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Recommended Citation
MILTON R. FRIEDMAN, CREATION AND EFFECT OF PERSONAL LIABILITY ON MORTGAGE DEBTS IN NEW YORK, 50 YALE L.J. (1940).
Available at: https://digitalcommons.lawyale.edu/ylj/vol50/iss2/3

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CREATION AND EFFECT OF PERSONAL LIABILITY ON MORTGAGE DEBTS IN NEW YORK

By MILTON R. FRIEDMAN†

FULL liability on a mortgage imports more than an obligation to pay the debt thereby secured. In the usual mortgage are contained covenants affecting priorities, after-acquired titles, and other matters. Personal liability on the debt and these covenants may be incurred by a grantee who assumes the mortgage as well as by the original mortgagor. This Article will discuss the creation of such liabilities, the rights of the mortgagee stemming therefrom, and the various incidents of mortgage liabilities so created.

CREATION OF LIABILITY

Original Mortgagor. The mere execution of a mortgage does not create a personal liability on the part of the mortgagor to pay the debt.¹ In the absence of a bond or other obligation to pay the debt secured by the mortgage, no covenant to pay will be implied and the remedy of the mortgagee is confined to an enforceable lien upon the land.² An express covenant in the mortgage to pay the debt is sufficient to make the mortgagor enforceable as a bond.³ That an unqualified admission of liability in the mortgage is likewise sufficient was the holding in Elder v. Rouse,⁴ but this case has been distinguished more often than it has been followed.⁵ The mortgagor’s usual method of incurring personal liability⁶

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2. Wood v. Travis, 231 App. Div. 331, 248 N. Y. Supp. 22 (3d Dep't 1931). This is specifically provided by N. Y. REAL PROP. LAW § 249; see 2 JONES, MORTGAGES (8th ed. 1928) § 838. Furthermore, N. Y. REAL PROP. LAW § 251, providing that no covenants are implied in conveyances, has been applied to mortgages. Stoddard v. Weston, 53 Hun. 634, 6 N. Y. Supp. 34 (Sup. Ct. 1889).


4. 15 Wend. 218 (N. Y. 1836); Consumers Brewing Co. v. Braun, 147 App. Div. 171, 132 N. Y. Supp. 87 (2d Dep't 1911); see Culver v. Sisson, 3 N. Y. 264, 266 (1850).

5. See cases discussed in Smith v. Rice, 12 Daly 307, 310-311 (N. Y. Comm. Pl. 1884).

6. A recital of consideration or amount of the debt secured creates no personal liability because, in the absence of a bond, such recitals more readily indicate an intention
is the execution and delivery of a bond. The assumption is generally repeated in the accompanying mortgage if any of the generally used mortgage forms is followed. The New York Legislature has popularized an abbreviated mortgage by the creation of a statutory short form, the interpretation of which is set forth in an expanded statutory construction. The statutory form of mortgage contains the clause: "The mortgagor will pay the indebtedness as above provided," which serves to create a personal liability to pay.

7. Bond and mortgage are construed together but the bond prevails in case of repugnancy, even though it is the mortgage, and not the bond, which is publicly recorded. Adler v. Berkowitz, 254 N. Y. 433, 173 N. E. 574 (1930); Cunningham v. Pressed Steel Car Co., 238 App. Div. 624, 265 N. Y. Supp. 256, aff'd, 263 N. Y. 671, 189 N. E. 750 (1934); Biedka v. Ashkenas, 119 Misc. 647, 197 N. Y. Supp. 851 (Sup. Ct. 1922). If, however, the recorded mortgage recites a lesser sum than the bond, a bona fide purchaser is protected. Frost v. Beekman, 18 Johns. 544 (1820). But see Note (1934) 90 A. L. R. 1432.


If the obligation is expressed in an unsealed note, separate statutes of limitation will govern the debt and the mortgage from their inception and the statute may bar the debt without impairing the enforceability of the mortgage. Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891); Broward Operating Co. v. Harding, 167 Misc. 573, 3 N. Y. S. (2d) 696 (Sup. Ct. 1938). Even where bond and mortgage are under seal, the same
Assuming Grantee. After conveyance of the premises by the mortgagor, the grantee may assume the mortgage by an agreement with the mortgagee, whose promise to modify or extend the mortgage supplies adequate consideration for the new owner's assumption. More difficult problems, however, are presented where the assumption is by agreement between mortgagor and grantee—a stranger. A conveyance merely subject to a mortgage imposes no liability for the mortgage debt on the grantee, regardless of any deduction of the amount of the mortgage from the purchase price as part of the consideration; nor is the grantee liable to indemnify the mortgagor against the mortgage. Moreover, payment of neither interest nor principal by the grantee implies any obligation on the mortgage debt.

It is generally established that a grantee's acceptance of a deed containing an affirmative covenant on the grantee's part constitutes a valid assumption of the covenant, even though the grantee does not sign the deed. Assumption of a mortgage could formerly be effected in New York by a grantee in this manner or even by parol. But result may occur after sale of the property, where payments of principal or interest made by the grantee do not prevent the running of the statute against the mortgagor. Brooklyn Sav. Bank v. Wechsler Estate, 259 N. Y. 9, 180 N. E. 752 (1932).


14. See Smith v. Trustlow, 84 N. Y. 660 (1881); 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 383, n. 4; 1 WILTSIE, MORTGAGE FORECLOSURES (5th ed. 1939) § 218. For minority rule see 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 622 et seq.; 1 WILTSIE, op. cit. supra, § 220; Notes (1937) 111 A. L. R. 1114, 1124, L. R. A. 1917C 592, 594-595.


Where the deed is not signed by the assuming grantee, the statute of limitations affecting specialties is applied to the assumption wherever the deed is deemed to be the act of both parties. Bowen v. Beck, 94 N. Y. 86 (1883). The cases are not uniform. See Note (1936) 51 A. L. R. 911.

18. The assumption of a mortgage is an original undertaking and not within the Statute of Frauds. Taintor v. Hemmingway, 18 Hun. 458 (3d Dep't 1879), aff'd, 83 N. Y. 610 (1880); see Howard v. Robbins, 67 App. Div. 245, 249, 73 N. Y. Supp. 172, 175 (4th Dep't 1901), aff'd, 170 N. Y. 498, 63 N. E. 530 (1902); In re Amsdell-Kirchner Brewing Co., 240 Fed. 492, 497 (N. D. N. Y. 1917).
by an act effective April 6, 1938, no mortgage assumption by deed is valid unless signed and acknowledged by the grantee. As the statute is prospective in operation only, the lien of countless mortgages on record as of the date of passage will be preserved indefinitely. Insofar as these were assumed before that date, the old rule will continue to obtain.

The holder of a mortgage to which the statute does not apply may not rely conclusively upon an assumption clause in a deed subsequent to the mortgage. The assumption clause is not regarded as part of the grant but as a collateral contractual undertaking, personal in nature, requiring a meeting of the minds. The mortgagee has the burden of establishing the delivery and acceptance of the deed, the grantee's knowledge of the existence of the assumption clause, and an understanding of the grantor and grantee with respect to the provisions and meaning of the clause purporting to bind the grantee personally. Acceptance or retention of the deed by the grantee is evidence of assent, but the rule that a purchaser is deemed to know everything in his deed has been held inapplicable to the assumption clause. Recordation of the deed by the grantee subsequent to acquisition of title may be unenforceable for want of consideration.

20. As the statute refers only to a mortgage which “shall be hereafter executed,” it will apparently not govern assumptions, made subsequent to its enactment, of mortgages theretofore executed.
Where a negotiable mortgage note is used, the defense will not prevail against a bona fide purchaser for value. Hayden v. Drury, 3 Fed. 782 (C. C. N. D. Ill. 1889).
show the agent's power to bind the grantee to pay. Subsequent ratification by the principal may, however, be established through proof of the principal's knowledge both of the actual facts and of the legal effect of his act. The mere payment of interest without knowledge of the assumption is insufficient. Reconveyance of the premises by the grantee may be evidence of ratification, but not if it is done without knowledge of the assumption. Nor is ratification to be spelled out of an instrument certifying the mortgage to be valid and free of offset and defense, given by an owner to induce a purchase of the mortgage.

**Mortgagee's Rights Against Assuming Grantee**

If the mortgagee establishes delivery and acceptance of the deed and a purposive assumption on the grantee's part, under new rule or old, his right of enforcement may still be defeated by technical requirements or equities in the grantee's favor. In cases in which the 1938 statute does not apply, the mortgagee is required to establish not only the grantee's intention to assume but compliance with other conditions precedent as well. The new statute, by its requirement of writing, simplifies the proving of intention but does not purport to affect other conditions to inception of liability or matters in avoidance. Inasmuch as the mortgagee's rights are derivative, the assuming grantee may interpose any defense available against his grantor.

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29. Blass v. Terry, 156 N. Y. 122, 128, 50 N. E. 953, 954 (1898); Matter of Smathers, 153 Misc. 132, 141, 274 N. Y. Supp. 717, 730 (Surr. Ct. 1934). But specific authority to assume a particular mortgage is unnecessary where the agent has general authority to buy real estate for cash or credit. Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280 (1885).


33. Union Trust Co. v. Allen, 239 App. Div. 661, 268 N. Y. Supp. 437 (4th Dep't 1934). Whenever mortgages are non-negotiable, it is the practice of an intending purchaser of a mortgage to require an estoppel certificate.

34. But the grantee in this situation need not await action by the mortgagee but may, in a proper case, obtain rescission in an action against his grantor alone. In Crowe v. Lewin, 95 N. Y. 423, 427 (1884), the plaintiff sought to set aside an exchange of property on the ground that the deed running to the plaintiff conveyed premises other than those agreed upon. Defendant, whose deed provided for an assumption of the mortgage encumbering the parcel conveyed by plaintiff, argued that, in view of the assumption, rescission could not restore the status quo. In deciding for the plaintiff, the court ruled that its decree "annuls the deed and adjudges that the land did not pass, and so the [mortgagee] can have no right of action upon a promise divested by the judgment of any consideration."


An agreement between grantor and grantee, making the latter’s assumption subject to conditions precedent, has been held to qualify the mortgagee's right of enforcement. *Flagg v. Munger* and *Judson v. Dade* involved agreements arising out of shortages in acreage conveyed. In the *Flagg* case, the grantee discovered the shortage after preparation of the deed but before its delivery. At his instance the deed was accompanied by the grantor’s bond securing the grantee for part of the mortgage debt assumed by the grantee in the conveyance, and by a stipulation expressly conditioning the assumption upon the grantor’s compliance with the terms of the bond. The grantor's default on the collateral bond was held to release the assuming grantee completely. In the *Judson* case, the deed expressly purported to convey 80 acres and recited that any difference would be adjusted at the rate of $30 an acre. Subsequent to the conveyance, the grantor gave the grantee an unrecorded instrument making allowance for the shortage and reducing the grantee’s liability *pro tanto*. This agreement was upheld as against the mortgagee. Even parol agreements made simultaneously with the conveyance which give the grantee the option to reconvey and be released from his assumption have been enforced where acted upon in good faith before a prejudicial change of position on the part of the mortgagee.

The assuming grantee who takes title by quitclaim deed can not defend against the assumption agreement on grounds of failure of title. Even if the grantor has warranted the title, the mortgagee can recover prior to eviction or to an offer on the grantee’s part to surrender the premises as a basis for equitable relief. It has been said that if failure of title were later urged successfully, equity could, if the defendant paid a deficiency judgment, furnish relief by revival of the mortgage or some form of subrogation. This is no more than the right, inhering in any owner, to pay the mortgage and take it by assignment. This right in these circumstances—succession to a junior lien after establishment of a paramount title—is probably of no value unless it is also coupled with a right on the bond. In *Dunning v. Leavitt*, an assuming grantee who acquired title through a full covenant and warranty deed had been evicted

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37. 9 N. Y. 483 (1854); see Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 Yale L. J. 1008, 1028.
38. 79 N. Y. 373 (1880).
44. 85 N. Y. 30 (1881).
by a paramount title prior to foreclosure. The mortgagee's efforts to obtain a deficiency judgment were defeated on the ground that the eviction represented a total failure of consideration for the assumption agreement. The majority held that the assumption had not been given for a promise but for the land and that there was no fund, i.e., land, in the defendant's hands applicable to the mortgage. The dissenting judge argued that the conveyance was consideration and that the grantee's liability was absolute, subject only to a counterclaim for breach of covenant. In the earlier ejectment action the rents and profits previously received by the grantee had been remitted to the lawful owner; the grantee apparently never obtained any beneficial enjoyment of the premises. If the failure of title had affected only part of the land conveyed, there would be force to the suggestion that the grantee's right be limited to a counterclaim for breach of covenant in the degree in which this counterclaim would have been available against the grantor. If the grantee had obtained the beneficial use of the premises, it would seem that a tender of rescission could be made only if restoration of the status quo were also offered.

Although the mortgagee may in many instances enforce the grantee's assumption at the time of the conveyance, the question as to whether the mortgagee's rights under the assumption may subsequently be released by an agreement to which he is a stranger is not definitely settled. The answer to this question requires a consideration of the theory of the mortgagee's position and the influence which has been exerted upon it by the third party beneficiary doctrine.

It should be noted at the outset that the mortgagee is not a party to the assumption agreement, that no consideration therefor moves from him, and that he may not even be aware of its existence. Nevertheless, even before Lawrence v. Fox, a mortgagee was held to have rights arising out of the grantee's assumption by deed. In Halsey v. Reed, the Court of Chancery held that the intention of an assuming grantee was not to pay the amount of the mortgage to the grantor but to indemnify the grantor against the mortgage. Under the theory of "equitable subrogation" laid down in this case, as between grantor and assuming grantee, the latter became the principal debtor and the former stood in the position of a surety. The assumption was in the nature of an indemnity for the grantor and the creditor (mortgagee) became entitled to the benefit of the security received by the surety. Under this theory of equitable

45. Compare Loeb v. Willis, 100 N. Y. 231, 3 N. E. 177 (1885).
47. 20 N. Y. 268 (1859).
subrogation, mortgagees were permitted to recover deficiency judgments against assuming grantees in foreclosure actions. Their rights were based upon the existence of a "surety," liable for payment of the debt and possessed of "collateral security," regardless of whether the mortgagor acted upon the credit of this security in the first instance or even knew of its existence. If the grantor had not assumed the mortgage, he was under no liability which could be the subject of indemnification; the elements of equitable subrogation were lacking, and the mortgagee could not enforce the grantee's assumption.

Under equitable subrogation the mortgagee's rights were in equity and he could proceed against the grantee directly to avoid circuity of action; but as he lacked privity, he had no status as the third party beneficiary of a contract and could maintain no action at law on the bond. If the lien of his mortgage had been cut off by the foreclosure of a paramount mortgage, he had no remedy against the grantee.

The term "equitable subrogation" has been criticised by Professor Williston because it "suggests analogies which do not exist, with the position of a surety who has paid the debt." He argues that the relief granted the mortgagee is merely the application toward payment of the debt of the mortgagor's property, consisting of the promise running to him from the grantee of the mortgaged premises. This "asset" theory is criticised by Professor Corbin on the ground that the grantee's promise is not available to creditors of the mortgagor other than the mortgagee and that the differentiation of the mortgagee from other creditors is but the recognition of a special right in personam vested in the mortgagee.

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49. Halsey v. Reed, 9 Paige 445 (N. Y. 1842); Curtis v. Tyler, 9 Paige 431 (N. Y. 1842); Blyer v. Monholland, 2 Sandf. Ch. 526 (N. Y. 1845).
51. King v. Whitely, 10 Paige 465 (N. Y. 1843); Trotter v. Hughes, 12 N. Y. 74, 78 (1854).
58. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 384; see 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 623.
59. ANSON, CONTRACTS (Corbin's 5th ed. 1930) § 295.
Considering first Professor Williston's criticism, it is perhaps illogical to characterize the mortgagor, a primary party, as a "surety." Yet, by token of the same logic, the conveyance of mortgaged premises is generally deemed to make the personal liability of the mortgagor secondary and to make his position akin to that of a surety.00 Furthermore, the analogy to a surety who has paid the debt seems questionable. If it be remembered that the assuming grantee is primarily responsible, at least with respect to the grantor, and that the mortgagee may in the first instance resort to either or to both,63 the grantee's position appears to be more nearly akin to that of an indemnitor against liability than to that of an indemnitor against loss.62

If, however, the asset theory is, as Professor Corbin argues, illogical in giving the mortgagee a preference over the grantor's other creditors, it should be noted first that preferences are valid except where they are expressly forbidden by statute.63 Furthermore, asset, subrogation, and kindred theories which entail possible preferences are frequently applied in mortgage law64 as well as in closely analogous situations.65 It should be noted that Professor Corbin claims for the mortgagee but a "special right in personam," a limitation imposed by the cases which deny the mortgagee a right on the bond as a full-fledged third party beneficiary. But this limitation, which today is the chief objection to the doctrine of

60. After a sale of the premises by the mortgagor, the land is deemed, as between the mortgagor and grantee, primarily responsible for the debt. Murray v. Marshall, 94 N. Y. 611, 614-615 (1884). The same result is automatically effected by statute upon the mortgagor's death. N. Y. REAL PROP. LAW § 250; Hauselt v. Patterson, 124 N. Y. 349, 26 N. E. 937 (1891). If only part of the premises is conveyed to a grantee who assumes the entire mortgage, the part conveyed is first to be sold in foreclosure. See pp. 248, 249 infra. Modification of the mortgage by the mortgagee and a subsequent owner without the mortgagor's consent, may release the mortgagor from his obligation. Calvo v. Davies, 73 N. Y. 211 (1878).


62. A bond given for indemnity against loss is not enforceable before actual payment by the obligee whereas an indemnity against liability is enforceable immediately upon breach. Albert v. Freedman, 253 N. Y. 508, 171 N. E. 760 (1930); see authorities collected in (1938) 47 YALE L. J. 1015, 1016.

The mortgagee's right against the assuming grantee has been placed in part upon "the equity of the statute" (now N. Y. CIV. PRAC. ACT 1079 [7]), permitting the joinder in a foreclosure action of any person liable to the plaintiff for payment of the mortgage debt. Blyer v. Monholland, 2 Sandf. Ch. 526 (N. Y. 1845); Gifford v. Corrigan, 117 N. Y. 256, 264, 22 N. E. 756, 758 (1889).


64. Compare notes 133-134, 138-139, 142-144, 168-172 infra; Note (1919) 2 A. L. R. 242; (1939) 48 YALE L. J. 683; Spencer v. Spencer, 95 N. Y. 353, 358 (1884).

equitable subrogation, is an anachronism deriving from the separation of law and equity. It makes the mortgagee's rights "depend upon the number of officials or courts to whom application must be made or upon the complexity of machinery of enforcement." 66

Apart from his status under the theory of equitable subrogation, the mortgagee has certain rights stemming from the rule of Lawrence v. Fox. In that case Holly, owing $300 to Lawrence, loaned this sum to Fox who promised Holly to pay the money to Lawrence on the following day. Lawrence was held to have an action at law against Fox on Fox's promise to Holly, supported by consideration from Holly to Fox to which Lawrence was not a privy. Before this case there was some authority supporting the right of a third party beneficiary to enforce a contract at law. 67 The history of the third party beneficiary doctrine since Lawrence v. Fox has been a checkered one of sorties and retreats, "of alternate enunciation of broad principle and narrow doctrine." 68 Although the Court of Appeals has frequently said that the rule is to be confined within its original limits, 69 Lawrence v. Fox was followed by Burr v. Beers, in which a mortgagee recovered a judgment on the bond directly


67. Schemerhorn v. Vanderheyden, 1 Johns. 139 (N. Y. 1806); Barker v. Bucklin, 2 Denio 45 (N. Y. 1846); see Burr v. Beers, 24 N. Y. 178, 189 (1861); Roussel v. St. Nicholas Ins. Co., 9 Jones & S. 279, 283 (1876). Before Lawrence v. Fox, promises for the benefit of close relations who were sole beneficiaries were enforceable by the beneficiaries. Comment (1919) 4 CORN. L. Q. 53, 54 et seq. For a discussion of the English cases, see Corbin, Contracts for the Benefit of Third Persons (1930) 40 L. Q. Rev. 12; FINLAY, CONTRACTS FOR THE BENEFIT OF THIRD PERSONS (1939).

In Mellen v. Whipple, 67 Mass. 317 (1854), it was said that in only three situations might third party beneficiaries enforce a contract: (1) where A gives money to B to pay A's creditors and B agrees, (2) where the promise is made for the benefit of a nephew or child of the promisee, and (3) where a lessee assigns to an assignee who agrees to pay the rent; cf. Baurer v. Devenes, 99 Conn. 203, 121 Atl. 566 (1923). In the Mellen case, supra, a mortgagee sought to recover on the mortgage debt in a direct action at law against the assuming grantee. The court stated that "The plaintiff's claim is not supported by any known decision of any court." There were no mortgage cases of the simple debt type in the Court of Appeals before Lawrence v. Fox. 4 CORN. L. Q., supra, at 55. Despite the foregoing, the beneficiary of a life insurance policy probably could always recover, 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 369, as could a mortgagee holding fire insurance for his security, id. at § 401-A. Recovery by third parties has been permitted on contractor's surety bonds and public contracts. See Corbin, Third Parties as Beneficiaries of Contractors' Surety Bonds (1928) 38 YALE L. J. 1; Corbin, Liability of Water Companies for Losses by Fire (1910) 19 YALE L. J. 425; Comment (1919) 4 CORN. L. Q. 53, 59-59.


69. Vrooman v. Turner, 69 N. Y. 280, 284 (1877); Pardee v. Treat, 82 N. Y. 385, 392 (1880); Wheat v. Rice, 97 N. Y. 296, 301 (1884); Durnherr v. Rau, 135 N. Y. 219, 222, 223, 32 N. E. 49, 50 (1892).
against the assuming grantee, a result which the court admitted could not have been reached under the doctrine of equitable subrogation.\textsuperscript{70} Next came \textit{Thorp v. Keokuk Coal Co.}, involving a mortgage which expressly limited the mortgagor's liability to the amount of a deficiency after a foreclosure sale. The grantee had assumed the mortgage without qualification and was held liable for the full amount of the mortgage debt. In a dictum, the court stated that the mortgagee could enforce the grantee's assumption even if the grantor were not liable.\textsuperscript{71} The narrower doctrine, however, appeared again in the later case of \textit{Simpson v. Brown}, in which the court said:

"But it is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."\textsuperscript{72}

In \textit{Vrooman v. Turner}\textsuperscript{73} the \textit{Thorp} dictum was overruled by a square holding that a mortgagee may not enforce the grantee's assumption unless his immediate grantor was liable—a result identical with that reached under equitable subrogation. The rule of this case expressly requires an intent by the promisee to secure a benefit to the third party and makes it clear, at least in the mortgage cases, that the mortgagee must be a creditor, rather than a donee, beneficiary. Where the grantor is an heir or devisee of the mortgagor and subject to a limited statutory liability for payment of the mortgagor's debts measured by the assets received,\textsuperscript{74}

\textsuperscript{70} 24 N. Y. 178, 179 (1861); see Keller v. Ashford, 133 U. S. 610, 620 (1890).
\textsuperscript{71} 48 N. Y. 253, 257 (1872); see Ritter v. Phillips, 53 N. Y. 586 (1873).
\textsuperscript{72} 68 N. Y. 355, 361-362 (1877).
\textsuperscript{73} 69 N. Y. 280 (1877); and see Notes (1921) 12 A. L. R. 1528, 1532, (1922) 21 A. L. R. 439. Outside New York the cases are hopelessly at variance. Corbin, \textit{Contracts for the Benefit of Third Persons} (1918) 27 \textit{Yale L. J.} 1008, 1015.

That the grantor initially acquired title subject to the mortgage is immaterial. Any subsequent assumption by the grantor during his ownership will render his grantee's assumption enforceable. Wager v. Link, 134 N. Y. 122, 31 N. E. 213 (1892); Howard v. Robbins, 67 App. Div. 245, 73 N. Y. Supp. 172 (4th Dep't 1901), aff'd, 170 N. Y. 498, 63 N. E. 530 (1902). There is some suggestion that the grantee's assumption is enforceable if the grantor were legally or equitably liable. See cases discussed in Ross v. Davis, 138 Misc. 863, 865, 248 N. Y. Supp. 441, 443 (Sup. Ct. 1931); Corbin, \textit{Contracts for the Benefit of Third Persons} (1918) 27 \textit{Yale L. J.} 1008, 1028. But the mortgage cases do not seem to furnish authority for this statement. See Durnherr v. Rau, 135 N. Y. 219, 222, 32 N. E. 49 (1892). The grantee's assumption is effective between grantor and grantee even if unenforceable by the mortgagee under \textit{Vrooman v. Turner}. Brenner v. Ebbets-McKeever Exhibition Co., 256 App. Div. 980, 10 N. Y. S. (2d) 323 (2d Dep't 1939).

\textsuperscript{74} N. Y. Deced. Est. Law §§ 170-176.
the grantor is sufficiently liable within this requirement. The burden of establishing the grantor's liability rests on the mortgagee.

The requirement that the promise be made for the direct benefit of the mortgagee has been developed in a group of cases holding that the mortgagee can enforce the assumption only where in equity the mortgage debt is intended to become the debt of the grantee — i.e., where the contracting parties intend that as between them there is to be a substitution of liability. The courts accordingly hold that if the conveyance is not absolute, the mortgagee can not enforce the grantee's assumption, and that where the conveyance is only for the purpose of security, amounting to an equitable mortgage, or where the assumption is by a junior mortgagee, there is no assumption of the debt but merely an agreement to make advances on the security of the land, with a right of subrogation in the senior lien by way of security. Such an agreement is regarded as benefiting the mortgagor alone, and the mortgagee is regarded as having no enforceable interest despite the incidental benefit accruing to him through performance. Likewise, a conveyance to an assignee for benefit of creditors does not render the assignee liable for a deficiency judgment. Application of equitable subrogation would have impelled the same results in these cases.

It is clear then, under the decisions following Lawrence v. Fox, that the right of a creditor beneficiary must be predicated upon an agreement made for his benefit. It has been argued that the mortgagor-grantor

78. 2 WILISTON, CONTRACTS (rev. ed. 1936) § 387; 1 WILISIE, MORTGAGE FORECLOSURES (5th ed. 1939) §§ 239, 240.
79. Garnsey v. Rogers, 47 N. Y. 233 (1872); Pardee v. Treat, 82 N. Y. 385 (1880); Root v. Wright, 84 N. Y. 72 (1881); Cole v. Cole, 110 N. Y. 630, 17 N. E. 682 (1883).
80. Safford v. Levin, 149 Misc. 384, 266 N. Y. Supp. 687 (Sup. Ct. 1932). The result differed where a junior mortgagee agreed to pay a prior mortgage, deducted its amount from the proceeds of the loan and remitted only the balance to the mortgagor. See Miller v. Winchell, 70 N. Y. 437, 439 (1877). The Miller case holds that a grantee taking a warranty deed subject to the prior mortgage could not enforce the covenant. But cf. Baurer v. Devenes, 99 Conn. 203, 121 Atl. 566 (1923).
83. An incidental beneficiary has no enforceable rights against the promisor. Simpson v. Brown, 68 N. Y. 355 (1877); Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49 (1892); 2 WILISTON, CONTRACTS (rev. ed. 1936) § 369; Corbin, Contracts for the Benefit of Third Persons (1918) 27 YALE L. J. 1005, 1017-1018; RESTATEMENT, CONTRACTS (1932) § 147.
requires the assumption from the grantee not for the benefit of the mort-
gagee but for his own advantage,\(^8\) an argument which in most cases
would bar the mortgagee from enforcement of the assumption. Pro-
fessor Corbin has answered this by pointing out that the contract itself
has no intent. The parties have intents, but their intents are never the
same. The grantor bargains for a discharge of his obligation by the
grantee—a matter of benefit to himself as well as to his creditor. The
intended benefit is an entirety, not susceptible of division into primary
and incidental purposes.\(^8\) It now seems certain that the mortgagee is
a party "benefited" by the grantee's assumption by deed.

Outside of New York, the American states are split on whether the
mortgagee has a direct cause of action at law or must proceed under
equitable subrogation. The great weight of authority permits an action
at law.\(^8\) Precise classification of the states is difficult, and is not attempted
here, because of the growing tendency of equity states to shift to the
law doctrine,\(^8\) thereby outdating many of the decisions. The situation
is also confused by the prevalence of both doctrines simultaneously in
some jurisdictions,\(^8\) and by the fact that identical results are frequently
reached regardless of the purported theory.\(^8\)

Nevertheless, neither group maintains a consistent uniformity with
respect to the power of the mortgagor to release the mortgagee's rights.
The confusion is compounded in New York because of uncertainty as
to which theory is to be applied.\(^8\) Holdings that under equitable subro-

\(^8\) See Douglass v. Wells, 18 Hun. 88, 95 (3d Dep't 1879); Keller v. Ashford, 133
U. S. 610, 621-622 (1890); 2 Williston, Contracts (rev. ed. 1936) §§361, 380; 3 Tiff-
Fany, Real Property (2d ed. 1920) § 623; Finlay, Contracts for the Benefit of
Third Persons (1939) 59; Glassie, The Assuming Vendee (1923) 9 Va. L. Rev. 196,
199; Comment (1910) 10 Col. L. Rev. 765, 766.

\(^8\) Corbin, Third Parties as Beneficiaries of Contractors' Surety Bonds (1928) 38
Yale L. J. 1, 7-8; see Durnherr v. Rau, 135 N. Y. 219, 221, 32 N. E. 49, 50 (1892).

\(^8\) See Hubard v. Thacker, 132 Va. 33, 40, 110 S. E. 263, 266 (1922); 2 Williston,
Contracts (rev. ed. 1936) § 361; 3 Tiffany, Real Property (2d ed. 1920) § 623;
1065; (1925) 9 Minn. L. Rev. 295, 296.

\(^8\) Professor Williston's statement that the overwhelming majority of American
courts support a direct action by the creditor (2 Williston, Contracts (rev. ed. 1936)
§ 361) does not appear in his 1920 edition.

\(^8\) Comment (1939) 25 Va. L. Rev. 993, 996; see note 90 infra.

\(^8\) See Corbin, Contracts for the Benefit of Third Persons in the Federal Courts
(C. C. A. 4th, 1937).

\(^8\) While Gifford v. Corrigan, 117 N. Y. 257, 264, 22 N. E. 756, 758 (1889), states
that the law doctrine has absorbed the equitable "in a broader equity," Wager v. Link,
134 N. Y. 122, 31 N. E. 213 (1896) refers to both doctrines as apparently of equal
standing. Compare Bennett v. Bates, 94 N. Y. 354, 370 (1884). Wicks v. Carmichael,
172 Misc. 924, 927, 16 N. Y. S. (2d) 395, 399 (Sup. Ct. 1939), indicates that equitable
subrogation may be the New York theory. Comment (1927) 13 Corn. L. Q. 123, 126.
gation the mortgagee's right is to the security existing at the time of the action\textsuperscript{91} should impel the conclusion that a release is valid at any time prior to the inception of the mortgagee's action.\textsuperscript{92} Rulings that this result obtains except where the mortgagee has acted in reliance in the interim, where fraud against the mortgagee has occurred, or where the release constitutes a fraudulent conveyance,\textsuperscript{93} do not militate against this conclusion but merely cloud the result with extraneous, though prevailing, factors. Any requirement in the equity states that the mortgagee "accepts" the assumption cannot be reconciled with the theory that does not even require the mortgagee to know of the collateral security's existence. Some of these states rule that dealings between mortgagee and grantee\textsuperscript{94} or mere payments of interest by the grantee\textsuperscript{95} render the mortgagee's rights indefeasible. Other jurisdictions rule that payments are insufficient.\textsuperscript{96} It has been suggested that a reconveyance by the grantee to his grantor is no different from a conveyance by the grantee to a third person,\textsuperscript{97} but this is not true in an equity state if in the reconveyance the original obligor again assumes the mortgage, for the priority of liability is now reversed and the entire equitable subrogation set-up unraveled.\textsuperscript{98}

A few of the law states hold that the mortgagee's right becomes indefeasible immediately upon the assumption,\textsuperscript{99} but the majority rule (citing Wager v. Links, \textit{supra}, and Calvo v. Davies, 73 N. Y. 211 (1878)), submits that the equitable rule still obtains in New York with the addition of a contract right in the mortgagee. \textit{Calvo v. Davies} is not in point as it merely holds that a modification of a mortgage made between the holder and an assuming grantee discharges the mortgagor from personal liability because of prejudice to the mortgagor's right of "subrogation." The reference there is to the mortgagor-former owner's right against the mortgaged premises, after payment of the mortgage debt, and not to the mortgagor's collateral security, as the term "equitable subrogation" connotes.

91. Biddell v. Brizzolara, 64 Cal. 354, 361, 30 Pac. 609 (1883); Crowell v. Currier, 27 N. J. Eq. 152, 156 (1876), \textit{aff'd sub. nom.} Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, 656 (1876).
96. Stephens v. Casbacker, 8 Hun. 116 (4th Dep't 1876).
97. Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652 (1897); Comment (1927) 13 CORN. L. Q. 123, 125.
99. Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652 (1897); Bay v. Williams, 112 Ill. 91, 1 N. E. 340 (1884); Hill v. Hoeldtke, 104 Tex. 594, 142 S. W. 871 (1912).
requires acceptance or adoption by the mortgagee before deeming the right vested.\textsuperscript{100} The institution of an action clearly satisfies this requirement.\textsuperscript{101} In New York it has been said that, while the institution of an action is conclusive evidence of acceptance, any clear manifestation of intention short of a lawsuit is sufficient.\textsuperscript{102} The Court of Appeals has, however, never defined such manifestation.\textsuperscript{103} The lower New York courts conflict squarely on whether the grantor has any power to release,\textsuperscript{104} and stray statements by the Court of Appeals, some of them hardly meriting the dignity of the term dictum, are in irreconcilable conflict.\textsuperscript{105}

The requirement that the mortgagee must accept or adopt the assumption cannot be reconciled to the view of the majority in \textit{Lawrence v. Fox} that acceptance is presumed until dissent is shown.\textsuperscript{106} If it be assumed

\textsuperscript{100} N. Y. Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732 (1891); Betts v. Drew, 3 Fed. Cas. No. 1372 at 317 (C. C. N. D. Ill. 1879); Wallace v. Hammonds, 170 Ark. 952, 281 S. W. 902 (1926); Carnahan v. Tousey, 93 Ind. 561 (1883); U. S. Fidelity & Guar. Co. v. R. I. Covering Co., 53 R. I. 397, 167 Atl. 143 (1933) (mortgagee need not know of assumption when made); Clark v. Fisk, 9 Utah 94, 33 Pac. 248 (1893); 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 623; Corbin, Contracts for the Benefit of Third Persons (1918) 27 YALE L. J. 1008, 1023; Comment (1910) 10 CORN. L. Q. 765, 766-767; Comment (1927) 13 CORN. L. Q. 123, 124; Note (1922) 21 A. L. R. 439, 462; see Thorp v. Keokuk Coal Co., 48 N. Y. 253, 257 (1872); RESTATEMENT, CONTRACTS (1932) § 143; but see Douglas v. Wells, 18 Hun. 88, 92 (3d Dep't 1879).

\textsuperscript{101} Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756 (1889); N. Y. Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732 (1891); Whiting v. Gearty, 14 Hun. 498 (N. Y. 1878); Comment (1927) 13 CORN. L. Q. 123, 124.

\textsuperscript{102} Gifford v. Corrigan, 117 N. Y. 257, 263, 22 N. E. 756, 757-758 (1889); Carnahan v. Tousey, 93 Ind. 561, 564 (1883).

\textsuperscript{103} See Morales v. Joanou, 146 Misc. 515, 517, 262 N. Y. Supp. 468, 470 (Sup. Ct. 1933); Comment (1927) 13 CORN. L. Q. 123, 125.

\textsuperscript{104} No power to release: Ranney v. McMullen, 5 Abb. N. C. 246 (1878); Douglass v. Wells, 18 Hun. 88 (3d Dep't 1879); Ellis v. Kristofersen, 129 Misc. 443, 222 N. Y. Supp. 370 (Sup. Ct. 1927), 13 CORN. L. Q. 123; and see Londen v. Perlman, 129 App. Div. 93, 113 N. Y. Supp. 420 (1st Dep't 1908); 1 WILTSIE, MORTGAGE FORECLOSURES (5th ed. 1939) § 235. \textit{Contra:} Stephens v. Casbacker, 8 Hun. 116 (4th Dep't 1876). A release, ineffective against the mortgagee, may be good \textit{inter partes}, its effect being to rearrange the priority of liability. Field v. Thistle, 58 N. J. Eq. 339 (1899).


\textsuperscript{106} 20 N. Y. 268, 274-275 (1859). Only four judges concurred in this holding. Clearly distinguishable are cases holding that if the assumption agreement is not based on new consideration and amounts only to a direction of the creditor to his debtor to pay the former's debt to a third person, the direction may be revoked before it is acted upon. Comley v. Dazian, 114 N. Y. 161 (1889); Wheat v. Rice, 97 N. Y. 296, 302
that the promisee is an “agent” of the beneficiary, as the concurring judges in Lawrence v. Fox felt,\textsuperscript{107} or that the assent of the beneficiary is the acceptance of an offer,\textsuperscript{108} it would follow that the beneficiary has the power of ratifying or disaffirming — though it is difficult to understand why he should disaffirm. If the relationship is assimilated to a trust or an insurance policy without power to change the beneficiary, a contrary result would follow. But it is foolish to invoke an analogy arbitrarily and then complain if the results under observation fail to conform in every respect to the analogy chosen. It is submitted that no fetish should be made of the mortgagee’s “acceptance,” particularly in those communities where it is the general practice to let mortgages run past due if taxes and interest are paid.\textsuperscript{109}

Professor Corbin writes persuasively that the relationship is contractual and based on offer, acceptance and consideration, all of which occur between the promisor and promisee.\textsuperscript{110} In view of the fact that these are completed on the making of the promise, it seems to follow logically that the mortgagee’s rights become indefeasible at that time.\textsuperscript{111} Professor Corbin stops short of this conclusion — properly so, because the weight of authority fails to sustain it.\textsuperscript{112} One difficulty in reaching a satisfactory conclusion is the paucity of judicial analysis of the basis upon which Lawrence v. Fox rests.\textsuperscript{113} With questionable analysis which disregards the growth of the law, it has been regarded as a legal salutation that fails to fit snugly into any pre-existing legal categories.\textsuperscript{114} In some respects


\textsuperscript{108} Disapproved in Gifford v. Corrigan, 117 N. Y. 257, 263, 22 N. E. 756, 758 (1889); Corbin, Contracts for the Benefit of Third Persons (1918) 27 Yale L. J. 1008, 1009. Logical extension of the agency theory would prevent the promisee from participating in the contract in his own right.

\textsuperscript{109} Disapproved in Corbin, Contracts for the Benefit of Third Persons (1918) 27 Yale L. J. 1008, 1020.


\textsuperscript{111} 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 623; Comment (1910) 10 Col. L. Rev. 765, 766; Comment (1927) 13 Corn. L. Q. 123, 126; note the bootstrap argument in 3 POPE, EQUITY JURISPRUDENCE (4th ed. 1918) § 1206 n. 3.


\textsuperscript{113} For the tortuous groping of the English courts toward relief for third party beneficiaries, see Corbin, Contracts for the Benefit of Third Persons (1939) 46 L. Q. Rev. 12, 19 et seq.; FINLAY, CONTRACTS FOR THE BENEFIT OF THIRD PERSONS (1939).

\textsuperscript{114} See Comment (1910) 10 Col. L. Rev. 765, 766; FINLAY, CONTRACTS FOR THE BENEFIT OF THIRD PERSONS (1939).
the same might be said for *Lumley v. Gye* and *Luinley v. Wagner*, but *Lawrence v. Fox*, when applied to mortgages, differs from these. Once *Lawrence v. Fox* had been decided, it was difficult on logical grounds to exclude the mortgagee from its operation. There is no strong public policy, however, behind helping the mortgagee who has admittedly picked up an unexpected windfall. Some have sought to distinguish a mortgagee from other creditor beneficiaries on the ground that there is no fund in the hands of the promisor for his payment but there is no basis for distinguishing between delivery of money and land. The Restatement of Contracts set forth a general conclusion which merely recapitulates uncritically the majority rule.

**INCIDENTS OF LIABILITY UNDER A MORTGAGE**

*After-acquired personal property clauses.* The degree of liability undertaken is measured by the terms of the mortgage or contract of assumption. And liability under a mortgage and all its covenants includes

115. 2 El. & Bl. 216 (Q. B. 1853).
118. See Learned, P. J. dissenting in Douglas v. Wells, 18 Hun. 88, 98 (3d Dep’t 1879); Comment (1919) 4 Corn. L. Q. 53, 55.
120. Restatement, Contracts (1932) § 143 reads:

"A discharge of the promisor by the promisee in a contract or variation thereof by them is effective against a creditor beneficiary if,

(a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation, and

(b) the promisee’s action is not a fraud on creditors."

more than a liability for principal and interest. An important incidental aspect is the relation of assumption to the after-acquired personal property clauses generally appearing in New York mortgages. The lien of a real property mortgage covers fixtures installed at the inception of a mortgage, as well as those subsequently affixed. In the absence of special provision, however, it does not cover personal property used in connection with the realty. Despite the marked growth in the use of personal property as the regular equipment of buildings, especially urban structures, the inelastic common law concept of fixtures excludes it from the scope of the usual real property mortgage lien. Personal property clauses have been added to mortgages to include in the security for the debt personal property essential for the operation of the realty which would otherwise be removable. This practice is recognized by statute and a special provision permits the single recordation of this type of mortgage in the real property records without the necessity of filing and refiling as a separate chattel mortgage. Insofar as the personal property clause purports to include after-acquired property, doctrinal considerations limit its effect to those persons liable on the mortgage. Theoretically, a mortgage on future property creates no present lien and is but an affirmative covenant to give a mortgage in the future. Like many affirmative covenants it does not run with the land but binds only the mortgagor and grantees who have assumed the covenant in question.


124. As there is no relevant statute, the definition of fixtures must be sought in the cases. In re Walker Bin Co., 9 F. Supp. 367 (W. D. N. Y. 1935).


126. Guaranty Trust Co. v. New York & Q. C. Ry., 253 N. Y. 190, 170 N. E. 887 (1930); Newbrook Realty Co. v. Frigidaire Sales Corp., N. Y. L. J. Oct. 6, 1936, p. 1026, col. 6 (N. Y. City Ct.); see authorities collected in Foley & Pogue, After-acquired Property Under Conflicting Mortgage Indentes (1929) 13 Minn. L. Rev. 81, 85 n. 17, and Douglas & Shanks, Cases and Materials on Business Units:
Fire Insurance. Liability under a mortgage also affects the rights of mortgagor and mortgagee in fire insurance covering the mortgaged premises. A mortgagor's liability for payment of the mortgage debt in itself gives the mortgagee no rights in the proceeds of fire policies.\textsuperscript{127} The usual mortgage includes an express covenant by the mortgagor to insure for the benefit of the mortgagee, which is effected by delivery of policies endorsed for payment to the mortgagee.\textsuperscript{128} Even though the mortgagor breaches this clause, its mere presence gives the mortgagee an equitable lien on the proceeds of policies procured by the mortgagor for his own benefit.\textsuperscript{129} Although this rule applies to an assuming grantee, it does not reach a grantee \textit{subject to} the mortgage on the ground that the insurance clause is a personal and collateral covenant that does not run with the land.\textsuperscript{129}

Order of Priorities. Liability on a mortgage may rearrange the order of priorities in the premises. Two types of liability are involved: liability for the debt and liability on the covenants and warranties. There are several types of cases in which the problem of a shift in priorities is likely to arise. One class is predicated upon the rule which bars a mortgagor from claiming a right paramount to the mortgage, as against his own mortgagee. An owner may preserve the lien of a mortgage after its payment, where rights of creditors and others have not intervened,\textsuperscript{130} and reissue the mortgage to a third person, but its priority as a lien thereafter dates from the reissue rather than from its original recordation.\textsuperscript{131} An owner, by executing a mortgage, thereby subordinates any prior mortgage he may then own or may subsequently acquire on the

\begin{flushleft}
\textsuperscript{127} Carter v. Rockett, 8 Paige 437 (N. Y. 1840).
\textsuperscript{132} Sherow v. Livingston, 22 App. Div. 530, 48 N. Y. Supp. 269 (2d Dep't 1897).
\end{flushleft}
person liability on mortgage debts

This subordination binds the owner, his assignees, and those claiming through him. The result is based either on a theory of liability that a man cannot prefer a mortgage he owns, as well as owes, over a mortgage he owes but does not own, or on merger; but the cases place no stress on the warranties of title usually included in the mortgage.

Liability for the debt alone affects priorities where guaranteed mortgages are involved. During the boom, part interests in mortgages were often sold to the public. Other interests went unsold or were reacquired by the mortgage companies. The companies, which were not parties to the mortgages or the covenants in them contained, accompanied the public sale with a guaranty of principal and interest. While there are several rules of priority respecting successive assignees of part interests in mortgages, the Court of Appeals has taken the position that, in the absence of contractual provisions to the contrary, any participations in the hands of the guarantor are subordinate to those held by the public. This position has been based upon presumed intent, “special equities” and on

“the underlying principle . . . that a mortgage company which sells participating certificates in a mortgage and itself guarantees


If the mortgagor's grantee assumes the mortgage, he may not after acquiring the bond and mortgage enforce the indebtedness against the mortgagor-grantor, since, by taking the assignment, he became the owner of the demand he had bound himself to satisfy. Ely v. McNight, 30 How. Pr. 97 (Sup. Ct. 1854). In Russell v. Pistor, 7 N. Y. 171 (1852) it was held that a sale of part of mortgaged premises to an assuming grantee made the part sold primarily responsible for the mortgage and that a subsequent grantee of the part sold, though not personally liable on the mortgage, could not after taking an assignment enforce the mortgage against the part not sold.

134. Williams v. Thorne, 11 Paige 459, 464-465 (N. Y. 1845); see cases cited note 133 supra.


137. 3 Pomeroy, Equity Jurisprudence (4th ed. 1918) §§1200-1203; Note (1927) 50 A. L. R. 543.

them is in the position of a debtor, and the equitable rule existing between debtors and creditors applies."\(^{139}\)

The court has expressly denied that its rule is to avoid circuity of action.\(^{140}\) A New Jersey court, however, has maintained that this rule is only to avoid circuity, and no longer obtains when the guarantor is insolvent.\(^{141}\) It has applied the pro rata rule in a struggle between secured and general creditors of the guarantor. The court found that the participants had no expectation of priority over other participants or the guarantor, that the guarantor had not made its own share an additional security, and that the unsold balance of the mortgage or other assets of the guarantor had neither been assigned nor intended to be assigned.

In a third type of case, the authorities stress the mortgagor's warranties of title to the virtual exclusion of his liability for the debt. It is generally held that a mortgage purporting to convey a definite estate with warranties estops the mortgagor or an assuming grantee from asserting an after-acquired title or interest, which the mortgage purports to convey, against the mortgagee or those claiming under him, including a purchaser at a foreclosure sale. The subsequently-acquired title is held to vest in the mortgagee by estoppel.\(^{142}\) Without warranties there is no estoppel despite the mortgagor's liability for the debt.\(^{143}\) Nevertheless, there is authority for the proposition that a representation in the mortgage of the ownership of a precise estate will suffice in the absence of a warranty\(^{144}\)—a result which realizes the intentions of the parties without exalting the technical distinction between representations and warranties. Warranties are not uniform—some may be special or limited—and distinctions are predicated upon their variations.\(^{145}\) A warranty against claims by the mortgagor or his successors excludes an after-acquired title obtained from an outsider.\(^{146}\) But the title of a mortgagee by estoppel is subject to pre-existing liens and liens created to secure

\(^{139}\) Pink v. Thomas, 282 N. Y. 10, 12, 24 N. E. (2d) 724, 725 (1939).


\(^{142}\) Tefft v. Munson, 57 N. Y. 97 (1874); Vanderheyden v. Crandall, 2 Den. 9 (1846), aff'd, 1 N. Y. 491 (1848); Note (1929) 58 A. L. R. 345, 350 et seq.


\(^{144}\) Sparrow v. Kingman, 1 N. Y. 242 (1848) (but cf. concurring opinion at 258); Note (1929) 58 A. L. R. 345, 381 et seq.

\(^{145}\) Note (1929) 58 A. L. R. 345, 403-407.

\(^{146}\) Id. at 409.
the purchase price of the after-acquired title and may be the subject of conflicts with others claiming through the common grantor or mortgagor. Purchase money mortgages are in a special class because they are ordinarily intended to secure the payment of the exact estate conveyed by vendor to vendee. If the parties bargain for a greater security, there is no reason for not enforcing the bargain. But if the grantor has short-changed the vendee on the title contracted to be sold, and the grantee cures the defect through outside purchase, a result which gives the mortgagor credit against the mortgagee, by offset, counterclaim or otherwise, regardless of the warranties in the mortgage or covenants in the deed, seems desirable.

If a junior mortgagor, after being divested of title, reacquires the premises through a paramount foreclosure, the junior mortgagee may succeed in reestablishing his lien. It is well to note here, though beyond the scope of this paper, that a junior lien may not be destroyed by fraud or conspiracy. Neither the owner's liability for payment of the junior lien nor any covenants or warranties he may have given have any bearing here. Fraud is generally found not to exist where the property's income is insufficient for taxes, service of mortgages and carrying charges. In New York, at least, an owner or mortgagor may not acquire a superior tax lien for the purpose of cutting off paramount interests in the property. But aside from fraud or conspiracy, liability on the mortgage may justify the re-creation of a junior lien after a senior foreclosure. Under one theory, reacquisition of the property is but the payment of the senior mortgage under compulsion of the power of sale, leaving the junior mortgage intact. Under another theory, the mortgagor is estopped from attacking the junior lien by the warranties or covenants in the junior mortgage.

148. See Note (1923) 25 A. L. R. 83.
149. See Hitchcock v. Fortier, 65 Ill. 239, 242 (1872).
150. The cases are not uniform. See Jackson v. Marsh, 5 Wend. 44 (N. Y. 1839) and cases collected in Notes (1923) 26 A. L. R. 173, L. R. A. 1918B 734, 771 et seq.
154. See Wood and Oberreich, Revival of a Second or Subsequent Mortgage (1936) 11 IREM L. J. 429, 430-433.
Other arguments have been advanced with less cogency, both for and against re-creation. It has been suggested that an owner owes a junior mortgagee a duty to pay a prior mortgage. But even if the owner were liable on the first mortgage, which is not always true, the second mortgagee is no beneficiary within the requirements of third party contracts. The argument that reestablishment is a windfall for the junior mortgagee disregards the fact that the latter's recovery thereby cannot exceed the amount of his mortgage. It is said that the junior mortgagee's failure to protect himself at the senior foreclosure destroys his rights. Though this is true with respect to those claiming through a paramount mortgage, it should have no effect on the mortgagor's status. Application of the theory of estoppel to this situation has been criticized upon another ground. After predating title by estoppel upon a failure of title when the warranty is made, commentators have pointed out that the owner, by subsequent divesture followed by reacquisition, does not acquire an outstanding title which he lacked at the inception of the mortgage. They have suggested that warranties should be construed merely as agreements that the mortgagor will not acquire an adverse interest during the continuance of the junior lien. This argument presupposes that covenants and warranties, regardless of the plain meaning of their language, require but an initial compliance, after which the junior lien would continue only during the warrantor's pleasure. Analogies drawn to the right of a grantor under a warranty deed to reacquire the property conveyed by adverse possession or through a tax title, are bad because in such event reacquisition is based on the grantee's fault. A grantor never intends to pay taxes accruing after a conveyance.

Efforts by junior lienors to reimpose their liens after senior foreclosure arise in these situations: where an owner liable on two mortgages, or only on the second mortgage, buys at the senior foreclosure, or from the purchaser or subsequent owner; where the junior mortgage contains general or special warranties which may or may not be expressly subordinate to the senior mortgage; where the junior mortgagor has or has not been discharged in bankruptcy prior to reacquisition; as well as variations on the foregoing. The cases outside New York are hopelessly in conflict in all these situations except that in which the owner is liable at least on a junior mortgage containing unqualified covenants and warranties. In this event, reacquisition directly at the senior fore-

155. See authorities cited note 156 infra.
closure sale reimposes the lien, subject to purchase money mortgages and other intervening equities.\textsuperscript{157}

The leading case on this subject is \textit{Otter v. Lord Vaux}, where an owner made two mortgages, the second expressly subordinate to the first.\textsuperscript{158} The owner's direct acquisition through a senior foreclosure was held to re-impose the junior lien on the payment theory. The same result was reached in New York where the owner's procedure was called a "device and contrivance."\textsuperscript{159} The court felt that the money used to acquire the fee should have been used to pay the first mortgage. In the \textit{Otter} case, the English court questioned whether the same result would follow if reacquisition were through a third person, for in such event there would be no "payment" of the senior mortgage. The payment theory cannot logically be applied to any case other than that of direct reacquisition.

Indirect reacquisition may, however, defeat the junior mortgagee, at least in the absence of fraud. In \textit{Kossoff v. Wald}, defendant Greenberg acquired property subject to two mortgages, neither of which he assumed. At a time when income from the property was insufficient to carry both mortgages, Greenberg and the first mortgagee agreed that if the latter foreclosed he would reconvey to the former. The premises were deeded to Greenberg's nominee after foreclosure. In an action to reinstate the junior mortgage, judgment was given for the defendants.\textsuperscript{160} In \textit{Dorff v. Bornstein}, the facts were similar except that the owner was liable on both mortgages. Four months after acquisition the senior mortgagee conveyed to the owner's children, whom the lower court found to be nominees for their parent. Again, judgment was given for the defendant.\textsuperscript{161} The Court of Appeals ruled the foreclosure had destroyed all estates in the property, cut off all rights of redemption and vested an indefeasible title in the mortgagee with an unqualified power to transfer. The \textit{Dorff} decision makes it virtually certain that, in the absence of fraud, reestablishment of junior liens in New York is limited to the mortgagor's direct reacquisition at the senior foreclosure sale. The court found:

"... there was no duty arising under any contract, provision of law or consideration of equity which required the owner of the property to protect the second mortgage against the foreclosure of the first mortgage. The second mortgage indenture, in express terms, made it subordinate to the lien of the first mortgage."\textsuperscript{162}

\textsuperscript{157} Duer v. Jaeger, 113 Misc. 743, 186 N. Y. Supp. 584 (Sup. Ct. 1920); cf. text at notes 147-148 supra.

\textsuperscript{158} 2 K. & J. 650 (Ch. 1856), aff'd, 6 DeG. M. & G. 638 (1856).


\textsuperscript{160} 272 N. Y. 480, 3 N. E. (2d) 878 (1936).

\textsuperscript{161} 277 N. Y. 236, 14 N. E. (2d) 51 (1938).

\textsuperscript{162} 277 N. Y. 236, 243, 14 N. E. (2d) 51, 54 (1938).
The court, however, made no reference to a covenant in the second mortgage to warrant and defend title. Yet in Gans v. Clark, the same court held a lessor responsible to his lessee for breach of covenant of quiet enjoyment after termination of a lease by foreclosure of a paramount mortgage and this time made no reference to a clause expressly subordinating the lease to the mortgage.

It is interesting to note that, although a mortgagor may not set up a prior mortgage against his mortgagee, he may with a little care acquire a fee through this mortgage which will survive the extinction of his junior mortgage. Once a second mortgage but not always a second mortgage! The junior mortgagee is not entirely helpless, however. His debt is still enforceable. The Dorff case prevents the clogging of estates in the hands of bona fide purchasers, with the familiar implications of prospective purchasers being scared off while the property deteriorates materially in value. Yet the Negotiable Instruments Law, which is zealous to promote the free exchange of commercial paper, gives no such protection to an intermediate holder. Clogging of titles could be reduced by shortening the relevant statute of limitations.

Finally, the purchaser of part of a mortgaged tract who assumes the entire mortgage thereby subjects the part purchased to a primary responsibility for payment of the mortgage. And this is without reference to warranties. Suppose a blanket mortgage covers parcels A and B. X, the owner, sells B to Y who assumes the mortgage. In a foreclosure of the blanket mortgage, X, or any subsequent owner of A, may have B offered first for sale for the purpose of exonerating A of the mortgage, even though Y has in the interim sold B to Z merely subject to the mortgage. If parcel A is sold at foreclosure, any owner of A may recover a judgment from Y for the value of A, on the ground that A was applied under compulsion of law toward satisfaction of Y's debt.

For this reason, should any owner of B, the land primarily responsible

163. The mortgage provided: "That the mortgagor warrants title to the premises" (Record on Appeal fol. 387), a clause construed by statute as a covenant to warrant and defend title. N. Y. REAL PROP. LAW § 254(5).
164. 252 N. Y. 92, 169 N. E. 100 (1929).
167. See NEGOTIABLE INSTRUMENTS LAW § 58; Chaffee, Reacquisition of a Negotiable Instrument by a Prior Party (1921) 21 COL. L. REV. 538.
for the blanket mortgage, become the owner of the mortgage, the mortgage would thereupon become cancelled as to $A.\textsuperscript{172}$

A survey of the creation and effect of mortgage liability covers but half of the mortgagee's problems. Further issues include the remedies of the mortgagee and the effect thereon of the emergency mortgage and subsequent statutes, the rights over of the mortgagor, and the release of the mortgagor by events subsequent to the conveyance. These subjects are reserved for further extended treatment.

\textsuperscript{172} Wilcox v. Campbell, 35 Hun. 254 (5th Dep't 1885), aff'd, 106 N. Y. 325, 12 N. E. 823 (1887).