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THE DOUBLE HAZARD OF A NOTE AND MORTGAGE

By G. W. C. Ross *

Mr. borrower borrows money from Mr. Lender and gives the latter his negotiable promissory note, and a real estate mortgage to secure it. Does he thereby put himself in jeopardy of having to pay the money and also lose his land? He may do things later that will entail that hazard, but does he incur it at the outset, by giving his note and mortgage? It would seem obvious that the answer must be negative. Paying the note, B rightfully expects the mortgage to be discharged; B failing to pay the note, L or his successor in interest may take the land by foreclosure. “The note and mortgage are inseparable, the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity,”¹ or at most, conveys only a “dry trust.” Payment of the debt, even after maturity, extinguishes the mortgage lien without formal re-conveyance or satisfaction executed by the mortgagee.² Minnesota has gone further than some states in holding the note and mortgage separate contracts, more or less independently enforceable. Contrary to the Uniform Mortgage Act, sec. 6,—not yet law in Minnesota³—and to the federal court rule,⁴ the Minnesota court has persistently held a mortgage

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¹Carpenter v. Longan, (1872) 16 Wall. (U.S.) 271, 274, 21 L. Ed. 313
³Except that Part III of the Uniform Act has just been (substantially) enacted by the Minnesota Legislature as a “Short Form Mortgage Act”: Minn. Laws 1931, ch. 204.
⁴Carpenter v. Longan, (1872) 16 Wall. (U.S.) 271, 274, 21 L. Ed. 313.
non-negotiable, even when it secures a negotiable note. The note, however, is negotiable, though it is secured by a mortgage and discloses that fact upon its face. And the note's reciting the fact of its mortgage security does not import the terms of the mortgage into the note. That remains negotiable, though the mortgage contains stipulations that would destroy the note's negotiability if it immediately contained them. In *King Cattle Co. v. Joseph* our court held that if the note not simply recites the existence of the mortgage but goes on to make its own terms expressly "subject to" the provisions of the mortgage, that will import the conditions of the mortgage into the note. The decision was promptly overruled by the legislature, indicating (perhaps) a feeling among Minnesota lawyers and business men that a note ought to be negotiable no matter what it says about the mortgage. In all these rules Minnesota seems more or less peculiar. But they are not supposed to impair the basic inseparability of the two instruments, and it is not believed that they control the present inquiry.

After taking the note and mortgage, suppose L "in due course" endorses and delivers the note to X. X thereby becomes "equitable" owner of the mortgage, but, in Minnesota at least, L...
retains "what may be called the legal title to the mortgage,"\textsuperscript{11} From this point on, if L is dishonest he can do several things to cause complications. Perhaps the most common occurrence is that L accepts payment from B and keeps the money, B not knowing the note has been transferred. Where the mortgage partakes of the note’s negotiability, B will have to pay again, to X; else, X will get judgment for the money and foreclosure of the mortgage.\textsuperscript{12} This subjects B to double liability. He must pay twice; or, having paid once, also lose his land by foreclosure. But this result he brought upon himself, not just by giving the note and mortgage, but by the circumstances of his later payment. By paying L without requiring surrender of his note he paid at his own risk.\textsuperscript{13} But Minnesota holds that by so paying L, B discharged the mortgage lien, though he is still personally liable to X on the note.\textsuperscript{14} For the redemption of his land from the mortgage lien, B need make no inquiry as to L’s right to receive payment. He need not see nor ask for the note, nor even obtain a recordable satisfaction of the mortgage. Still, he will be held to have paid L in “good faith.” and the mortgage lien is extinguished.\textsuperscript{15} Indeed, even if X held not only the note, but also a formal, recorded assignment of the mortgage, still, under the Minnesota statute.\textsuperscript{16} B. blindly paying L without production of the note or inquiry, will have freed his land from the mortgage lien.

Where it is not B himself, but his grantee of the land, that pays L, many decisions hold such grantee to the same risk as B himself. He must at his peril ascertain L’s right to receive payment. But other opinions point out that the grantee did not make

\textsuperscript{11}Mitchell, J., in Burke v. Backus, (1892) 51 Minn. 174, 178, 53 N. W. 458.
\textsuperscript{13}In Kellogg v. Smith, (1862) 26 N. Y. 18. Allen J., diss., urged (in a somewhat different connection) that where the note is asked for and not produced, but a false though plausible excuse is given and relied on, the party inquiring ought not to be held at risk of the falsity of the excuse. But a majority of the court did not agree. The risk is absolute. If only part payment is made, of course surrender of the note cannot be required. But its production can be, and an “endorsement” of the payment upon it. Cf. Note 38, post.
\textsuperscript{15}Sed. Cf. Merchant v. Woods, (1881) 27 Minn. 396, 7 N. W. 826; Cf. Notes 44, 46, 47, 48, post.
\textsuperscript{16}Minn. G. S. 1923, sec. 8225. The same statute is found in other states.
the note and it is not to be surrendered to him, and hence urge that he should be under no burden of inquiry about it, but should be able safely to pay L as record holder of the mortgage and discharge the land from its lien. This is particularly cogent if the grantee did not assume the mortgage debt, or if he acquired from B only part of the mortgaged land and is interested to obtain only a "partial release" of the mortgage.17

Suppose (the note having been transferred to X in due course) B pays L and obtains from him a formal, recorded satisfaction of the mortgage; later, B sells and conveys the land to Y, who buys "on the record," making no inquiry beyond or outside it. Courts early found this situation difficult. On the principle that transfer of the debt carries the mortgage, it has been held that the assignment of a mortgage is not within the purview of the recording acts; or, that while a recorded assignment might be requisite to protect the assignee against a future purchaser of the mortgage, no formal assignment was necessary to his rights against a future purchaser of the land.18 But such a doctrine could not last, and Y now is generally protected.19 Buying in reliance on the satisfaction of record, he need not get or see the note, nor ask whether it was surrendered to B. Sometimes, however, the satisfaction is delivered to Y or is given in conne-

17 Distinction may be drawn between a direct mortgage and a mortgage in the form of a trust deed; also, between payment made before maturity and payment at or after maturity. Cf. Note 12, ante; Wolcott v. Winchester, (1860) 15 Gray (Mass.) 461; Shoemaker v. Minkler, (1926) 202 Iowa 942, 211 N. W. 563; Marling v. Jones, (1909) 138 Wis. 82, 91-2, 119 N. W. 931, 934-5. Cf. Carleton College v. McNaughton, (1879) 26 Minn. 194, 2 N. W. 688. In one respect B's grantee pays L at greater risk than B himself. The statute last cited (Minn. G.S. 1923, sec. 8225) authorizes B to pay L in the teeth of a recorded assignment of the mortgage, but that protection is not extended to B's grantee.

18 Purdy v. Huntington, (1870) 42 N. Y. 334.

tion with his purchase of the land, his purchase-money or part of it being paid over to L for the satisfaction. An early federal case 20 refused to protect Y in such case. Though he did not make the note and it was not to be surrendered to him, yet he must see to it that it is surrendered to B. He cannot rely simply on L’s record title to the mortgage and his delivered satisfaction, though if he had bought the land only after the satisfaction had been given and recorded, having no part in that transaction himself, he would have been protected. Other courts have enforced this distinction, but some courts have apparently ignored it. 21

A combination of the two situations arises when B, instead of paying L in money, gives him a new note and mortgage to refund the old ones. No serious difficulty ensues so long as L retains the new papers. He holds them as trustee for X.—at X’s option; or, if X declines the new papers and enforces collection of the old note from B, then B can require L to cancel and surrender the new note and mortgage. 22 But if before discovery L has endorsed and assigned the new note and mortgage in due course to W (the old note still being in X’s hands), divergent results are reached. If L gave B a recorded satisfaction of the old mortgage, then W obviously stands as a bona fide purchaser of the land from B in reliance on the recorded satisfaction, like Y in the preceding paragraph. 23 If L gave no recorded satisfaction, the new note and mortgage may still be treated as a payment of the old item and the problem worked out as though B

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22It is assumed that L took the new note and mortgage to himself, without X’s knowledge or authority.
23Cf. ante, Notes 18 to 21.
had paid L the amount of the old note in cash. If, as in Minnesota, such cash payment would have discharged the mortgage, then X now may be held to have no lien on the land, though he holds his note in due course. This means that B now owes the money to both X and W, but W has the only mortgage security. If B’s cash payment to L would not have freed the land from the mortgage as against X, then a refunding mortgage to L will not do so. X will have his note, secured by first lien on the land. Plainly then, the consideration for the new note and mortgage has failed. This is only a personal defense to the note, not good against W; but a jurisdiction where mortgages are non-negotiable will award W no lien on the land. Where the new mortgage is held negotiable, W will have a second lien on the land, subordinate to X’s first lien.

After transferring the note to X in due course, L, instead of giving B a recorded satisfaction, may take from him a conveyance of the land and later sell and convey (or mortgage) it over to T. T supposing that he is getting it free from incumbrance, relied on the union of the record title to the mortgage and the record title to the land as having produced a merger. No merger took place in fact. Until L conveyed over to T, the land in L’s hands was subject to the mortgage in favor of X. Could T safely rely on the record? Inquiry of L presumably would have brought nothing to light, but inquiry of B ought to have disclosed the non-surrender of the note to him. T was bound to know that it might have been transferred. Could he safely neglect the inquiry? Notwithstanding our recording act, it may be deemed material whether L conveyed to T by warranty or by quitclaim deed. The latter would have implied no representation by L as to the nature or extent

24Cf. ante, Notes 12 to 16. It is not an inevitable conclusion that a refunding note and mortgage must be treated like payment of the old item in cash; Cf. Rea v. Kelley, (Minn. 1931) 235 N. W. 910.


26“The fact that such first recorded conveyance is in the form or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate.” Minn. G. S. 1923, sec. 8226.
of his title or the incumbrances against it, but if he conveyed by full warranty deed he thereby explicitly stated to T that the land was free from incumbrance. This should protect T as fully as if he saw L's formal satisfaction of record. L recording a satisfaction would assert nothing more than he asserts by his warranty deed; and following out the line of thought, that T did not make the note and it was not to be surrendered to him and he had no part in the previous transaction between B and L, it would seem not unfair to protect T's title against X. The Minnesota court (as well as others) has so held, though there is some conflict of authority.\textsuperscript{27} It is believed most courts would protect T if L had given formal satisfaction in addition to taking conveyance from B,\textsuperscript{28} yet, as just suggested, if T may not rely on L's warranty deed, how should he rely any better on L's satisfaction of the mortgage, with no inquiry as to surrender of the note?

Greater difficulties come into view if we assume that after endorsing the note to X in due course L then assigns the mortgage to Z by formal, recorded assignment, Z paying value "in good faith."\textsuperscript{29} If at this point the facts become known, B will


\textsuperscript{28}In such case T obviously stands in the same position as Y in an earlier paragraph (Cf. ante, Notes 18 to 21). He is a bona fide purchaser under mesne conveyance from B.

\textsuperscript{29}L to begin with has two instruments: the note, and the mortgage. It is a fair question why anybody should be deemed a purchaser "in good faith" and free from "negligence" (Cf. post, Note 38), who buys and accepts delivery of either instrument without the other. However, possession of the note is much more important than possession of the mortgage. And X, buying the note, may not even know that any mortgage goes with it; then he can hardly be criticized for not getting possession of it (sed cf. Franklin Sav. Bank v. Colby, (1898) 165 Iowa 424, 75 N. W. 346.) But Z is almost always on notice that the mortgage secures a
have to pay X; but, paying X, he can require Z to satisfy the mortgage. This result will obtain, not only in Minnesota, by reason of a mortgage's non-negotiability, but as well in jurisdictions that hold mortgages negotiable. It flows from the primary doctrine that the mortgage is merely incidental to the debt and is not to be separated from it.\(^{30}\) X, unimpeachable holder of the debt, is entitled to be paid; B duly paying the debt to its proper holder, discharges the mortgage with the debt. Z has no rights (except against L).\(^{31}\) But reverse the chronology of these transactions: Suppose L first sold the mortgage to Z by formal, recorded assignment, and later endorsed the note to X in due course. Z, paying value, of course, did not intentionally buy the mortgage alone, as a "dry trust;" he meant to buy its beneficial ownership.\(^{32}\) But that means the debt, and he failed to get possession of the note. Did he not thereby run the same risk of a later as of an earlier transfer of the note to X?\(^ {33}\) But on the other hand, if (by recital in the note or by parol) X knew of the mortgage when he bought the note, then ought not X to have searched the record and found the earlier assignment to Z? This suggestion would seem to impair the negotiability of a note known to be secured by mortgage;\(^ {34}\) but good authority supports the proposition that X in such case is not "buying negotiable paper simpliciter" and is not entitled to prevail against Z.\(^ {35}\) The

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\(^{30}\) Cf. ante, Notes 1 and 2.


\(^{32}\) The most usual form of mortgage assignment purports to assign the mortgage, "together with the indebtedness thereby secured."

\(^{33}\) It sometimes happens that Z did get the note with the mortgage, but later L by some means re-possesses himself of the note and transfers it to X in due course. Cf. ante, Note 29.

\(^{34}\) Cf. ante, Note 6.

\(^{35}\) Murphy v. Barnard, (1894) 162 Mass. 72, 38 N. E. 29. Sed cf. Foster v. Augustana College, (1923) 92 Okla. 96, 218 Pac. 335 (holding that X will prevail vs. Z, and that Z has no rights in either the note or the
mortgage and assignment being conveyances within the recording acts, X buys subject to the record. These decisions award Z the beneficial ownership of the mortgage, not simply its technical "legal title." Z is entitled to be paid, at least out of the land or its proceeds. What of X's position; has he a personal action against B? If so, the note and mortgage have been effectually severed; B must pay twice, or pay once and lose his land besides; yet B had no part or lot in any of the transactions (after he gave the note and mortgage) that produced this result. But that is not believed to be the meaning of the decisions. They often leave this point obscure, because the mortgagor commonly defaults in the litigation and so his rights and obligations are not carefully considered. But in Murphy v. Barnard, at least, the mortgagor was an active party to the litigation, and the opinion evidently means that his obligation is to pay Z alone. The opinions discuss the matter in terms of "negligence." Z was negligent in buying the claim without getting and keeping the note, but with his assignment on record no trouble would have ensued had X not afterward bought the note (known to be secured) without examining the mortgage records. But this negligence can be fastened on X only when he knew of the mortgage. If he bought the note as a plain, unsecured note, how can his position as a holder in due course be attacked? What then is the position of Z, and B? No case has been found squarely on this situation; but it is submitted the court should protect B against Z in such a case, and that on B's paying X the mortgage). Cf. Stein v. Sullivan, (1879) 31 N. J. Eq. 409; Hewell v. Coulbourn, (1880) 54 Md. 59; Strong v. Jackson, (1877) 123 Mass. 60; Porter v. King, (D.C. Pa. 1880) 1 Fed. 755; Kernohan v. Manss Bros., (1895) 53 Ohio St. 118, 41 N. E. 258. Cf. (1924) 8 MINNESOTA LAW REVIEW 337, 347.

Cf. Robbins v. Larson, (1897) 69 Minn. 436, 72 N. W. 456, where the court frankly intimated the decision might have been different if the mortgagor had contested the case.

"Negligence" in this connection obviously does not mean just what it means, e.g., in personal injury law. There it means tortious conduct, imposing on the negligent party the obligation to pay damages. But neither X nor Z here has done anything tortious. Their "negligence" was rather what the chancellors meant by "laches." Precisely, it means that by doing as they did they ran some risk of losing their rights, which they would not have run had they done differently. In Hohfeldian discourse, they subjected themselves to a "liability." One can hardly be deemed negligent in the ordinary sense who is deceived by a skilful forgery (Cf. ante, Note 29); but, of course, one who buys a forged note acquires nothing. Cf. Note 13, ante.
mortality should be cancelled. Z was plainly negligent in not getting and keeping the note), and because of that B now must pay X, an innocent holder of the note; but no negligence can possibly be charged against B unless it be boldly asserted that he was negligent in giving his negotiable note with a mortgage in the first place. 49

Finally, suppose that instead of assigning the unforeclosed mortgage to Z, L forecloses the mortgage (either before or after transferring the note to X) and then conveys the land to S, who buys purely “on the record.” S as a purchaser of the land after foreclosure stands very differently from Z, as assignee of the unforeclosed mortgage. 40 Z buying the unforeclosed mortgage was negligent in not obtaining and retaining the note; but S buying the foreclosed land seems under no burden to see or ask about the note. Buyers of land that has been foreclosed on do not usually do so. Has he then bought valid title to the land? 41

When X bought the note, he bought also the beneficial interest in the mortgage. 42 But without formal, recorded assignment to him he could not foreclose it by advertisement. L was the only party competent to do that. 43 Of course L could rightfully foreclose only on B’s default and at X’s request. But suppose he did it without X’s request or knowledge. Has such a foreclosure

49 An early New York or New England judge (to the writer’s regret, the citation has been lost) deplored the then new-fangled custom of giving a negotiable note with a mortgage. The older practice had been to give a non-negotiable bond. But it is surely too late now to stigmatize giving a negotiable note with a mortgage as “negligent” or in any degree un-businesslike. It is not so far-fetched to suggest that B might be deemed negligent in not seeing to it that his note referred to the mortgage, so as to bring into play the doctrine of the cases cited under Note 35 (ante). Notes that are secured not uncommonly do disclose the fact. But not always; and B would scarcely find himself able to insist upon it, if L required a note plain on its face. “The borrower is servant to the lender.”

40 Cf. ante, Notes 14 and 15. The “lien States” regard an unforeclosed mortgage as a chose in action; but after foreclosure a purchaser is dealing with the title to the land, even before expiration of redemption: Cf. Pioneer Ass’n v. Farnham, (1892) 50 Minn. 315, 52 N. W. 897; Berthold v. Holman, (1867) 12 Minn. 335 (Gil. 221); Whitney v. Huntington, (1886) 34 Minn. 458, 26 N. W. 631; Marshall & Illsley Bank v. Cady, (1899) 76 Minn. 112, 78 N. W. 978; Grady v. First Securities Co., (1930) 179 Minn. 571, 229 N. W. 874.

41 Cf. ante, Note 19.

42 Cf. ante, Notes 1, 2, 10, 11.

any validity? In Minnesota, at least, apparently it has. So long as L retains title to the land, no harm has been done. He will be held trustee of it for X; or, if X, declining the land, should enforce the note against B, then L could be made to reconvey the land to B, or the foreclosure be annulled by decree. But after L has conveyed the land to S, apparently S cannot be made constructive trustee, but will hold the land for his own benefit. The foreclosure then was valid and binding on B, though X does not get the benefit of it. B has lost his land to S. Does he also owe X the money? Huitink v. Thompson was contested only between X and S; the mortgagor defaulted, and hence his rights were not adjudicated. As usual, the opinion proceeds on the ground of negligence. But in that case X bought the note with knowledge of the mortgage and deliberately refrained from recording a formal assignment. Hence it was said he left “apparent title” to the mortgage in L, with the possibility of the foreclosure and conveyance to S. The same negligence might well have defeated his right to recover the money from B. But suppose X had bought the note in ignorance of the mortgage: Then apparently his right to recover from B as a holder in due course could not be defeated. Must B be held then also to have lost the land to S? In a contest between X and S it is well enough to talk of X's negligence, but the gist of S's position against B is that he bought the land “on the record” with no burden of making parol inquiry about the note. How is that position affected by X's conduct, negligent or otherwise?

But what has B done or omitted to subject himself to the loss of the land to S and the money to X? In Merchant v. Woods B had paid L but had failed to have the note surrendered or to record a formal satisfaction, and it was said he thereby left L. “apparently authorized” to foreclose. Wherever the foreclosure took place after maturity, or was based on B's actual default,

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45Meeke Co. Bank v. Young, (1892) 51 Minn. 254, 53 N. W. 630.

46That is the apparent effect of the Minnesota cases cited under Note 44, ante.

47(1905) 95 Minn. 392, 104 N. W. 237.

48This is learned from the paperbook; the published report does not disclose the fact.

49Cf. ante. Notes 35 to 37.

50(1881) 27 Minn. 396, 7 N. W. 826. Cf. ante. Note 44.
it may be urged B was negligent; he must have anticipated foreclosure and should have learned whether L was conducting it with authority. But under an acceleration clause foreclosure by advertisement can be conducted even though the debtor is in no actual default, and it can be so conducted, and redemption expire, without coming to B's knowledge at all. It is nevertheless valid and binding on B, and on X, once title under the foreclosure has come to S? It is one thing to say that by defaulting, or paying without recording a satisfaction, B gives L apparent authority to foreclose. But by the very giving of the mortgage with power of sale does he give L apparent authority to foreclose, default or no default? True, no purchaser in S's position, buying land whose title deraigns through a foreclosure, takes note of the fact that it was held under an acceleration clause and therefore inquires whether the claimed default was actual. But must B, having given a mortgage with power of sale and acceleration clause, thereafter mount continuous guard at the register of deeds' office to see that no foreclosure is spread on record based on a fictitious default? It means just that, to hold that S buying under such a foreclosure acquires an indefeasible title? If X bought the

51The Minnesota statute does not require the foreclosure notice issued under power of sale even to state explicity that default has occurred, though it commonly does so: Minn. S. 1923, secs. 9603, 9605; cf. Fowler v. Woodward, (1880) 26 Minn. 327, 4 N. W. 23; Trafton v. Cornell, (1895) 62 Minn. 442, 64 N. W. 1148; West v. Berg, (1896) 66 Minn. 287, 68 N. W. 1077. And the notice need not be served on the mortgagor or ever come to his actual notice unless he happens also to occupy the premises personally. If they are vacant, the notice need not be actually served on anybody. Minn. S. 1923, secs. 9604, 9618 (2). In Huitink v. Thompson, (1905) 95 Minn. 392, 104 N. W. 237, the foreclosure was conducted on such an "affidavit of vacancy," and neither the report nor the paperbook makes it clear that the mortgagor either knew of the foreclosure or had committed any default at that time.

52Cf. Bradford Sav. Bank v. Crippen, (1901) 63 Neb. 210, 88 N. W. 166, where foreclosure by action had been brought in the name of a nominal plaintiff who neither owned nor had possession of the note or mortgage, and decree had been obtained although it is said the debtor was not actually in default at all. The report does not disclose whether the decree was based on a contest or on the mortgagor's non-appearance. Cf. Kenney v. Bank, (1898) 2 Colo. App. 24, 54 Pac. 404 (with the note transferred to X, the mortgage in L's hands becomes in effect a trust deed); Smith v. Bradford, (S.D. 1929) 228 N. W. 466; Merrill v. Luce, (1894) 6 S. D. 354, 61 N. W. 43.

53If B knew of the foreclosure and the sale was for the full amount, thus purporting to satisfy the debt, it seems not impertinent to suggest that he ought to demand that his note be surrendered to him. He would thereby speedily learn of its previous transfer to X. If the foreclosure was held under an acceleration clause, it is possible for the note to get into the hands of a holder in due course after the foreclosure, and by requiring its surrender at the sale B would avoid that risk. In Meeker Co.
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Note in due course and with no knowledge of the mortgage, so that he is an unassailable holder in due course, and if S buying the foreclosure title is absolved from any duty of parol inquiry as to the note or actual default by B, then B by the very giving of his negotiable note and mortgage (without seeing to it that the note refers to the mortgage) subjects himself to this hazard of forfeiture.

No case has been found that confronted the court with this extreme situation. If one ever does arise, it is not believed the court will forfeit B's land to S and also make him pay the money to X, and the further suggestion is ventured that S is the one who should lose. After all, the purchaser of real estate "on the record" necessarily runs many risks,—of forged deeds, e.g., of dower rights of undisclosed spouses, and the like—and it were better to add the risk of having bought under a foreclosure which, though fair on its face and not a forgery, was nevertheless unauthorized and void, than to forfeit B's property when he has done nothing (except to give his "plain" negotiable note and mortgage) to incur such danger. In *Huitink v. Thompson* the mortgagor's default in the litigation, and the vagueness of the appellate record as to the actuality of his default on the mortgage or his knowledge of the foreclosure enabled the court to avoid giving his position thorough consideration. But by the same token it is submitted the apparent doctrine of that case need not be pushed to the last extremity. That case, and the other Minnesota cases cited are extreme enough, however severely limited to their "exact facts."

One or two practical suggestions emerge. A mortgagor should see to it, if he can, that his note recites the existence of the mortgage. And, to attorneys engaged in foreclosure practice: As an officer of court and a minister of justice an attorney is recreant who forecloses a mortgage without requiring delivery

Bank v. Young, (1892) 51 Minn. 254, 53 N. W. 630, the note was so transferred after the foreclosure. Yet if it is negligent for B not to procure surrender of his note on foreclosure, the opinion is hazarded that negligence is the all but uniform custom in Minnesota. It is not believed that attorneys conducting foreclosure by advertisement usually surrender the note to the debtor after the sale. They commonly return it to their client, the foreclosing creditor, or else keep it in their own files. But if B did not know of the foreclosure and was not in default he cannot possibly be deemed negligent in not demanding his note before its maturity.

Cl. post, Notes 56, 57.

54(1905) 95 Minn. 392, 104 N. W. 237. Ante, Note 44.

55At Note 44, ante.
of the note to him. And after foreclosure he should not simply return the note to his client; certainly not without cancelling it so that it cannot be put in further circulation. Otherwise, he ought to see to it that it is surrendered to the debtor.

*Cf. ante, Note 53. In Bradford Sav. Bank v. Crippen, (1901) 63 Neb. 210, 88 N. W. 166, the foreclosure was conducted and findings made that plaintiff owned the note and mortgage, when that finding was false and the papers apparently were not produced in court. It would seem this could not have happened if the foreclosing attorney had done his duty.

*Cf. ante, Note 53. Even if the note is past-due at the time of foreclosure, it still may be put later into the hands of one who will claim to have bought it before maturity, thus entailing the hazard and expense of litigation.