The Covenants of Title in Junior Mortgages

G.W.C. Ross

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE COVENANTS OF TITLE IN JUNIOR
MORTGAGES

By G. W. C. Ross*

The purpose of this paper is to discuss and criticize a recent tendency in some cases with regard to the effect of covenants of title in junior mortgages. This discussion will center around a recent North Dakota case, *Sletten v. First National Bank*, the facts of which will be given in some detail. One Sletten owned land in North Dakota encumbered by a first mortgage for $800. This mortgage, however, does not enter into and has no bearing upon the subsequent litigation. Sletten bought a threshing machine and to pay for it borrowed $1,500 from a bank. To secure his notes for this amount he gave the bank a chattel mortgage on the threshing machine and also a mortgage on his land junior to the first mortgage. Later, to represent a bill he owed to one Johnson, Sletten gave Johnson his note for about $200 and to secure it, a third mortgage on his land. Johnson soon afterwards sold and transferred this $200 note and mortgage to the bank. Later, both the $1,500 and the $200 being past-due, the bank foreclosed the third mortgage on the land by advertisement and at the foreclosure sale bid the land in for just the amount due on the third mortgage debt—the $200 note, with interest and costs. During the ensuing year of redemption, Sletten sold the threshing machine for $1,500 to purchasers who gave him their notes for that price. These “threshing machine notes” Sletten endorsed over to the bank to hold as security in lieu of its chattel mortgage on the machine itself. Later, but still during the year of redemption, the purchasers paid these notes in full to the bank, in the sum of $1,576, a sum a little less than the full amount due on the bank’s $1,500 notes against Sletten, and the bank so applied it. Then the year of redemption expired on the real estate foreclosure, and no redemption having been made, the bank received a sheriff’s deed to the land.

Not long thereafter Sletten brought action in equity against the bank to set aside the foreclosure, or to be permitted to redeem therefrom notwithstanding the fact that the statutory period had

---

*Professor, St. Thomas College of Law, St. Paul, Minnesota.

1(1917) 37 N. D. 47, 163 N. W. 534, noted in 1 MINNESOTA LAW REVIEW 458.
COVENANTS OF TITLE IN MORTGAGES

expired. He based the action on allegations of fraud and conspiracy by the bank in concealing from him the fact that it had foreclosed, the amount due and the time when redemption would expire, and the trial court found accordingly and gave him relief. If this were the whole case it would be a typical case of equitable relief against fraud and of no general interest to the profession. But on appeal the supreme court of North Dakota rather balked at the findings of fraud; but without explicitly reversing them, it seized upon a different ground for supporting the trial court's judgment cancelling the sheriff's deed and permitting redemption. This ground irrespective of the question of fraud, it found in the facts recited above relating to the sale of and payment for the threshing machine. It held that the bank's purchase of the land at the third mortgage foreclosure sale was (necessarily) a purchase "subject to" its own senior mortgage for $1,500; that thereby the land became the primary fund for the payment of that debt, which therefore the bank could not enforce otherwise against Sletten thereafter; that therefore the bank's receipt of the proceeds of the threshing machine sale amounted to its collecting (that much of) its $1,500 claim twice; and that therefore, since the bank had not refunded nor tendered to Sletten this threshing machine money, it could now have no "complaint" if the court treated its retention of that money as a disaffirmance of its own title under the third mortgage foreclosure and accordingly permitted Sletten to redeem.

On the court's own chain of reasoning, its final conclusion is sufficiently surprising. If the bank had wrongfully collected $1,576 twice, the proper remedy would seem to be to declare it a constructive trustee of that sum for Sletten, rather than to fly in the face of the statute on foreclosure and redemption in order to let the bank keep its wrongfully collected money by taking away from it its rightfully acquired land. But that is not what we started to say. The text for this discussion is the supposed rule on which the court relies, that when the bank purchased at the third mortgage foreclosure sale it bought "subject to" the prior mortgage, so that as between Sletten and the bank the land became the primary fund for payment of the prior debt. This doctrine finds a certain support in encyclopedia texts and in some judicial opinions, as will be noted later; and it might be sound in a case where the junior mortgage that was foreclosed was in form a quitclaim deed. But mortgages are not commonly quitclaim deeds. They are usually warranty deeds, and this Sletten
third mortgage contained the following covenants: of seisin and right to convey; that the premises were

"clear and free from all encumbrances except two mortgages of record for $800 and $1,500 respectively, and that the said first party, his heirs and assigns, will forever warrant and defend the title to the same unto the said second party, his heirs and assigns, against all lawful claims of all persons whomsoever;"

and a further covenant to pay the mortgage debt.²

It is to be noted that the supreme court’s opinion in no manner alludes to these covenants. For all that the report of the case discloses, the mortgage might have been in the form of a quitclaim deed. It is submitted that the rule laid down by the court cannot operate in the face of these covenants. Although a mortgage, in North Dakota as in Minnesota, does not convey immediate "legal title," but gives only a “lien” on the land, yet this does not mean that the covenants are waste paper, mere survival of ancient verbiage with no present meaning. On the contrary, the covenants in a mortgage mean what they say and are effective, as in a straight warranty deed.³ In the Sletten third mortgage the prior mortgage is duly excepted from the covenant against encumbrances. But the later covenant to warrant and defend the title is absolute and unqualified: to protect it against “all lawful claims of all persons whomsoever.” The exception in the covenant against incumbrances does not by implication or construction limit or restrict the later covenant of warranty.⁴ The case of Sandwich Mfg. Co. v. Zellmer⁵ is a leading case. The land there involved being already encumbered by a first mortgage for $700, the owner and his wife gave the plaintiff a second mortgage containing full covenants of title and warranty; only the covenant against encumbrances mentioned and excepted the first mortgage. The first

²The mortgage is of record in the office of the register of deeds at Jamestown, N. D., in Book 39 of Mortgages, p. 113. The prior mortgage for $1,500 is recorded in Book 41, p. 577. The original mortgages were transmitted to the supreme court as part of the record on the appeal.


⁵(1892) 48 Minn. 408, 51 N. W. 379.
mortgage was foreclosed and after expiration of the redemption period the land was conveyed to the former owner's wife, who later conveyed over to the defendant. The plaintiff then foreclosed the second mortgage by action, and the defendant resisted on the ground that the first mortgage foreclosure and expiration of the redemption period thereunder had extinguished the second mortgage. It was so held by the trial court; but on appeal the judgment was reversed, and it was held that the covenant of warranty was not qualified by the exception in the covenant against encumbrances; that therefore the first mortgage was a "lawful claim" against which the owner's wife, joining in the covenants of the second mortgage, had undertaken to protect the second mortgagee; that therefore she could not hold the land discharged from the obligation of that covenant; and that therefore as soon as the land was conveyed to her the second mortgage re-attached as a lien against her after-acquired title.

This means that under Sletten's third mortgage it was his duty, not the duty of the third mortgagee or his assignee the bank, to pay that prior $1,500 debt. Certainly, prior to the foreclosure the land was not the "primary fund" for that purpose at all. If before the foreclosure Sletten had voluntarily paid the $1,500 debt or it had been paid by realizing on the chattel security, no one could suppose that Sletten then would have had a right to take the second real estate mortgage (by assignment or subrogation) and foreclose it against the holder of the third mortgage. Sletten was in duty bound to pay the prior $1,500 claim for the benefit and protection of the third mortgagee's title and security. By paying the $1,500 out of the chattel security or other funds, Sletten of course improved the third mortgage security just that much; but that was no more than he ought to do. He ought, indeed, to pay both debts in full, without resort to the land by either mortgagee; and if after Sletten had paid the $1,500 debt the third mortgage had then been foreclosed, no one would urge that such foreclosure gave Sletten the right to recover back the $1,500 he had paid. Yet the effect of such foreclosure would have been exactly as in the actual case: that the bank would have got the land for the $200 and with its $1,500 otherwise paid in money. Just why does the fact that the foreclosure took place first, before the payment of the $1,500 debt, so alter the rights and equities of the situation? The reason, it is said, is that the purchase at the foreclosure sale was "subject to" the prior mortgage, thereby making the land the "primary fund" for payment of the prior debt.
A treacherous ambiguity lurks in that phrase, "subject to." Suppose the owner of mortgaged land conveys it by full warranty deed. In a sense the grantee takes and holds the land "subject to" the mortgage, and it is sometimes so expressed; that is, the mortgage subsists as a paramount lien against the title of the grantee. If it is not paid the grantee will lose the land. But under such a deed the land is by no means "the primary fund" for payment of the mortgage debt; as between the grantor and grantee the deed was not "subject to" the mortgage. On the contrary, the grantor under his covenants is bound to warrant and defend his grantee's title against the mortgage. So the grantor after such a conveyance cannot buy the mortgage and foreclose it against his grantee, and in case of foreclosure by the original mortgagee the grantee is free to contest the validity of the mortgage as for fraud, usury, or other defect; he is not by his deed estopped from doing so. He does not in that sense hold the land "subject to" the mortgage at all.\(^6\) If, on the other hand, the deed by its terms recites that the grantee takes the land "subject to" the mortgage, then the situation is reversed. The land now is said to have been charged as the "primary fund" with payment of the mortgage debt. The original mortgagor-grantor is free now to buy the mortgage and foreclose it against his grantee; or if he is compelled to pay it under judgment obtained by the mortgagee he is entitled by subrogation to take it and foreclose it against his grantee. And on foreclosure the grantee is usually held estopped to contest the validity of the mortgage.\(^7\) What the effect is, in these respects, of a conveyance of mortgaged land by simple quit-claim deed seems more or less uncertain.\(^8\)

\(^6\) Calkins v. Copley, (1882) 29 Minn. 471, 13 N. W. 904; Merritt v. Byers, (1891) 46 Minn. 74, 48 N. W. 417 (semble); Tappan v. Huntington, (1906) 97 Minn. 31, 34, 35, 106 N. W. 98 (semble); Bennett v. Keehn, (1886) 57 Wis. 154, 29 N. W. 207; Smith v. Gaub, (1910) 19 N. D. 337, 123 N. W. 827.


\(^8\) Cf. Gerdine v. Menage, (1889) 41 Minn. 417, 420, 423, 43 N. W. 91; Morrison v. Morrison & Berry, (1874) 38 Iowa 73, 79, 81; Miller-Piehl Co. v. Mullen, (1920) 170 Wis. 375, 382, 383, 374 N. W. 542; Forgy v. Merryman, (1883) 14 Neb. 513, 16 N. W. 836; Cooper v. Bigly, (1865) 13 Mich. 463, 474, 475; Stevens v. Church, (1874) 41 Conn. 369; Thompson v. Morgan, (1861) 6 Minn. 292 (Gil. 199); Ross v. Worthington, (1866) 11 Minn. 438 (Gil. 323).
Hence, when a junior mortgage is referred to as "subject to" the senior mortgage, care is required in interpreting the language. Of course it is "subject" in the sense that the senior mortgage is a paramount lien; but that does not necessarily mean that as between the mortgagor and the junior mortgagee the land is "the primary fund" for payment of the senior debt. Is the latter ever the case? If the junior loan was made expressly for the purpose of paying off the senior debt, the proceeds of the junior mortgage to be used directly and immediately for that purpose, it would be correct to say that the land, as security for the junior mortgage, was the primary fund for payment of the senior mortgage. Usually a junior mortgage in such case is not in fact so phrased. More commonly it is phrased as though itself a first mortgage, with full covenants against the senior lien, the idea being, that since the junior mortgage will not be valid and effective until its consideration is furnished (i.e., until the senior lien has been paid off), therefore, at its real inception it will stand as a first lien against the land. But such a junior mortgage might properly enough recite in terms that its mortgagee takes it "subject to" the senior encumbrance. But in the case of a junior mortgage given for money furnished directly to the mortgagor, to be by him used for other purposes and not to pay off the senior claim, it is not at all correct to say that as between mortgagor and junior mortgagee the "land is the primary fund" for payment of the senior debt, or that the junior mortgage is "subject to" the senior one in any such sense as that. For that is not the purport of the bargain between the parties. The junior mortgagee is not supposed to protect the land against the senior mortgage for the benefit or protection of the mortgagor. Quite the contrary, it is the mortgagor who ought to pay off and protect against the senior lien for the benefit and indemnity of the junior mortgagee. A neat illustration of the carelessness of phraseology common in this regard and its uncertain meaning is furnished by the case of *National Investment Co. v. Nordin*. The plaintiff here held both a senior mortgage and a junior mortgage against Nordin's land. The paper book does not set out the instruments in extenso; but the pleadings *allege and admit* that the junior mortgage was "by its terms made expressly subject to" the senior one. But inspection of the recorded mortgages discloses that in fact the junior mortgage was

---

9(1892) 50 Minn, 336, 52 N. W. 899.
10In Ramsey County, Minnesota, Book 219 of Mortgages, pp. 216-217.
a full warranty deed, only excepting the senior mortgage from its covenant against encumbrances, which, as we have seen, does not qualify the covenant of warranty. It does not appear that the junior mortgage was floated for the purpose of raising funds with which to pay off the senior loan. So all that the pleader presumably meant was that the junior mortgage showed that it was junior; but he stated his allegation precisely as though he meant that as between the mortgagor and the junior mortgagee the land was the primary fund for paying the senior mortgage,—that the junior mortgagee ought to pay off the senior loan for the relief of the mortgagor.11 As it happened, the decision of the case did not turn upon that point, so the inaccurate pleading did no harm, though the court in its opinion repeats the statement of the pleadings, the trial court having expressly found the same as a fact. But it is not improbable that the same error which is here found in the pleadings has at times crept into mortgages themselves, and that ignorant or careless scriveners have drawn junior mortgages, though given for separate and additional loans and not for refunding, so as to make them read as though the junior mortgagees held the property in terms "subject to" the senior liens. But that would be slovenly, not to say false and dangerous draftsmanship. The proper and careful way to draw such a junior mortgage, so as to state correctly the bargain and the equities and obligations of the parties, is to draw it as a full warranty deed, only excepting the senior mortgage from the covenant against encumbrances. This shows that it is a junior mortgage and protects the mortgagor from any claim of fraud or misrepresentation but at the same time makes it clear that the mortgagor agrees and is obligated to pay both debts, and, specifically, to pay the senior one for the protection and benefit of the junior mortgagee and his security.

The third mortgage which the bank foreclosed against Sletten was painstakingly and accurately drawn, in just this way, as noted above. As between Sletten and the third mortgagee the third mortgage was not "subject to" the prior ones. It was not so expressed, and that was not the true bargain between the parties, for the third mortgage was given as independent security for a separate merchandise bill, not to raise funds for paying off or reducing the prior encumbrances. Hence, as already pointed out,

before the foreclosure the land, as security to the third mortgagee or his assignee the bank, certainly was not the primary fund for payment of the prior debts. It was Sletten's duty to pay the prior debts and the third mortgage debt also. If therefore it is said that the junior foreclosure made the land the primary fund for paying the senior claim, that amounts to holding that the foreclosure terminated and cut off the covenants in the third mortgage, that the purchaser at the foreclosure sale did not take under those covenants, and that Sletten was no longer bound by them. But that is not the law. The purchaser at foreclosure sale under a mortgage with covenants does not buy just the land, as though by quitclaim deed. The covenants in the mortgage pass to him and inure to his benefit. He stands as though the mortgagor had conveyed the land to him by absolute deed given at the date the mortgage was actually given and containing the covenants the mortgage actually contained. This is very easy to see in cases where the junior mortgage did not purport to be such, but was given as a first mortgage. Thus, in the case of Security Bank v. Holmes, the plaintiff held a mortgage with full covenants, all unqualified. He foreclosed and bid in the land for the full amount due on his mortgage; then he had to clear off prior encumbrances, and then sued the mortgagor for the amount so paid. And he recovered. It was held that the covenant against encumbrances for this purpose runs with the land, or at any rate the cause of action for its breach is assigned by and with the conveyance of the land; that the foreclosure purchaser buys the covenanted title, and therefore, though he bought for the full amount due, he has also his action on the covenants. The plaintiff's equity here is plain, because it might be thought to rest on the deceit involved in the false covenant against encumbrances. But of course it does not. The action is not in tort, it is in contract; hence the plaintiff's ignorance or knowledge of the prior encumbrances is immaterial. In the Sletten third mortgage the prior liens were excepted from the covenant against encumbrances; but as we have seen, neither in Minnesota nor North Dakota (nor generally elsewhere, it is believed) does this limit or qualify the later full covenant of warranty. Sletten's obligation to protect the third mortgagee against the prior encumbrances does not arise because he assured the third mortgagee that no such prior liens existed; it arises because, though disclos-

---

12 Allis v. Foley. (1914) 126 Minn. 14, 147 N. W. 670; (1918) 140 Minn. 423, 426, 168 N. W. 183.
13 (1896) 65 Minn. 531, 68 N. W. 113.
ing to the third mortgagee the existence of the prior liens, he
nevertheless explicitly undertook to warrant and defend the title
to the third mortgagee against "all lawful claims of all persons
whomsoever," and the prior mortgages are just such lawful claims.
This is the precise and express doctrine of *Sandwich Manufacturing Company v. Zellmer*\(^{14}\) and of *Smith v. Gaub*.\(^{15}\) And so, on a
second appeal in the above-cited case of *Security Bank v. Holmes*\(^{16}\) the court held that it was no defense to the mortgagor, nor mitiga-
tion of damage, that the plaintiff at the time of the foreclosure
sale knew of the prior encumbrance and took it into account in
bidding. It was not alleged, says Judge Mitchell, that the plain-
tiff bought in terms "subject to" the prior encumbrances. The
answer "refers only to the plaintiff's mental operations;" hence,
what the plaintiff bought was the title "as warranted and protected
by the covenants."

This is not merely technical reasoning. It rests on the funda-
mental fact that Sletten borrowed, and owed, both the $1,500 and
also, independently of it, the $200. The doctrine that one who
buys "subject to" a mortgage thereby makes the land the primary
fund for payment of the debt depends on the fact that the courts
construe that language in a deed to mortgaged land as indicating
that the amount of the mortgage encumbrance was deducted and
withheld from the full consideration paid by the grantee; there-
fore it would be unfair for him to hold the land without paying the
encumbrance. In effect, the grantor has already paid it, so far as
he is concerned, by leaving that much of the purchase price of the
land in the grantee's hands for that purpose.\(^{18}\) But as we have
already seen, nothing of that kind can apply to the Sletten mort-
gages, certainly not before the foreclosure. The $200 considera-
tion for the third mortgage was furnished to Sletten in full, with-
out deduction, in merchandise. Now the North Dakota court's
doctrine that the purchase at the foreclosure sale was "subject to"
the prior mortgage rests on the presumption that because the bank,
bidding at the sale, knew of the existence of the prior mortgages,
therefore it must be presumed to have bid with reference to them
and to have bought the land for a price which would represent its
value with the prior encumbrances deducted. But this "con-

\(^{14}\)(1892) 48 Minn. 408, 51 N. W. 379. See text to note 5.
\(^{15}\)(1910) 19 N. D. 337, 123 N. W. 827, cited above in note 6.
\(^{16}\)(1897) 68 Minn. 538, 71 N. W. 699. See text to note 13.
\(^{17}\)(1897) 68 Minn. 538, 540, 71 N. W. 699.
\(^{18}\)Jones, Mortgages, 7th ed., sec. 751; Grove v. Great Northern
clusively presumes" that the bank deliberately shut its eyes to some of the pertinent facts, while holding it fast bound by others, no more material. True, the bank knew of the prior encumbrances. But it knew also that Sletten owed them as principal debtor, and that he had covenanted with it to pay them and to protect it against them, and that it was buying these covenants with the land; and still further, in this particular case it knew that the $1,500 prior debt was protected, not only by the covenants, but also by the chattel security, adequate presumably and as the event proved. Just why must the bank be "conclusively presumed" to have made its bid with reference to the existence of the prior liens but without any regard to Sletten's primary and covenanted obligation to pay them or the other security therefor? No doubt, in the majority of cases as a practical proposition "on mortgage foreclosure sales bids are usually in fact made with reference to known encumbrances and without reference to the existence of covenants in the mortgage;" this, because the mortgagor is likely to be insolvent and his personal responsibility is deemed negligible. But this is by no means always the case, as this Sletten Case cogently illustrates; which lends apt pertinence to Judge Mitchell's further observation in the Holmes Case, that its doctrine "is, beyond question, logically sound," and "too well established to be now reconsidered, even if we were otherwise disposed to do so."

As authority for its position the North Dakota court cites the Minnesota case of American Building and Loan Association v. Waleen. In that case the plaintiff's mortgagor gave the plaintiff also a surety bond to indemnify against mechanics' liens. The property became or was afterwards found to be encumbered by a mechanics' lien paramount to the mortgage. The plaintiff foreclosed the mortgage and bid in the land for its full amount, and then sued the mortgagor and his bondsmen on the bond. On a technical construction of the wording of the bond the Minnesota court held that it was given merely as a further security for the payment of the mortgage debt; that, therefore, since the purchase at the foreclosure sale for the full amount due had paid and satisfied the mortgage debt, the bond was thereby discharged. In the opinion Justice Mitchell remarks that a foreclosure purchaser "is bound to know the condition of the title, and if the mortgage con-

21 (1892) 52 Minn. 23, 53 N. W. 867.
tains no covenants of title, he has no claim on the mortgagor to make the title good. Where the mortgage contains covenants of title running with the land, different considerations apply. Then the purchaser buys the covenants, and the consideration he pays represents the value of the land as warranted by the covenants." But this bond was not a covenant of the mortgage and hence was held not to have passed to the foreclosure purchaser, and so the plaintiff's bid could not be deemed to have been made on the basis of the value of the land with the title indemnified by the bond.

It is clear that this case has no bearing on a situation like that in the Sletten Case; and indeed, that the opinion in the Waleen Case, so far as it goes, runs directly against the Sletten decision. Like the Sletten opinion, the Waleen opinion does not disclose whether the mortgage contained any covenants; but whether it did or not, the Waleen action was not brought on any mortgage covenants nor in any way depended upon them, but was grounded on a wholly separate and independent contract. The gist of the Waleen holding is found in the court's construction of the bond as given merely as additional security for payment of the debt; so that, with the debt paid by the purchase at the foreclosure sale, there was nothing left for the bond to secure. Justice Dickinson, it may be noted, dissented and the case has troubled the Minnesota court since. It was followed without discussion in American Building and Loan Association v. Stoneman, and was followed again in Pioneer Company v. Freeburg. But when the same situation came once more before the Minnesota court in Wood v. Pacific Surety Company, the court reconsidered its position. In that case land with a building under construction upon it was already encumbered by a first mortgage. The owner borrowed further money from the plaintiff on a second mortgage containing full covenants, only excepting the first mortgage from the covenant against encumbrances. He gave the plaintiff also a surety bond to protect against mechanics' liens. Mechanics' liens accrued and were foreclosed and adjudged prior to both mortgages. The plaintiff foreclosed the second mortgage and bid in the property for its full amount. The first mortgagee redeemed from the mechanics' lien foreclosure, but the plaintiff did not redeem, but let the property go, and then sued the surety company on the bond. It will be noted that the pleadings in this case state and rely upon

22(1892) 52 Minn. 23, 27 et seq, 53 N. W. 867. Italics the writer's.
23(1893) 53 Minn. 212, 54 N. W. 1115.
24(1894) 59 Minn. 230, 61 N. W. 25.
25(1912) 116 Minn. 474, 134 N. W. 127.
the covenants in the mortgage. And it was held by the supreme court that the bond must be deemed to have been given to secure the covenants of title in the mortgage and hence to have passed with those covenants to the purchaser at the second mortgage foreclosure sale. Justice Bunn labors with the earlier Waleen Case. Just where he leaves it may not be altogether clear; but it is plain that if not overruled, the Waleen Case is distinguished because it was so framed as to ignore the covenants in the mortgage. And it is plain that this Wood Case is square authority against the rule of the Sletten Case. The Wood Case holds: (1) that the covenants in a mortgage are effective; (2) that the purchaser at foreclosure sale buys and takes the benefit and protection of the covenants in the mortgage.

The Sletten opinion cites also a line of Illinois cases, running back to the early case of Weiner v. Heintz.26 In that case a mortgage was given to secure two notes maturing at different times. The mortgage was foreclosed by action for the note first matured, and the decree in express terms required the land to be sold “subject to” the note to mature later. The purchaser at the ensuing sale was also the holder of the later note. It having come due, he then sought to foreclose the mortgage again for it, and to recover personal judgment against the maker. But it was held that since at the foreclosure sale he bought the land expressly “subject to” his own later note, he thereby merged it in his title to the land and thereby extinguished it. This case is the foundation of the whole later line of Illinois authority and it will be seen at once that it gives no support to the Sletten decision. True, it holds that the purchase at that foreclosure sale was “subject to” the other note; but that is held, not as a rule of law or “conclusive presumption” to operate generally, but simply on the terms of the decree in the particular case. The court explicitly emphasizes the decree and its terms and bases its decision upon it. It may be doubted whether counsel who drew that decree intended by its phraseology anything more than to make the later-maturing note a senior lien, as though secured by a separate prior mortgage. But the court construed it as requiring the purchaser to buy as though under a deed from the mortgagor drawn in terms “subject to” the later note and charging the land in the purchaser’s hands as the primary fund for its payment, and the opinion is bottomed on that construction—another illustration, possibly, of the obscurity and hazard of the facile phrase, “subject to.” But the Sletten foreclosure was

26(1855) 17 Ill. 259.
by advertisement, not by action. There was no decree fixing and regulating the terms of the sale. It was not a judicial sale; it was purely a statutory sale under the power of sale in the mortgage, at which the purchaser bought the land as though he were buying it from the mortgagor by warranty deed dated at the date of the mortgage.\textsuperscript{27}

The opinion in \textit{Weiner v. Heintz} is cast in terms of the doctrine of merger, and some expressions in the \textit{Sletten} opinion would indicate that the North Dakota court founded its result more or less on that doctrine: that since the bank by its foreclosure purchase and the expiration of redemption thereunder got fee title, its "lesser" interest or lien under its prior mortgage necessarily merged therein and so extinguished not only the prior mortgage as a lien on the land, but also the prior mortgage debt as a personal obligation of Sletten's. But of course, and as the opinion in \textit{Weiner v. Heintz} itself expressly recognizes, the doctrine of merger is not to be applied by any such mechanistic rule of thumb in a court of equity; and the \textit{Sletten Case} was in a court of equity. In all sorts of situations and for all sorts of purposes it is held in equity that merger depends "on the intention of the parties and a variety of other circumstances. Equity will prevent or permit a merger, as will best subserve the purposes of justice and the actual and just intention of the parties, and in the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent [to do so] will ordinarily be implied."\textsuperscript{28} And "the authorities are quite uniform that the holder of a mortgage interest shall lose no substantial rights by becoming owner of the equity of redemption. It would be a rule in conflict with every principle of justice to hold that by the union of two separate interests, each of which represented a full and valuable consideration, either should be destroyed."\textsuperscript{29}

\textsuperscript{27}Allis v. Foley, (1914) 126 Minn. 14, 147 N. W. 670; (1918) 140 Minn. 423, 426, 168 N. W. 183.

\textsuperscript{28}Powell v. Patrick, (1902) 64 S. C. 190, 193, 41 S. E. 894.

After the case of *Weiner v. Heintz* the next pertinent case in Illinois seems to be *Esty v. Brooks.* One Kingdon gave Esty ten notes of different maturities, all secured by a single mortgage. Esty transferred and endorsed the notes. Eight of them being held by Brooks, the mortgage was foreclosed and the land sold, not by action, but under power of sale, "by advertisement," as we would say. The opinion does not explicitly say so, but it would seem that Brooks must have been the purchaser at the sale. The holder of the other two notes later assigned them to Brooks, who then sued Esty upon them, as endorser. It was held that the action lay. The court cites and distinguishes *Weiner v. Heintz* on the express ground that there the sale was under a decree making it in terms "subject to" the unmatured note:

"and the court held this provision in the decree in equity made the land the primary fund for the payment of that note, as the purchaser of the land must be presumed, in his bid, to have deducted such note from the estimated value of the land. . . . But there is nothing of that sort in this case, and how the right of Brooks, as assignee . . . to collect these notes . . . is in any way affected by the sale under the deed of trust, we are wholly unable to perceive."

In the later case of *Biggins v. Brockman* a mortgagee bought judgments which stood behind his mortgage, levied execution upon them and at the execution sale bought the mortgaged land. Then he sued the maker on the mortgage note, but it was held that his action did not lie; that at the execution sale he had bought "subject to his own prior deed of trust," and so as to discharge the debt secured by it. Although the court does not stress the fact, it is to be noted that the purchaser here did not buy a covenanted title. He bought at an execution sale under an ordinary money judgment, i.e., as though under a quitclaim deed from the judgment debtor. However, the court's holding that he bought "subject to" his prior claim is made not as a rule of law but as a finding of fact from the specific evidence in the case. They say that "it is difficult to avoid the conviction, which the evidence tends to produce, that the appellant expressly agreed to purchase the property subject to the deed of trust. To this effect is the testimony of Challacombe and other witnesses who are wholly disinterested." About all that can be made out of this case is that when mortgaged

---

30(1870) 54 Ill. 379.
31(1870) 54 Ill. 379, 380, 381. Italics the writer's.
32(1872) 63 Ill. 316.
33(1872) 63 Ill. 316, 318.
land is purchased by quitclaim deed it becomes a matter for parol evidence whether or not it was the bargain between grantor and grantee that the latter should hold the land charged as the primary fund with payment of the mortgage debt. Of course, no such parol evidence is competent to vary the meaning of a full warranty deed, except in an action in equity brought for reformation on the ground of fraud or mistake, and nothing of that sort is so much as hinted at in the Sletten Case.

But in still later cases the Illinois court has used language that sounds like the Sletten opinion. In Robins v. Swain, the holder of several serially-maturing notes secured by a single mortgage foreclosed by action for part of the notes, bought at the sale, and then sought to enforce the remaining notes at law against the maker. And it was held that he could not do so; that the sale merged the legal and equitable titles and operated as a satisfaction of the mortgage, the plaintiff being still the holder of the entire indebtedness. "The purchaser in such case is presumed to have bought the land at its value less the unpaid note." It is to be noted here that while the foreclosure was by action, the report is wholly silent as to the terms of the decree or sale, and as to the existence or non-existence of any covenants in the mortgage. The court cites Weiner v. Hcintz, from which, without more, it might be permissible to infer that this case was on all fours with it, i.e., that the decree here too required the sale to be "subject to" the remaining notes. If that is not so, then the Robins Case simply makes a broad statement without any satisfactory consideration.

The same remarks apply to the latest Illinois case that has been found in point, Belleville Savings Bank v. Reis. Here, the holder of first and second mortgages foreclosed the second by action and bought in the land, and then sued at law on the first mortgage debt; and it was held that the action would not lie; that the sale was made "subject to" the first mortgage. There is no discussion; the court says that the case of Biggins v. Brockman "is precisely applicable to the case at bar." It is not, unless there was direct evidence in this case, as in Biggins v. Brockman, that the purchaser "expressly agreed to purchase subject to" his prior mortgage. Here, as in the Robins Case, the report discloses nothing concerning the terms of the decree as regulating the sale, nor concerning the existence or absence of covenants in the mortgage.

34 (1873) 68 Ill. 197.
35 (1873) 68 Ill. 197, 201, 202.
36 (1891) 136 Ill. 242, 26 N. E. 646.
It is to be remarked, too, that the foregoing point apparently was not contested; the case was fought on the ground that, although the period for redemption had expired, the foreclosure had never been formally completed by the issue of a sheriff’s deed. These last two Illinois cases do appear to lay down a general rule of law substantially in the terms of the Sletten opinion. But like the Sletten opinion, they do it by arguing as though the mortgages involved were in the form of quitclaim deeds, overlooking and ignoring entirely the existence of any covenants in them, or the bearing of any such covenants upon the terms of the foreclosure sale. They certainly are not considered authority for the doctrine that the purchaser at a sale under foreclosure by advertisement of a junior mortgage containing full covenants nevertheless buys without the benefit of the covenants, as though under a quitclaim deed or one drawn in terms “subject to” the senior mortgage. And no case has been found anywhere which does consider and deliberately announce such a doctrine.

The Iowa court makes the same sort of loose statement in Hult v. Temple, that “the law is well settled in this state” that where the holder of a junior mortgage forecloses he takes subject to the senior mortgage, so that he cannot afterwards buy the latter and enforce it. But as elsewhere, the statement is made without the slightest reference to the existence or significance of covenants in the junior mortgage; and the earlier Iowa cases do not support any such broad statement as a rule of law. Moore v. Olive is a leading and significant case. The holder of a junior mortgage foreclosed by action and bid in the land. Later he bought the senior mortgage, which covered forty acres not embraced in the junior mortgage; and then the mortgagor brought action to have the senior mortgage cancelled. And it was held that it be cancelled. Says the court:

“"It is familiar doctrine that the purchaser of an equity of redemption by deed without covenants takes the estate charged with the payment of mortgage debts, . . . and it is for the purchaser and not the seller, to discharge these liens. This same rule has been applied to purchasers at execution and foreclosure sales. In such cases the premises in the hands of the purchasers are primarily liable for the payment of the mortgage debt."
In the light of the foregoing discussion, the non sequitur here will be glaringly apparent to the reader. The court begins by talking of a purchaser of the equity of redemption under a deed without covenants; then it assimilates to that position the purchaser at execution and foreclosure sales. The purchaser at ordinary execution sale is indeed in that position, as noted in connection with the Illinois cases. A judgment debtor gives his levying judgment creditor no warranty deed. But when the court goes on to couple foreclosure sales in the same category, it forgets that if the mortgage contained covenants the foreclosure purchaser is not a buyer under a deed without covenants; yet it is the position of a buyer under a deed without covenants on which it bases its whole discussion. It is this identical forgetfulness that underlies the whole body of so-called authority for the supposed rule of the Sletten Case. It underlies the Sletten decision itself; as we have said, that opinion ignores and does not disclose the existence of any covenants in the mortgage foreclosed.41

Likewise, in Byington v. Fountain42 the court says that the grantee of twice-mortgaged land "took it just as it was held by [his grantor], burdened with the payment of both mortgages."43 But the report does not give the actual terms of the deed involved, nor show whether it was with or without covenants. The only legitimate inference from the court's statement would be that it was a quitclaim deed. Another Iowa case sometimes referred to as authority for the rule of the Sletten Case, but plainly distinguishable, is Crowley v. Harader.44 Here land already encumbered was sold; the grantee assumed the mortgages and gave back a junior mortgage, which the plaintiff bought and foreclosed. Later the plaintiff bought one of the senior mortgages and upon the note secured by it sued the maker at law. Note that the defendant was not the grantee-mortgagor, but a prior owner of the mortgaged land, in whose favor the grantee-mortgagor had assumed the outstanding mortgage. It was held, and properly, that the action would not lie. Why not? Why, because the plaintiff's title under his junior mortgage foreclosure came to him from a mortgagor who, before making that mortgage, had assumed payment of the prior mortgage; hence, the plaintiff's own title was burdened by that same obligation in favor of the prior owner. To

42 (1883) 61 Iowa 512, 14 N. W. 220.
43 (1883) 61 Iowa 512, 514, 14 N. W. 220.
44 (1886) 69 Iowa 83, 28 N. W. 446.
make this case analogous to the *Sletten Case*, it would have to be taken that Sletten did not give the $1,500 mortgage, but had assumed its payment on a purchase from a prior owner; that he then gave the junior $200 mortgage, which the bank foreclosed; and that the bank then sought to recover the $1,500 debt, not from Sletten, but from his grantor. Now in such case the bank's title would stand just as though Sletten had conveyed to it by absolute warranty deed dated at the date of his $200 mortgage. But of course, all the title he then had to convey was his title under the deed by which he had assumed payment of the $1,500 mortgage. Hence the bank's title would in its hands be subject to the same obligation, *in favor of that prior owner*. The bank's rights and equities against Sletten himself would not be involved in such litigation.45

There is, however, an Iowa case directly in point. In *Kellogg v. Colby*,46 a second mortgage "contained a warranty against all encumbrances except" the first mortgage. The mortgagor conveyed the land in terms "subject to" the first mortgage *only*; and the grantee conveyed it over to the plaintiff also "subject to" only the first mortgage, which the plaintiff also assumed. The second-mortgagor (Colby) foreclosed and bid in the land for the amount due on his second mortgage debt, and the redemption period expired. The plaintiff then bought the first mortgage and started to foreclose it against the land in Colby's hands. Now take note, that if Colby were to be deemed to have purchased at his junior foreclosure sale "subject to" the prior mortgage, so that the land became the primary fund for its payment, it would follow that the plaintiff thereafter could buy that prior mortgage and enforce it against Colby. But the Iowa court held against him, because by his assumption the plaintiff was the principal debtor, whose obligation to pay the prior mortgage was primary, and hence he could not buy it or be subrogated to it against Colby. The court says:

"It is true that Colby, when he purchased the land at the foreclosure sale, had notice from the record that the Johnson mortgage was unpaid, and a prior lien for which his land might become liable; but he at the same time had knowledge of the plaintiff's personal undertaking to pay the debt. It is not a case, as we understand, where the 'land is the primary fund' for the payment. The plaintiff's personal obligation was first—primary—against which he could plead no excuse, and that obligation existed to the mo-

45But as to that last point, cf. *McDonald v. Magirl*, (1896) 97 Iowa 677, 66 N. W. 904.
46(1891) 83 Iowa 513, 49 N. W. 1001.
ment he paid the debt. *The obligation was entirely uninfluenced by Colby's conduct or situation as to the land.*

It is submitted this is good logic, and that it disposes of both the rule and the reasoning of the *Sletten Case*, as well as the similar holdings of the Iowa Court itself in *Hult v. Temple* and *McDonald v. Magirl*.

Some Massachusetts cases also contain broad expressions similar to the *Sletten* opinion. In *Feuer v. Caprilowitch* the court says that a junior mortgagee foreclosing under power of sale ("by advertisement") can sell only the mortgagor's equity of redemption, "subject to" the prior mortgage. This might mean nothing more than the obvious truth that the senior item will remain a lien paramount to the title of the junior foreclosure purchaser. If it means more than that, it is another case of overlooking the existence and materiality of covenants in the junior mortgage. No Massachusetts case has been found discussing the precise point; but that Massachusetts gives effect to the covenants in a mortgage, and construes them carefully, is shown by the case of *Ayer v. Philadelphia Company*. It may be noted in this connection that Massachusetts foreclosure procedure seems quite different from that obtaining in Minnesota and North Dakota. In *Donohue v. Chase* a fourth mortgagee foreclosed under power of sale (not by action). At the sale it appears he notified bidders who were present that "the terms were cash," and that he would pay off the prior mortgages. In other words, he required bidders to pay him the cash price of a clear, unencumbered title and trust to him out of such price to pay off the prior liens. Not unnaturally, they all refrained from bidding; the foreclosing mortgagee bid in the land himself; and the mortgagor then brought action to set aside and cancel the whole proceeding as illegal. It was held that it be cancelled; that a mortgagee under power of sale can sell "neither more nor less than he has to sell;" he had therefore in this case "power to sell according to the terms of his notice of sale and subject to the prior mortgages, but not to sell the estate as if there were no previous mortgages or encumbrances upon it and require those present to bid as if such were the fact." It is these quoted

---

47(1891) 83 Iowa 513, 519, 520, 49 N. W. 1001. Italics the writer's.  
48(1926) 201 Iowa 663, 208 N. W. 70. See text to note 37.  
49(1896) 97 Iowa 677, 66 N. W. 904.  
51(1892) 157 Mass. 57, 31 N. E. 717 (Holmes, J.).  
52(1881) 130 Mass. 137.  
sentences that are supposed to furnish authority for the rule of the Sletten Case; but in view of the state of facts involved and the nature of the relief sought and awarded, it is not clear that by the phrase "subject to" the Massachusetts court meant anything more than that the sale must be simply to pay the amount due the foreclosing fourth mortgagee, with the prior mortgages left remaining as paramount liens outstanding. There is nothing to show that it meant to deny that the purchaser would buy any covenants that the fourth mortgage might contain, or to hold that he would have to pay off the prior encumbrances later for the benefit and indemnity of the mortgagor. The case may well be just one more illustration of the pitfalls of that equivocal term "subject to."

Two New Jersey cases are also cited to support the Sletten doctrine, but neither of them is in point. In Speer v. Whitfield the actual decision was simply that where judgment at law is obtained for a debt that is also secured by a mortgage and the mortgaged land is bid in on an execution under this judgment, the amount so bid is to be credited as pro tanto satisfaction of the mortgage. That is good Hornbook law, but it has no bearing whatever on the Sletten Case. In the opinion the chancellor says:

"It is true, if the mortgagee purchases the mortgaged premises subject to the mortgage, he cannot hold the land and enforce the payment of the mortgage debt against the mortgagor."

True, if he purchases "subject to" the mortgage. But when does he purchase thus "subject to" the mortgage? The chancellor elucidates:

"If he purchase the mortgaged premises on an execution at law against the mortgagee [mortgagor?] in favor of a third person, he purchases subject to the mortgage and thereby extinguishes his debt."

That is, if a third party, a judgment creditor of the mortgagor, levies execution on the mortgaged land and the mortgagee buys it in at the execution sale, he has bought "subject to" his mortgage and extinguished it. This is no more than the doctrine that a purchaser at ordinary execution sale, since he buys without covenant, buys only the equity of redemption pure and simple, i.e., "subject to" all prior encumbrances. Or, continues the chancellor, "if

---

84 (1854) 10 N. J. Eq. 107.
he purchases the mortgaged premises under an execution upon a judgment for his mortgage debt, he thereby extinguishes the debt to the amount he gave for the land." This is what had happened in the case itself and is the gist of the decision, as noted above. If the Sletten Case derives any support from this opinion, it is not discernible to the writer. It will be observed that where on such an execution the land is bid in for less than the amount due, this New Jersey case requires only partial satisfaction of the mortgage, repudiating any hard and fast application of the doctrine of merger. In the later case of Lydecker v. Bogert, the mortgagee sued at law on the mortgage note and obtained judgment, and at the execution sale bid in the mortgaged land for less than the amount due; then, for the balance, he set out to levy upon and sell other land belonging to the mortgagor, who thereupon brought action to restrain and enjoin him, relying on the doctrine of merger. The opinion is interlocutory; but it says in so many words that the mortgagee did not necessarily buy the land "subject to" his mortgage, so as to extinguish the balance of the mortgage debt, and this, be it noted, although the purchase at the execution sale was clearly a purchase as under quitclaim deed, without covenants. But the opinion goes on to say that while the balance of the debt is not necessarily extinguished by the mere fact of the purchase by the mortgagee, yet a court of equity in proper proceedings might appraise the land and compel a further credit. That is, if under a $1,000 judgment at law, representing the mortgage debt, the mortgagee had bid in the mortgaged land for $600, leaving a $400 balance, the equity court might now inquire whether the land was worth more than the $600 bid, and if so, compel the excess value to be applied as a further credit on the mortgage debt.

This last part of the opinion gives some real support to the Sletten decision. For in the Sletten Case the trial court found as a fact that the land was worth more than the sum total of the three mortgages and the costs of foreclosure, and that fact is noticed by the supreme court to buttress its conclusion. That is to say, the bank (if the "opinion evidence" of value on which the finding was based is to be taken as reliable) had a profit in the land, and would have had some profit in it even if its prior $1,500 claim had not been paid out of the chattel security or otherwise. Does this finding, based on that sort of evidence, furnish a sound basis for upsetting the foreclosure? In states where the advertisement

---

\(^57\) (1887) 38 N. J. Eq. 136.
foreclosure procedure of Minnesota and North Dakota is in vogue, it is elementary law that mere inadequacy of the price bid on foreclosure sale gives no ground for impeaching the sale.\(^5\) There is the best of reason for this rule, founded basically upon the fact of the statutory year of redemption after the sale. Under our foreclosure by advertisement the value of the land bears only a one-way relation to the price that will be bid at foreclosure sale. If the foreclosing mortgagee is satisfied that the land is not worth the amount of his mortgage debt, and he thinks also that he has some chance to collect (not simply recover, but collect) a deficit from the mortgage debtor, he will sometimes bid in the land for less than the amount due. But the converse is never true. More than the amount due on the debt for which the foreclosure is had is never bid on the foreclosure sale. It is believed safe to say that this statement is true without exception (in the absence of mistake) under our advertisement procedure. If the Sletten land had contained a known oil well and had been demonstrably worth $100,000, the bank nevertheless would not have thought of bidding more than the $200 and costs due on the third mortgage; nor would it have occurred to anyone else to bid the sale up against the bank on that account. This fact does no injury to the debtor against whom the foreclosure runs, because he has a year thereafter in which to redeem by paying just the amount of the bid price, with interest; hence it is of no concern, either to the mortgagee or the mortgagor, that the land at foreclosure sale should bring any higher price than the amount due on the debt for which the foreclosure is had.

So in the Sletten Case, Sletten had twelve months after the foreclosure sale to redeem the land. He could have redeemed it by paying just the $200, interest and costs. Such redemption would have left the land in his hands still subject to the bank's $1,500 debt, as well as to the first mortgage.\(^5\) So when, during the year of redemption, he caused the $1,500 debt to be paid out of the chattel security, he only did what he must do to redeem from the third mortgage and continue to hold the land. His payment of the $1,500 did not impair or jeopardize his chance to redeem from the foreclosure sale and hold the land. Indeed, if anything, it made it easier for him to redeem indirectly, as by sale of the land to a

\(^5\)Minn. G. S. 1923, sec. 9630; N. D. Comp. Laws 1913, secs. 7758, 8085, 8115.
third person. With the land relieved of the $1,500 encumbrance, Sletten could sell it that much cheaper and still get enough to pay off the first and third mortgages and an equity for himself; hence it would be easier to find a purchaser, if there were any valuable equity there to get. If there was not, then the bank was getting no more than was coming to it in getting the land for the $200 debt and the $1,500 otherwise paid.

This train of reasoning may not apply in New Jersey, whose foreclosure system may be very different. The argument of this paper probably does not apply in Nebraska. In that state land to be sold at foreclosure or judicial sale must first be officially (and "judicially") appraised, and prior liens deducted; and the sale is governed by the "net appraisal." Such sales in Nebraska are held "subject to" such prior liens, i.e., so that the purchaser is estopped to question their validity or priority against his title. It would logically follow that the land should be held the primary fund in the purchaser's hands, for payment of the prior liens. But this result depends on Nebraska's peculiar foreclosure statute, requiring sale on the basis of a "net appraisal." No such appraisal obtains in Minnesota, nor in North Dakota. Also, our contention may not hold good in states which, like Montana, have statutes requiring a secured creditor first to exhaust his security before pursuing the debtor otherwise. The purport of such statutes seems to be to make the security in a real sense, as between debtor and creditor, the "primary fund" for payment of the debt, at least as far as it will reach. But that sort of law is wholly foreign to our system in Minnesota and North Dakota, where the mortgage and the note furnish remedies cumulative, not alternative, so that the mortgage is strictly a collateral security and the creditor is free to sue on the note, and failing to collect, may thereafter foreclose the mortgage.

---


63Minn. G. S. 1923, sec. 9603; N. D. Comp. Laws 1913, sec. 8077.

It may be said that no attempt has been made to compare the statutes of all the forty-eight states or to run down all possible cases in point throughout this country, let alone the rest of the common-law world. But it is confidently believed that the authorities have been exhausted in Minnesota and North Dakota, and the endeavor has been to make the investigation complete for all the states covered by the Northwestern Reporter.
The *Sletten Case* was taken as the starting point for this exploration because it is an example, in rather an aggravated form, of a broad statement made of late years by several courts, as we have seen, which shows signs of hardening into a positive maxim or rule of law: that the purchaser at foreclosure sale under a junior mortgage buys "subject to" all prior liens, so as to make the land in his hands the primary fund for their payment, relieving the debtor from his primary obligation. Yet, when analyzed, such a rule evidently would upset the entire effect and value of the covenants in the ordinary form of mortgage and would amount to holding, contrary to apparently uniform authority, that those covenants do not run to the foreclosure purchaser. When investigated, it appears that these recent statements proceed simply from forgetfulness of that fact. No case has been found which, recognizing and considering the covenants of a junior mortgage, has deliberately held that a foreclosure purchaser under it takes, not under the covenants of his mortgage, but as though under a quitclaim deed given by the mortgagor or a deed drawn in terms "subject to" the senior liens and charging the land in the purchaser's hands primarily with their payment. But there is abundance of unequivocal authority that the covenants in a junior mortgage do pass to the foreclosure purchaser, for his benefit and protection against prior encumbrances. It seems time for the courts to halt, take stock of the situation, correlate their various holdings, and determine with their eyes open whether they really mean any such wholesale revision of the doctrine of covenants running with the land in relation to junior mortgages as is implied from an unqualified construction of such opinions as in the *Sletten Case*, the Iowa case of *Hult v. Temple*, and the Illinois cases of *Belleville Savings Bank v. Reis* and *Robins v. Swain*. The present writer does not believe that they do.

---

64 (1926) 201 Iowa 663, 208 N. W. 70. See text to note 37.
65 (1891) 136 Ill. 242, 26 N. E. 646. See text to note 36.
66 (1873) 68 Ill. 197. See text to note 34.