

*Furniture Co. v. I. B. of T. C. & H. of A.*, 268 N.W. 250 (Wis. 1936) (provisions of act denying injunction for peaceful picketing constitutional); *Dehan v. Hotel & Rest. Employees*, 159 So. 637 (La. 1935). But even in such jurisdictions, although the act has probably reduced the work of labor counsel, it has not substantially increased the power of organized labor because the substantive provisions were substantially declaratory of the pre-existing law, and the procedural restrictions had generally been imposed by judicial self-limitation. See 13 N.Y. U. L. Q. Rev. 92 (1935); 22 Va. L. Rev. 83, 86 (1935). For a discussion of jurisdictional disputes between rival labor unions, see 46 Harv. L. Rev. 125 (1932); 21 Corn. L. Q. 640 (1936).

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**Mortgages—Priorities between the Mortgagee and Assignees of Part of the Notes Secured by a Mortgage—[Illinois].**—As collateral for a loan from a bank, the mortgagor executed to the bank thirty-two notes, all bearing the same maturity date and secured by a mortgage on his property. The bank, for which the defendant is receiver, assigned most of the notes without recourse to the various plaintiffs, keeping the remainder itself. On default, the plaintiff assignees filed a bill for foreclosure and sale, asking that the proceeds be applied *pro rata* to the payment of their notes, but that they be preferred to the mortgagee. *Held*, since the act of assignment does not imply a warranty by the mortgagee that the notes will be paid, and since an assignment of a portion of a debt can carry with it only a proportionate part of the security, no preference should be given to the assignees over the mortgagee. *Domeyer v. O'Connell*, 364 Ill. 467, 4 N.E. (2d) 830 (1936).

Although the decision in the instant case was almost a necessary one, the court's language in discussing related problems makes appropriate a study of the conflicting results in mortgagee-assignee priority cases. Many courts hold that all the notes secured by the same mortgage carry with them a proportionate part of the security and all share *pro rata* in the proceeds on foreclosure, regardless of whether or not there is an acceleration clause, and regardless of the time of assignment or the stated time of maturity. *Donley v. Hays*, 17 Serg. & R. (Pa.) 400 (1828); *Pugh v. Holt & Wheless*, 27 Miss. 461 (1854); *Andrews v. Hobgood*, 69 Tenn. 693 (1878); *Studebaker Bros. v. McCurgur*, 20 Neb. 500, 30 N.W. 686 (1886). According to these courts, rights in the property begin with the date of the mortgage, and not with the date of maturity of the notes; so that the fact that one note matures before another should not affect the result. *Penzel v. Brookmire*, 51 Ark. 105, 10 S.W. 15 (1888). Finally, by holding that the fact that an assignee's interest comes to him through an intermediate assignment does not affect his rights, these courts achieve a uniform *pro rata* rule. *Kelly v. Middlesex Title Co.*, 115 N.J.Eq. 592, 171 Atl. 823 (1934). Many other courts, including Illinois, have held that as among assignees priority is to be granted to the holder of the earliest maturing note, others taking after him in the order of maturity of their notes. *Gardner v. Diederichs*, 41 Ill. 158 (1866); 3 Pomeroy, *Equity Jurisprudence* § 1202 (4th ed. 1918). A few courts hold that the order of assignment of the notes governs priority. *Solberg v. Wright*, 33 Minn. 224, 22 N.W. 381 (1885) (the first assignment transfers the mortgage; later assignments transfer only the mortgagee's remaining equitable interest).

In the "early maturity" jurisdictions, it is held that the assignment of a note is an assignment *pro tanto* of the mortgage; and since upon default the holder of the first

due note may foreclose and have the property sold, he is entitled to priority over the others. *Sargent v. Howe*, 21 Ill. 147 (1859); *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447 (1847). The notes stand as so many successive mortgages. This order of priority is not lost if the holder of the earliest maturing note grants an extension. *People's Bank v. Finney*, 63 Ind. 460 (1878). Treatment of the later maturing notes as junior mortgages is especially weak in view of the growing use of acceleration clauses in mortgages. Accordingly, some of these jurisdictions have given effect to these clauses by interpreting the notes as due at maturity or as much sooner as there is default on any note. *Bank of the United States v. Covert*, 13 Ohio 240 (1844); *Bushfield v. Meyer*, 10 Ohio St. 334 (1859); *Pierce v. Shaw*, 51 Wis. 316, 8 N.W. 209 (1881). Others, however, hold that such a clause does not make the note due in such a sense as to "expunge from the contract the implied agreement that the notes shall have priority in the order of their maturity." *Leavitt v. Reynolds*, 79 Iowa 348, 44 N.W. 567 (1890); *Horn v. Bennett*, 135 Ind. 158, 34 N.E. 321 (1893). Illinois at an early date refused to modify the "early maturity" rule. *Koester v. Burke*, 81 Ill. 436 (1876).

In a contest between a partial assignee and a mortgagee who retains some of the notes, courts following the "early maturity" rule generally give priority to the assignee regardless of whose note matures first. *Parkhurst v. Watertown Steam Eng. Co.*, 107 Ind. 594, 8 N.E. 635 (1886); *Roberts v. Mansfield*, 32 Ga. 228 (1861); *Lawson v. Warren*, 34 Okla. 94, 124 Pac. 46 (1912). Since these courts base their holdings on the ground that the transfer of the note assigns the security *pro tanto* and not *pro rata*, it appears to be immaterial whether the transfer is by unqualified indorsement or by assignment without recourse. The justification given for this rule of priority is that since the mortgagee has transferred the notes for consideration, it is inequitable for him to deprive the assignee of any part of their value by insisting upon a priority or an equality of right in sharing the proceeds of foreclosure. 3 Pomeroy, Equity Jurisprudence § 1203 (4th ed. 1918). The Illinois appellate court has found an equity in favor of a partial assignee even where he and the mortgagee held shares in the same note. *Kuppenheimer v. Chicago Title & Trust Co.*, 163 Ill. App. 127 (1911); *Lake View Bank v. Rice*, 279 Ill. App. 538 (1935). The supreme court, however, has never been confronted with a case in which a mortgagee sought priority over his assignee by virtue of the "early maturity" rule. Some "early maturity" jurisdictions have held that the order of maturity controls priorities unless a special agreement or a paramount equity requires a different order of payment. *Richardson v. McKim*, 20 Kan. 346 (1878); *Corbin v. Kincaid*, 33 Kan. 649, 653 (1885); see *Robinson v. Waddell*, 53 Kan. 402, 36 Pac. 730 (1894). Such a paramount equity has not been found, however, where the mortgagee merely retained the earlier maturing notes, and he has been given priority in the absence of a special agreement. *Aultman-Taylor Co. v. McGeorge*, 31 Kan. 329, 2 Pac. 778 (1884); *Massie v. Sharpe*, 13 Iowa 542 (1862); *Hinds v. Mooers*, 11 Iowa 211 (1860). The court in the present case found no inherent equities in favor of an assignee; they saw no reason why, when other notes of the same maturity date are outstanding, notes subordinate in the hands of the mortgagee should acquire parity with the others through the mere act of assignment. Therefore, they held that all notes maturing at the same time should share *pro rata*. A court wishing to adopt an intermediate rule might hold that a mortgagee who retains earlier maturing notes may not obtain priority unless he has notified his assignees of this relation. But the simplest manner of avoiding these priority problems would be to abandon altogether

the "early maturity" rule and substitute in its stead the *pro rata* rule. Particular cases in which assignees may require protection against a mortgagee or other assignees can more readily be disposed of by the application of general doctrines of equity.

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**Mortgages—Right of Mortgagor to Cancel Leases Subordinate to the Mortgage after Commencement of Foreclosure Proceedings—[Illinois].**—The defendant was a tenant of mortgaged premises under a lease subordinate to the mortgage which provided for a monthly rental of \$200 until its expiration in November, 1935. In March, 1934, while foreclosure proceedings were pending and after being notified that application for the appointment of a receiver in these proceedings had been made, the tenant and his lessor, the mortgagor, entered into the following agreement: (1) the mortgagor canceled the existing lease in return for the tenant's release of a debt owed it by the mortgagor; (2) the mortgagor agreed to lease the premises to the tenant for three months at a monthly rental of \$50. The tenant vacated the premises at the end of this short period. The plaintiff, a receiver appointed April 6, 1934 in the above proceedings, sued for the entire rental under the former lease, amounting to \$4,000. A master in chancery found that the reasonable rental value of the premises was \$60 a month. *Held*, for the plaintiff. While the mortgagor and his tenants may enter into agreements without the consent of the mortgagee, they had no power thus to defeat the pledge of rents and profits contained in the mortgage. *First National Bank v. Gordon*, 4 N.E. (2d) 504 (Ill. App. 1936).

The situation presented in the instant case is one not covered by normal mortgagee protections. In the ordinary case the mortgagor's activities in milking the property through payment of rent in advance, etc. are adequately controlled by the appointment of a receiver early in the foreclosure proceedings. If the terms of existing leases are satisfactory, the receiver is authorized to collect all rents and profits thereunder. *Tefft, Receivers and Leases Subordinate to the Mortgage*, 2 Univ. Chi. L. Rev. 33, 37 (1934). On the other hand if the leases are unsatisfactory, the receiver may disaffirm them and sue for the reasonable value of the tenant's occupation of the mortgaged premises from the date of his appointment. *Greenebaum v. Kingsbury*, 248 Ill. App. 321 (1928); see 86 A.L.R. 366 (1933). The receiver is allowed to disaffirm and collect this reasonable rental even if the tenant has paid the mortgagor in advance. *Rohrer v. Deatherage*, 336 Ill. 450, 168 N.E. 266 (1929); *Henshaw v. Wells*, 9 Humph. (Tenn.) 568 (1848); *State ex rel. Coker v. District Court*, 159 Okla. 10, 11 P. (2d) 495 (1932); *cf. Prudence Co. v. 160 W. 73rd St. Corp.*, 260 N.Y. 205, 183 N.E. 365 (1932) ("lien" jurisdiction). Furthermore, the receiver is permitted to collect all rents accrued at the date of his appointment. 4 N.E. (2d) 504, 505; *Palmieri v. N.Y. Prep. School*, 233 App. Div. 694, 248 N.Y.S. 934 (1931); *contra, Stewart v. Fairchild-Baldwin Co.*, 91 N.J. Eq. 86, 108 Atl. 301 (1919). But since obtaining the appointment of a receiver involves proof of inadequacy of the security, insolvency of the mortgagor, and perhaps other proof of actual or threatened impairment of the security, receivership is probably not available until some considerable time after foreclosure has been commenced. The mortgagee requires the same protection in this period that he is offered by the receivership device; thus a resort to additional restrictions on the mortgagor's powers is necessary.

The mortgagor's most valuable right before the appointment of a receiver is his