

Lectures on Legal History (1913), 310, 311; 3 Pomeroy, Equity Jurisprudence (4th ed. 1918), 1054. But, since the West Virginia court refused to permit the administrator to recover, it might well have permitted the state to recover by regarding it as the cestui of a constructive trust with the murderer-beneficiary as constructive trustee. The contract between the insurance company and the insured was a chose in action, a property right, which the insured intended to vest in his wife. Since the wrongdoer certainly will not be permitted to receive it, and since the insurance company should not be able to escape liability on the contract, the state should be able to claim this chose in action as property without an owner. See 20 Col. L. Rev. 465 (1920).

Mortgages—Right to Possession of Senior Mortgagee as against Receivers Appointed for Junior Mortgagee—[Illinois].—A senior mortgagee filed a petition praying that a receiver appointed in a prior foreclosure proceeding brought by a junior mortgagee be ordered to surrender possession of the mortgaged realty and to turn over the rents and profits to him. *Held*, affirming the appellate court's decision, 270 Ill. App. 473, that the petition be granted since the senior mortgagee was the legal title holder and therefore entitled to possession of the mortgaged premises. *Wolkenstein v. Stonim*, 355 Ill. 306, 189 N.E. 312 (1934).

If the prior mortgagee is not in possession the application of the subsequent mortgagee for a receiver will generally be allowed assuming the usual requirements are present. *Bryan v. Cormick*, 1 Cox 422 (1788); *Dalmer v. Dashwood*, 2 Cox 378 (1793); *Silver v. Bishop of Norwich*, 3 Swans. 112 (1818); *Berney v. Sewell*, 1 Jac. & W. 647 (1820). But the appointment must be made without prejudice to those who have prior rights in the property. *Post v. Dorr*, 4 Ed. Ch. (N.Y.) 412 (1844); *Washington Life Ins. Co. v. Jacob Fleischauer et al.*, 10 Hun (N.Y.) 117 (1877); *Courtleyeu v. Hathaway*, 11 N.J.Eq. 39, 42 (1855); *Tanfield v. Irvine*, 2 Russ. 149 (1826). See also, 3 Jones, Mortgages (8th ed. 1928), 420-3, §§ 1937-39.

In Illinois it seems settled that on default the senior mortgagee has a legal right to possession. *Taylor v. Adams*, 115 Ill. 570 (1886); *Rohrer v. Deatherage*, 336 Ill. 450, 454, 455, 168 N.E. 650 (1929). If the junior mortgagee has already secured the appointment of a receiver, the senior mortgagee may ask leave of the court of equity in which the receiver for the junior mortgagee was appointed to bring ejectment. *Angel v. Smith*, 9 Ves. 335 (1804); *Brooks v. Greathed*, 1 Jac. & W. 176 (1820); *Green v. Winter*, 1 Johns. Ch. (N.Y.) 60 (1814). But if there is an express recognition of the senior mortgagee's title in the order granting the receiver some courts intimate that such leave need not be obtained. See *Wiswall v. Sampson*, 14 How. (U.S.) 52 (1852); *Walmsley v. Mundy*, 13 Q.B.D. 807 (1884). But see *Underhay v. Read*, 20 Q.B.D. 209 (1887). But a suit in ejectment frequently involves delay and in the meantime the junior mortgagee is entitled to the rents and profits collected by the receiver (*Sosnick v. Jesieski*, 110 N.J.Eq. 267, 159 Atl. 630 (1932); *Sullivan v. Rosson*, 223 N.Y. 217, 119 N.E. 405 (1918); but see *Bergin v. Robbins*, 109 Conn. 329, 335 (1929)) unless the senior mortgagee was made a party to the proceedings by the junior mortgagee for the appointment of the receiver, in which case the proceeds are distributed according to the priority of the claims. *Cross v. Will County Nat. Bank*, 177 Ill. 33, 52 N.E. 322

(1898); *Palmer v. Lewistown Nat. Bank*, 238 Ill. App. 492 (1925); *Fidelity Mtg. Co. v. Mahon*, 31 Ohio App. 151, 166 N.E. 207 (1929).

The disadvantages of an ejectment action may be avoided by the senior mortgagee having a receiver of his own appointed, but this is seldom done (*Howell v. Ripley*, 10 Paige (N.Y.) 43 (1843)) since the prior encumbrancer may also have the existing receivership extended to his encumbrance and in such manner obtain the benefit of rents and profits from the date of such extension. See *Builder's Bond & Mortgage Co. v. Wrobel*, 266 Ill. App. 325 (1932); *Seegren v. Decker*, 263 Ill. App. 373 (1931); *Agra & Masterman's Bank v. Barry*, Ir. Rep. 3 Eq. 443 (1869); *Sanders v. Lord Lisle*, Ir. Rep. 4 Eq. 43 (1869). But see *Beverley v. Brooke*, 4 Grat. (Va.) 187 (1847). Such relief is not entirely satisfactory, for as was pointed out in the principal case, the expenses of administration by a receiver are often greater than if the mortgagee managed the property himself.

Apparently the English courts have held that the court appointing the receiver, since it has the property under its control, may direct that such receiver surrender possession to the prior mortgagee on his examination *pro interesse suo*, thereby avoiding the disadvantages encountered in an ejectment action and under an extension of the receivership. *Langton v. Langton*, 7 De G., M. & G. 30 (1855); *Preston v. Tunbridge Wells Opera House, Ltd.*, [1903] 2 Ch. 323. This seems to be the established Illinois practice. *Gunning v. Sorg*, 214 Ill. 616, 73 N.E. 870 (1905); *Altschuler v. Sandelman*, 264 Ill. App. 106 (1931); *Consumer's Bond & Mtg. Co. v. Sadin*, 266 Ill. App. 141 (1932). There are dicta to the effect that the rule will be followed in other jurisdictions. See *Odell v. Batterman*, 223 Fed. 292, 299 (1915); *Palys v. Jewett*, 32 N.J. Eq. 302, 316 (1880).

The objection that might be raised to the relief given in the present case is that where the security is adequate for the senior mortgagee only, the junior mortgagee should be permitted to retain possession in order that he might receive the rents and profits until foreclosure and thus reduce the indebtedness to that extent. But to the extent that the senior mortgagee receives rents and profits his indebtedness is decreased and this inures to the benefit of the junior mortgagee.

A second objection is that after the senior mortgagee takes possession the junior mortgagee has no sufficient protection against mismanagement, though the junior mortgagee is, of course, entitled to an accounting by the mortgagee in possession. *Williams v. Marmor*, 321 Ill. 283, 151 N.E. 880 (1926); *Long v. Richards*, 170 Mass. 120, 48 N.E. 1083 (1898). But if the receiver were allowed to continue in possession, the position of the junior mortgagee would be more secure, for the courts hold the receiver to a high degree of diligence and care in dealings with the property entrusted to him. *Home Trust Savings Co. v. District Court of Polk County*, 121 Ia. 1, 95 N.W. 522 (1903); *Atkins v. Judson*, 33 App. Div. 42, 53 N.Y.S. 504 (1898); *Herrigan v. Gilchrist*, 121 Wis. 127, 99 N.W. 909 (1904). While all that is required of the mortgagee in possession is such management and diligence in making the property productive as a prudent owner would exercise. *American Freehold Land Mtg. Co. of London, Ltd. v. Pollard*, 132 Ala. 155, 32 So. 630 (1902); *Benham v. Rowe*, 2 Cal. 387 (1852); *Kinkead v. Peet*, 153 Ia. 199, 132 N.W. 1095 (1911). See also *Mills v. Day*, 206 Mass. 530, 92 N.E. 803 (1910); *Stevenson v. Edwards*, 98 Mo. 622, 12 S.W. 255 (1889); *Conaway v. Thomas*, 101 Okla. 227, 224 Pac. 965 (1924).

But if placing the prior mortgagee in possession does not afford adequate protection to the junior mortgagee, the remedy does not lie in establishing a very questionable distinction between the senior mortgagee's right to possession before and after appointment of a receiver, but by holding the mortgagee in possession to a more strict standard. Under such a standard the mortgagee in possession would be held accountable for the proceeds that reasonably efficient management would have availed. See *Jackson v. Lynch*, 129 Ill. 72, 21 N.E. 580 (1889); *Atwood v. Warner*, 92 Neb. 370, 138 N.W. 605 (1912); *White v. City of London Brewing Co.*, 42 Ch. 237 (1889). And where the senior mortgagee has the unquestioned legal right to possession, as he had in the present case, it would seem contrary to equitable principles to permit the receiver to force the mortgagee to sue at law in ejectment when the sole result would be to delay the termination of the receivership.

Real Property—Inheritance Tax—Escheat—[Nebraska].—Upon the death of O'Connor, intestate and without heirs, the state took his property by escheat. Adams County brought an action against the state claiming an inheritance tax under a statute (Neb. Rev. Stat. (1913), § 6622) which named the counties as recipients of the tax. *Held*, the county could not recover because escheat is not a transfer of property "by will or under the intestate laws." *In re O'Connor's Estate*, 126 Neb. 182, 252 N.W. 826 (1934).

Under the English common law escheat was an inseparable incident of feudal tenure. The feudal policy was to have a tenant always seized of the land to perform the feudal services; upon failure of heirs or the inheritable quality of the blood, the estate of the tenant ended and the lord of the fee, whether a mesne lord or the crown, became entitled to the land by virtue of his paramount title, that is, the land escheated. 3 Cruise, Digest (1804), 491; 3 Holdsworth, History of English Law (1923), 67. Those property rights not the subject of tenure, such as equitable estates, could not escheat. *Burgess v. Wheate*, 1 Eden 177 (1759). Intestate personalty on failure of next kin went to the crown as *bona vacantia* by virtue of the sovereign powers of the crown. *Dyke v. Wiford*, 5 Mos. P.C. 434 (1846); *In re Bond*, [1901] 1 Ch. 15. The Statute of Quia Emptores (1290) made escheat of little value to anyone except the crown. Escheat has now been abolished in England and intestate land on failure of heirs now lapses to the Crown as *bona vacantia*. Administration of Estates Act, 15 Geo. V, c. 3, §§ 45(1), 46 (1925).

In the United States the view has been taken that after the Revolution the state succeeded to the rights of the Crown in the tenure relation; hence, under Quia Emptores, land was held of the state and so escheated to the state upon intestacy and failure of heirs. Escheat statutes, according to this theory, have merely applied this to all property, real and personal. *State v. Reeder*, 5 Neb. 203 (1876); *Hughes v. State*, 41 Tex. 10 (1874); Gray, Rule against Perpetuities (3d ed. 1915), §§ 23, 24.

Modern writers tend to ignore the feudal origin of escheat and base it upon principles of sovereignty. 3 Kent, Commentaries (14th ed., 1896), 510; 4 Kent, Commentaries (14th ed. 1896), 425; 3 Pomeroy, Equity Jurisprudence (3d ed. 1905), 990; 3 Washburne, Real Property (3d ed. 1868), 46-49; 8 Corn. L. Q. 74 (1923); 18 Michigan L. Rev. 226 (1920). But see Bigelow and Madden, Introduction to the Law of Real Property (2d ed. 1934), 17. That this attitude is a reflection of the actual state of the