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Applications of the Distinction between Mortgages and Trust Deeds in California

Joseph M. Cormack
William & Mary Law School

James B. Irsfeld Jr.

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I

THE TREND TOWARD UNIFICATION

IN 1915 Professor Kidd published a valuable and stimulating discussion of the two forms of real property security existing in California—the mortgage and the trust deed.¹ After a lapse of twenty-three years it has been thought worth while to investigate again the state of the differences and similarities existing in the legal treatment of the two instruments. In view of the present writers' indebtedness to Professor Kidd's treatment of the subject, while the present discussion will be made complete, its contribution can be only in the nature of a postscript to Professor Kidd's scholarly article.

The paradoxical character of the situation in California was well expressed by Professor Kidd as follows:²

"... a court which holds that no legal title passes to the mortgagee will generally hold that no title passes when the conveyance is made to trustees. ... While in most jurisdictions there is little difference between a trust deed and a mortgage, the courts of California, strangely enough where the lien theory of mortgage has been adopted, have preserved trust deeds in which the legal title actually passes. Both the lien theory and the legal title theory have been made to work fairly well. When, however, the two theories are simultaneously in operation in the same jurisdiction, difficulties are sure to arise."

The present study will be limited to a detailed examination of the state of the law in regard to the two instruments as it exists today. No proposals for change in the law will be advanced. It may be observed, however, that it is felt that a trend can be observed, in both the decisions and the statutes of the state, toward a lessening of the distinction between the two types of instruments. There has not been an even progress in this direction, the courts swinging back and forth between emphasis upon the similarities and upon the differences in the rules of law applicable to the two instruments. Without citing the many statements of conflicting points of view, it is believed that the following passages, from an early and a late decision, are fairly illustrative of the general current of the legal doctrine of the state. In 1859 it was said:³

"It [a trust deed] has no feature in common with a mortgage, except that it was executed to secure an indebtedness."

In 1933 is found the following:⁴

"... deeds of trust, except for the passage of title for the purposes of the trust, are practically and substantially only mortgages with a power of sale ..."

¹ Kidd, *Trust Deeds and Mortgages in California* (1915) 3 CALIF. L. REV. 381.

² *Ibid.* at 383, 384.

³ Koch v. Briggs (1859) 14 Cal. 256, 262, 73 Am. Dec. 651, 653.

⁴ Bank of Italy v. Bentley (1933) 217 Cal. 644, 657, 20 P. (2d) 940, 945.

II

DIFFERENCES IN THE LAW RESULTING FROM THE DISTINCTION

1. *Passage of Title.*—The fundamental distinction between deeds of trust and mortgages in California is that in the case of a mortgage legal title does not pass from the debtor,⁵ whereas the converse is true in connection with a trust deed.⁶ If this distinction were carried through to its logical conclusion, there would be many more differences in the law resulting from the distinction between the two types of instruments than have been observed. Toward the close of this article the situations in which the courts have ignored the passage of title in a trust deed will be discussed.⁷ The immediate discussion will relate to the differences in the law that have been found to result from the distinction between the two forms of security.

2. *Procedure to Effect Formal Discharge.*—The procedure required to effect formal discharge of a mortgage differs from that necessary in the case of a trust deed. A recorded mortgage may be discharged by an entry in the margin of the record acknowledging satisfaction, or by recording the mortgagee's certificate of discharge,⁸ but a reconveyance of title is necessary in connection with a trust deed.⁹ The following quotation aptly expresses the distinction:

"The instrument is a deed of trust . . . and unless the indorsement upon the margin of the record of the deed of trust constitutes a reconveyance, it follows that the legal title remains in [the trustee]. By express statutory provision the lien of a recorded mortgage may be satisfied by an indorsement upon the margin of the record . . . but such an indorsement is lacking in all the essential elements requisite to a transfer of title."¹⁰

3. *Tender.*—Because of the necessity of reconveyance in order to formally extinguish a trust deed, it seems that a distinction as to the

⁵ California very early adopted the lien theory of mortgages. *McMillan v. Richards* (1858) 9 Cal. 365, 70 Am. Dec. 655; *Dutton v. Warshauer* (1863) 21 Cal. 609, 82 Am. Dec. 765.

⁶ *Anglo-California Trust Co. v. Oakland Ry.* (1924) 193 Cal. 451, 225 Pac. 452. See *Hollywood Lbr. Co. v. Love* (1909) 155 Cal. 270, 100 Pac. 698.

⁷ See *infra*, part III, SIMILARITIES IN THE LEGAL TREATMENT OF THE TWO INSTRUMENTS.

⁸ CAL. CIV. CODE §§ 2938, 2939. Entering the discharge of a mortgage discharges the security, but not the debt. *Sherwood v. Dunbar* (1856) 6 Cal. 53.

⁹ This is true, even though CAL. CIV. CODE § 2279 provides that "A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful," and CAL. CIV. CODE § 871 provides that "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."

¹⁰ *Roberts v. True* (1908) 7 Cal. App. 379, 380-381, 94 Pac. 392, 393; *Travelli v. Bowman* (1907) 150 Cal. 587, 89 Pac. 347; *Duncan v. Wolfer* (1922) 60 Cal. App. 120, 212 Pac. 390; CAL. CIV. CODE § 871.

effect of tender of performance exists. Section 1504 of the Civil Code provides that a tender of performance has the same effect upon all the incidents of an obligation as a performance thereof. Whether or not a deed of trust should be considered an incident of the obligation which it secures, as it is thus settled that performance by the debtor does not extinguish the trust deed, the same result would seem necessarily to follow in connection with a tender of performance. As to whether a mortgage is discharged by a tender, the latest expression of the supreme court of the state is to be found in *Walker v. Houston*:¹¹

"Some uncertainty exists as to whether tender discharges a mortgage, but logically it should, for the mortgage is only a lien."¹²

4. *Effect upon the Creditor's Remedies of Running of the Period of Limitation.*—Section 2911 of the Civil Code provides that a lien is extinguished by the lapse of time within which an action can be brought on the principal obligation.¹³ Since a mortgage is regarded as a lien, it follows that when the period of limitation has run upon the principal obligation, the mortgage is extinguished, and cannot be foreclosed.¹⁴ Neither can there be a sale under a power of sale contained in a mortgage where the note secured has been outlawed.¹⁵ In the case of deeds of trust, however, the trustee has legal title, and can always sell the land, even after the statute has run on the note.¹⁶

Section 2911, relating to mortgages, was not designed, however, to permit the debtor to recover his property without paying the debt, so despite the expiration of the statutory period the mortgagor must pay the debt before he can maintain ejectment, or quiet his title to the mortgaged premises.¹⁷

¹¹ (1932) 215 Cal. 742, 746, 12 P. (2d) 952, 953.

¹² *Accord*: *Weimeyer v. Southern T. & C. Bank* (1930) 107 Cal. App. 165, 290 Pac. 70. *Contra*: *Himmelmann v. Fitzpatrick* (1875) 50 Cal. 650. See Note (1915) 3 CALIF. L. REV. 336.

¹³ It has been said that no other state has such a statute. *Goldwater v. Hibernia S. & L. Soc.* (1912) 19 Cal. App. 511, 126 Pac. 861. But see MONT. REV. CODE (1935) § 9467.

¹⁴ *Kern Valley Bank v. Koehn* (1910) 157 Cal. 237, 107 Pac. 111; *Lilly-Brackett Co. v. Sonnemann* (1910) 157 Cal. 192, 106 Pac. 715.

¹⁵ *Goldwater v. Hibernia S. & L. Soc.*, *supra* note 13; *Faxon v. All Persons* (1913) 166 Cal. 707, 139 Pac. 919. In the *Goldwater* case, hearing in the supreme court was denied on the ground that since the mortgagor had died before the mortgagee executed the power, and it no longer was a power coupled with an interest, it terminated. That a mortgagee has a power coupled with an interest not terminated by the death of the mortgagor before the statute of limitations has run, see *New York Life Ins. Co. v. Doane* (1936) 13 Cal. App. (2d) 233, 56 P. (2d) 989.

¹⁶ *Grant v. Burr* (1880) 54 Cal. 298; *Travelli v. Bowman*, *supra* note 10. See *Kidd, op. cit. supra* note 1, at 395.

¹⁷ *Puckhaber v. Henry* (1907) 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75; *Cameron v. Ah Quong* (1917) 175 Cal. 377, 165 Pac. 961.

5. *Assignments by the Creditor.*—Section 858 of the Civil Code provides that the power of sale contained in a mortgage may be exercised by an assignee of the note, provided the assignment is acknowledged and recorded. The reason for this requirement is to make certain that after foreclosure there will be a clear record title. Further, the mortgagor could not safely redeem from one whose interest in the property was not indicated by the record. These reasons are lacking in the case of a trust deed, since no lien passes to the creditor, to be assigned by him, and legal title remains at all times in the trustee. Consequently, an assignee of the creditor can order the trustee to sell the property, without having had his assignment recorded.¹⁸

Under a deed of trust, the creditor's assignee cannot himself sell the property, because his assignor did not have a power of sale to transfer.¹⁹ In the case of a mortgage, however, the assignee of the note which is secured can himself exercise the power of sale.²⁰

6. *Parol Trusts.*—Apparently another difference in the law resulting from the fact that title is not conveyed to the mortgagee, but only a lien, has arisen in regard to parol trusts. The early case of *Tapia v. DeMartini*²¹ allowed the mortgagee to hold a mortgage in trust, by parol agreement, in part for his own benefit and in part for the benefit of another.²² It would seem that a trustee could not hold the legal title which has been conveyed to him in like manner, as to do so would constitute the imposition of a trust in respect of real property by parol. This is upon the assumption that the courts will apply to this situation section 1971 of the Code of Civil Procedure, reading as follows:

"No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

7. *Presentation of Secured Claim against Decedent's Estate.*—Although claims against decedents' estates founded on written instruments

¹⁸ Stockwell v. Barnum (1908) 7 Cal. App. 413, 94 Pac. 400.

¹⁹ *Ibid.* See Kidd, *op. cit. supra* note 1, at 399.

²⁰ CAL. CIV. CODE § 858. It is assumed that the mortgage contains an express provision for private sale.

²¹ (1888) 77 Cal. 383, 19 Pac. 641.

²² Professor Kidd criticizes the reasoning of the *Tapia* case, and believes that the decision should have been reached upon the theory that the debt is the principal thing, and the security the incident, and that there is no prohibition against declaring a parol trust in a debt. Kidd, *op. cit. supra* note 1, at 399. If this reasoning is correct, the same result could be reached in a situation involving a deed of trust if the courts would recognize the security element of a deed of trust and ignore the passing of legal title.

secured either by mortgage or by deed of trust are filed and presented in like manner,²³ different results follow when claims so secured are not filed or presented. With respect to claims secured by mortgage, section 716 of the Probate Code provides:

"No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator, except in the following case: An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless the claim was filed or presented as aforesaid."

Inasmuch as no judicial action need be taken for a sale under a deed of trust, these provisions do not apply. There is no penalty for failure to file or present a claim secured by deed of trust,²⁴ although of course if payment by the estate of a claim for any deficiency remaining unpaid after the trustee's sale is desired the claim must be presented.

8. *Receiverships*.—A difference in the law relating to the two types of security which is not based upon the passage of legal title has to do with the creditor's right to a receiver. As to mortgages the court has no jurisdiction to appoint a receiver except under section 564 of the Code of Civil Procedure, and the parties to any form of instrument cannot confer jurisdiction for the appointment of a receiver merely by stipulation.²⁵ In general, the mortgagee is entitled to a receiver during foreclosure proceedings until the sale if he can make a proper showing under section 564, subdivision 2,²⁶ but he is not entitled to a receiver after the sale²⁷ except in unusual circumstances, either set forth in the code or recognized by decisions, of which the following are examples:

- (1) After judgment to preserve the property pending appeal;²⁸
- (2) After sale and during the redemption period, to satisfy a deficiency judgment;²⁹

²³ CAL. PROB. CODE § 706.

²⁴ *More v. Calkins* (1892) 95 Cal. 435, 30 Pac. 583; *Whitmore v. San Francisco Sav. Union* (1875) 50 Cal. 145.

²⁵ *Baker v. Varney* (1900) 129 Cal. 564, 62 Pac. 100; *Bank of Woodland v. Stephens* (1904) 144 Cal. 659, 79 Pac. 379; *Lewis v. Shaw* (1926) 77 Cal. App. 99, 246 Pac. 86.

²⁶ CAL. CODE CIV. PROC. § 564 (2) provides that a receiver may be appointed: "2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt."

²⁷ *Reidy v. Young* (1931) 119 Cal. App. 322, 6 P. (2d) 112.

²⁸ CAL. CODE CIV. PROC. § 564 (4).

²⁹ See *Boyd v. Bennayan* (1928) 204 Cal. 23, 26, 266 Pac. 278, 279. In support of this *dictum* is cited *Montgomery v. Merrill* (1884) 65 Cal. 432, 4 Pac. 414, but

(3) After sale, and during the redemption period, to prevent waste.³⁰ It is not proper to continue a receiver in possession to pay over the rents, issues and profits to the *purchaser* under a mortgage, even though section 707 of the Civil Code gives the purchaser the right to them.³¹ Nor is it possible for the mortgagee to put a receiver in possession prior to the institution of foreclosure proceedings. Section 564 of the Code of Civil Procedure confers no such right. Further, there is no court action available to the mortgagee by which he can acquire possession other than foreclosure.³²

Where a trust deed expressly gives the creditor or the trustee the right to enter and take possession of the property, and collect and apply the rents and income to the discharge of the indebtedness, the creditor has the right to have a receiver appointed.³³ In *Mines v. Superior Court*,³⁴ the supreme court said that such an action to recover possession and for the appointment of a receiver is in the nature of a suit for specific performance, and that, since specific performance is an equity proceeding, the appointment of a receiver is proper under subdivision 7 of section 564 of the Code of Civil Procedure.³⁵ After the trustee's sale, the purchaser is allowed the remedy of unlawful detainer, and is entitled to a receiver to take possession of the premises pending the final termination of the action.³⁶

The conclusion to be reached from these cases is that apparently there are greater receivership possibilities in connection with properly drawn deeds of trust than with mortgages. In the ordinary case of the latter possession cannot be acquired prior to foreclosure, and then must be returned to the mortgagor after the foreclosure sale during the redemption period,³⁷ whereas in the case of the trust deed, the receiver

this case is not in point because in it the receiver had acted prior to the sale, and the crop of which he took possession was part of the mortgaged property. The *dictum* in the Boyd case is approved, however, by *dicta* in First Nat'l T. & S. Bank v. Staley (1933) 219 Cal. 225, 25 P. (2d) 982, and Reidy v. Young, *supra* note 27.

³⁰ Hill v. Taylor (1863) 22 Cal. 191, where the mortgagor remained in possession after the sale and continued to mine gold.

³¹ Boyd v. Benneyan, *supra* note 29; Mau, Sadler & Co. v. Kearney (1904) 143 Cal. 506, 77 Pac. 411; West v. Conant (1893) 100 Cal. 231, 34 Pac. 705.

³² CAL. CODE CIV. PROC. § 744; Fogarty v. Sawyer (1861) 17 Cal. 589; Adams v. Hopkins (1904) 144 Cal. 19, 77 Pac. 712.

³³ Snyder v. Western Loan & Bldg. Co. (1934) 1 Cal. (2d) 697, 37 P. (2d) 86; Isaacs v. Jones (1936) 12 Cal. App. (2d) 98, 54 P. (2d) 1123.

³⁴ (1932) 216 Cal. 776, 16 P. (2d) 732. *Accord*: American Sec. Co. v. Van Lohen Sels (1933) 218 Cal. 662, 24 P. (2d) 499; Mercantile Mtge. Co. v. Chin Ah Len (1935) 3 Cal. App. (2d) 98, 38 P. (2d) 806.

³⁵ CAL. CODE CIV. PROC. § 564 (7) provides that a receiver may be appointed: "7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

³⁶ Pacific States S. & L. Co. v. Hoffman (1933) 134 Cal. App. 601, 25 P. (2d) 1006.

³⁷ See *supra* notes 28, 29, and 30, for exceptional situations in which possession need not be returned to the mortgagor.

can acquire possession in accordance with its terms, and then retain the property until possession is turned over permanently to the purchaser at the sale.

9. *Creditor's Actions for Relief.*—The situation of the trust deed beneficiary is less favorable than that of the mortgagee in regard to the number of actions which may be required in order to secure complete relief. If the debtor under a trust deed wishes to cause trouble, the trustee's sale, accompanied by trustee's fees, is only one of several steps that may have to be taken. It may be necessary, either prior to or after sale, to bring an action in the nature of specific performance in order to obtain the appointment of a receiver or to compel the performance of provisions in the trust deed. Such a suit may be required in order to collect rents, or to enjoin the commission of waste. There is a possibility that the debtor may seek to enjoin the trustee's sale, and the creditor will have to defend any such action. An unlawful detainer action under section 1161a of the Code of Civil Procedure may be required in order to obtain possession after the sale. Being a possessory action, title cannot be tried in such a proceeding, and, in the absence of a prior specific performance action, it may then be necessary to bring an action to quiet title. Finally, if a deficiency judgment is desired, a special action must be brought for this purpose.³⁸ These various possibilities confront the holder of the trust deed, with the necessity of paying attorney's as well as trustee's fees.³⁹ Looking at the matter from a practical standpoint, payment by the beneficiary of the trustee's fee for the sale does not entitle him to the benefit of any legal counsel. It is to be expected that as soon as the trustee is confronted with a point of legal difficulty, or any doubtful question of responsibility, the beneficiary will have attorney's fees to pay in addition, whether or not it is necessary to bring any action.

If the security instrument is a mortgage, the single remedy of judicial foreclosure takes the place of all these suits. The debtor can present all

³⁸ If a necessity for such a judgment is felt, it will make some sort of suit necessary in all cases after the trustee's sale. The deficiency judgment may be secured in an equity proceeding also asking other relief. Of course, the beneficiary is given the right (of which, as a practical matter, he may not be advised by the trustee), to have the deed of trust foreclosed in the first instance in the same manner as a mortgage, CAL. CODE CIV. PROC. § 725a, thus avoiding the necessity of having both trustee's sale and deficiency judgment suit. See Note (1937) 25 CALIF. L. REV. 347.

³⁹ If the holder of a trust deed elects to foreclose it as a mortgage, the added fee burden is not present. The creditor is then in the same position as one who took a mortgage in the first instance. Further, if the holder of the trust deed refers the matter to his attorney, the attorney can substitute himself as trustee to make the sale, which will result to some extent in avoidance of duplication of fees. CAL. CIV. CODE § 2934a. See text to note 86, *infra*.

his objections in his defense to this action, and equity will deny him the possibility of any relief in a separate injunction suit.⁴⁰ Under section 564 of the Code of Civil Procedure, as has been pointed out,⁴¹ in the foreclosure suit a receiver may be appointed pending the sale. In connection with the suit the summary remedy of writ of assistance may be used to obtain possession.⁴² The foreclosure action is in the nature of a quiet title suit, in that the claims of all parties and their privies are determined by the decree.⁴³ The deficiency judgment can be secured in the same action.⁴⁴

10. *Restrictions on Sale Price.*—The fact that a right of redemption exists after a mortgage foreclosure sale, but not after a trustee's sale⁴⁵ under a deed of trust, has created a difference between the two types of instruments in regard to restrictions on sale price. The mortgagor may sell his right of redemption,⁴⁶ and the purchaser upon exercising it pays, not the amount of the debt secured by the mortgage, but the price the property brought at the foreclosure sale, plus interest and costs.⁴⁷ The purchaser takes the property entirely free from the mortgage lien,⁴⁸ and without liability because of any deficiency judgment that may have been entered against the mortgagor.⁴⁹ Therefore the mortgagee will generally buy in the property at the foreclosure sale for the amount of the mortgage and costs, if the property, either presently or prospectively, is worth that much. The debtor is thus protected from having the property bought in at a low figure, and then being subjected to a large deficiency judgment,⁵⁰ as may occur, as will be pointed out, in connection with a deed of trust. As an additional check on the sale price as to instruments executed since 1933,⁵¹ there was in that year added a provision in section

⁴⁰ CAL. CODE CIV. PROC. § 526.

⁴¹ See *supra* note 26.

⁴² *Hibernia S. & L. Soc. v. Lewis* (1897) 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Richardson v. Superior Court* (1929) 101 Cal. App. 638, 281 Pac. 1077.

⁴³ *Arnoux v. Westphall* (1932) 122 Cal. App. 476, 10 P. (2d) 133; *McNutt v. Nuevo Land Co.* (1914) 167 Cal. 459, 140 Pac. 6.

⁴⁴ CAL. CODE CIV. PROC. § 726.

⁴⁵ See *infra* note 53.

⁴⁶ CAL. CODE CIV. PROC. § 701.

⁴⁷ CAL. CODE CIV. PROC. § 702.

⁴⁸ Upon redemption by the mortgagor himself equity revives the mortgage lien, subject to the granting of priority to all other incumbrances then existing.

The same rule applies upon reacquisition of the property by the grantor of a trust deed who has not paid the debt secured. *Barberi v. Rothchild* (1936) 7 Cal. (2d) 537, 61 P. (2d) 760, (1937) 25 CALIF. L. REV. 360.

⁴⁹ *Simpson v. Castle* (1878) 52 Cal. 644.

⁵⁰ The creditor usually purchases at the sale, because he has the amount of his loan already invested in the property and need not produce any cash, crediting the amount of his bid on the indebtedness. See *Kidd, op. cit. supra* note 1, at 401.

⁵¹ The effective date of the amendment to CAL. CODE CIV. PROC. § 726 was August 21, 1933. See *Notes* (1932) 21 CALIF. L. REV. 471; (1933) 22 *ibid.* 170.

726 of the Code of Civil Procedure, authorizing the court, either upon application of the parties or upon its own motion, to appoint one of the inheritance tax appraisers to appraise the property as of the time of sale. The court then may render a money judgment against a defendant personally liable for the debt for not more than the amount by which the indebtedness exceeds the fair market value of the property. This provision has been held unconstitutional as to mortgages existing at the time of its enactment.⁵²

After a trust deed sale, on the other hand, the purchaser has no fear of a redemption, no matter how cheaply he may have bought in the property. No right of redemption after such a sale exists,⁵³ and the following recent statement of the supreme court is in harmony with repeated earlier holdings:⁵⁴

"In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made."

It is true that as to instruments executed since 1933⁵⁵ the Legislature has removed the incentive of increasing the amount of the deficiency judgment as a motive for buying in the property at an inadequate figure. Section 580a of the Code of Civil Procedure contains a provision for the appointment of appraisers, in a deficiency judgment suit, similar to that already discussed relating to mortgages, and a like limitation of the amount of the judgment to the excess of the indebtedness over the fair market value of the property. The section has been declared unconstitutional as to instruments previously executed.⁵⁶

If the holder of a trust deed sees fit to exercise the recently granted privilege of having the instrument foreclosed in the same manner as a

⁵² Banta v. Rosasco (1936) 12 Cal. App. (2d) 420, 55 P. (2d) 601.

⁵³ Sacramento Bank v. Alcorn (1898) 121 Cal. 379, 53 Pac. 813; Penryn Fruit Co. v. Sherman-Worrell Co. (1904) 142 Cal. 643, 76 Pac. 484; Flahrenbaker v. E. Clemens Horst Co. (1930) 209 Cal. 7, 284 Pac. 905.

In Heney v. Heney (1926) 80 Cal. App. 301, 251 Pac. 841, a trust deed was foreclosed, and it was held that there was no right of redemption. *Contra*: Hall-Martin Co. v. Hughes (1912) 18 Cal. App. 513, 123 Pac. 617. *Cf.* Clemens v. Gregg (1917) 34 Cal. App. 245, 167 Pac. 294, where a trust deed was by consent of parties treated as a mortgage and foreclosed, with the right of redemption; Tonningens v. Odd Fellows Ass'n (1923) 60 Cal. App. 568, 213 Pac. 710, where an instrument which provided that it was either a deed of trust or a mortgage was foreclosed. In the latter case it was held that there was a right of redemption, the instrument for the purposes of the case being treated as a mortgage.

⁵⁴ Stevens v. Plumas Eureka Annex Min. Co. (1935) 2 Cal. (2d) 493, 496, 41 P. (2d) 927, 928. *Accord*: Baldwin v. Brown (1924) 193 Cal. 345, 224 Pac. 462; Engelbertson v. Loan & Bldg. Ass'n (1936) 6 Cal. (2d) 477, 58 P. (2d) 647.

⁵⁵ The exact date is August 21, 1933.

⁵⁶ Central Bank v. Proctor (1936) 5 Cal. (2d) 237, 54 P. (2d) 718.

mortgage,⁵⁷ then the debtor receives the same protection that he would have if a mortgage had been executed in the first instance.⁵⁸

11. *Possibility of Redemption.*—In the discussion of the preceding point it has been noted that unless the holder of a trust deed elects to foreclose it in the manner applicable to mortgages there is no right of redemption.⁵⁹ The mortgagor, on the other hand, is given the statutory year of redemption after a sale which is provided for as to execution sales by section 700a of the Code of Civil Procedure.⁶⁰

The point is so important that it merits separate statement as a difference between the two instruments. Absence of redemption under trust deeds not only bears upon the amount at which the creditor will buy in the property, along the line of earlier discussion,⁶¹ but deprives the trustor of the added year accorded the mortgagor within which to retain possession of his property.⁶² During the year the debtor who has given a mortgage may make a final effort to fulfill the obligation which he has assumed, and permanently preserve his home or other property.

⁵⁷ CAL. CODE CIV. PROC. § 725a.

⁵⁸ The statute is specific that foreclosure is "subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property." This subjects the purchaser to the same fear of a redemption by a purchaser of the equity of redemption if he has bought in the property cheaply. While the provision for foreclosure as a mortgage is constitutional as to preexisting instruments, *Lincoln v. Superior Court* (1934) 2 Cal. (2d) 127, 39 P. (2d) 405, as with mortgages the limitation upon the amount of the deficiency judgment can be applied only to instruments executed thereafter (the effective date being Sept. 15, 1935). *Wilson v. Superior Court* (1935) 8 Cal. App. (2d) 14, 47 P. (2d) 331.

⁵⁹ *Kent v. Laffan* (1852) 2 Cal. 595; *McMillan v. Richards*, *supra* note 5, further stating that the right of redemption after foreclosure had become a property right. See *Kidd, op. cit. supra* note 1, at 387. As to the right of redemption after sale under a power of sale in a mortgage, the case of *Cormerais v. Genella* (1863) 22 Cal. 116, expressed a doubt whether such a right would exist. See also *Sacramento Bank v. Alcorn, supra* note 53, at 384, 53 Pac. at 814; *Commercial etc. Co. v. Superior Court* (1936) 7 Cal. (2d) 121, 129, 59 P. (2d) 978, 982. But see *Arnoldy, Right of Redemption from Sales of Property under Power of Sale* (1936) 11 LOS ANGELES BAR BULL. 321, where it is stated, without citation of authority, that "It is difficult to perceive why sales of property made in the exercise of a power of sale should not be subject to this right of redemption." The fact that the power of sale mortgage is not widely used in California has been attributed to the *Cormerais* case, *supra*, where, in addition to the question as to the existence of the right of redemption after such a sale, it was doubted whether under a mortgage a sale could be made other than by judicial foreclosure. See *Kidd, op. cit. supra* note 1. For discussion of further reasons for the failure to make use of powers of private sale in mortgages in this state see *infra*, Part III, (4). *Validity and Efficacy of Grant of Power of Private Sale.*

⁶⁰ CAL. CIV. CODE § 2931.

⁶¹ See text *supra*, Part II, (10). *Restrictions on Sale Price.*

⁶² The mortgagor is entitled to possession during the redemption period. *Mau, Sadler & Co. v. Kearney, supra* note 31; *Purser v. Cody* (1898) 120 Cal. 214, 52 Pac. 489; *Peterson v. Jurras* (1935) 2 Cal. (2d) 253, 40 P. (2d) 257; *First Nat'l T. & S. Bank v. Staley, supra* note 29.

Throughout the history of the state⁶³ public policy has been felt to require that the mortgagor should be given this protection. As early as 1625 the Courts of Chancery had developed the remedy of strict foreclosure⁶⁴ for the same reason, and redemption has been a principle of equity jurisprudence ever since. It is true that under California statutes the trustee's sale can not be had on the day of maturity of the obligation,⁶⁵ but there seems to be no reason why to the great extent which still exists debtors should be placed in two categories, depending upon their selection of one or the other of two instruments as identical in their function and as similar in their nature as those now under discussion.

III

SIMILARITIES IN THE LEGAL TREATMENT OF THE TWO INSTRUMENTS

1. *Right to Court Foreclosure.*—Since 1915, the date of Professor Kidd's excellent survey, the courts have ironed out a number of the differences formerly existing between the two types of securities. At that time there was a doubt whether or not the remedy of judicial foreclosure, which was normally used when the creditor held a mortgage, could be used when the creditor's security was a trust deed.⁶⁶ In 1933 the holder of a trust deed was expressly given the benefit of this remedy by the addition of section 725a to the Code of Civil Procedure.

As applied to trust deeds previously executed, in *Lincoln v. Superior Court*⁶⁷ it was held that the statute was constitutional, only a matter of remedy being involved. However, the effect of the decision is weakened by the further observation of the court that since the trust deed contained a clause which authorized any necessary action or proceeding by any of the parties, the remedy of foreclosure was a proper one under the contract. It nevertheless seems clear that foreclosure of all trust deeds will be permitted under the statute.

2. *"But One Action" Rule.*—Much discussion in the past has hinged upon the peculiar California "but one action" rule contained in section

⁶³ West v. Conant, *supra* note 31.

⁶⁴ 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 330; Emanuel College v. Evans (1625) 1 Chan. Rep. 18.

⁶⁵ CAL. CIV. CODE § 2924 provides: (a) that notice of default must be filed; (b) that not less than three months must elapse; and (c) that notice of sale must be given as under CAL. CODE CIV. PROC. § 692 (20 days) before the trustee may sell. It has recently been decided that the three months period and the 20 day period may run concurrently. Bennett v. Ukiah Fair Ass'n (1936) 7 Cal. (2d) 43, 59 P. (2d) 805.

⁶⁶ Herbert Kraft Co. v. Bryan (1903) 140 Cal. 73, 73 Pac. 745. See Kidd, *op. cit.* *supra* note 1, at 389.

⁶⁷ *Supra* note 58; Note (1935) 9 So. CALIF. L. REV. 65.

726 of the Code of Civil Procedure. This section provides that there can be but one action upon any right secured by a mortgage, and that this action must be foreclosure, including sale of the property, but contains no statement in regard to deeds of trust. In *Powell v. Pattison*,⁶⁸ decided in 1893, it was held that the same rule applied to deeds of trust, *i.e.*, that a personal judgment could not be had until the security had been legally exhausted. *Dicta* in later cases cast some doubt on this holding, and it was remarked in one case that the decisions cited in the *Powell* case all concerned mortgages, and that for that reason it was not considered authority.⁶⁹ Whatever distinction may have existed in this connection was wiped out in 1933 by *Bank of America v. Bentley*.⁷⁰ In that case it was decided that "either by reason of implied agreement or by reason of public policy," in the absence of unusual circumstances, the possible nature of which is not discussed in the case, it is not permissible to sue on a promissory note secured by a deed of trust without first exhausting the security or showing it to be valueless.⁷¹ This rule, which, it was stated, had been decided by the *Powell* case and had become a rule of property, was thereafter codified, and now appears as the last sentence in section 580a of the Code of Civil Procedure.⁷²

3. *Negotiability of Instrument Secured*.—Because of the necessity of foreclosure as the means of collection, under section 726 of the Code of Civil Procedure, notes secured by mortgages were held to be non-negotiable,⁷³ as calling for the performance of an act other than the payment of money. Notes secured by deeds of trust were also held to be non-negotiable because of uncertainties as to the amount to be paid and the date of payment created by the various trust provisions, and the contingent character of the obligation.⁷⁴ In 1923 section 3265 of the Civil Code, being section 148 of the Uniform Negotiable Instruments Law, was amended by the insertion of the following clause:

⁶⁸ (1893) 100 Cal. 236, 34 Pac. 677.

⁶⁹ *Herbert Kraft Co. v. Bryan*, *supra* note 66. See *Commercial Nat'l Bank v. Catron* (1931) 50 F. (2d) 1023; *Hodgkins v. Wright* (1900) 127 Cal. 688, 692, 60 Pac. 431; *Sacramento Bank v. Copesey* (1901) 133 Cal. 663, 665, 66 Pac. 8, 205; *Smiley v. Watson* (1913) 23 Cal. App. 409, 414, 138 Pac. 367; *Kidd, op. cit. supra* note 1, at 391; *Notes* (1932) 5 So. CALIF. L. REV. 227; (1923) 12 CALIF. L. REV. 307; (1932) 20 CALIF. L. REV. 318.

⁷⁰ *Supra* note 4, at 658, 20 P. (2d) at 945.

⁷¹ Although CAL. CODE CIV. PROC. § 726 does not in terms authorize a suit on the obligation, instead of foreclosure, in the event that the security becomes valueless, it has been so construed. *J. I. Case Co. v. Copren Bros.* (1916) 32 Cal. App. 194, 162 Pac. 647; *Ferry v. Fisk* (1921) 54 Cal. App. 763, 202 Pac. 964.

⁷² See *Notes* (1934) 8 So. CALIF. L. REV. 35; (1937) 25 CALIF. L. REV. 347.

⁷³ *Meyer v. Weber* (1901) 133 Cal. 681, 65 Pac. 1110; *Notes* (1930) 3 So. CALIF. L. REV. 335; (1932) 5 So. CALIF. L. REV. 227.

⁷⁴ *Central Sav. Bank v. Coulter* (1925) 72 Cal. App. 78, 236 Pac. 956; CAL. CIV. CODE § 3082. See *Kidd, op. cit. supra* note 1, at 394; *Note* (1930) 3 So. CALIF. L. REV. 335, 340.

"... but the negotiability of a promissory note otherwise negotiable in form, secured by a mortgage or deed of trust upon real or personal property shall not be affected or abridged by reason of a statement therein that it is so secured, nor by reason of the fact that said instrument is so secured nor by any conditions contained in the mortgage or deed of trust securing the same."

This amendment leaves open the question as to whether negotiability is affected by provisions in the nature of a mortgage or deed of trust inserted in the note itself. It would seem that the amendment should be interpreted to cover this situation in furtherance of the legislative policy to establish the negotiability of secured instruments. The problem should be regarded as one of two instruments upon the same piece of paper and over the same signatures.

4. *Validity and Efficacy of Grant of Power of Private Sale.*—The usual method of taking advantage of the security under a deed of trust is by exercise of the power of private sale granted by the instrument itself. Mortgages generally contain a similar power of private sale, but there never has been a widespread use of the power in this state. Four explanations may be offered. First, the early case of *Cormerais v. Genella*⁷⁵ expressed a doubt as to whether under a mortgage a sale could be made other than by judicial foreclosure; second, there seems to have been a doubt as to whether the power of sale was coupled with an interest so as to survive the death of the mortgagor;⁷⁶ third, it seems to have been once thought that a deficiency judgment was not available after a private sale under a power in a mortgage;⁷⁷ and finally, there has been a doubt as to whether or not there was a right of redemption after such a sale.⁷⁸

These doubts as to the validity and efficacy of the grant of a power of private sale in a mortgage have now been dispelled. The Civil Code expressly recognizes the power of private sale.⁷⁹ It has been decided that the power survives the death of the mortgagor,⁸⁰ and that a deficiency judgment may be had after such a sale.⁸¹ As to the possibility of a right of redemption following such a sale, the express recognition of powers of private sale under mortgages in the Civil Code, without reference to

⁷⁵ *Supra* note 59.

⁷⁶ See *Goldwater v. Hibernia S. & L. Soc.*, *supra* note 13; *New York Life Ins. Co. v. Doane*, *supra* note 15.

⁷⁷ This contention was made in *J. I. Case Co. v. Copren Bros.*, *supra* note 71; *Commercial etc. Co. v. Superior Court*, *supra* note 59.

⁷⁸ See *Kidd, op. cit. supra* note 1, at 388.

⁷⁹ CAL. CIV. CODE § 2932, commented on in *Commercial etc. Co. v. Superior Court*, *supra* note 59.

⁸⁰ *New York Life Ins. Co. v. Doane*, *supra* note 15. But *cf.* cases cited *supra* note 15, where statute of limitations had run.

⁸¹ *J. I. Case Co. v. Copren Bros.*, *supra* note 71; *Commercial etc. Co. v. Superior Court*, *supra* note 59.

redemption, would seem to be sufficient to remove any doubt on this score.⁸² It must be remembered, however, as already pointed out, that limitation will run against the exercise by the mortgagor of the power of private sale, whereas the legal title conveyed to the trustee remains good, permitting sale by him at any time.

5. *Private Sale by Agent*.—A distinction was formerly thought to exist with respect to the possibility of having a private sale conducted by an agent. It was early decided that the mortgagee did not need to be present at a sale under a power of sale contained in a mortgage, but that such a sale might be conducted by his agent.⁸³ The trustee, however, was thought to occupy a fiduciary relation, and, it was therefore held, had to be present at the trustee's sale.⁸⁴ In 1929 section 2924a was added to the Civil Code, under which the trustee's attorney may conduct the sale. In addition, in *Orloff v. Pece*⁸⁵ it was said:

"Without regard to . . . [Civil Code section 2924a] a trustee may employ an agent to do the ministerial act of auctioning the property."

6. *Substitution of Party to Make Private Sale*.—A closely connected question is that of substitution of another party to make a private sale. Section 858 of the Civil Code allows an assignee, when the assignment is acknowledged and recorded, to act under a power of private sale contained in a mortgage, but because of the fiduciary position that the trustee has been thought to occupy, it has been said that the trustee must personally execute his trust.⁸⁶ This difference, if it existed, has now been removed, through the addition of section 2934a to the Civil Code in 1935. This section authorizes the beneficiary to substitute a trustee in a deed of trust where the trustee has no duties to perform other than those incidental to the power of sale. The section has not as yet been construed. The provision seems clearly to relate only to a matter of remedy, and to be constitutional as to preexisting instruments. The trustee, often designated without his knowledge, has given no consideration, and would seem clearly to have no vested right, either to the land or to the office of trustee. It should be immaterial to the debtor who holds the security title. The title companies have taken the position, however, that

⁸² See *Cormerais v. Genella*, *supra* note 59; *Sacramento Bank v. Alcorn*, *supra* note 53, at 384, 53 Pac. at 814; *Commercial etc. Co. v. Superior Court*, *supra* note 59, at 129, 59 P. (2d) at 982. As to whether elimination of the right of redemption in this way is consistent with the character of mortgages, see 3 JONES, MORTGAGES (8th ed. 1928) 788, 838; WALSEH, MORTGAGES (1934) 340.

⁸³ *Fogarty v. Sawyer* (1863) 23 Cal. 570.

⁸⁴ 2 JONES, MORTGAGES (5th ed. 1894) § 1862. *Kidd*, *op. cit. supra* note 1, at 384, criticises this view.

⁸⁵ (1933) 134 Cal. App. 434, 436, 25 P. (2d) 484. *Accord*: *Harris v. Seidell* (1934) 1 Cal. App. (2d) 410, 36 P. (2d) 1104.

⁸⁶ See *supra* note 84.

until the matter is adjudicated they will not issue a policy of title insurance upon preexisting instruments where there has been a substitution of trustees.

7. *Enforcement of Security During Bankruptcy Proceedings of Debtor.*—It is a question of current interest, not yet worked out thoroughly in the decisions, just what steps may validly be taken by security holders during bankruptcy proceedings of the debtor, without the necessity of intervening therein and thus subjecting themselves to the payment of trustee's and referee's fees. There seems to be no reason to believe that there will be any difference in the rules applicable to mortgages and deeds of trust. Without going into the matter fully here, it seems that as to both forms of security the following either have been or are in process of being settled as the governing principles:

- (1) Judicial foreclosure proceedings may be instituted during bankruptcy proceedings only with the consent of the bankruptcy court.⁸⁷
- (2) Judicial foreclosure proceedings instituted prior to commencement of the bankruptcy proceedings may be prosecuted to conclusion unless restrained by the bankruptcy court.⁸⁸
- (3) Unless restrained by the bankruptcy court, a valid sale under private power may be had at any time during the bankruptcy proceedings.⁸⁹

⁸⁷ *Isaacs v. Hobbs Tie & Lumber Co.* (1931) 282 U. S. 734. A doubt has been expressed, in which the present writers do not concur, as to whether a bankruptcy court can grant such consent to a state court. *Bierce, New Beacons in Bankruptcy* (1932) 37 *COMM. L. J.* 183, 185. That such consent can be granted, see *Title & Trust Co. v. Wernich* (C. C. A. 9th, 1934) 68 F. (2d) 811, 812; *Comer v. John Hancock Mut. Life Ins. Co.* (C. C. A. 8th, 1935) 80 F. (2d) 413, 415.

In the text it is assumed that the creditor is not in possession. The writers incline to the view that if possession is lawfully secured prior to the commencement of bankruptcy proceedings consent of the bankruptcy court is not required, by analogy to pledge sales. As to pledge sales: *Hiscock v. Varick Bank* (1906) 206 U. S. 28, 40; *In re Hudson River Nav. Corp.* (C. C. A. 2d, 1932) 57 F. (2d) 175, 176; *Kerr v. Southwestern Lumber Co.* (C. C. A. 5th, 1935) 78 F. (2d) 348, 349, *cert. den.* (1935) 296 U. S. 611. But see, as to pledge sales: *Cherry v. Insull Utility Investments* (D. C. Ill., 1932) 58 F. (2d) 1022, 1026, *rev'd on other grounds, sub. nom.* *Guaranty Trust Co. v. Fentress* (C. C. A. 7th, 1932) 61 F. (2d) 329. The specific provision in section 57 (h) of the Bankruptcy Act (30 STAT. (1898) 560, 11 U. S. C. A. § 93 (h)) in regard to "securities" weakens the force of the analogy.

⁸⁸ *Straton v. New* (1931) 283 U. S. 318. In this case the suit in the state court was commenced more than four months prior to the filing of the bankruptcy petition, to enforce liens acquired through legal proceedings, but it is believed that these facts are relevant only from the standpoint of validity of the liens.

⁸⁹ *Robinson v. Kay* (C. C. A. 9th, 1925) 7 F. (2d) 576 (mortgage); *Heffron v. Western Loan & Building Co.* (C. C. A. 9th, 1936) 84 F. (2d) 301, *cert. den.* (1936) 299 U. S. 597 (deed of trust); *Hardt v. Kirkpatrick* (C. C. A. 9th, 1937) 91 F. (2d) 875 (deed of trust). But see *Comer v. John Hancock Mut. Life Ins. Co.*, *supra* note 87.

8. *Duty of the Creditor to Effect Formal Discharge.*—Section 2941 of the Civil Code provides that when a mortgage is satisfied the mortgagee must, on demand, execute a certificate of discharge, or enter satisfaction of record. This section, by its terms, applies only to mortgages, but does not give rise to a distinction between the two types of instrument, as the same result is reached in connection with a trust deed. Under the decisions, upon payment of the debt the trustor is entitled to a reconveyance in order to clear the record title,⁹⁰ although by statute, when the purpose for which the trust was created terminates, the estate of the trustee ceases.⁹¹

9. *Miscellaneous.*—As already remarked, if the courts had pursued to its logical conclusion the conception that legal title passes from the debtor in the case of a trust deed, and does not so pass in the case of a mortgage, many more differences in the law would have been developed as the result of the distinction between the two instruments. In many situations, however, the passage of title upon the execution of a deed of trust has been ignored, with the result that the two classes of security transactions have been treated in like manner.

For example, the debtor after execution of a trust deed may still declare a homestead upon the property.⁹² The later execution of a trust deed does not constitute an abandonment of the homestead, except as to the security transaction itself, even though section 1243 of the Civil Code provides that a homestead is extinguished by a grant of the land.⁹³ Neither the trustee nor the mortgagee need give notice of non-responsibility under the mechanic's lien law.⁹⁴

Despite the passage of title to the trustee, the trustor can execute a second trust deed;⁹⁵ he retains an interest that is subject to attachment

It seems somewhat paradoxical that without the consent of the bankruptcy court a private party can do what a state court cannot. The explanation is to be found, of course, in the relative functions of the two systems of courts.

Section 75 (o) of the Bankruptcy Act (47 STAT. (1933) 1473, 11 U. S. C. A. § 203 (o)) provides a temporary limitation upon the statement in the text.

⁹⁰ *Travelli v. Bowman*, *supra* note 10; *Herbert Kraft Co. v. Bryan*, *supra* note 66; *Savings & Loan Soc. v. Burnett* (1895) 106 Cal. 514, 39 Pac. 922.

⁹¹ CAL. CIV. CODE §§ 2279, 871.

⁹² *King v. Gotz* (1886) 70 Cal. 236, 11 Pac. 700. See *Bank of America v. Bentley*, *supra* note 4.

⁹³ *MacLeod v. Moran* (1908) 153 Cal. 97, 94 Pac. 604.

⁹⁴ *Williams v. Santa Clara Min. Ass'n* (1884) 66 Cal. 193, 5 Pac. 85; *Hollywood Lbr. Co. v. Love*, *supra* note 6. For the purpose of establishing priority of liens under CAL. CODE CIV. PROC. § 1186, the deed of trust is considered a lien. *Fickling v. Jackman* (1928) 203 Cal. 657, 265 Pac. 810; *Waxco C. & C. Co. v. Coffee* (1931) 117 Cal. App. 298, 3 P. (2d) 588; *Miller v. Citizens T. & S. Bank* (1932) 128 Cal. App. 295, 16 P. (2d) 999.

⁹⁵ This was done in *Barberi v. Rothchild*, *supra* note 48.

and execution,⁹⁶ has an estate of inheritance under the McEnery Act,⁹⁷ and finally has not violated a sole and unconditional ownership clause in an insurance policy.⁹⁸

In numerous other instances there is no difference in the treatment of trust deeds and mortgages. Under either type of security the debtor is entitled to possession, in the absence of special agreement,⁹⁹ and after either mortgage foreclosure or trustee's private sale, unlawful detainer is allowed as a remedy to remove the person in possession.¹⁰⁰ The doctrine of after acquired title applies to both types of instruments, that is, if the debtor acquires title after the execution of the security instrument, the after acquired title inures to the benefit of the mortgagee or trustee as security for the obligation in like manner as though it had been acquired before execution.¹⁰¹ Likewise the doctrine of instantaneous seizure applies to both types of transactions, that is, a purchase money incumbrance has priority over any instrument executed by the vendee before he purchased the property.¹⁰² If either the mortgagor or trustor reacquires the property after foreclosure or private sale, all liens or trust

⁹⁶ Kennedy v. Nunan (1877) 52 Cal. 326; Lynch v. Cunningham (1933) 131 Cal. App. 164, 21 P. (2d) 154; Kidd, *op. cit. supra* note 1, at 394.

⁹⁷ Warren Co. v. All Persons (1908) 153 Cal. 771, 96 Pac. 807.

⁹⁸ Krone v. Insurance Co. (1933) 218 Cal. 556, 24 P. (2d) 459. Of course the execution of a mortgage by the insured does not violate such a clause. Lee v. United States Fire Ins. Co. (1927) 55 Cal. App. 391, 203 Pac. 774.

⁹⁹ *Mortgages*: CAL. CIV. CODE § 2927; Lord v. Morris (1861) 18 Cal. 482; Paladine v. Durchman (1932) 216 Cal. 212, 13 P. (2d) 731; Ely v. Williams (1907) 6 Cal. App. 455, 92 Pac. 393.

CAL. CODE CIV. PROC. § 744 provides: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." This statute was designed to take from the mortgagee, in the absence of any agreement as to possession, the right to possession, which right was an incident of a mortgage at common law. Fogarty v. Sawyer, *supra* note 32.

Trust Deeds: Meadows v. Snyder (1930) 209 Cal. 270, 286 Pac. 1012; Snyder v. Western Loan & Bldg. Co. (1934) 1 Cal. (2d) 697, 701, 37 P. (2d) 86, 88, where it is said that the court must apply "the same rules as to the rights of the trustee or the beneficiary to possession of the premises as are applicable by statute in the case of a mortgagee, whose rights to possession, whether before or after default, are controlled by the agreement, or the consent otherwise of the mortgagor, express or implied."

¹⁰⁰ CAL. CODE CIV. PROC. § 1161a (1), (2). The debtor is entitled to possession during redemption, however, so that a difference may arise on this ground. Mau, Sadler & Co. v. Kearney, *supra* note 31. See text to note 60, *supra*, *et seq.*

¹⁰¹ *Mortgages*: CAL. CIV. CODE § 2930; Jensen v. Duke (1925) 71 Cal. App. 210, 234 Pac. 876; Schelling v. Thomas (1929) 96 Cal. App. 682, 274 Pac. 755.

Trust Deeds: Younger v. Moore (1909) 155 Cal. 767, 103 Pac. 221. See (1937) 25 CALIF. L. REV. 360.

¹⁰² *Mortgages*: CAL. CIV. CODE § 2898; Tolman v. Smith (1890) 85 Cal. 280, 24 Pac. 743.

Trust Deeds: 1 JONES, MORTGAGES (8th ed. 1928) 799, § 585.

deeds, which had been wiped out by the original sale, are revived.¹⁰³ Either type of instrument may be used to secure future advances,¹⁰⁴ and both are unenforceable if without consideration.¹⁰⁵ The transfer of the note secured will effect the transfer of either without further assignment.¹⁰⁶

Deeds of trust generally contain a provision that recitals of notice, default, *etc.*, are conclusive in favor of the purchaser, while a mortgage ordinarily does not contain such a provision.¹⁰⁷ Such a stipulation is unnecessary in a mortgage, as the foreclosure judgment, constituting *res judicata* and clearing the title, especially when coupled with the presumptions in favor of the regularity of proceedings on which a judgment is based,¹⁰⁸ protects the purchaser at the mortgage foreclosure sale much more fully than the recitals protect the purchaser at the trustee's sale.¹⁰⁹

¹⁰³ See *supra* note 48.

¹⁰⁴ *Lumber & Buildings Sup. Co. v. Ritz* (1933) 134 Cal. App. 607, 25 P. (2d) 1002.

¹⁰⁵ *Mortgages*: *Muir v. Hamilton* (1908) 152 Cal. 634, 93 Pac. 857; *Briggs v. Crawford* (1912) 162 Cal. 124, 121 Pac. 381; *National Hardware Co. v. Sherwood* (1913) 165 Cal. 1, 130 Pac. 881. But see 2 JONES, MORTGAGES (8th ed. 1928) 11, § 756.

Trust Deeds: CAL. CIV. CODE § 2280; *Wheat v. Big Pines Lime, etc. Co.* (1921) 55 Cal. App. 654, 204 Pac. 43. See *More v. Calkins*, *supra* note 24; *Hayward Lbr. Co. v. Naslund* (1932) 125 Cal. App. 34, 13 P. (2d) 775.

¹⁰⁶ *Mortgages*: *Savings & L. Soc. v. McKoon* (1898) 120 Cal. 177, 52 Pac. 305.

Trust Deeds: *Lewis v. Booth* (1935) 3 Cal. (2d) 345, 44 P. (2d) 560, where the court refers to the trust deed as a lien.

¹⁰⁷ *Kidd, op. cit. supra* note 1, at 390.

¹⁰⁸ *Bank of Com. T. Co. v. Kenney* (1917) 175 Cal. 59, 165 Pac. 8.

¹⁰⁹ Recitals are conclusive against the trustor in favor of the purchaser when the deed of trust so provides. *Mersfelder v. Spring* (1903) 139 Cal. 593, 73 Pac. 452; *Jose Realty Co. v. Pavlicevich* (1913) 164 Cal. 613, 130 Pac. 15; *Sorensen v. Hall* (1934) 219 Cal. 680, 28 P. (2d) 667; *Carpenter v. Smallpage* (1934) 220 Cal. 129, 29 P. (2d) 841. Such recitals are not necessary to the validity of the sale. Where there are recitals, and the deed of trust is silent as to their effect, they are prima facie evidence of the facts recited, *Savings & L. Soc. v. Deering* (1885) 66 Cal. 281, 5 Pac. 353; but, in the absence of special facts, will not be treated as conclusive against the trustor. *Seccombe v. Roe* (1913) 22 Cal. App. 139, 133 Pac. 507 (between parties to the deed); *Jose Realty Co. v. Pavlicevich, supra*, (third party having notice of the fraud). *Cf. Central Sav. Bank v. Lake* (1923) 62 Cal. App. 588, 217 Pac. 563, where the trustee was empowered to substitute a trustee, and it was stipulated that the recital of such action was to be conclusive. The substituted trustee's deed contained a recital of his substitution. It was held that this recital was not evidence of the fact of substitution. It was stated that recitals to be taken as evidence are "those recitals which are set out in the acts done in the exercise of the power, such as notice, sale and the like. They are, necessarily, recitals of acts done by the trustee in the exercise of his power. . . . The only evidence of the substituted trustee's status as a trustee is his own recital of it."

A recital in a deed given under a power of sale contained in a mortgage was held conclusive in favor of an innocent purchaser against the grantor and his privies. *Simson v. Echstien* (1863) 22 Cal. 580.

Nor is a distinction taken as to who can purchase at a sale of the property—either the trustee, beneficiary or mortgagee may buy in the property.¹¹⁰ The procedure required in connection with either instrument for the exercise of the power of private sale is the same.¹¹¹ Finally, the existence of either a trust deed or a mortgage will defeat the right to an attachment in an action upon the debt secured.¹¹²

Joseph M. Cormack.

SCHOOL OF LAW,
UNIVERSITY OF SOUTHERN CALIFORNIA.

James B. Irsfeld, Jr.

LOS ANGELES, CALIF.

¹¹⁰ *Trustee*: Copey v. Sacramento Bank; Herbert Kraft Co. v. Bryan, both *supra* note 66; Shimpones v. Stickney (1934) 219 Cal. 637, 28 P. (2d) 673.

Beneficiary: Felton v. LeBreton (1891) 92 Cal. 457, 28 Pac. 490, where the property was conveyed to a creditor in trust to sell and pay the debt. *Held*: that in effect this was a mortgage with a power of sale, and that the trustee-beneficiary was in the same position as a mortgagee in an ordinary mortgage. Billings v. Farm Development (1925) 74 Cal. App. 254, 240 Pac. 298.

Mortgagee: Gartlan v. Hooper & Co. (1918) 177 Cal. 414, 170 Pac. 1115.

¹¹¹ CAL. CIV. CODE § 2924.

¹¹² CAL. CODE CIV. PROC. § 537. See Note (1937) 25 CALIF. L. REV. 469, 473.