junior incumbrancer his rights might be foreclosed by decree. Such a suit, of course, is in reality a suit to quiet title or remove a cloud, and deals with the redemption (statutory or equitable) allowed anyone subsequently interested in the prop-

¹⁸1 Jones, *Mortgages*, 8th ed., p. 60.

¹⁹Beginning with sec. 1965, 3 Jones, *Mortgages*, 8th ed.

²⁰The cases and statutes are cited in 3 Jones, *Mortgages*, 8th ed., sec. 1719, and 1975; also, in Wiltsie, *Mortgage Foreclosure*, 4th ed., sec. 903. See, in particular, *Mason's Minnesota Statutes*, 1927, sec. 9634-45 and cases cited *infra* note 22.

²¹But it has very limited application. See, 3 Jones, *Mortgages*, 8th ed., sec. 1987 and 1745; Wiltsie, *Mortgage Foreclosure*, 4th ed., sec. 903.

²²See note 20, and in particular, *Wilder v. Haughey*, (1874) 21 Minn. 101; *Hollingsworth v. Campbell*, (1881) 28 Minn. 18, 8 N. W. 873; *Morey v. Duluth*, (1897) 69 Minn. 5, 71 N. W. 694; *Blanchard v. Hoffman*, (1923) 154 Minn. 531, 192 N. W. 352.

²³3 Jones, *Mortgages*, 8th ed., secs. 1690-1746, 1960-1987.

²⁴Notably Indiana, New York and Iowa.

erty and has nothing to do with the rights as between the mortgagor and mortgagee.²⁵

Of the states where no decision or statute on the point is listed, an investigation of previous sections in the book where the usual methods of foreclosure²⁶ are set out, discloses that Mr. Jones²⁷ reaches the conclusion that a decree of sale by a court of equity is the usual method in all of them. In most of them there is specific statutory provision for the proceedings, and a requirement that the decree "shall" be for a sale. It seems certain that the result would be reached in all of them that a court could no longer enter a decree of strict foreclosure, were that point to be specifically put to the courts for decision.

The conclusion is, therefore, that with some exceptions in Minnesota and Wisconsin, the only normal interest which the mortgagee has is a power of sale.²⁸

VII.

Is this power of sale the common law power of sale, or is it *sui generis*?

In substance it is the former. The mortgagee has an ability to produce a change in the mortgagor's relation to the real estate in question.²⁹ He has no right against the mortgagor; that is, the mortgagor may sell without interfering with the mortgagee's interest; his interest, therefore, is a power and not a right.³⁰

In its essential incidents it is a power. A power was not an estate in land.³¹ If it was coupled with an interest it passed to the one who held the interest.³² A power in gross might be extinguished by release.³³ The law of merger (or something similar

²⁵3 Tiffany, *Real Property*, 2nd ed., p. 2694.

²⁶Which is here, of course, a misnomer. The decree is a decree of sale and not for the foreclosure (i. e. the cutting off) of the equity of redemption.

²⁷3 Jones, *Mortgages*, 8th ed., sec. 1697-1746.

²⁸Some states prohibit a private sale, but in those where it is allowed its use merely removes the limitation on the power that the sale be under judicial decree, and the mortgagee has an option to exercise the power privately or under the direction of a court.

²⁹American Law Institute, *Restatement of the Law of Property*, Tentative Draft No. 1 (1929) sec. 3.

³⁰American Law Institute, *Restatement of the Law of Property*, Tentative Draft No. 1 (1929) secs. 1 and 3.

³¹1 Tiffany, *Real Property*, 2nd ed., p. 1041.

³²1 Tiffany, *Real Property*, 2nd ed., p. 1069.

³³1 Tiffany, *Real Property*, 2nd ed., p. 1105.

to it) ordinarily would operate to extinguish it.³⁴ The sale under a power related back to the time of its creation, and intervening interests were cut off.³⁵

In all these respects it is identical with the mortgage interest.

VIII.

The only serious objections which can be urged are these:

1. The law of seisin made impossible a conveyance through the donee of a power; there had to be a conveyance to a trustee to the uses of the future exercise of the power;³⁶ 2. The rule against perpetuities might apply.³⁷

As to the first. In practically all of the lien theory states the law of seisin has either been abolished, or its efficacy reduced to an unascertained minimum.³⁸ There would (in those states) be no valid objection to a conveyance by the donee of a power, without the intervention of a trust. But even in those states where the common law or legal theory of mortgages prevails, the practice and law seems to permit an express power of sale, without the use of a trustee.

In this connection Mr. Tiffany says:

“Careful conveyancing would seem to call for the insertion in the conveyance or settlement of the declaration of a use, whenever it is sought to create a power of appointment of the legal title, except as any such necessity may be obviated by statute. Such is the usage in England, but in this country, with the looser methods of conveyancing in vogue, it might readily occur that no use is declared, and a question suggests itself as to the theory on which, in such a case, the power can be regarded as operating.”³⁹

The learned author doubts that it could be sustained either as a covenant to stand seised, or as a bargain and sale; but the fair implication is that it would be upheld on some theory. Later on the same author says this:

“In view of the very general utilization of powers of sale of this character (in mortgages) it is surprising that the courts have not more closely investigated their fundamental character. . . . But

³⁴1 Tiffany, *Real Property*, 2nd ed., p. 1106.

³⁵3 Tiffany, *Real Property*, 2nd ed., p. 2727. As to the theories involved see Simes, *The Devolution of Title to Appointed Property*, (1928) 22 *Ill. L. Rev.* 480.

³⁶1 Tiffany, *Real Property*, 2nd ed., p. 1056.

³⁷1 Tiffany, *Real Property*, 2nd ed., 1110, et seq.

³⁸1 Stimson, *Am. St. Law*, sec. 1420-27.

in some decisions in states in which the legal title is vested in the mortgagee, without any express repudiation of the above view, it is assumed that the mortgagee's power to sell is a legal power of appointment, taking effect under the statute of uses.³⁹⁴⁰

If it be considered, in a particular jurisdiction, however, that there is *prima facie* still sufficient life in the law of seisin to cause trouble, the answer is that the courts and legislatures, as far as this particular power of sale is concerned, have trampled it under foot until it is as dead as the well-known door nail. When the courts and legislatures allow a so-called mortgage to transfer a power of sale to the mortgagee; allow the mortgagee to exercise it (chiefly through the medium of a judicial decree, and a sale and conveyance by the sheriff); recognize as valid the title which the purchaser acquires at the sale; the objection that what has been done is in utter disregard of the law of seisin, only proves that the law of seisin is no longer an objection.

IX.

As to the rule against perpetuities. That normally an estate to be created under a power comes within the rule against perpetuities admits of little doubt.⁴¹ In some states the rule has been changed to allow a future vesting only within lives in being.⁴² The result would be, if the rule were applied, that practically all mortgages would be void. This would be true even where the common law rule still prevails; for the power might be exercised anytime within twenty years (the usual statute of limitation here) after default (and few mortgages are given for so short a space of time as one year.)

But the same difficulty is presented under the legal theory of mortgages. A condition subsequent logically is within the rule.⁴³ Professor Gray meets the difficulty by suggesting that an exception must be made.

"Mortgages in fee for the payment of money or the performance of other acts at a date more than twenty-one years after lives in being have probably been few. The question may be some day

³⁹1 Tiffany, *Real Property*, 2nd ed., sec. 319.

⁴⁰3 Tiffany, *Real Property*, 2nd ed., p. 2710.

⁴¹Gray, *The Rule Against Perpetuities*, 3rd ed., sec. 473, et seq.; 1 Tiffany, *Real Property*, 2nd ed., sec. 334, et seq.; 1 Sugden, *Powers* p. 468, et seq. Cf. Foulke, *Powers and the Rule Against Perpetuities*, (1916) 16 *Col. L. Rev.* 537.

⁴²1 Tiffany, *Real Property*, 2nd ed., sec. 189.

⁴³Gray, *The Rule Against Perpetuities*, 3rd ed., sec. 562, et seq.

presented in connection with railroad mortgages. In view of the large interests likely to be involved, and the novelty of the question, the courts may perhaps sustain the validity of such mortgages. It is to be hoped, should this be the case, that they will frankly declare them an exception to the rule against perpetuities, and not, by attempting to reconcile them with the rule, bring confusion into the rule itself."⁴⁴

In the lien theory states it is submitted that the courts and legislatures have already (quite unconsciously in practically all of the cases) made the exception. Again Professor Gray says:⁴⁵

"Where no legal title passes to the mortgage as is the case in several of the United States, it would seem that the mortgage would be without security."

But he adds in a note:

"Such mortgages will often be found to have been authorized or confirmed by legislative action."⁴⁶

He also quotes⁴⁷ from the case of *Sacramento Bank v. Alsom*:⁴⁸

"The appeal is supported by very elaborate and forcible briefs, which, if the questions were open for consideration, would challenge and receive serious and careful examination, but we do not think the matter can now be considered open for discussion. Our own records will disclose the fact that trust deeds have been quite frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the code and continuing until the present time. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed."

In the lien theory states the proceedings for sale are provided for by statute, and the objection that the power of sale violates the rule against perpetuities is met by the answer that to that extent the legislatures have amended the rule. If the sale is the result of a rule imposed by court decision, those decisions and others recognizing the validity of the title obtained by the purchaser, show that the courts have to that extent amended the rule. The decisions would constitute a rule of property which it is too late to question.

⁴⁴Gray, *The Rule Against Perpetuities*, 3rd ed., sec. 570.

⁴⁵Gray, *The Rule Against Perpetuities*, 3rd ed., sec. 571.

⁴⁶Gray, *The Rule Against Perpetuities*, 3rd ed., sec. 571, note 3, p. 463.

⁴⁷Gray, *The Rule Against Perpetuities*, 3rd ed., sec. 570, note 1, p. 462.

⁴⁸(1898) 121 Cal. 379, 53 Pac. 813.

X.

The conclusion must be that in substance the so-called lien mortgage is only a power of sale. In so far, and if, there are exceptions as against the law of seisin and the rule against perpetuities, it might possibly be said that the mortgage is *sui generis*; but if one means by that expression that it involves an interest in real estate not recognized at common law the obvious answer is it is not *sui generis*.