

WRIT OF ENTRY, on a mortgage to the plaintiffs' testate, executed October 19, 1863, to secure, besides certain notes that have been paid, one note for \$147, dated April 1, 1862, made payable in five years from its date with interest annually, which has not been paid. The defendant pleaded the statute of limitations. The court ruled that the plea was not sustained by the foregoing facts, and the defendant excepted.

Sulloway, Topliff & O' Connor, for the defendant.

Clough & Clark, for the plaintiffs.

CLARK, J. "No action for the recovery of real estate shall be brought after twenty years from the time the right to recover first accrued." G. L., c. 221, s. 1. A mortgagee's recovery of possession by a real action before breach of condition (when possession is not reserved by the mortgagor) is a mere provisional protection of the creditor's security. *Furbush v. Goodwin*, 29 N. H. 321, 332; *Tripe v. Marcy*, 39 N. H. 439, 444; *Gray v. Gillespie*, 59 N. H. 469. Foreclosure being an application of the land to the payment of the debt, an action for the foreclosing recovery of the estate cannot be maintained until the debt is due; and under the statute, limiting the time within which the foreclosing right of action can be exercised, the limited time does not begin before the right exists. *Howard v. Hildreth*, 18 N. H. 105; *Tripe v. Marcy*, *supra* 445. If the unpaid note were payable twenty-one years after the date of the mortgage, the right of enforcing its payment by foreclosure would not be barred a year before foreclosure could be begun.

Exceptions overruled.

SMITH, J., did not sit: the others concurred.

GREEN v. CURRIER.

Where land is subject to two mortgages held by different persons, and the first mortgagee is in possession for the purpose of foreclosure, his quitclaim conveyance to a purchaser of the equity of redemption operates as an assignment of the first mortgage, and not as a discharge of it, justice requiring the instrument to have that effect.

WRIT OF ENTRY. Facts found by the court. December 14, 1870, Francis D. Berry mortgaged his farm, of which the demanded premises constitute a small part, to the Pittsfield Savings-Bank, to secure his note for \$4,250. June 3, 1881, he mortgaged the same

farm to the plaintiff, subject to the foregoing mortgage, to secure his note for \$344.44.

February 24, 1883, the savings-bank filed a bill in equity against Berry and the plaintiff, together with others, for a foreclosure of the mortgage to the bank. The plaintiff did not appear, and the bill was taken *pro confesso* as to him. At the April term, 1884, it was decreed that the amount due to the bank, as of September 1, 1884, was \$5,697.14, and that the right of redemption should be foreclosed in one year after the bank should be put in possession of the premises. A writ of possession was issued, and the bank put in possession under it, November 10, 1884, and the right of redemption became fully foreclosed on the 10th day of November, 1885. The value of the premises was from the time of the filing of the bill, and is now, considerably less than the amount of the mortgage to the bank. Green made no offer, and did not desire, to redeem.

September 13, 1883, Berry executed a warranty deed of the demanded premises to the defendant; and September 19, 1883, the bank executed a quitclaim of the same premises to the defendant. These deeds were deposited in the hands of Geo. F. Berry, to be delivered only in case the bank prevailed in the bill in equity, and upon the payment by the defendant to the bank of \$125, which was the full value of the land. The deeds were delivered to the defendant, and the defendant paid \$125 to the bank on the 30th day of December, 1884.

After September 13, 1883, and before December 30, 1884, the defendant erected a house on the premises, with the assent of Berry and the bank, and with the knowledge, but without the express assent, of the plaintiff. The land and buildings were at the time of the delivery of the deeds, and are now, of the value of \$2,000 or more.

A. F. L. Norris, for the plaintiff.

Chase & Streeter, for the defendant.

CLARK, J. The quitclaim deed of the bank to Currier conveyed to him the title of the bank in the premises, which was that of a mortgagee in possession for the purpose of foreclosure (*Hinds v. Ballou*, 44 N. H. 619); and by his continued possession under the deed, the foreclosure proceedings, to which the plaintiff was a party, were completed, and Currier's mortgage title became absolute as against the plaintiff. The deed from Berry to Currier is immaterial. It was a conveyance of the equity of redemption, which did not affect either of the prior mortgage-titles, or the title subsequently acquired by Currier from the bank. It could operate upon the subsequently acquired mortgage title only by way of merger, and there could be no merger because of the intervening

mortgage title of the plaintiff. In such a case it is to be presumed, as matter of law, that the parties did not intend to extinguish the mortgage. The doctrine, that where the purchaser of an equity of redemption takes an assignment of the mortgage it does not operate to extinguish it, if it be for the interest of the assignee to uphold it, is too well settled to require the citation of authorities. *Bacon v. Goodnow*, 59 N. H. 415; *Stantons v. Thompson*, 49 N. H. 272. And when it will subserve the purposes of justice, equity restores a mortgage released through mistake, and gives to it its original priority as a lien. *Hammond v. Barker*, 61 N. H. 53.

Judgment for the defendant.

CARPENTER, J., did not sit: the others concurred.

HALL & a. v. DIMOND.

The right of stoppage *in transitu* is terminated when the goods are delivered to the buyer, or possession, actual or constructive, is taken by him.

The carrier's change of character into that of an agent to keep the goods for the buyer is not inconsistent with his right to retain the goods in his custody till his lien for freight is satisfied.

REPLEVIN, for goods bought of the plaintiffs in Boston, and by them shipped to one Sawyer at Penacook, at which place they were attached by a creditor of Sawyer's while remaining in the freight-house of the railroad. The plaintiffs claimed to hold them by virtue of their right of stoppage *in transitu*. The facts, which were found by the court, are stated in the opinion.

Harry G. Sargent and Albin & Martin, for the plaintiffs. I. The rule of law is generally stated to be, that the vendor's right of stoppage *in transitu* continues until the goods have reached their ultimate destination, and come into the actual possession of the vendee. *Mohr v. Boston & Albany R. R. Co.*, 106 Mass. 70, and cases cited. The arrival of the goods at the place of destination will not defeat the vendor's right to take them. That right will only be terminated by the goods passing into the actual or the constructive possession of the vendee. Hence the inquiry in such cases must always be, Have the goods passed into the possession of the purchaser?

In *Reynolds v. Railroad*, 43 N. H. 580, goods shipped from Dover arrived at Boston, and the consignee called for them, paid the freight, and received a delivery check, and would have received