To be Argued by:
ADAM M. SWANSON
(Time Requested: 15 Minutes)

APL-2021-00151
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Appellate Division–Second Department Docket No. 2019-00544

Court of Appeals

of the

State of New York

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), a corporation organized and existing under the laws of the United States of America,

Plaintiff-Appellant,

– against –

MAXI JEANTY a/k/a Maxi Jeanty, Jr. and SHERLEY JEANTY a/k/a Sherley Adrien Jeanty,

Defendants-Respondents,

– and –

CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

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DISCLOSURE STATEMENT
PURSUANT TO COURT OF APPEALS RULE 500.1(f)

Pursuant to Court of Appeals Rules 500.1(f) and 500.22(b)(5), Plaintiff-Appellant, Federal National Mortgage Association ("Fannie Mae"), states that it has the following parents, affiliates, or subsidiaries: None.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Plaintiff-Appellant, Federal National Mortgage Association ("Fannie Mae") respectfully submits this brief in support of its appeal from the decision & order of the Appellate Division, Second Department dated November 12, 2020.

This is another mortgage foreclosure action dismissed under the New York statute of limitations. One of the questions presented is what impact borrowers, Maxi Jeanty a/k/a Maxi Jeanty, Jr. ("Maxi Jeanty") and Ingrid Adrien's (collectively, "Borrowers") execution of a Home Affordable Modification Trial Period Plan ("HAMP Agreement") and the seven payments they made thereunder have on the foreclosure statute of limitations. Since the Borrowers' mortgage was not permanently modified under the Home Affordable Modification Program ("HAMP"), their seven payments were fully applied in accordance with the terms of their original and unmodified mortgage, which is what they agreed to in the HAMP Agreement.

HAMP was integral to the recovery from the financial crisis of 2008. HAMP sought to curb avoidable foreclosures by compelling mortgage servicers and owners to modify defaulted mortgage loans under certain circumstances, including a review of the borrower's income to determine if they qualified for a

mortgage modification. Through HAMP, thousands of New York residential mortgage borrowers cured their mortgage defaults and had their monthly mortgage payments permanently reduced to an affordable level through modification, allowing them to keep their homes. Before a permanent HAMP modification was granted, borrowers made a series of trial payments under the terms of the same HAMP Agreement that Borrowers did here, while the lender assessed Borrowers' income qualifications. Not all borrowers given a temporary HAMP Agreement were also given a permanent modification under the HAMP program, only qualified borrowers received a permanent modification.

Under the HAMP Agreement, which is a form document, if a permanent HAMP modification was not ultimately offered to a borrower, the parties agreed, "any payment I make under the Plan shall be applied to the amounts I owe under the Loan Documents and shall not be refunded to me." When this occurred, as it did in this case, the mortgage holder would apply the payments received under the HAMP Agreement to pay the mortgage loan in accordance with its original and unmodified terms, and then proceed with enforcing the unmodified mortgage.

Here, the Supreme Court incorrectly determined that Borrowers' seven payments under the HAMP Agreement were of no consequence and did not renew

the statute of limitations. The Second Department affirmed and incorrectly applied this Court's precedent in *Lew Morris Demolition Co. v. Bd. of Ed. of City of New York*, 40 N.Y.2d 516, 520 (1976) ("*Lew Morris*"). The decision on appeal reveals a direct conflict between the Second and Third Departments on this exact issue. Here, the Second Department relied on its decision in *Nationstar Mtge., LLC v. Dorsin*, 180 A.D.3d 1054 (2nd Dept. Feb. 26, 2020) ("*Dorsin*"), concerning payments under the very same agreement. The Second Department found these payments were "conditional" and, therefore insufficient to renew the statute of limitations under Section 17-101 of the General Obligations Law ("GOL"), or the part payment doctrine under the common law and GOL 17-107.

By contrast, the Third Department held in *Wells Fargo Bank v. Grover*, 165 A.D.3d 1541, 1543 (3rd Dept. Oct. 25, 2018) ("*Grover*") that when the permanent modification contemplated by the HAMP Agreement was not given, the HAMP Agreement trial payments renew the statute of limitations under GOL 17-101 and under the part payment doctrine of the common law and GOL 17-107. The *Grover* court found "a borrower who entered into a HAMP agreement necessarily admitted the existence of the underlying debt, acknowledged that more payments were due, and made an implied promise to pay them in consideration of the modification of

the mortgage." Unable to distinguish *Grover* on the facts or law, the Second Department simply observed in *Dorsin*, "we disagree and decline to follow that holding." This Court should reverse the decision below and overrule *Dorsin*.

The purpose of the HAMP program, including the HAMP Agreement, was to increase the number of mortgage modifications and give borrowers an opportunity to continue paying their mortgage debts on more affordable terms. This remedial goal is not served by penalizing lenders who negotiated and offered HAMP Agreements with the possibility of a permanent modification of payment terms by an unwavering application of the statute of limitations. As it was here and as the Third Department held in *Grover*, through the HAMP Agreement, borrowers acknowledged their mortgage debt and made reduced payments to the lender for the opportunity to re-cast the mortgage debt, and under this arrangement the statute of limitations was renewed. Although Borrowers here did not receive a permanent modification, many New York borrowers did.

Alternatively, this Court should find that the election to accelerate was revoked via the voluntary discontinuance of the prior 2008 foreclosure action under this Court's authority in *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, *reargument denied*, 37 N.Y.3d 926 (2021) (hereinafter, "*Engel*").

QUESTIONS PRESENTED

(1) Was the Second Department's decision correct?

(2) Was the HAMP Agreement sufficient to renew the statute of limitations under either GOL 17-101 or 17-105(1)?

(3) Did the seven trial plan payments renew the statute of limitations under the common law and GOL 17-107?

(4) Was the election to accelerate contained in the 2008 foreclosure complaint revoked by the motion to voluntarily discontinue that action?

JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to CPLR 5602(a) because it originated in the Supreme Court, Kings County, and this appeal is from an order of the Appellate Division, Second Department that finally determined the proceeding and that is not appealable as of right. The Appellate Division's order affirmed the Supreme Court's order, which denied Fannie Mae's motion for summary judgment and granted "defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them as time-barred". (R. 315.)[1]

[1] (R. __) denotes reference to the Record on Appeal.

The Supreme Court's decision and order dismissing the complaint, affirmed by the Appellate Division's decision and order, resolved all claims in this case because Fannie Mae's complaint stated just one claim to foreclose the Mortgage. (R. 11.) Respondents were the only defendants that appeared in the Supreme Court and defended against Fannie Mae's claim. (R. 84-85.) The Supreme Court heard no claims, conducted no proceedings, and entered no order or judgment with respect to any of the other non-appearing defendants. As a result of the Supreme Court's decision and order that Fannie Mae's complaint is barred by the statute of limitations, which was affirmed by the Second Department, Fannie Mae has no enforceable interest in the Property and no other claim that it could pursue in this case. Accordingly, there is nothing left for the Supreme Court to do in this case, and the Appellate Division's order of affirmance disposed of all issues within the meaning of CPLR 5611.

STATEMENT OF FACTS

A. The Note and Mortgage and 2008 Foreclosure Action

On June 20, 2007, Borrowers, Maxi Jeanty and Ingrid Adrien borrowed the principal amount of $384,000.00 to purchase property at 42 Paerdegat 10th Street, Brooklyn, New York 11236, Block 8069, Lot 138 ("Property"). To evidence their debt, Borrowers executed a promissory note ("Note") and to secure their debt,

Borrowers mortgaged the Property ("Mortgage") (collectively, the "Mortgage Loan"). The Mortgage was recorded July 16, 2007, in the Office of the City register of the City of New York as City Register File No. 2007000362095. (R. 22-26; R. 33-61.)

The Mortgage Loan went into default and on August 27, 2008, Fannie Mae's predecessor commenced an action to foreclose the Mortgage under Index No.: 24539/2008 (the "2008 Foreclosure Action"). (R. 238-247; R. 258.) Shortly after the 2008 Foreclosure Action was commenced, Borrowers entered into the HAMP Agreement, which is discussed in more detail below. The HAMP Agreement did not lead to a permanent modification of the Mortgage or resolve the 2008 Foreclosure Action. (R. 177.) Soon after, Borrower, Ingrid Adrien filed for bankruptcy on June 17, 2010, and was granted a discharge on October 4, 2010. (R. 83; R. 125; R. 296.) The Property was subsequently transferred for nominal consideration from Borrowers to Defendants-Respondents, Maxi Jeanty and Sherley Jeanty a/k/a Sherley Adrien Jeanty (collectively, "Respondents") by deed dated April 17, 2013. (R. 27-32.) On December 10, 2014, a motion to voluntarily discontinue the 2008 Foreclosure Action was filed. (R. 258; R. 260.) That motion was granted by order dated February 13, 2015. (R. 127-128.)

B. The HAMP Agreement

As mentioned above, during the pendency of the 2008 Foreclosure Action Borrowers entered into the HAMP Agreement, which became effective on May 1, 2009. (R. 177.) The HAMP Agreement explained that:

> If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement ("Modification Agreement"), as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.

(R. 177.) The purpose of the HAMP Agreement was to provide Borrowers more affordable monthly mortgage payments due to their financial hardship. During the term of the HAMP Agreement, Borrowers provided "documents to permit verification of all my income…to determine whether I qualify for the offer" and the pending foreclosure action was suspended. (R. 177-178.) To that end, Borrowers represented, *inter alia*, that:

> A. I am unable to afford my mortgage payments for the reasons indicated in my Hardship Affidavit and as a result, (i) I am either in default or believe I will be in default under the Loan Documents in the near future, and (ii) I do not have sufficient income or access to sufficient liquid assets to make the monthly mortgage payments now or in the near future.

(R. 177.) While Borrowers' qualifications were being reviewed, the HAMP Agreement required them to make at least three consecutive monthly payments of

$2,553.00 on May 1, 2009, June 1, 2009, and July 1, 2009.[2] (R. 178.) Addressing the application of these payments, Borrowers agreed as follows in Paragraph 2:

> D. The Lender will hold the payments received during the Trial Period in a non-interest bearing account until they total an amount that is enough to pay my oldest delinquent monthly payment on my loan in full. I understand the Lender will not pay me interest on the amounts held in the account. If there is any remaining money after such payment is applied, such remaining funds will be held by the Lender and not posted to my account until they total an amount that is enough to pay the next oldest delinquent monthly payment in full;
>
> E. When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents;
>
> F. If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; (iii) the Lender determines that any of my representations in Section 1 were not true and correct as of the date I signed this Plan or are no longer true and correct at any time during the Trial Period; or (iv) I do not provide all information and documentation required by Lender, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me; and

[2] These payments were tied to the Mortgage debt and represented, "an estimate of the payment that will be required under the modified loan terms." (R. 178.)

(R. 178.) Under Paragraph 4 of the HAMP Agreement, the Borrowers made additional promises and re-affirmed their Mortgage debt, consistent with their goal to modify the Mortgage terms. Borrowers promised:

> B. To comply, except to the extent that they are modified by this Plan, with all covenants, agreements, and requirements of the Loan Documents, including my agreement to make all payments of taxes, insurance premiums, assessments, Escrow Items, impounds, and all other payments, the amount of which may change periodically over the term of my loan.
>
> * * *
>
> D. That all terms and provisions of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents.

(R. 179.) Nothing in the HAMP Agreement disavowed the Mortgage or stated that Borrowers maintained or reserved any right to challenge the validity or enforceability of the Note or Mortgage. On the contrary, under the HAMP Agreement, Borrowers acknowledged their debt and affirmed that "all terms and provisions of the Loan Documents remain in full force and effect." (R. 179.)

Moreover, Borrowers understood and agreed that, "Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan." (R. 179.)

Under these terms, Borrowers made seven payments of $2,553.00 on account of their Mortgage debt, on April 30, 2009; May 30, 2009; July 2, 2009; August 1, 2009; September 19, 2009; October 27, 2009; and March 8, 2010. (R. 123; R. 180-193.) For reasons that do not appear in the record, were not integral to the litigation and are not disputed by Borrowers, the trial plan under the HAMP Agreement did not result in a permanent Mortgage modification for Borrowers. Thus, Borrowers payments were applied to the Mortgage debt and Fannie Mae subsequently commenced the instant foreclosure action under the original Note and Mortgage terms. (R. 11-21.)

C. This Foreclosure Action, Appeal and Preservation of Arguments for Review

Fannie Mae commenced this action on March 12, 2015, to foreclose the Mortgage. (R. 11.) Recognizing the seven trial payments made under the HAMP Agreement, which had been applied against the Mortgage debt, the Complaint in the instant action alleges the Mortgage is in default for failure to make the payment due November 1, 2008. (R. 20.) By contrast, when the 2008 Foreclosure Action was commenced the alleged date of default was March 1, 2008, several months earlier. (R. 239.) Respondents filed an Answer with Affirmative Defenses on

December 19, 2017, alleging, *inter alia*, the statute of limitations as an affirmative defense. (R. 73-77.)

Fannie Mae moved for summary judgment in April 2018 and Respondents cross-moved for summary judgment dismissing the action as barred by the statute of limitations. (R. 78; R. 208.) In support of its motion and in opposition to the cross-motion, Fannie Mae argued that, *inter alia*, enforcement of the Mortgage was not barred by the statute of limitations because Borrowers had executed the HAMP Agreement under which they made seven trial payments that were applied against the Mortgage loan balance as they had agreed. (R. 98-102; R. 281-286.) Fannie Mae argued that the statute of limitations was renewed (1) under either GOL 17-101 or GOL 17-105(1) and (2) by part payment of the debt under the common law and GOL 17-107. (R. 98-102; R. 281-286.)

To prove these payments, in the Record before the Supreme Court Fannie Mae introduced as part of its summary judgment moving papers: (a) the HAMP Agreement (R. 177); (b) an escrow ledger and payment history for the Mortgage loan (R. 180); and (c) the Affidavit of Riki Lachia, sworn to April 4, 2018 (R. 121). Respondent-Borrower, Maxi Jeanty never disputed making these payments and never repudiated his covenants under the HAMP Agreement. (R. 261-263.) The

Supreme Court (Dear, J.S.C.) denied Fannie Mae's motion for summary judgment and granted Respondents' summary judgment motion, dismissing the Complaint finding the foreclosure suit time-barred notwithstanding these payments and the covenants under the HAMP Agreement. (R. 6-7.)

Supreme Court rejected Fannie Mae's argument that the trial payments under the HAMP Agreement renewed the statute of limitations, but did note Borrowers' acknowledgement of the Mortgage debt, observing:

> While the agreement presumes the continued existence of a debt, there was no unconditional promise to pay it – rather, the signors thereof agreed to make three trial payments. If they did so – and if the lender decided that they qualified – a permanent modification would be offered. Put differently, the borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to[1]. Their "promise" to pay, if any, was conditional and the condition was not fulfilled. As such, the statute of limitations was not restarted.
>
> [1]The trial plan was, in essence, a forbearance agreement. While payments were made, the plaintiff would suspend the foreclosure action with no guaranty that it would offer a permanent modification.

(R. 7.) No evidence was offered by Respondents to support the finding that Borrowers' promise was "conditional" and, therefore Supreme Court relied exclusively on the four corners of the HAMP Agreement to reach its conclusion. This finding was incorrect because Paragraph 4 of the HAMP Agreement was

unambiguous, Borrowers did agree that their payments would be applied against the Mortgage debt even if ultimately the Mortgage was not modified. (R. 178.)

On appeal to the Second Department, Fannie Mae charged that the Supreme Court committed error by not recognizing that the HAMP Agreement and accompanying seven payments renewed the statute of limitations. Specifically, Fannie Mae argued that renewal occurred (1) under either GOL 17-101 or 17-105(1) and (2) under the part payment doctrine at common law and GOL 17-107. (*See* Br. for Appellant-Plaintiff (10/2/2019), at pp. 10-15 and *see* Reply Br. for Plaintiff-Appellant (2/10/2020), at pp. 6-11.) The Second Department affirmed the Supreme Court, in reliance upon its *Dorsin* decision and this Court's precedent in *Lew Morris*. The Second Department determined:

> Contrary to the plaintiff's contention, Maxi's execution of the HAMP plan, and the trial payments made pursuant thereto, did not constitute an "unconditional and unqualified acknowledgment of [the] debt sufficient to reset the statute of limitations" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1054, 1056-1057 [internal quotation marks omitted]). Rather, because "[a]ny intention to repay the debt was conditioned on the parties reaching a permanent modification agreement . . . it cannot be said that the writing contained 'nothing inconsistent with an intention on the part of the debtor to pay' the debt" (*id*. at 1056, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d at 521; see *U.S. Bank, N.A. v Kess*, 159 AD3d 767, 768-769). Similarly, the trial payments made by Maxi pursuant to the HAMP plan "were made for the purpose of reaching an agreement to modify the terms of the parties' contract, and any

> promise to pay the remainder of the debt that could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d at 1057 [citation omitted]).

(R. 315). *See also Federal Nat'l Mtg. Assoc. v. Jeanty*, 188 A.D.3d 827, 829-830 (2d Dept. 2020). Fannie Mae moved for reconsideration or for leave to appeal to this Court based upon the split of authorities between *Grover* and *Dorsin* and a misapplication of *Lew Morris*. The Second Department denied the motion for reconsideration or for leave to appeal to the Court of Appeals. (R. 312.) Thereafter, Fannie Mae moved this Court directly for leave to appeal from the Second Department's decision, which motion was granted by order dated September 14, 2021. (R. 311.)

ARGUMENT

I. THE STATUTE OF LIMITATIONS WAS RENEWED BY THE HAMP AGREEMENT

The HAMP Agreement was sufficient to renew the statute of limitations under both GOL 17-101 and 17-105(1), because it contains an acknowledgment of the Mortgage debt, a promise to pay it, and evinces Borrowers' intention to waive the period of time that had elapsed after the statute of limitations had started to run. Contrary to the decision by the courts below, these statutes do not require a new

promise to pay the Mortgage debt in order to renew the statute of limitations. GOL 17-101 provides:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

Specifically addressing mortgages, GOL 17-105 provides several other ways to renew the statute of limitations, in addition to an acknowledgement or promise to pay under section 17-101. That statute provides, in relevant part:

> A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.

GOL 17-105(1).

Former Section 251-a of the Real Property Law [now GOL 17-105][3] was recommended by the Law Revision Commission "to provide rules governing the requirements and effect of transactions, other than a part payment or a stipulation in an action or proceeding, by which the time limited for an action to foreclose a mortgage of real property may be extended or a barred action revived." 1961 Leg.Doc. 65(F). In its 1961 Annual Report, the Law Revision Commission explained:

> The proposition that an "acknowledgment" revives a barred mortgage or tolls the statute of limitation applicable to an action to foreclose the mortgage leads to a result parallel to the rule under which an acknowledgment of a debt makes the time limited for action on *the* debt run from the date of the acknowledgment, whether the time had already expired or had merely started to run. The latter rule, however, has been generally explained on the ground that the acknowledgment implies a new promise to pay the debt, supported by the moral consideration of the previous obligation. Consistently with this view, it is held that the "acknowledgment" must be made in terms and in circumstances consistent with such a new promise. This rationale is clearly inapplicable to an acknowledgment of a mortgage lien: a mortgage is not a promise, but an executed transaction; the mortgage lien is an interest in land requiring for its creation a written instrument which is a conveyance within the real property recording statutes.

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[3] GOL 17-105 was enacted as part of the 1963 reconsolidation of various provisions of the law, including RPL 251-a, under the General Obligations Law which is construed as a continuation and re-enactment of those provisions. *See* GOL 1-201(1) & 19-101(7). Other than being re-codified as GOL 17-105, the statute was not otherwise amended or changed.

Report Leg. Doc. (1961) No. 65., p. 110. It is for this reason that in the context of a mortgage lien—a continuing obligation—GOL 17-105 provides additional means, aside from an acknowledgement or promise to pay, through which the mortgage foreclosure statute of limitations may be renewed or revived. One of these means, which is applicable here, is waiver.

In its 1961 Report, the Law Revision Commission also explained certain factors which should be controlling to determine whether a transaction is sufficient to renew or revive the mortgage foreclosure statute of limitations:

> In determining whether a transaction should be given effect by statute either to toll the statute applicable to a mortgage foreclosure or to revive a mortgage where the time limited for foreclosure has run, two factors should be controlling: first, whether the transaction manifested an intention to waive the statute or not to plead it, and second whether the transaction expressing such intent is sufficiently evidenced.
>
> An express waiver of the bar of the statute, or of the time that has expired, and a promise not to plead the statute or not to plead the time that has expired, clearly meet the first requirement. An intention to waive the bar of the statute or the time that has expired is also reasonably to be inferred from an express promise to pay the mortgage debt, made after the accrual of a right of action to foreclose the mortgage…

Report Leg. Doc. (1961) No. 65., p. 113.

Under the HAMP Agreement, Borrowers both expressly waived the statute of limitations and impliedly waived the period of time that had already run by their

express promise to pay the Mortgage debt. Under the Mortgage, Borrowers originally agreed as follows:

> I will pay to Lender on time principal and interest due under the Note and any prepayment, late charges and other amount due under the Note. I will also pay all amounts for Escrow Items under Section 3 of this Security Interest…No offset or claim which I might have now or in the future against Lender will relieve me from making payments due under the Note and this Security Instrument or keeping all of my other promises and agreements secured by this Security Instrument.

(R. 45.) In their HAMP Agreement, Borrowers again agreed to comply with this promise to pay provision of the Mortgage, including all "covenants, agreements, and requirements of the Loan Documents..." (R. 179.) Borrowers further agreed:

> That all terms and provisions of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents.

(R. 179.)

Consequently, under the terms of the HAMP Agreement, Borrowers expressly agreed to pay the Mortgage debt and also expressly waived the statute of limitations to foreclose the Mortgage when they agreed for a second time that no offset or claim which they "might have now or in the future against Lender will relieve [them] from making payments due under the Note and [] Security Instrument…" (R. 45.) *See e.g. Petra CRE CDO 2007-1, Ltd. v. 160 Jamaica*

Owners, LLC, 73 A.D.3d 883, 884 (2d Dept. 2010) ("In opposition, the appellants raised various affirmative defenses, including, *inter alia*, breach of contract and breach of the covenant of good faith and fair dealing, and asserted a counterclaim for damages. However, in the loan documents, the appellants validly waived all defenses, counterclaims, and setoffs. Accordingly, the Supreme Court properly granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the appellants, and dismissing their counterclaim (internal citations omitted).").

Moreover, and contrary to the Second Department's unsupported finding, these covenants Borrowers made in the HAMP Agreement were not "conditioned on the parties reaching a permanent modification agreement." (R. 315.) Under New York law, "[i]f a contract is complete, clear and unambiguous, it must be enforced according to its plain meaning." *Littleton Const. Ltd. v. Huber Const., Inc.*, 27 N.Y.3d 1081, 1083 (2016). "[T]he intent of the parties controls." *Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 157 (2015). "[T]he intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole." *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (2014). The HAMP

Agreement is clear and unambiguous and no extrinsic evidence was offered to refute its terms.

Under its terms, the only thing that was conditional in the HAMP Agreement was the possibility that the Mortgage Loan would be modified after Borrowers submitted documents "to permit verification of my income…to determine whether I qualify." (R. 177.) In contrast, Borrowers made an unconditional promise to pay the Mortgage debt by agreeing that, "any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents". (R. 178.) And Borrowers expressly acknowledged and agreed, "Lender will not be obligated or bound to make any modification of the loan documents". (R. 179.) These were the covenants sufficient to renew or revive the statute of limitations pursuant to GOL 17-101 and they were not conditional.

The Second Department's focus on whether the HAMP Agreement "contained nothing inconsistent with an intention on the part of the debtor to pay the debt (internal quotations and citations omitted)" was misguided. (R. 315.) As the Law Revision Commission explained, the rationale that an acknowledgment must be tantamount to a new promise to pay "is clearly inapplicable to an acknowledgment of a mortgage lien". Report Leg. Doc. (1961) No. 65., p. 110. Rather, with respect to a mortgage, the focus is on whether the transaction

manifested an intention to waive the period of time that has run under statute of limitations and thereby renew it, and whether that transaction is sufficiently evidenced. *Id*., p. 113. Here, the HAMP Agreement was comprehensive and clearly evidenced Borrowers' intention to waive the period of time that had run and renew the statute of limitations to foreclose the Mortgage through the express promise to pay the Mortgage debt, as the Law Revision Commission explained. *See* Report Leg. Doc. (1961) No. 65., p. 113 ("An intention to waive the bar of the statute or the time that has expired is also reasonably to be inferred from an express promise to pay the mortgage debt, made after the accrual of a right of action to foreclose the mortgage…").

As such, the terms of the HAMP Agreement were sufficient to renew the time limited to commence a foreclosure action pursuant to GOL 17-105(1). Measuring the six-year statute of limitations from its renewal under the HAMP Agreement on June 3, 2009 (R. 179), the action below was timely commenced on March 12, 2015 (R. 8) and the decision below should be reversed.

II. THE STATUTE OF LIMITATIONS WAS RENEWED BY THE SEVEN TRIAL PLAN PAYMENTS

Under GOL 17-107, also the statute of limitations began running anew on March 8, 2010, when Borrowers made their final trial plan payment under the HAMP Agreement. That statute provides, in relevant part:

> A payment on account of a mortgage indebtedness, or instalment thereof or interest thereon, which is effective to revive an action to recover such indebtedness, installment or interest or to extend the time limited for such action, is also effective, between persons described in subdivision two of this section, to make the time limited for commencement of an action to foreclose the mortgage run from the date of payment, unless the payment is accompanied by written disclaimer of intention to affect the time limited for foreclosure of the mortgage.

GOL 17-107(1). Accordingly, pursuant to the express terms of GOL 17-107, a part payment is ineffective to renew or revive the statute of limitations only if it "is accompanied by written disclaimer of intention to affect the time limited for foreclosure of the mortgage." *Id*. Evidencing that GOL 17-107 is an additional and not exclusive means to renew the mortgage foreclosure statute of limitations, GOL 17-105 expressly provides that it does not change the requirements of a part payment or the effect of a part payment on the statute of limitation. *See* GOL 17-105(5)(a).

This statute (formerly RPL 251-b) was also part of the 1963 reconsolidation of laws under the General Obligations Law[4] and in its 1961 Report, the Law Revision Commission explained the following:

[4] As with GOL 17-105, other than being re-codified, this statute was not otherwise amended or changed.

> A part payment upon a debt, whether of principal or interest, has long been regarded as an effective acknowledgment that will take a case out of the statute of limitations. It is a judge-made exception preserved by Section 59 of the New York Civil Practice Act, which asserts that nothing therein shall "alter the effect of a payment of principal or interest." The effect of a part payment is, in almost all jurisdictions, recognized to be an acknowledgment of the existence of a larger debt from which a promise to pay the balance can be implied so as to remove the bar of the statute. This doctrine has additional application in the case of a mortgage debt where it is "universally recognized" that a payment of interest or of part of the principal extends not only the debt but the lien upon the land given to secure it, so that an action may be brought to enforce the mortgage within the statutory period as measured from the date of the last payment...A part payment of principal or interest made by the mortgagor or his agent keeps the mortgage alive, or, if made after bar, revives it, so that the time within which to foreclose is extended. The effect is to toll the statute of limitations not only against the mortgagor himself, but as against his grantee and those taking under him. And this is true in New York whether the payment is made before or after bar, and, usually, whether before or after the mortgagor has disposed of his interest in the property.

Report Leg. Doc. (1961) No. 65., pp. 134-136. The Law Revision Commission acknowledged that "[i]n business practices involving routine payments, a requirement of a written waiver of the statute of limitation would be burdensome and unrealistic." *Id*., p. 115. Thus explained the Commission, a waiver of the statute of limitations may be reasonably implied by the part payment unless it is accompanied by a written disclaimer of intention to affect the time limited for

foreclosure of the mortgage. *Id*., pp. 113 and 115. Notably, the Commission observed that this is the law in "almost all jurisdictions". *Id*.

This Court has had occasion to address an express disclaimer like the one contemplated by GOL 17-107. In *Lew Morris*, the parties had a dispute concerning plaintiff's performance under a construction contract that also included a separate protracted litigation arising from the death of another at the construction site. After the wrongful death claim was resolved, the contractor, Lew Morris Demolition Co. filed a notice of claim against the municipal defendant and the parties entered into a stipulation under which Lew Morris made a $13,650 payment. The parties' stipulation provided:

> [S]aid amount is paid "not as a final payment or payment of any character under said contract, but as a partial settlement, pursuant to the above resolution of the Board of Education, of and on account of the aforesaid claim and without prejudice to the rights of either party with respect to the balance of the above numbered claim."

Lew Morris Demolition Co., 40 N.Y.2d at 519.

This Court determined that under the terms of the payment and stipulation in *Lew Morris*, the statute of limitations was not renewed because the payment was made with a disclaimer. Although this Court in *Lew Morris* was analyzing section 17-101 of the General Obligations Law since a mortgage was not at issue, the case

is instructive because it illustrates the requirements for a disclaimer to avoid the consequence of renewing the statute of limitations by a part payment.

The *Lew Morris* Court explained that the parties' stipulation expressly provided that the payment was not made "under said contract" and it also expressly reserved the parties' disputed rights to the contract in their claim because it was executed "without prejudice". *Id*. at 521. Thus, the Court found the Lew Morris claim was time-barred and not renewed by the part payment doctrine.

But the facts of this case are exactly opposite of *Lew Morris* because there is no disclaimer at all. Instead, and in contrast to *Lew Morris*, in the HAMP Agreement, Borrowers expressly agreed, "any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me". (R. 178.) With this express understanding, Borrowers proceeded with making the seven payments of $2,553.00 on account of their Mortgage debt, on April 30, 2009; May 30, 2009; July 2, 2009; August 1, 2009; September 19, 2009; October 27, 2009; and March 8, 2010. (R. 123; R. 180-193.) Notably, the HAMP Agreement required only the first 3 of those payments but notwithstanding that, Borrowers actually made 4 additional payments on account of and to reduce the Mortgage debt. Then, as lender agreed to do, Borrowers' seven payments were

accepted and applied against the Mortgage and not refunded. (R. 123.) These seven payments were not accompanied by a written disclaimer of intention to affect the time limited for foreclosure of the mortgage; not in the HAMP Agreement and not by some separate communication or notation.

These payments by Borrowers were also unquestionably made "on account of" their Mortgage debt because they were actually applied against it. In *Petito v. Piffath*, 85 N.Y.2d 1 (1994), the Court examined the impact of a borrower's payment to their lender under a settlement stipulation. There, the mortgagee, Petito sought to foreclose a $200,000.00 mortgage that had been assigned to him after the settlement of a prior foreclosure action. Petito's predecessor, Roslyn Savings Bank had sought to foreclose the same mortgage years prior. In that prior action, Roslyn agreed in a settlement stipulation with the borrower that it would accept a $197,455.57 payment and assign the mortgage to borrower's designee. *Id*. at 5. When Petito brought his foreclosure action years later and borrower raised the statute of limitations, Petito claimed the $197,455.57 payment renewed the statute of limitations. This Court determined the payment was for a whole new agreement, "in exchange for Roslyn's promise to terminate the foreclosure action and assign the mortgage to Petito's brother [his designee]." *Id*. at 8.

Unlike *Petito*, here the parties assumed no new obligations under the HAMP Agreement. Instead, Borrowers acknowledged their existing obligations under the Mortgage Loan and engaged in a process that might have modified their installment payment arrangement to pay the same Mortgage debt. Under the circumstances of this case where the Mortgage debt and Borrower's covenants to pay it were not transformed and the payments Borrowers made were actually applied to reduce that same debt, the statute of limitations is renewed under GOL 17-107.

Accordingly, these payments were an implied waiver by Borrowers of the statute of limitations to foreclose the Mortgage which were effective to extend the time limited to commence a foreclosure action under GOL 17-107. The action below was commenced on March 12, 2015, and is, therefore timely since it was brought within 6 years of when the statute of limitations began running anew on March 8, 2010. The Second Department's analysis should have stopped here. Instead, the Second Department improperly focused on the purpose of the payments and whether those payments evinced an intent to pay the remainder of the Mortgage debt. There was no evidence in the Record to support any other intent but the clear and unambiguous terms of the HAMP Agreement under which these payments were made against the Mortgage debt and without condition. The

Second Department, in essence, conflated the requirements of GOL 17-105 and 17-101 with GOL 17-107 in violation of the express legislative directives to the contrary contained in Sections 17-105 and 17-101, to wit, that those sections do not alter the effect of a part payment. Simply put, the intent behind the payment is not relevant to the section 17-107 inquiry unless there is a written disclaimer. And there was none.

III. THE ELECTION TO ACCELERATE CONTAINED IN THE 2008 FORECLOSURE COMPLAINT WAS REVOKED BY THE MOTION TO DISCONTINUE THAT ACTION

Finally, even if the statute of limitations was not renewed by the General Obligations Law, the Mortgage is still enforceable under the rule solidified by this Court's recent decision in *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, *reargument denied*, 37 N.Y.3d 926 (2021). *Engel* had not been issued at the time the decisions on appeal here were rendered. Instead, Supreme Court's decision relied on the Second Department's decision in *Engel*, which this Court later reversed. (R. 6.) The rule in *Engel* can be applied by this Court now because at the time of the decision on appeal the contrary rule of the Appellate Division departments had not yet been overruled and, thus prevailed:

> It is settled law…that a court applies the law as it exists at the time of appeal, not as it existed at the time of the original determination and

> new questions of law may be raised for the first time on appeal if they could not have been presented to the trial court.

Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19, 28-29 (1984); *see also People v. Favor*, 82 N.Y.2d 254, 261 (1993); *James v. Liberty Lines*, 97 A.D.2d 749, 749 (2d Dept. 1983) ("Absent a sharp break in the web of the law, all cases on direct appeal must be decided in accordance with any principles newly enunciated by the Court of Appeals.").

Here, the 2008 Foreclosure Action was voluntarily discontinued so that application of the *Engel* rule compels that the election to accelerate was nullified by revocation. This issue was raised before the Supreme Court. (R. 95-96.) The Supreme Court's decision was rendered a few months after the Second Department's decision in *Engel*. It would have been futile to ask the Second Department to reverse itself, but upon application of this Court's rule in *Engel*, the statute of limitations did not expire.

In *Engel*, this Court clarified the law in foreclosure cases concerning the impact of a voluntary discontinuance on the acceleration of a mortgage loan and announced a bright line rule that:

> [W]hen a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—*i.e.,* the withdrawal of the complaint—constitutes a revocation of that acceleration. In such a circumstance, the noteholder's withdrawal of

> its only demand for immediate payment of the full outstanding debt, made by the 'unequivocal overt act' of filing a foreclosure complaint, 'destroy[s] the effect' of the election.

Engel, 37 N.Y.3d at 31-32 *quoting Albertina Realty Co. v. Rosbro Realty Corp*., 258 N.Y. 472, 476 (1932).

Here, the 2008 Foreclosure Action was commenced on August 27, 2008 (R. 238-247; R. 258.) The statute of limitations was tolled for 109 days from June 17, 2010 to October 4, 2010 during Borrower, Ingrid Adrien's bankruptcy proceeding. (R. 83; R. 125; R. 296.) Taking into account that bankruptcy toll, the statute of limitations was to expire on December 14, 2014. Four days prior to expiry of the statute of limitations, however the motion to voluntarily discontinue the 2008 Foreclosure Action was made. (R. 258; R. 260.) As such, the election to accelerate was timely revoked and the acceleration nullified by that voluntary discontinuance.

Moreover, because Respondents included evidence of the voluntary discontinuance with their cross-motion papers before the Supreme Court (R. 258; R. 260), they failed to meet their prima facie burden of establishing that this action is time-barred. *See U.S. Bank Nat'l Ass'n v. Francis*, 197 A.D.3d 525, 527-528 (2d Dept. 2021) ("[T]he defendant's motion papers also included a particular affirmation that Deutsche Bank had submitted in support of its request for

a voluntary discontinuance and the order rendered thereon. The defendant's evidence that the debt was accelerated by commencement of the 2010 action, which was later discontinued voluntarily, failed to demonstrate, prima facie, that an action to foreclose the subject mortgage was time-barred (internal citations and quotations omitted).").

Accordingly, if the Court determines that the General Obligations Law did not renew the statute of limitations, then this Court should apply *Engel* to the facts of this case and reverse the portion of the Second Department's decision affirming the grant of Respondents' cross-motion and dismissal of Fannie Mae's complaint.

CONCLUSION

For the reasons set forth above, the Second Department's November 12, 2020 decision and order should be reversed.

Dated: New York, New York
January 12, 2022

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using [name of word processing system].

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Dated: New York, New York
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Compendium of Authorities
Cited in Appellant's Brief

Legislative Document (1961) No. 65

STATE OF NEW YORK

REPORT

OF THE

LAW REVISION COMMISSION

FOR 1961

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Executive Secretary

LAURA T. MULVANEY
Director of Research

[F]

Acts, Recommendation and Study relating to Transactions Affecting the Time Limited for An Action to Foreclose a Mortgage of Real Property

SUBMITTED WITH

Senate Introductory No. 1126, Printed Nos. 1128, 1535
Assembly Introductory No. 1633, Printed No. 1635
Senate Introductory No. 1124, Printed No. 1126
Assembly Introductory No. 1634, Printed No. 1636

Senate Introductory No. 1126, Printed Nos. 1128, 1535

Assembly Introductory No. 1633, Printed No. 1635

AN ACT

To amend the real property law, in relation to promises and waivers affecting the time limited for action to foreclose a mortgage

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The real property law is hereby amended by inserting therein a new section, to be section two hundred fifty-one-a, to read as follows:

§ 251-a. Promises and waivers affecting the time limited for action to foreclose a mortgage. 1. A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.

2. (a) A statement by a grantee of real property or assignee of a lease of real property, effective under section one thousand eighty-three-c of the civil practice act as an assumption of or agreement to pay an indebtedness or other sum secured by a mortgage of such property or lease has also, to the extent of the amount specified therein, the same effect as provided in this section with respect to a waiver or promise described in subdivision one, unless it contains language disclaiming an intention to affect the statute of limitation.

(b) A recital, in an instrument in which real property is conveyed or a lease is assigned, that the conveyance or assignment is made subject to a mortgage, or provision to that effect in a contract for purchase of real property or purchase of a lease, or an agreement or instrument by which another encumbrance or interest is subordinated to the lien of a mortgage, does not have the effect provided in this section with respect to a waiver or promise described in subdivision one.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

3. A waiver or promise made as provided in this section is effective

(a) against (i) the person who made it, to the extent of any interest held by him at the date thereof and (ii) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the waiver or promise, to the extent of the interest so acquired; and

(b) in favor of (i) the mortgagee or his assignee, (ii) any other person to whom or for whose benefit it is expressed to be made, and (iii) any person who, after the making of the waiver or promise, succeeds or is subrogated to the interest of either of them in the mortgage or otherwise acquires an interest in the enforcement of the mortgage.

4. Except as provided in subdivision five, no acknowledgment, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose a mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

5. This section does not change the requirements, or the effect with respect to the time limited for commencement of an action, of

(a) a payment or part payment of the principal or interest secured by the mortgage, or

(b) a stipulation made in an action or proceeding.

§ 2. This act shall take effect September first, nineteen hundred sixty-one and shall apply to waivers, promises, agreements, recitals and acknowledgments made on or after that date.

NOTE.—This is an amendment recommended by the Law Revision Commission. See Leg. Doc. (1961) No. 65 (F). Its purpose is to provide rules governing the requirements and effect of transactions, other than a part payment or a stipulation in an action or proceeding, by which the time limited for an action to foreclose a mortgage of real property may be extended or a barred action revived.

Senate Introductory No. 1124, Printed No. 1126

Assembly Introductory No. 1634, Printed No. 1636

AN ACT

To amend the real property law, in relation to effect of part payment on time limited for foreclosure of a mortgage

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The real property law is hereby amended by inserting therein a new section, to be section two hundred fifty-one-b, to read as follows:

§ 251-b. Effect of part payment on time limited for foreclosure of a mortgage. 1. A payment on account of a mortgage indebtedness, or instalment thereof or interest thereon, which is effective to revive an action to recover such indebtedness, instalment or interest or to extend the time limited for such action, is also effective, between persons described in subdivision two of this section, to make the time limited for commencement of an action to foreclose the mortgage run from the date of payment, unless the payment is accompanied by written disclaimer of intention to affect the time limited for foreclosure of the mortgage.

2. A payment on account of the indebtedness secured by a mortgage of real property or a mortgage of a lease of real property, or on account of an instalment thereof or interest thereon, is effective as provided in this section:

(a) as against (i) the person who made it, to the extent of any interest held by him at the date thereof, and (ii) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the payment, to the extent of the interest so acquired; and

(b) in favor of (i) the mortgagee or his assignee, and (ii) any person who, after the date of the payment, succeeds or is subrogated to the interest of either of them in the mortgage or otherwise acquires an interest in the enforcement of the mortgage.

If the payment is made before expiration of the time limited for the commencement of the action, it is also effective against any subsequent purchaser of the interest of the person who made the payment, to the extent of the interest that the person who made the payment had at the time thereof.

3. No payment described in subdivision one of this section has any greater effect, with respect to the time limited for foreclosure of the mortgage, than that provided in this section.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

§ 2. This act shall take effect September first, nineteen hundred sixty-one and shall apply to payments made on or after that date.

NOTE.—This is an amendment recommended by the Law Revision Commission. See Leg. Doc. (1961) No. 65 (F). Its purpose is to clarify and restrict the rule under which a payment on account of a mortgage debt which is effective to revive the debt or to extend the time limited for action on the debt, is also effective to make the time limited for action to foreclose the mortgage run from the date of the payment.

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Transactions Affecting the Time Limited for An Action to Foreclose a Mortgage of Real Property

There is general recognition in the decisional law of New York, as in the decisions of other states and in legal literature, that the time limited for an action to foreclose a mortgage is extended by an "acknowledgment." In New York and most states a barred mortgage may also be revived by an "acknowledgment."

A part payment of the mortgage debt is ordinarily treated as an "implied acknowledgment" which starts the statute of limitation on the action to foreclose the mortgage running again from the date of the payment. See *Wooley* v. *Hoffman,* 99 N.Y.S.2d 293 (Sup. Ct. Nassau Co. 1950). What other transactions constitute acknowledgments for this purpose is unclear in New York. There is also uncertainty as to the requirements of an effective acknowledgment and confusion as to the legal theory on which the various transactions that operate as acknowledgments affect the statute of limitation. Finally, the law is unsettled as to the effect of the transaction against other persons who have or acquire an interest in the real property.

Some of the problems concerning the requirements and operation of transactions affecting the time limited for foreclosure of a mortgage have been raised in litigation in recent years. See *Shohfi* v. *Shohfi,* 303 N. Y. 370, 103 N. E. 339 (1952), holding that, in the circumstances, the acceptance of a conveyance "subject to" a mortgage was not an acknowledgment that revived the action to foreclose the mortgage; *Tortora* v. *Malve Realty Co.,* 96 N.Y.S.2d 388 (Sup. Ct. N. Y. Co. 1950) *aff'd without opinion,* 283 App. Div. 769, 128 N.Y.S.2d 569 (1st Dep't 1954), holding that a recital in a conveyance, stating that the conveyance was subject to a mortgage, presented a triable issue of fact as to whether the action to foreclose the mortgage was barred so that the complaint in the action to foreclose would not be dismissed on motion; *Mintz* v. *Greenberg,* 5 App. Div. 2d 744, 170 N.Y.S.2d 82 (2d Dep't 1958), *mem., affirmed without opinion,* 5 N.Y.2d 909, 156 N. E. 716 (1959), rejecting the contention that a conveyance "subject to all tax liens, unpaid assessments and incumbrances of record" was an acknowledgment on the part of the grantor as well as by the grantee; *Carlos Land Company* v. *Root,* 282 App. Div. 349, 122 N.Y.S.2d 650 (4th Dep't 1953), holding that the recognition of a mortgage in a fire insurance policy was insufficient as an acknowledgment which would revive a barred debt because it did not meet the requirements of section 59 of the Civil Practice Act, requiring a signed writing for an acknowledgment of a debt whereby to take the case out of the statute of limitation; *Schwitzer* v. *Sier,* 73 N.Y.S.2d 569 (Sup. Ct. N. Y. Co. 1947), *aff'd* (*mem.*) 273

App. Div. 944, 78 N.Y.S.2d 564 (1st Dep't 1948), holding that a part payment by the mortgagor was not effective, as against a grantee to whom he had previously conveyed the premises, to revive a mortgage barred at the time of the payment.

The proposition that an "acknowledgment" revives a barred mortgage or tolls the statute of limitation applicable to an action to foreclose the mortgage leads to a result parallel to the rule under which an acknowledgment of a debt makes the time limited for action on the debt run from the date of the acknowledgment, whether the time had already expired or had merely started to run. The latter rule, however, has been generally explained on the ground that the acknowledgment implies a new promise to pay the debt, supported by the moral consideration of the previous obligation. Consistently with this view, it is held that the "acknowledgment" must be made in terms and in circumstances consistent with such a new promise. This rationale is clearly inapplicable to an acknowledgment of a mortgage lien: a mortgage is not a promise, but an executed transaction; the mortgage lien is an interest in land requiring for its creation a written instrument which is a conveyance within the real property recording statutes.

Under section 59 of the Civil Practice Act, an acknowledgment or a new promise to pay a debt must be in writing, signed by the promisor. The question whether an acknowledgment of a mortgage is within this section, as well as the question whether a written acknowledgment signed by the grantee would have been effective, was expressly left undecided in *Shohfi* v. *Shohfi, supra.* In *Winter* v. *Kram,* 3 App. Div. 2d 175, 159 N.Y.S.2d 417 (2d Dep't 1957) the court referred to section 59 as controlling "the only manner in which a period of limitation can be extended" but placed its decision on the fact that acceptance of a conveyance reciting that it was "subject to existing mortgages," without an assumption of the mortgages, did not evidence an intent by either the grantor or the grantee to admit the validity of the mortgage for the benefit of the mortgagee, but merely barred the grantee from urging that the mortgage was an incumbrance rendering the title unmarketable.

Section 59 of the Civil Practice Act states that it does not alter the effect of part payment, but the effect of a part payment, and the circumstances in which it is effective, are not defined by statute. The decisional law requires that in order to affect the statute governing an action on the debt, a part payment must be one from which a "new promise" can be implied.

In cases involving actions for money, decisions in New York have given effect to a written promise to waive or not to plead the statute of limitation, and such promises are enforced in most states either by treating them as acknowledgments or on principles of estoppel. (See Recommendation of the Law Revision Commission relating to Agreements Extending the Statute of Limitation; Leg. Doc. (1961) No. 65 (E).) There is nothing in the reasoning of the cases that would preclude application of this rule to a promise

not to plead the statute applicable to an action to foreclose a mortgage of real property. However, no New York cases have been found either involving an express waiver of the statute or a promise not to plead it or treating such a promise, or the factual implication of such a promise, as the essential basis of an "acknowledgment" sufficient to revive a barred mortgage or to toll the statute on an action to foreclose a mortgage. Instead, a part payment sufficient to revive the debt or toll the statute applicable to the action on the debt has been treated as affecting the statute governing foreclosure of the mortgage merely because of its effect on the statute governing the action on the debt. With respect to transactions not involving a part payment by a person obligated on the mortgage, the cases appear to consider merely whether the transaction amounts to an admission of the existence and validity of the mortgage or estops a party to question its validity.

A leading case involved a formalized part payment of "One dollar," recited in an instrument made and acknowledged by heirs of the mortgagor who were not obligated for the debt, where the transaction was clearly intended to accomplish a binding extension of the statute in order to protect the property from imminent foreclosure. (*Murdock* v. *Waterman,* 145 N. Y. 55, 39 N. E. 829 (1895).) In holding that the transaction did not affect the running of the statute as to a part of the mortgaged property owned by another person, the Court recognized that the payment was "an unequivocal acknowledgment . . . of the mortgage" by the parties to the instrument, and operated to continue the lien of the mortgage for twenty years as against the property then owned by them.

In *Shohfi* v. *Shohfi, supra,* it was argued (and the Appellate Division had held) that a conveyance reciting that it was "subject to" the mortgage amounted to an "acknowledgment" by the grantee which revived the lien of a mortgage barred by the statute of limitation. In holding that the recital was not such an acknowledgment, in the circumstances, the decision seems to recognize that such a recital *may* be effective as an acknowledgment, and also suggests that the circumstances of a conveyance may estop the grantee to assert, against the mortgagee, that the action to foreclose a mortgage is barred. In his opinion for the majority, Judge Fuld said:

> The principle that acceptance of a title subject to a mortgage can interrupt or suspend the Statute of Limitations has never been declared by this court to be a hard and fast rule. On the contrary, the principle applies, as we have said, only when "the circumstances of the purchase amount to an admission of the validity and lien of the outstanding incumbrance" (*Purdy* v. *Coar,* 109 N. Y. 448, 453; *Morrill Realty Corp.* v. *Rayon Holding Corp.,* 254 N. Y. 268, 275).
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> . . .

Decisions in other states have treated a conveyance "subject to" a mortgage as effective, either as a formal acknowledgment or on principles of estoppel, both to revive a barred mortgage and to

toll the statute where it has not yet run. In some jurisdictions the recital operates as an acknowledgment by both parties. In one jurisdiction the transaction has been treated as analogous to an assumption of the mortgage debt, creating a new cause of action in favor of the holder of the mortgage, and operating, therefore, to set a new date for the running of the statute. *Schmucker* v. *Sibert,* 18 Kans. 104, 112 (1877); see also Osborne, Handbook of the Law of Mortgages (1951) § 252, p. 700. In another jurisdiction, the rule under which the acceptance of a conveyance reciting that it is subject to a mortgage, without an assumption of the debt, is effective to revive a barred mortgage or toll the statute is based on estoppel and depends on whether the mortgage debt was deducted from the purchase price. *Fontana Land Co.* v. *Laughlin,* 199 Calif. 625, 250 Pac. 669 (1926).

Serious impairment of titles to land and hindrance of real property financing would result, in New York, from adoption of certain of the rules apparently in force in some states. Indeed, the mere absence of a settled rule may have adverse effect on titles in some cases and seems likely in any case to create difficulties in real estate transactions. In view of the diversity of rules in other states on particular aspects of the problem and the variety of legal theories advanced to support the effectiveness of various transactions as an "acknowledgment," it is doubtful whether a satisfactory clarification of this area of the law can be accomplished by decisional development without a prolonged period of uncertainty or without repeated litigation.

The Commission believes that legislation is needed to provide a coherent set of rules which will give effect, within limits clearly defined, to transactions intended to toll the statute of limitation or traditionally and reasonably relied upon in ordinary cases as being so intended, without permitting indefinite extensions which defeat the policy of the statute of limitation and without requiring litigation of difficult questions of fact or impairing the security of titles and of real property financing.

The Commission believes (1) that the doctrine that the statute of limitation is affected by a recital that a conveyance is subject to a mortgage should be rejected, and (2) that an assumption of the mortgage by the grantee should be treated like an acknowledgment of the debt made by the grantee to the mortgagee. Taking subject to a mortgage involves no acknowledgment of indebtedness by the grantee and no promise for the benefit of the mortgagee, but is a mere recognition of the lien, whatever its status at that time may be. An assumption agreement, on the other hand, creates a new obligation to pay the mortgage debt, enforceable by the mortgagee.

In rejecting the doctrine with respect to a recital that a conveyance is subject to a mortgage, the statute should make it clear, as well, that an agreement to take subject to the mortgage, in the

conveyance or contract or in a subordination agreement, is also inoperative to affect the statute of limitation.

In determining whether a transaction should be given effect by statute either to toll the statute applicable to a mortgage foreclosure or to revive a mortgage where the time limited for foreclosure has run, two factors should be controlling: first, whether the transaction manifested an intention to waive the statute or not to plead it, and second whether the transaction expressing such intent is sufficiently evidenced.

An express waiver of the bar of the statute, or of the time that has expired, and a promise not to plead the statute or not to plead the time that has expired, clearly meet the first requirement. An intention to waive the bar of the statute or the time that has expired is also reasonably to be inferred from an express promise to pay the mortgage debt, made after the accrual of a right of action to foreclose the mortgage. Such an intention may similarly be inferred from a formal assumption of the mortgage debt by a grantee of the mortgaged premises, unless such intention is expressly disclaimed. In the light of the decisional law a waiver of the statute applicable to the action to foreclose may also be reasonably implied from a part payment which revives the action upon the indebtedness or tolls the statute upon that action. Since these transactions differ with respect to the requirement that the intention to affect the statute of limitation be sufficiently evidenced, and also with respect to the effect they should be given against subsequent purchasers of the mortgaged premises, the amendments proposed by the Commission are set forth in two separate sections, numbered as sections 251-a and 251-b of the Real Property Law.

The new section 251-a of the Real Property Law proposed by the Commission applies to a waiver of the bar of the statute, or of the time that has expired, to a promise not to plead the statute, or not to plead the time that has expired, to a promise to pay the mortgage debt, and to an assumption of the mortgage debt by a grantee. Under the proposed new section 251-a, any such waiver or promise made either with or without consideration by the express terms of a writing signed by the party to be charged would be effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the promise or waiver. A statement of assumption of the mortgage debt by a grantee of the mortgaged premises which is effective as an assumption under Civil Practice Act, section 1083-c would have the same effect, to the extent of the amount specified therein, unless the assumption statement disclaims an intention to affect the statute of limitation.

The Commission believes that a mortgagor should not be permitted, by any transaction, to extend the time for foreclosure of a mortgage upon premises he has previously conveyed, or so as to impair any interest which he has previously created. See *Schwitzer* v. *Sier,* 73 N.Y.S.2d 569 (Sup. Ct., N. Y. Co. 1947),

aff'd mem., 273 App. Div. 944, 78 N.Y.S.2d 564 (1st Dep't 1948), holding that a payment made by the mortgagor after he had conveyed the premises was ineffective to revive against his previous grantee a mortgage barred at the time of the payment; but see *Murdock* v. *Waterman*, 145 N. Y. 55, 67, 39 N. E. 829, 832 (1895), holding that a part payment by heirs of the mortgagor was inoperative against owners of another part of the mortgaged property, but stating that a part payment made before bar by the mortgagor himself, after conveying part of the premises, would be effective as against the grantee of the premises so previously conveyed, because of their privity of estate and the mortgagor's personal liability. The new section 251-a proposed by the Commission limits the effect of the waiver or promise to the interest held by the person who executed it at the time of the waiver or promise.

The new section 251-a also limits the effect of the waiver or promise against subsequent grantees, making it effective only against persons who take without giving value, or with actual notice. If the essential element of a transaction reviving a barred mortgage or tolling the statute of limitation on an action to foreclose the mortgage is a waiver or a promise not to plead the statute, the result, logically, is a personal disability of the promisor to plead the statute in derogation of his waiver or promise. A rule under which a written agreement reviving a barred mortgage or extending the time limited for action to foreclose a mortgage was made to run with the land so as to bind subsequent purchasers would require that the agreement be brought within the recording system so that it would be discoverable by ordinary search.

Even though the promise or waiver is a personal transaction, it should be binding as well, under general principles of equity, upon persons who subsequently acquire the interest of the person who made it, if they take without giving value or with actual notice. Subsequent purchasers of the real property for value and without notice should not be affected, however, and to prevent clouding of titles, subsequent purchasers for value should be relieved of any presumed notice or duty to inquire based either on knowledge or notice of the mortgage. (Compare *Heyer* v. *Pruyn*, 7 Paige (Ch.) 465 (1839); *Harrington* v. *Slade*, 22 Barb. 161 (1856), both involving presumption of payment, in which acknowledgments made by a previous owner of the land were held effective to rebut the presumption; *Wooley* v. *Hoffman*, *supra*, holding a part payment effective as an acknowledgment against a subsequent grantee.

The proposed new section 251-a provides that it does not change the requirements of a part payment or the effect of a part payment on the statute of limitation. The separate section 251-b proposed by the Commission applies to part payment and differs from the provisions with respect to promises and waivers set forth in the proposed new section 251-a in two respects.

Although the effect of a part payment of the mortgage debt to revive the action to recover the indebtedness or to extend the time

limited for such action is not declared by statute, the doctrine under which the payment has this effect and the rules determining whether a particular payment is so effective are stated in decisional law. The further rule that a payment effective to revive the action on the indebtedness or extend the time limited for that action has like effect with respect to the action to foreclose the mortgage is also recognized in the decisional law of New York. In business practices involving routine payments, a requirement of a written waiver of the statute of limitation would be burdensome and unrealistic. The new section 251-b of the Real Property Law proposed by the Commission therefore provides that a payment on account of a mortgage indebtedness, or instalments thereof or interest thereon, which is effective to revive an action to recover such indebtedness, instalment or interest, or to extend the time limited for such action, is also effective, between persons described in the section, to make the time limited for commencement of an action to foreclose the mortgage run from the time of the payment, unless the payment is accompanied by a written disclaimer of intention to affect the time limited for foreclosure of the mortgage.

The proposed new section 251-b also states that the payment has this effect only with respect to the interest which the person who made the payment holds at the date of the payment, and states that the payment is effective against any person subsequently acquiring such interest from the person who made the payment, without giving value or with actual notice of the making of the payment. As to these two matters, the proposed new section 251-b is similar to the provisions of the proposed new section 251-a with respect to an express waiver of the statute of limitation. In the case of a part payment made before the mortgage has actually become barred, however, the proposed new section 251-b provides further that the part payment is effective against any subsequent purchaser, to the extent of the interest that the person who made the payment had at the time thereof. Inquiry concerning the state of the mortgage debt, which would disclose the fact of the part payment, is normal and prudent upon purchase of property appearing from the record to be subject to a mortgage. The purchaser is thus in a position to learn whether an extension has occurred by reason of a part payment. A rule permitting a purchaser to take free of the extension resulting from part payment would defeat the mortgagee's justifiable expectations where payments are made routinely before expiration of the time allowed for action.

The Commission therefore recommends the enactment of the following new sections 251-a and 251-b of the Real Property Law:

> *§ 251-a. Promises and waivers affecting the time limited for action to foreclose a mortgage. 1. A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired,*

or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified.

2. (a) A statement by a grantee of real property or assignee of a lease of real property, effective under section one thousand eighty-three-c of the civil practice act as an assumption of or agreement to pay an indebtedness or other sum secured by a mortgage of such property or lease has also, to the extent of the amount specified therein, the same effect as provided in this section with respect to a waiver or promise described in subdivision one, unless it contains language disclaiming an intention to affect the statute of limitation.

(b) A recital, in an instrument in which real property is conveyed or a lease is assigned that the conveyance or assignment is made subject to a mortgage, or provision to that effect in a contract for purchase of real property or purchase of a lease, or an agreement or instrument by which another encumbrance or interest is subordinated to the lien of a mortgage, does not have the effect provided in this section with respect to a waiver or promise described in subdivision one.

3. A waiver or promise made as provided in this section is effective

(a) against (i) the person who made it, to the extent of any interest held by him at the date thereof and (ii) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the waiver or promise, to the extent of the interest so acquired; and

(b) in favor of (i) the mortgagee or his assignee, (ii) any other person to whom or for whose benefit it is expressed to be made, and (iii) any person who, after the making of the waiver or promise, succeeds or is subrogated to the interest of either of them in the mortgage or otherwise acquires an interest in the enforcement of the mortgage.

4. Except as provided in subdivision five, no acknowledgment, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose a mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

5. This section does not change the requirements, or the effect with respect to the time limited for commencement of an action, of

(a) a payment or part payment of the principal or interest secured by the mortgage, or

(b) a stipulation made in an action or proceeding.

§ 251-b. Effect of part payment on time limited for foreclosure of a mortgage. 1. A payment on account of a mortgage indebtedness, or instalment thereof or interest thereon, which is effective to revive an action to recover such indebtedness, instalment or interest or to extend the time limited for such action, is also effective, between persons described in subdivision two of this section, to make the time limited for commencement of an action to foreclose the mortgage run from the date of payment, unless the payment is accompanied by written disclaimer of intention to affect the time limited for foreclosure of the mortgage.

2. A payment on account of the indebtedness secured by a mortgage of real property or a mortgage of a lease of real property, or on account of an instalment thereof or interest thereon, is effective as provided in this section:

(a) as against (i) the person who made it, to the extent of any interest held by him at the date thereof, and (ii) any person subsequently acquiring from him any such interest, without giving value or with actual notice of the making of the payment, to the extent of the interest so acquired; and

(b) in favor of (i) the mortgagee or his assignee, and (ii) any person who, after the date of the payment, succeeds or is subrogated to the interest of either of them in the mortgage or otherwise acquires an interest in the enforcement of the mortgage.

If the payment is made before expiration of the time limited for the commencement of the action, it is also effective against any subsequent purchaser of the interest of the person who made the payment, to the extent of the interest that the person who made the payment had at the time thereof.

3. No payment described in subdivision one of this section has any greater effect, with respect to the time limited for foreclosure of the mortgage, than that provided in this section.

Dated, *December* 22, 1960.

BY THE LAW REVISION COMMISSION:

WALTER C. O'CONNELL,
Executive Secretary;

LAURA T. MULVANEY,
Director of Research.

TABLE OF CONTENTS

TRANSACTIONS AFFECTING THE RUNNING OF THE STATUTE OF LIMITATIONS APPLICABLE TO AN ACTION TO FORECLOSE A MORTGAGE OF REAL PROPERTY*

I. Introduction

A. Historical Basis of Limiting Statutes and the Tolling of Them

At common law, a right of action once existing never died through the flight of time.[1] But the result of this untrammeled power to sue was that debtors were harrassed by fraudulent claims pressed when memories had dimmed and witnesses were no longer at hand, and that courts were burdened with vexatious litigation.[2] There was also an undercurrent of sympathy for the debtor.[3] With the enactment of the Statute of James, in 1623,[4] limits were placed upon the length of time that was allowed to elapse before suit must be brought on a cause of action, and it no longer behooved individuals to sleep upon their rights.[5] But this ameliatory legislation proved less useful when transformed into a shield for "shifty debtors"[6] a device whereby to avoid their just obligations. To circumvent this a judge-made exception grew up that made a right enforceable despite the passage of time.[7] This was achieved through legal reasoning which said that the necessity to bring suit within a certain period rested on the presumption that if no attempt had been made to enforce the demand within that time it must be because the debt was paid, and if the contrary could be shown through words or acts of the debtor himself, the presumption was rebutted and recovery

* This study was made at the direction of the Law Revision Commission by Mrs. Frances T. Freeman Jalet, of the New York Bar, a member of the legal staff of the Commission.

[1] 1 Wood, Limitation of Actions, (4th ed. 1916) § 1, at p. 4; § 2, pp. 4–5.

[2] Judge Learned Hand rejects this as a justifiable basis for a limiting statute: [I]t cannot be that statutes of limitation are in any degree for the purpose of relieving courts of the trial of issues which have become hard to decide by the loss of evidence. Courts are maintained to settle disputes, however the parties may embroil themselves; it would be a strange doctrine which forbade people to deal with their affairs as they wish, lest the judges should be unduly vexed. United States v. Curtiss Aeroplane Co., 147 F.2d 639, 642 (2d Cir. 1945).

[3] "Long dormant claims have often more of cruelty than of justice in them." Best, C. J., in A'Court v. Cross, [1825] 3 Bing. 329, at pp. 332–333.

[4] The Limitation Act, 1623 (21 James I, ch. 16). This Act and almost all other English statutes of limitation are now replaced by the Limitations Act of 1939 (2 & 3 Geo. VI, ch. 21) passed upon the recommendation of the Law Revision Committee appointed by the British Parliament in 1934.

[5] 1 Wood, supra, note 1, § 4, at p. 8; § 5, p. 11.

[6] Lord Sumner in his remarkable and incisive opinion in Spencer v. Hemmerde (1922) 2 A. C. 507, 534 says, "The decisions on the exact meaning and effect of the precise words employed by generations of shifty debtors are, it is agreed on all hands, irreconcilable."

[7] Wood says of this rule, "[T]here is no instance of judicial legislation that is better sustained by both reason and justice." 1 Wood, supra, note 1, § 64, p. 344.

could be had.[8] Upon this theory, a new promise to pay the debt, or an acknowledgment of it, either by words, spoken or written, or through the act of payment, was taken as proof of its continued life and the bar to suit was lifted.

The creditor as well as the debtor now being protected, yet another abuse arose which necessitated legislative action. The presumption of payment was rebutted too easily. Any reference to the existence of the debt was enough to raise a promise to pay it, so that a denial of a debt became an acknowledgment of it; and a refusal to pay might supply the foundation for an implied promise to pay.[9] Spoken words were admissible as proof of an acknowledgment and the opportunity was again rife for the perpetration of frauds upon debtors.[10] To meet this situation, Lord Tenterden's Act[11] was passed in 1828. This was in the form of an amendment to the Statute of Frauds[12] which required that acknowledgments and promises to pay, in the case of "any simple contract," must be in writing and signed by the party to be charged. Lord Tenterden's Act, as does New York's version of it (section 59 of the Civil Practice Act), spoke in the language of evidence.

B. The New York Statute of Limitations

Article 2 of the New York Civil Practice Act is entitled "Limitations of Time." Section 10 of that Act states that the provisions of Article 2 constitute the only rules of limitation applicable to a civil action or special proceeding except in a case where a different limitation is specially prescribed by law "or a shorter limitation is prescribed by the written contract of the parties."

Section 59 of the Civil Practice Act, which is a part of Article 2, provides that:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the provisions of this article relating to the limitations of time within which an action must be brought other than for the recovery of real property. But this section does not alter the effect of a payment of principal or interest.

Notwithstanding these sections, the New York law, like that of other states, recognizes a number of other transactions besides the

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[8] Thus the courts at first reasoned, although today the theory is that the effectiveness of an acknowledgment rests upon the theory of an implied promise to pay and not upon the rebuttal of a presumption. See discussion of this infra, p. 11. And see Wood, supra, note 1, § 65, p. 347 and § 68, p. 357.

[9] Lord Ellenborough in Bryan v. Horseman, [1804] 4 East 599 first cast doubt upon the propriety of this lax doctrine. Two years later in A'Court v. Cross, supra, note 3, Best, C. J. refused to follow it and, upon the theory of implied promise, ruled that defendant's acknowledgment of the debt coupled with an express refusal to pay it could not take the case out of the statute of limitations, observing that, "The mere acknowledgment of a debt is not a promise to pay it" and "if there be anything said at the time of the acknowledgement to repel the inference of a promise," the statutory bar is not removed.

[10] 1 Wood, supra, note 1, § 82, p. 460.

[11] 9 Geo. IV., c. 14 (1828).

[12] It is entitled Statute of Frauds (Am.) Act, 1828.

"new or continuing contract" mentioned in section 59, by reason of which the owner of a cause of action may obtain enforcement of that action after the expiration of the periods limited by Article 2 of the Civil Practice Act.

Section 59 does not itself state how the acknowledgment or promise to which it refers operates to take a case out of the operation of the various provisions placing limitations of time upon the bringing of an action. That a signed writing is required is clear, but section 59 makes no mention of the kinds of actions to which it applies, nor is there any elucidation of the nature of the "new or continuing contract" referred to and the extent to which the new contract is to be treated as such; or the requirements of an acknowledgment or a new promise that will be effective to toll the statute. These questions must be determined by examining the decisions. One can look to decisional law also for an instance of the enlarged operation of section 59 as a statute of frauds provision through the extension of its requirements to an important kind of transaction which affects the bar of the statute of limitations—a waiver, or a promise not to plead.[13] The applicability of the

[13] A study made for the Commission in 1946 and published in Legislative Document (1947) No. 65 (H), 1947 Report, Recommendations and Studies of the Law Revision Commission 135, related to Agreements Extending the Statute of Limitations and reviewed the decisions with respect to extension of limitations by reason of a promise not to plead the statute, relied on by the obligee, or by reason of a contract to waive or not to plead the statute or to extend the period. A later study made for the Commission in 1951, published as Legislative Document (1952) No. 65 (H), 1952 Report, Recommendations and Studies of the Law Revision Commission 189, dealt with acknowledgments and part payments as well as promises to extend the statute or not to plead it. The 1952 study analyzed the effect of part payment, acknowledgment and a new promise on the running of the statutes of limitation, including the theoretical basis on which acknowledgments and part payments are given effect, the kinds of "contracts" within the rule, the requirements for an effective acknowledgment and the requirements for an effective part payment.

It was held in Shapley v. Abbott, 42 N. Y. 443 (1870) that the defendant's oral promise not to plead the statute of limitations, if his note held by plaintiff "outlawed" was unenforceable, notwithstanding that defendant, in reliance on the promise, had postponed suit and allowed the limiting period to expire. The opinion of Chief Judge Earl treated the transaction in which the promise was made as an acknowledgment within the requirement of Code of Procedure, section 110, which is now section 59 of the Civil Practice Act. The ruling that a promise not to plead the statute falls within the statutory requirement of a signed writing, applicable to acknowledgments, has been criticized. (See Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 (1896) and Albachten v. Bradley, 212 Minn. 359, 3 N. W. 2d 783 (1942).) By the weight of authority an oral promise not to plead the statute, relied upon by the obligee, is enforceable upon some theory including that of estoppel, Matter of Gould, 257 App. Div. 109, 12 N.Y.S.2d 664 (4th Dep't 1939, rev'd on other grounds, 282 N. Y. 132, 25 N. E. 2d 877 (1940).)

An unqualified written waiver of "any defense by way of the Statute of Limitation," made by corporate directors in return for plaintiff's promise to withhold action until the receivership of the corporation was closed, was enforced in Watertown National Bank v. Bagley, 134 App. Div. 831, 119 N. Y. Supp. 593 (4th Dep't 1909). And this was the holding despite the fact that the six months period for the bringing of suit, set by special enactment, had passed. Accord: Gorowitz v. Blumenstein, 184 Misc. 111, 53 N.Y.S.2d 179 (Sup. Ct. N. Y. Co. 1944) giving effect to a provision in a written contract expressly waiving the statute of limitations.

requirement of a signed writing to some other kinds of transactions appears to be unsettled.

Section 59 of the Civil Practice Act is the New York enactment of Lord Tenterden's Act.[14] This English statute, in the form of an amendment to the Statute of Frauds,[15] provided:

> . . . Be it therefore enacted, . . . that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only *shall be deemed sufficient evidence* of a new or continuing contract whereby to take any case out of the operation of the said enactments . . . (Italics supplied)

For the underscored phrase, "shall be deemed sufficient evidence," the New York Act substitutes "is the only competent evidence," which retains the evidentiary aspect of the statute.[16] This language relating to "evidence" is explainable by the nature of the decisional rule in existence at the time of Lord Tenterden's Act that by the time the statutory period expired, the obligation was presumed to have been paid, which presumption would be rebutted by words or acts of the debtor indicating that such was not the case.[17]

The New York statute was first enacted in 1848 as section 110 of the Code of Procedure, and became section 395 of the Code of Civil Procedure in 1876. Prior to its enactment there was a considerable body of decisional law as to the nature of an admission of a debt which would be effective to toll the statute of limitations.[18] In New York, as in England and most American jurisdictions, however, the theory of presumption of payment and of "rebuttal" of the presumption by words or conduct admitting the debt, has been superseded by a theory of implied promise to pay.[19]

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[14] 9 Geo. IV Ch. 14 (1828).

[15] See discussion supra, p. 20 and reference in note 12.

[16] In construing section 59 of the Civil Practice Act in In re Povill, 105 F.2d 157, 159, (2d Cir. 1939), Judge Patterson said that the common law characteristics of an acknowledgment remained the same "save that an unwritten acknowledgment would no longer serve. *The act changed nothing but the mode of proof.*" (Italics supplied) [It was held that the listing of an outlawed claim in the bankrupt's schedules was not an acknowledgment sufficient to revive the claim and remove the statutory bar. Such a listing, the Court said is an acknowledgment in a literal sense but is not one from which an intention to pay the debt can be implied for "it signifies an intention . . . not to pay."]

[17] See the 1952 Study, Leg. Doc. (1952) No. 65 (H), pp. 19–21; 1952 Report, Recommendations and Studies of the Law Revision Commission, pp. 205–207.

[18] See authorities cited in Shapley v. Abbott, 42 N. Y. 443 (1870) at p. 446. The case is discussed supra, note 13. Chief Judge Earl, in Shapley v. Abbott, quoted the statement of Cowen, J., in M'Crea v. Purmort, 16 Wend. 460, 477 (1836), that "The admission of a debt is available to take it out of the statute of limitations, whether that admission be express or tacit, . . . and it may be implied from the conduct of the party," and relied on the M'Crea case as authority for holding that a promise not to plead the statute of limitations if the debt should outlaw was an "acknowledgment" governed by Code of Proc. § 110, from which the present section 59 is derived.

[19] See Van Keuren v. Parmelee, 2 N. Y. 523, 526 (1849) where Bronson, J. referred to the tendency of the early decisions to treat any admission as sufficient to take the case out of the statute, and to the conflict of decisions that resulted from "the early departure from principle in the construction of the statute [of limitation], the different view which prevailed at different

The view that the effect of an acknowledgment or part payment rests on an implied promise is determinative in cases like *Van Keuren* v. *Parmelee*,[20] where it was sought to make an acknowledg-

periods, and the unequal pace of the courts in attempting to get back on to solid ground." Judge Bronson refused to follow Lord Mansfield's holding in Whitcomb v. Whiting, [1781] 2 Doug. 652, 99 Eng. Rep. 413, that a part payment by one of four joint and several obligors took the case out of the statute as to all of them, and that of an earlier New York case (Patterson v. Choate, 7 Wend. 441 (1831)) holding that an acknowledgment by one partner, even after dissolution, binds the other, so far as to prevent him from availing himself of the statute of limitations. At page 531, Judge Bronson said: "Since the supreme court first fell into the error of following Whitcomb v. Whiting, the course of decision upon the statute of limitations has undergone a great change in this country, and particularly in this state. At the former period, the statute amounted to little more, in judicial construction, than a ground for presuming the debt paid, which might be rebutted by the mere admission that such was not the fact. But the law is not so now. There must be a promise, a new contract, though founded on the original consideration, to take a case out of the statute. If the promise is not express, the case must be such that it can be fairly implied. There must, at the least, be a plain admission that the debt is due, and that the party is willing to pay it. (Allen v. Webster, 15 Wend. 294; Stafford v. Richardson, id. 302; Bell v. Morrison, 1 Peters 362.) It is the new promise and not the mere acknowledgment, that revives the debt and takes it out of the statute. (Rosevelt v. Mark, 6 John. Ch. 290.) This doctrine is sustained by" many decisions in other states; but I do not think it necessary to cite them. (pp. 531–532.)

[20] Supra, note 19. And see the more recent case of Lorenzo v. Bussin, 7 App. Div. 2d 731, 180 N.Y.S.2d 625 (2d Dep't 1958), an action to cancel and discharge a mortgage on the ground that it was barred by the statute of limitations. Defendant by way of defense and counterclaim pleaded that the numerous promises of payment made by the decedent "would have estopped him" from pleading the statute in bar; that letters of the decedent were an acknowledgment of the debt which tolled the statute; and that therefore defendant should have judgment for the amount of the loan, with interest. The Appellate Division, in a memorandum opinion (which unlike the lower court gave no consideration to section 59 of the Civil Practice Act) reversed the holding of the Supreme Court which had found for plaintiff. Both Courts construed the letters as an acknowledgment of the obligation, but the Appellate Division, whose ruling the Court of Appeals affirmed, 7 N. Y. 2d 1039, 167 N. E. 273 (1960), interpreted them not as immediately effective to start the statute of limitations running again, but "as a promise to pay within the promisor's lifetime, "during all of which time the statute was tolled so that the cause of action first arose upon the testator's death and not at the time of the making of the promise, and the foreclosure of the mortgage was not barred and it could not properly be cancelled. It was noted that the letters recognized the debt but expressed inability to pay it. The Court gave as an alternative holding that the letters could be construed as a conditional promise to pay "when able," so that the cause of action accrued "as soon as the promisor acquired the ability to pay," which was an issue of fact that could not be decided by the Court upon a motion for summary judgment. The complaint was dismissed.

In Mesiano v. Mazzeo, 12 Misc. 2d 858, 172 N.Y.S.2d 913 (Sup. Ct. Kings Co. 1958), action was brought on a note payable on demand, and upon motion to dismiss the complaint, which was denied, Judge Levy held that a written request by defendants for an extension of time, made after the plaintiff had demanded repayment, "is sufficient 'acknowledgment or promise' to toll the statute of limitations (Civ. Prac. Act § 59)—at least to the extent of saving the complaint from the condemnation that, as a matter of law, it is insufficient on its face." (p. 859, p. 915.) It was said further that the force of this acknowledgment was not vitiated by its being coupled with language indicating that defendants were unable to meet the obligation at that time. Nor did such statement impose a condition based on "ability to pay," for it was not (although it could have been) couched in such terms.

ment by one person effective against another without showing that the person who made the acknowledgment did so as the authorized agent of the other; for under such a theory the inability to find a promise, even by implication, precludes recovery. Proceeding upon the theory of an implied promise also disposes of cases where the alleged acknowledgment is couched in language disclaiming willingness to pay or is accompanied by language or occurs in circumstances that negate any intention to pay.[21] On the other hand, an acknowledgment that is not so qualified by language or circumstances is in general sufficient, the promise to pay being implied merely from the unqualified acknowledgment.[22]

[21] See the 1952 Study, Leg. Doc. (1952) No. 65 (H), pp. 23–24, notes 28–30, and 38–40; 1952 Report, Recommendations and Studies of the Law Revision Commission, pp. 209–210.

And see the case of Kliaguine v. Jerome, 87 F. Supp. 629 (E. D. N. Y. 1949), 91 F. Supp. 809 (E. D. N. Y. 1950) twice heard by the District Court for the Eastern District of New York (new evidence being adduced the second time). This was an action on a demand note dated July 7, 1941. Defendant moved for summary judgment on the ground that the statute of limitations barred recovery. In both his opinions, Judge Galston found the pleadings sufficient to withstand a plea of the statute of limitations and to raise an issue as to the indebtedness so that there was a question which could not be decided upon a motion for summary judgment, but was for the jury. Section 59 of the Civil Practice Act was examined in relation to the facts to determine whether a letter written by defendant to the plaintiff in 1943 constituted sufficient acknowledgment to remove the bar of the statute. The Court looked at the surrounding circumstances and said that the statement in the letter, "I would like to start returning to you the money that is due you," would seem to be clear acknowledgment of the debt, and not simply a conditional promise to pay, but that its proper interpretation "must also wait upon proof at the trial."

[22] In Lincoln-Alliance Bank & Trust Co. v. Fisher, 247 App. Div. 465, 286 N. Y. Supp. 722 (4th Dep't 1936), the per curiam opinion states the rule in these words: "We deem the correct rule to be that in order to constitute an acknowledgment the writing must recognize an existing debt, and should contain nothing inconsistent with an intention on the part of the debtor to pay it. (Manchester v. Braedner, 107 N. Y. 346, 349.) The document need contain nothing more than 'a clear recognition of the claim as one presently existing.' (Matter of Gilman, Son & Co., 57 F.2d 294, 296.)" [p. 466, p. 723.]

See In re Meyrowitz Estate, 114 N.Y.S.2d 541 (Surr. Ct. N. Y. Co. 1952), aff'd without opinion, 284 App. Div. 801, 132 N.Y.S.2d 327 (1st Dep't 1954), where a proceeding was brought in the Surrogate's Court to settle accounts of an ancillary executor. The portion of Judge Collin's opinion concerned with the tolling of the statute of limitations by a transaction satisfying the requirements of section 59 of the Civil Practice Act relates to two accounts on the books of E. B. Meyrowitz, Inc., of which corporation the deceased had been president, director and controlling stockholder. These accounts represented advances made by the corporation for his benefit under the designations "personal account" and "suspense account." The amount of the indebtedness totalled some $28,000 at the time of death, but as there had been no voluntary payment by the decedent during the six years preceding his death, the Referee, to whom the issues had been referred, held the claims barred by the statute of limitations. The Court reversed this holding, ruling that the reporting of the indebtedness in the balance sheets of the corporation which were annexed to the Federal Excess Profits Tax Return of 1945, and were duly signed by the decedent as corporate officer, constituted sufficient acknowledgment of the obligation to take the case out of the operation of the statute in accordance with section 59 of the Civil Practice Act. [The holding of the Meyrowitz case as to balance sheets was relied upon by the Federal Court in applying the Florida statute similar to section 59 of the Civil Practice Act: Whale Harbor

II. Summary of New York Law Concerning Acknowledgement, New Promise or Part Payment

The exception to the general rule that once the statute of limitations has commenced to run it does not stop,[23] represented by the tolling effect of acknowledgments and new promises to pay, applies only to actions in contract or quasi-contract,[24] and not to actions in tort.[25] By the weight of authority, it is also limited to cases where the antecedent obligation was one for the payment of money,[26] and

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Spa, Inc., v. Wood, 266 F.2d 953, 955 (1959)] The Court found two other grounds to support its general holding: first, an estoppel because due to the position of trust and control that decedent held he was not free to borrow corporate funds, report the loans as due from him and then avoid payment by pointing to his failure to sue himself; and second, because this was a case involving a mutual, open and current account with reciprocal demands between the parties, upon which type of transaction the statutory period commences running from the date of the last item proved in the account on either side, rather than from the time the last payment is made; thus the obligation was brought within the limiting period. These alternate grounds serve to weaken the force of the Court's holding as to the acknowledgment.

[23] 1 Wood, supra, note 1, § 6, p. 12. Peck v. Randall's Trustees, 1 Johns 165 (N. Y. 1806), an action on the case based upon several claims arising out of plaintiff's participation with defendant in a joint sea venture. Plaintiff's demand for payment for his services as Captain was held barred by the statute of limitations, the period having run and there being nothing that had occurred to "arrest the progress of the statute," Chief Judge Kent adding, "and I know of nothing that could do it. The plaintiff was not prevented by any disability from suing Randall, in August, 1796, and the statute consequently then commenced to run, and the absence of the debtor, afterwards, would not impede it." (p. 176.)

[24] Section 86 of the Restatement of Contracts, quoted in 1952 Study, (Leg. Doc. (1952) No. 65 (H) at p. 43; 1952 Report, Recommendations and Studies of the Law Revision Commission at p. 229), refers to "a promise to perform all or part of an antecedent contractual or quasi-contractual duty for the payment of money due from the promisor," and refers to an acknowledgment, part payment or giving of security as "operating as such a promise" unless other circumstances indicate a contrary intention.

[25] 1 Wood, Limitations, § 66, note 1, supra.

[26] See the 1952 Study, Leg. Doc. (1952) No. 65 (H), p. 38 and notes 145–146; 1952 Report, Recommendations and Studies of the Law Revision Commission at p. 224. See Restatement of Contracts, § 86; and also note 24, supra.

As to the application of the doctrine in an action to impress a trust upon a house purchased with plaintiff's funds, see Scheuer v. Scheuer, 308 N. Y. 447, 126 N.E.2d 555 (1955), where the Court appraises the oral promise in relation to the requirement of a writing in section 59 of the Civil Practice Act. In the Scheuer case a wife brought suit to impress a constructive trust on real property held by her husband (from whom she separated in 1951) on the ground that the house was to be placed in her name as well as his since she had paid approximately one-half of the purchase price. She charged that her husband had repeatedly promised to alter the deed, but that a year or two previous to the commencement of the action he had absolutely refused to do so. This is not an action for payment of money due upon a debt, as are most acknowledgment cases coming within the purview of section 59, and the opinion of Judge Fuld admits some doubt as to whether the doctrine of acknowledgments as modified by section 59 of the Civil Practice Act "encompasses a right of action to enforce a promise by way of a constructive trust." [In the case of a constructive trust which by its very nature imposes a legal obligation involuntarily upon an individual so that he cannot profit from his own wrong, the statutory period normally begins to run from the time of the discovery

seems not to have been extended to other obligations in any reported New York decision.

Some statutes, creating a cause of action and specifying time limits for commencement of an action upon it, have been construed as making the time limitation a part of the cause of action.[27] Except in these cases, however, the expiration of the time limited for commencement of an action is a defense to be pleaded by the person against whom the suit is brought and is waived by failure to make

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of the wrong, and the existence of a confidential relationship between the parties may excuse some delay in the discovery. (55 A.L.R.2d 220, 228–229). But if the action is not predicated upon the ground of fraud, the statute in most jurisdictions runs from the time of the acts or events on which the trust is founded, and this was true in the instant case, where it was ruled that the statute began to run "when the acts occurred on which the claim of a constructive trust is predicated" (the placing of title in the husband's name alone—this date, 1938, was much earlier than the date of discovery, 1950.)] Judge Fuld concluded that the parole promise did not in any event meet "the statutory insistence on a writing found in section 59." The statute of limitations was successfully pleaded in bar, since there were no grounds for raising an estoppel. The opinion noted that there were conflicting views as to whether the doctrine of estoppel could be invoked in the face of a statute requiring a writing as did section 59. On this point Shapley v. Abbott was deemed controlling as precluding recovery on an oral promise based on estoppel.

[27] See, for example, General Business Law, section 372 (action for recovery of usurious interest must be brought within one year after such payment), Gilleran v. Colby, 164 App. Div. 608, 150 N. Y. Supp. 326 (1st. Dep't 1914); Landekar v. Property Security Co., 79 Misc. 157, 140 N. Y. Supp. 745 (N. Y. City Ct. 1913). In both these cases there was no recovery because suit was not brought within a year. Wood v. Scudder, 155 App. Div. 254, 140 N. Y. Supp. 284 (2nd Dep't 1913). Action to recover unpaid balance on a bond; defendant counterclaimed alleging usury. The Court said that the terms of the General Business Law need not be expressly pleaded as is true of a statute of limitation (p. 256, p. 285). The statute of limitations involved in Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231 (1959), was held to be of this kind. In that case the Supreme Court of the United States found conduct of the defendant misleading to the plaintiff, that he (the plaintiff) relied upon it, and that defendant was therefore estopped to plead the statute in bar. Action had been brought under the Federal Employer's Liability Act to recover damages for an industrial disease allegedly contracted while plaintiff worked for defendant. The case was before the Court upon the pleadings, after a motion to dismiss. Plaintiff alleged that defendant's agent had represented to him that he had seven years in which to sue, whereas the FELA allows only three. Defendants contended that the doctrine of estoppel could not apply because in FELA cases the time limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period. Certiorari had been granted to resolve the "sharp conflict" in the Federal Circuits as to whether or not the limiting provisions in section 6 of the Federal Employer's Liability Act had substantive effect to bar the right as well as the remedy at the expiration of the statutory period. In limitation provisions of the substantive type it has been held that fraud cannot have a tolling effect, Damiano v. Pennsylvania R. Co., 161 F.2d 534 (3d Cir. 1947). In the Glus case Justice Black held the doctrine of estoppel was applicable, and ruled that the complaint was sufficient to raise a triable issue as to the misrepresentation. The decision is valuable as affirming the equitable principle of estoppel, but its importance for cases where the statute of limitations is applicable not to actions in tort, but in contract is less clear. It has been suggested that if conduct can toll the statutory period surely a promise, a positive representation, would *a fortiori* do so. However, such an argument overlooks the requirement of a writing found in section 59 of the Civil Practice Act.

timely assertion of it.[28] Nevertheless courts, as well as legal writers, have recognized that statutes of limitations are not only for the protection of the individual, but serve a public interest as well in excluding stale claims.[29]

The effect of the new promise, whether express, or implied from the acknowledgment or part payment, is to establish a new date from which the statute runs.[30] This is the result whether the new promise, acknowledgment or part payment is made before or after the bar of the statute has fallen.[31] However, where the new promise, acknowledgment or part payment occurs before the action is barred, the majority view regards it as evidence of a continuing liability, so that the period is governed by the nature of the original cause of action; but where the new promise, acknowledgment or part payment occurs after the original action is barred, there is a conflict of view as to whether the old cause of action is revived or whether the new promise, express or implied, constitutes a new cause of action, supported by the consideration of the old debt.[32] Choice between the two theories would lead to differences in result where the period applicable to an action on a simple contract is different from the period applicable to the original obligation, or where a question arose as to the applicability of provisions tolling the statute for non-residence or other cause or invoking a foreign statute of limitations. A question is also presented as to whether the original cause of action or the new promise should be pleaded in the complaint. The New York law does not appear to be settled, although the practice of pleading the old cause of action and setting the new promise up after the statute of limitations has been asserted has been sanctioned.[33]

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[28] § 242 New York Civil Practice Act. In Hitchcock v. Harrington, 6 Johns (N. Y.) 290, 5 Am. Dec. 229 (1810) Chief Justice Kent held, in an action of dower brought by a widow, that the statute of limitations could be no ground of defense because not pleaded. See also, 1 Wood, supra, note 1, § 7, p. 25.

[29] See Note, 30 Col. L. Rev. 383, 384 (1930) "Effectiveness of Promises Not to Plead the Statute of Limitations in Contract Cases" in which it is said, "The policy behind the statute seems to be one of public benefit as well as desire to benefit the individual. It is for the public benefit that claims be litigated while witnesses are available and memories fresh so that perjury and fraud may be reduced to a minimum. It is also desirable to put an end to possible litigation. The individual is benefited by a feeling of security, as he knows that stale claims will not be revived . . ." To the same effect see Charles C. Callahan, "Statutes of Limitation—Background," 16 Ohio State L. J. 130 (1955); Thomas E. Atkinson, Reexamination of the Procedural Aspects of the "Statute of Limitations," 16 Ohio State L. J. 157, 170 (1955); 63 Harv. L. Rev. 1177, 1185 (1950), "Developments in the Law, Statutes of Limitations;" Note, 14 Calif. L. Rev. 126 (1925), and see cases cited in the 1947 Study, Leg. Doc. (1947) No. 65 (H), p. 13, notes 5–7.

[30] 1 Wood, Limitations, § 74, note 1, supra.

[31] 1 Williston, Contracts, (3d ed. 1957) § 163, p. 663.

[32] 2 Corbin, Contracts, (1950) § 214, p. 705 discusses the enforceability of a new promise made by the obligor after the statutory bar has fallen, and proceeds on the theory of "past consideration," and discards what he terms the "waiver" theory.

[33] See the 1952 Study, Leg. Doc. (1952) No. 65 (H), pp. 29–33; 1952 Report, Recommendations and Studies of the Law Revision Commission, pages 215–219.

The new promise, whether express or implied, may be conditional, and in such cases it is not operative until the condition is met.[34] The new promise may be limited to a part of the obligation, and in such case is effective with respect to the part specified.

A part payment, to be effective, must be accepted.[35] A tender operates only as an acknowledgment, and is subject to the requirement of section 59 that it be made by a signed writing. The payment must be made as a payment of principal or interest on the obligation to be affected, under such circumstances that it amounts to a recognition of the entire debt as subsisting.[36] The giving of security for the debt has the same effect as a part payment.[37]

The payment must, of course, be voluntary. Thus where there is an irrevocable authorization to the creditor to apply collateral in satisfaction of the debt, the subsequent act of the creditor pursuant to this authority involves no implied promise by the debtor, and does not affect the statute of limitations.[38]

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[34] 1 Williston, supra, note 31, §§ 179, 182. If the promise is conditional, the new period begins to run from the time the condition is met. Tebo v. Robinson, 29 Hun. 243 (2d Dep't 1883); and see generally, 1 Wood, Limitations, § 77, p. 407, supra, note 1.

[35] Crow v. Gleason, 141 N. Y. 489, 493, 36 N. E. 497 (1894)—a mere naked payment so the statute was not tolled.

[36] Ibid. And see 1 Wood, supra, note 1, § 96, p. 516, especially p. 518.

[37] Smith v. Ryan, 66 N. Y. 352 (1876) held that the delivery by a debtor to his creditor of the note of a third party was the giving of collateral security for the debt which amounted to an acknowledgment and tolled the statute and would have permitted recovery except that the new period had already run and the payments by the third party upon the note, not being authorized by defendant, could not further toll the statute as against him. (The case is digested infra, note 213.) In Scott v. Armstrong, 193 Misc. 220, 86 N.Y.S.2d 32 (Sup. Ct. N. Y. Co. 1948) (disapproved in Carlos Land Company v. Root, 282 App. Div. 349, 352, 122 N.Y.S.2d 650, 653 (4th Dep't 1953)), the premium payment of fire insurance upon the mortgaged premises was held to constitute sufficient acknowledgment of the mortgage debt to permit foreclosure. [The result appears equitable, however, due to the peculiar circumstances of this case in that the party seeking to enforce the mortgage agreement was the brother of decedent of whom she was very fond, but for whom she made only slight provision in her will assuming that as holder of the $20,000 mortgage on her property he was amply taken care of.] The case is discussed infra, p. 65 and digested infra, note 212. See also, 1 Wood, supra, note 1, § 112, p. 558.

[38] Security Bank 212 of New York v. Finkelstein, 160 App. Div. 315, 145 N. Y. Supp. 5 (1st Dep't 1913). This was an action to recover the balance due on a secured promissory note. Defendant had given his deposit account with a bank now in receivership as collateral security for the note. The plaintiff showed payments upon the note which payments were dividends coming from the receiver of the bank. The Court ruled that part payment upon a debt will remove the statutory bar, but that such payment must be made by the debtor or his authorized agent. Since the assignment of collateral as security does not make the person indebted on that debt the agent of the primary debtor, the Court concluded that the Receiver of the Bank in paying the dividends was not the agent of the defendant and there was therefore no inference to be drawn from such payments of a new promise to pay the balance due. (p. 320, p. 9.)

III. Acknowledgments of Mortgage Debts, Mortgage Liens and Rights of Redemption

The rule that an acknowledgment or new promise takes a case out of the statute of limitations originated as a rule applicable to the acknowledgment or part payment of a debt, and is generally considered to apply to money obligations.[39] There is, however, a parallel doctrine under which an admission of the existence of a real property mortgage prevents a party from asserting that rights with respect to the security are barred. This doctrine, and various problems with respect to its acceptance and application in New York are discussed in the pages that follow.

A. Preliminary Considerations

Mortgage questions are complicated by the division of ownership which exists between the mortgagor and the mortgagee. Both at law and in equity the mortgagor is generally regarded as the legal owner of the estate, the mortgage being a security, and the mortgagee having only a lien upon the land to assure repayment of the debt.[40] Thus the problem is twofold as respects mortgages because such a transaction by its very nature has two aspects:[41] (1) the mortgage debt; and (2) the mortgage lien. The creditor, usually the mortgagee or his assignee has a choice of two remedies, either to sue on the debt or on the mortgage—an action in assumpsit, or a suit to foreclose.[42] If the mortgage was duly recorded, the lien may be foreclosed even though the land has been conveyed. If the

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[39] See text, supra, p. 25, and notes 24 to 26.

[40] This represents the majority view first followed in New York. (Thomas, The Law of Mortgages in New York, (3d ed. 1914) § 23, p. 22; 1 Wiltsie on Mortgage Foreclosure, (5th ed. 1939) § 4, p. 14; 1 Jones on Mortgages, (8th ed. 1928) § 14, p. 17.) In Jackson v. Willard, 4 Johns 41 (N. Y. 1809) it was held that the interest of the mortgagee in the mortgaged lands could not be sold on execution where there had been no foreclosure to enforce his interest and where the mortgagor remained in possession. Chief Justice Kent said that "a mortgage [is] not an estate in fee, but . . . a mere security for a debt." (p. 43.) There are a minority of jurisdictions which still adhere to the ancient common law rule that the mortgagee is the legal owner of the mortgaged property (Alabama and Massachusetts, for example) and those states are spoken of as adopting the "title" view of mortgage ownership. On the other hand, the majority of states follow the "lien" theory. (Osborne on Mortgages, (1951) §§ 13–16.) In Bryan v. Butts, 27 Barb. (N. Y.) 503 (1858) plaintiff who claimed title to property by mesne conveyances as a result of a foreclosure was held not to have title so as to come into possession until all the foreclosure proceedings were complete, which included the affidavits necessary to transfer title; therefore he was properly non-suited. The Court stated the nature of a mortgage as a lien only not conveying any title. See 2 Wood, supra, note 1, § 221, p. 1030.

[41] There may even be a third aspect when the mortgagor, or his transferee, is seeking to enforce the equity of redemption. In Borst v. Boyd, 3 Sandf. Ch. 501, 507 (1846) the mortgagee in possession in making an assignment of his interest described it as a "mortgage" which acknowledged its existence and allowed the mortgagor to redeem, although he was not a party to the assignment.

[42] 2 Wood, supra, note 1, § 223, p. 1043.

grantee to whom the property was conveyed assumed the mortgage debt, action is maintainable against him on the debt.[43]

The dichotomy that exists with respect to mortgage transactions is given statutory recognition in some states. In Nebraska,[44] for example, a distinction is made based upon the nature of the proceeding—an action upon the debt is regarded as *in personam* to which one statutory period applies, whereas an action on the mortgage is in Nebraska deemed to be *in rem,* and a different limitation is applicable (10 rather than 5 years.) *McLaughlin* v. *Senne,*[45] which was before the Supreme Court of Nebraska in 1907, is illustrative of the different consequences which follow from this. The issue involved the priority of two mortgages and it was held that payments upon a a mortgage, as distinguished from payments made upon an ordinary debt, need not, in order to toll the statute, be made by the original debtor or by one having authority to bind him, but may be made by anyone having authority to bind the property.

It is possible to have a mortgage alone—unattached to any debt. Section 249 of the Real Property Law recognizes this when it provides that upon a simple mortgage "the remedies of the mortgagee are confined to the property mentioned in the mortgage."[46] Cases involving the acknowledgment of such a mortgage effective to toll the statutory period do not appear to have been frequently before the courts, perhaps because the theory of acknowledgment is traditionally applicable to money obligations.

The rule is recognized that as long as the debt remains in full force, so also does the mortgage (although the reverse is not true).[47]

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[43] Unless the mortgagee has consented that the purchaser who assumes the mortgage be substituted for the mortgagor, he (the mortgagee) may treat both mortgagor and purchaser as principal debtors, and may have a personal decree against both, 2 Jones on Mortgages, supra, note 40, § 920, p. 265. See also Williston's discussion of the theory on which the mortgagee can sue on the assumption: 2 Williston (Rev. ed 1936) §§ 390, 392—subrogation; § 398—third party beneficiary.

[44] Nebr. Rev. Stat. §§ 25–205 (1956) setting a five year period of limitations for actions upon a written contract or promise; §§ 25–202 setting a 10 year period for actions to recover title or possession of real estate, or for foreclosure of mortgages thereon.

[45] 78 Nebr. 631, 111 N. W. 377 (1907) in which payments by a subsequent grantee who held the equity of redemption preserved the lien of the first mortgage and continued its supremacy over the later mortgage.

[46] The New York provision, along with the existence of a similar one in the State of Washington, is noted in Garrard Glenn, "Purchasing Subject to a Mortgage," 27 Va. L. Rev. 853, 855 (note 5) (1941) where the author also observes: "Of course, it is possible, even today, for a mortgage or pledge to involve no personal obligation on the borrower's part, and in such a case the lender is confined to his security for payment, without the right to call upon any one for a deficiency. But that is a rare instance, ..."

[47] This principle is stated and applied in Johnson v. Johnson, 81 Mo. 331 (1884) where a credit upon a debt was held to be sufficient acknowledgment to keep the debt alive and also the mortgage lien in an action between two brothers, one of whom had died before satisfying the mortgage given as security to the other. See also Perry v. Horack, 63 Kan. 88, 64 Pac. 990 (1901) in which payments of principle and interest by the survivor of joint obligors kept the mortgage lien in existence so that foreclosure could be decreed.

Therefore, an acknowledgment or promise sufficient to prevent the statute running upon the debt, also keeps alive the mortgage.[48] If action upon the debt is barred by the statute of limitations, in most states,[49] including New York,[50] suit may be brought upon the mortgage which has been given as security therefore.[51] This is because the two remedies are distinct, and the fact that the statute has run upon the note does not destroy the lien which it imposes upon the land for the payment of the debt.[52] The courts of those states in which the rule is otherwise are guided, to some extent, by their peculiar statutory provisions which lead them to conclude that the debt is the principal obligation and the mortgage "a mere incident;" therefore, when the debt is barred the remedy upon the mortgage is barred also.[53]

The operation of the statute of limitations in the case of mortgages[54] is similar to its functioning generally with respect to other

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[48] Johnson v. Johnson, supra, note 47; 2 Wood, supra, note 1, § 230, p. 1057. Note: It is possible for the debt to be alive although the mortgage is barred. In Fowler v. Wood, 78 Hun. 304 (2d Dep't 1894) due to the bondsman's absence from the state the statute was tolled as to action on the debt, but foreclosure of the mortgage was barred. The case is discussed infra, p. 37. And see cases discussed, infra, note 82.

[49] California is representative of those states where, when the debt is barred, the remedy on the mortgage is barred also. Lord v. Morris, 18 Cal. 482 (1861). Action was upon a barred promissory note in which it was attempted to apply the security therefor, real property, in satisfaction. The note contained an indorsement reviving the debt made subsequent to bar. Holders of second and third mortgages upon the property claimed priority for their liens in any payment to be made from the proceeds of sale. It was held the mortgagee had no remedy upon the first mortgage. He may sue either upon the note or the mortgage, but the statutory period for both is the same, so if one is barred, so is the other when they are given simultaneously. It was concluded, therefore, that the liens of the second and third mortgages had priority over the lien of a barred first mortgage.

[50] Hulbert v. Clark, 128 N. Y. 295 (1891). Suit to foreclose a mortgage executed in 1867 as security for eight notes, two of which had remained unpaid. The statutory period had elapsed on the notes. Held: The mortgages continued to be a subsisting lien and could be foreclosed after action at law upon the notes was barred. And see Thomas, *supra* note 40, § 438, p. 358.

[51] 2 Jones, supra, note 40, § 1542, p. 1040.

[52] 2 Wood, supra, note 1, § 222, p. 1038.

[53] 2 Wood, supra, note 1, § 223, p. 1044; 2 Jones, supra, note 40, § 1546, p. 1045. But adherence to the "mere incident" theory does not mean that the decisions of the various jurisdictions in this category are the same, *Cf.* Clark v. Grant, 26 Okl. 398, 109 Pac. 234 (1910) and Wood v. Goodfellow, 43 Cal. 185 (1872): and the charge that some courts misapply the doctrine "that a mortgage is a mere incident of the debt it secures," made in Colonial and United States Mortgage Co., Ltd. v. Northwest Thresher Co., 14 N. D. 147, 157, 103 N. W. 915, 919, (1905).

[54] The present law in New York is found in § 47-a of the Civil Practice Act which sets a six year period from the time of the accrual of the cause of action in suits upon a "bond and/or mortgage." Thomas in explaining the statute of limitations applicable to foreclosure actions in New York says it "differs essentially" from the English statute (21 James I, ch. 16 § 1) and those of other states because, in equity, the statute is strictly applied in New York, and the usual qualification that a court of equity is not bound by it, except by analogy, does not apply. Thomas, supra, note 40, § 435, p. 355.

transactions. Unless otherwise provided by law, the statute commences to run upon a mortgage as soon as the right to foreclose[55] it accrues, which is deemed to take place after condition broken, or, to put it another way, upon the forfeiture of the condition of the mortgage.[56]

By statute in New York, [57] any person having an interest in real property may obtain a judgment cancelling a mortgage and discharging it of record when the time allowed for commencement of an action to foreclose the mortgage has expired, unless the mortgagee or his successor is in possession of the premises.

B. Tolling of the Statute of Limitations by Payments Made Upon a Mortgage Debt

1. Introductory

A part payment upon a debt, whether of principal or interest, has long been regarded as an effective acknowledgment that will take a case out of the statute of limitations.[58] It is a judge-made exception preserved by Section 59 of the New York Civil Practice Act,[59] which asserts that nothing therein shall "alter the effect of a payment of principal or interest." The effect of a part payment is, in almost all jurisdictions,[60] recognized to be an acknowledgment of the existence of a larger debt from which a promise to pay the balance can be implied so as to remove the bar of the statute. This doctrine has additional application in the case of a mortgage debt where it is "universally recognized"[61] that a payment of interest or of part of the principal extends not only the debt but the lien upon the land given to secure it, so that an action may be brought to enforce the mortgage within the statutory period as measured from the date of the last payment.

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[55] Since the right to foreclose a mortgage and the right to redeem it are reciprocal (2 Jones, supra, note 40. § 1467, p. 958) redemption under the mortgage is cut off at the expiration of the same time that the right to foreclose is barred.

[56] 1 Wiltsie, supra, note 40, § 71, p. 141.

[57] Real Property Law, section 500, subdivision 4. See Leg. Doc. (1948) No. 65 (N), 1948, Report, Recommendations and Studies of the Law Revision Commission 575.

[58] A part payment does not affect the running of the statute of limitations in those few states which did not include in their law that portion of Lord Tenterden's Act preserving the effect of part payment. See note 13, supra. See cases discussed infra, part III E where the conveyance has been made "subject to" the mortgage and the question arises whether this recital in the deed constitutes a sufficient acknowledgment.

[59] This exception is found also in Lord Tenterden's Act upon which section 59 is based. Lord Tenterden's Act is discussed supra, pages 20, and 22, and see note 58.

[60] 1 Wood, supra, note 1, § 96 at p. 518. In a few states, such as Virginia, part payment does not toll the statute. See "Annual Survey of Virginia Law. 44 Va. L. Rev. 1347, 1368 (1958).

[61] 2 Jones, supra, note 40, § 1536, p. 1031; 1 Wiltsie, supra, note 40, § 75. p. 149.

A part payment "has been deemed a much safer ground to go upon than a new promise or acknowledgment"[62] for the reason that one does not lightly part with his money. Certainly it is a more constantly recurring plea in mortgage cases where regular payments of principal and interest in liquidation of the debt are so common.

Basically, the rules with respect to the tolling of the statute of limitations by part payment upon a money obligation are similar to the rules applied as to the effect of a part payment to extend the time for foreclosure of a mortgage, but there appear to be some differences.[63]

It is easily said that part payment removes the bar of the statute of limitations and extends or revives the mortgage lien, but it is not so simple to determine whose payment will be effective to toll the statute and against whom it will be tolled. There are many persons who may seek to invoke its bar. The mortgagor, as holder of the legal title,[64] is free to convey the property as he sees fit. He may divide it between several grantees[65] or dispose of it in one piece,[66] and in either case subsequent conveyances by his grantees may increase the number of persons who have an interest in the property and who, therefore, are likely to become involved in any action with respect to it.[67]

2. Payment by the mortgagor

A part payment of principal or interest made by the mortgagor or his agent keeps the mortgage alive, or, if made after bar, revives it, so that the time within which to foreclose is extended. The effect is to toll the statute of limitations not only against the mortgagor himself,[68] but as against his grantee and those taking under him. And this is true in New York whether the payment is made before

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[62] Van Keuren v. Parmelee, 2 N. Y. 523, 527 (1849). (The Van Keuren case is a leading New York case to the effect that an acknowledgment by one of several joint obligors does not prevent the running of the statute of limitations in favor of the others. It is discussed *supra*, p. 23).

[63] Consider for example, the fact that in some instances a recital in a deed that it is subject to a mortgage is deemed a sufficient acknowledgment although the nature of the conveyance, or even that one has taken place, has not been brought to the attention of the mortgagee—there has been no acknowledgment to him, as creditor. See discussion of this point infra, p. 50.

[64] See note 40, supra.

[65] Mack v. Anderson, 165 N. Y. 529, 59 N. E. 289 (1901). Mortgagor divided mortgaged property, conveying 25 acres to one party and 50 acres to another. This case is discussed infra, p. 42.

[66] Heyer v. Pruyn, 7 Paige (Ch.) 465 (1839) (entire premises conveyed).

[67] Ibid. In Heyer v. Pruyn not only the original mortgagor, but subsequent purchasors and incumbrancers were joined as defendants. See discussion, infra, p. 39.

[68] Hughes v. Edwards, 9 Wheat. 489 (1824). In a foreclosure action brought against the mortgagor and persons to whom he had conveyed it was held that letters recognizing the mortgage and promising to pay when able, and indorsements of payment on the bond, made by the mortgagor, tolled the statute as against the mortgagor and his grantees. See generally, 2 Jones, supra, note 40, § 1536, pp. 1031–1032; 1 Wiltsie, supra, note 40, § 75, p. 149 and § 77, p. 152.

or after bar,[69] and, usually, whether before or after the mortgagor has disposed of his interest in the property.

There is, however, a sharp conflict of authority as to whether the mortgagor can bind subsequent grantees after he has parted with his interest in the land.[70] Legal writers, in particular Wood[71] and Jones,[72] support the position taken in California,[73] Kansas[74] and some other states,[75] that when the mortgagor disposes of the mortgaged premises his personal liability becomes separated from the ownership of the land and he is without power to bind it in any

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[69] New York Life Ins. & Trust Co. v. Covert, 6 Abb. N. S. 154, 3 Abb. Opp. Dec. 350 (1867). In this case payment by the mortgagor *after* conveyance was held to keep the debt and security alive in a suit to foreclose brought against a grantee through mesne conveyances. In Thomas on Mortgages, supra, note 40, § 437, p. 357, it is said "Not only will the grantee of the mortgaged premises be bound by the acts of the mortgagor or other person under whom he claims anterior to the conveyance, but he may also be bound by acts subsequent to the vesting of his rights."

[70] To the effect that the mortgagor can bind subsequent grantees *after* conveyance see Smith v. Bush, 173 Okl. 172, 44 P. 2d 921 (1935); Contra: Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., 14 N. D. 147, 103 N. W. 915 (1905) [effect of absence from the state analogized to that of part payment.] A controlling factor in these cases seems to be whether or not the mortgagor's payment is made before or after bar, Cook v. Prindle, 97 Iowa 464, 66 N. W. 781 (1896) where the mortgagor's indorsement on the note renewing the promise to pay it and continuing the lien of the mortgage made *after* his grantee had reconveyed (the first conveyance was before bar) and *after* bar was ineffective as a revivor as against the later grantee, who, however, took only a part of the mortgaged premises.

[71] 2 Wood on Limitations, supra, note, § 229, pp. 1056–1057: "A part payment of principal or interest made by the mortgagor or his agent revives the mortgage, and gives it a new lease of validity from the date of such payment; . . . But, in order to have that effect, the payment must be made while the mortgagor owns the equity of redemption, and a payment made after he has parted with the same does not revive or keep on foot the mortgage security, as, from the time when he parts with his interest in the land, his power to bind it in any manner is gone, either as to past or future debts."

[72] 2 Jones on Mortgages, supra, note 40, § 1534, p. 1030: "A mortgagor while retaining the ownership of the mortgaged property may make a new promise which will be binding upon a subsequent grantee, but not so generally after he has transferred the property, and this more particularly where the rights of his grantee have attached after bar."

[73] Wood v. Goodfellow, 43 Cal. 185 (1872). Absence from the state of the mortgagor does not toll the statute as against his grantee; therefore foreclosure will not be decreed against him; Accord: Low v. Allen, 26 Cal. 141 (1864). Absence from the state of one of three joint mortgagors tolls the statute only as to him and not against the other two, therefore mortgage can not be foreclosed against their grantee even though he took subject to the mortgage.

[74] Schmucker v. Sibert, 18 Kan. 104, 110 (1877), discussed infra, p. 58.

[75] Massachusetts and Texas cases are also cited in support of this view, but they do not constitute very strong holdings. Pike v. Goodnow, 12 Allen 94 Mass. 472 (1866). A holder of the equity of redemption who made payments for more than 20 years and then took an assignment of the mortgage from the mortgagee could not foreclose against the grantee of a small part who took by quitclaim and from whom no contribution with respect to payments was ever sought. The Court deemed it a question of equities as between the parties. Cason v. Chambers, 62 Tex. 305 (1884). (Renewal of a note made after bar and after transfer was not effective against a person who received the mule in a dispute over mortgaged personality.)

manner.[76] He has lost control and can by no subsequent act create or revive charges upon the premises so as to enlarge the responsibilities of his grantee.

The earliest New York decision on this point is *New York Life Insurance & Trust Co.* v. *Covert*,[77] in which the statute of limitations was not involved, but rather the doctrine of presumption of payment. It was there held that payments upon a bond and mortgage made by the mortgagor after conveyance of the property, and therefore when he held no interest therein, prevented the statute from running not only as to him but as to his grantee and subsequent takers, so that the mortgagee could recover in an action to foreclose brought against the present owners of the property. There are two opinions, one by Chief Judge Davies and one by Judge Grover, who concurred. The latter opinion makes it clear that the fact the subsequent purchasers were unaware of and did not make or authorize the payment by the mortgagor was immaterial since the action was not against them upon the debt (for they did not owe any) but against the land which they owned. It was said further, that as purchasers with notice they could be in no better position than the person through whom they derived their title, and payment by him (the mortgagor) overcame the defense of presumption of payment. Judge Grover was sympathetic toward the position of the mortgagee, indicating that it would be "harsh and unjust"[78] to hold the lien of a mortgage discharged after a lapse of twenty years notwithstanding punctual payments of interest each year by the mortgagor, simply because the premises had been conveyed to another. The mortgagee, the Judge maintained, is under no obligation to search for or keep abreast of conveyances of the property; his lien upon the land is unaffected by the act of the mortgagor in parting with it.[79]

Cases in which the act of the mortgagor which tolls the statute as to his grantees or later holders of an interest in the property, is absence from the state have been linked by analogy to those of payment by him. In *Boucofski* v. *Jacobsen*,[80] the Court said, "the

[76] Lord v. Morris, supra note 49, where it is said, p. 490: "The mortgagor, after disposing of the mortgaged premises by deed of sale, loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is as to the premises thenceforth a mere stranger." [*Note*: In California by statute, when the debt is barred, the lien is extinguished, § 2911 Cal. Civil Code, interpreted in Wells v. Harter, 56 Cal. 342 (1880).]

[77] Cited *supra*, note 69.

[78] 6 Abb. N. S. 154, 171.

[79] Likewise stressing the mortgagee's lack of duty to keep track of what disposition is made of the property, or to question the source of payments upon the mortgage, see Pike v. Goodnow, supra, note 75, p. 476 of the opinion.

[80] 36 Utah 165, 104 Pac. 117 (1909). Boucofski v. Jacobsen was an action to foreclose a mortgage brought against the original mortgagor and the subsequent owner of the property through purchase at a tax sale. Foreclosure was denied because the lien which the junior incumbrance purchaser acquired through the tax sale ripened into ownership of the equity of redemption as the result of an action to quiet title brought by said incumbrancer against the original mortgagor. (p. 185, p 124.) His interest then covered the entire property and empowered him to interpose the bar of the statute, which commenced to run when the cause of action accrued which was one year from the

effect of absence is practically the same as part payment would be."[81] Since in Utah, payments by the mortgagor are held not to toll the statute against subsequent claimants when made after the mortgagor has conveyed his interest, a like rule was held applicable when the tolling is based upon absence from the state.[82] In

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date of the execution of the mortgage. The interest of the junior claimant was acquired subsequent to that of the mortgagee but before the statute had commenced to run on the obligation. The Oklahoma court lays down the rule that the bar of the statute may be invoked by a subsequent grantee or junior lien claimant not only when the bar could be invoked by the debtor himself, but also where the debtor cannot invoke it if the senior claimant has had either actual or constructive notice of the subsequent grant or lien, *provided* the full period of time required by the statute has elapsed since the interest of the subsequent grantee or lienholder was acquired. The Court adds that the statute may be tolled as against the junior claimant by acts of the debtor or by agreement of extension between the debtor and the senior claimant occurring before the interest of the junior lienor attached, but not afterwards. In this case the absence of the original mortgagor from the state tolled the statute as against him but not against the subsequent claimant (pp. 180–181, p. 123.) The Court reiterated that it was "committed to the doctrine" that a subsequent claimant may invoke the bar of the statute as against a prior claimant "when the prior claim has been barred by the statute of limitations." (pp. 174, 177; pp. 120, 121.)

[81] 36 Utah 165, 182, 104 Pac. 117, 123. Cf. Clinton County v. Cox, 37 Iowa 570 (1873) which draws a similar analogy, and asserts that an admission of a debt and a new promise to pay it is effective to suspend the operation of the statute and keep alive the lien of the mortgage in the same way as non-residence. (p. 572.) In this case, however, unlike Boucofski, the holder of the subsequent interest was a purchaser from the mortgagor, not a junior lienor. The Iowa Court in ruling that the statute was tolled so foreclosure was possible, thus cut off the grantee's interest.

[82] Accord: Wood v. Goodfellow, supra, note 73; Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., supra, note 70 where recovery on a mortgage against a subsequent grantee was barred, although the remedy on the debt remained enforceable against the mortgagor who had been absent from the state. Contra: Waterson v. Kirkwood, 17 Kan. 9 (1876) in which, after conveyance by quitclaim deed (but before bar), the mortgagor left the state and it was held this tolled the statute as against his grantee, and that grantee's grantee, therefore judgment was for plaintiff in an action brought on the note and mortgage. (The original mortgagor, served by publication and who defaulted, was deemed liable on the note.) The Court's reasoning is of interest because Kansas, like California has adopted the "mere incident theory of mortgages." Judge Valentine expressed "great doubts" as to the correctness of the decision of the majority in refusing to follow Wood v. Goodfellow, and set forth their views thus: "the grounds upon which a majority of this court holds that Waterson and Edwards [grantee and subgrantee] cannot plead the statute of limitations are as follows: Waterson and Edwards have merely succeeded to the rights of Pearsoll [mortgagor and grantor]. They stand in his shoes. They have got just what he would have if he had not transferred his interest in the land to them. They have nothing more than he at any time had the right to transfer to them. The stream has not risen and cannot rise higher than the fountain, nor can they by their purchase of Pearsoll's interest in the land cast additional burdens and inconveniences upon the holder of the mortgage. And therefore, as Pearsoll has never obtained or had the right to plead the statute of limitations, his grantees, Waterson and Edwards, have no such right." (p. 14.) This reasoning, which accords with the New York cases (supra, p. 35) is followed in Smith v. Bush, supra, note 70 as representing the "better view." In that case the statute was tolled by payments of interest made by the mortgagor (who still retained an interest in the premises having leased out oil, gas and mineral rights) and his grantees could not plead it in bar. In outlining the division of authority on the issue of the effect of acts

the New York case of *Fowler* v. *Wood,*[83] this rule was applied to a person liable upon the bond (the bond and mortgage were given by different parties), and his absence from the state was held not effective to toll the statute as to the mortgage lien and so foreclosure was denied. *Simonson* v. *Nafis*[84] limited *Fowler* v. *Wood* to its exact holding as to a bondsman. The Court, therefore, was not precluded from ruling that the absence of the mortgagor did toll the statute so that foreclosure could be allowed. In neither of these New York cases had the mortgagor conveyed away the property, so the Courts were not concerned, as in the *Boucofski* case with the effect upon persons subsequently acquiring an interest. In the *Simonson* case, which would appear to be contrary to the view represented by *Boucofski,* there is a dictum that a different rule would be applicable had the mortgagor alienated the property.[85]

A somewhat different question is presented when the payment by the mortgagor (or subsequent owner obligated to pay the debt) occurs not only after he has parted with his interest in the property, but after action upon both the debt and mortgage is barred.

In *Schwitzer* v. *Sier,*[86] action of foreclosure was brought by the administrator of an assignee of the mortgage against the original mortgagor and his grantee who took the property in 1928. The grantee had not paid any interest or principal on account of the mortgage since that time, but plaintiff alleged that the mortgagor had made a payment in 1941. Defendants' motion for summary judgment dismissing the complaint was granted, the court holding

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of the mortgagor upon subsequent holders of an interest in the mortgaged property, the Oklahoma Court makes no distinction in their controlling effect of cases where the mortgagor has made payments or in some other way acknowledged the debt, and those in which he was simply absent from the state.

[83] 78 Hun. 304 (2d Dep't 1894). In this case it was sought to foreclose a mortgage against the widow of Wood who mortgaged her property as security for her husband's debt, as to which debt her brother was obligated on the bond. Absence of the bondsman from the state did not toll the statute as to Mrs. Wood and so foreclosure against her was denied. The Court regarded the liability upon the bond and upon the mortgage as distinct and constituting separate causes of action against different persons. Thus action on the mortgage was barred although recovery was still possible on the debt. The added fact that Wood, for whose benefit the transactions were entered into, made regular payments of interest for over 30 years was held ineffective to arrest the operation of the statute because he was not obligated on either the bond or the mortgage and payments by him were no more than the act of a stranger. (It is submitted that the Court's ruling as to the payments by Wood works an undue hardship upon the mortgagee who may well have been lulled into a false sense of security because of the continued receipt of interest payments. Contrast the view of Judge Grover in the Covert case, supra p. 35.)

[84] 36 App. Div. 473, 55 N. Y. Supp. 449 (2d Dep't 1899). The Court distinguishes a holding to the contrary in Anderson v. Baxter, 4 Oregon 105 (1871) on the ground that in Oregon a mortgage foreclosure is in effect a proceeding in rem, whereas in New York it is an action in personam. And see McLaughlin v. Senne, 78 Nebr. 631, 111 N. W. 377 (1907), supra, p. 30, discussing the different results that follow as to the effectiveness of part payment made by one not so authorized, depending upon whether or not the action is one in personam or in rem. (pp. 633–634.)

[85] 36 App. Div. 473, 475.

[86] 73 N.Y.S.2d 569 (Sup. Ct. N. Y. Co. 1947), aff'd mem. 273 App. Div. 944, 78 N.Y.S.2d. 564 (1st Dept. 1948).

that the payment made by the mortgagor after he had conveyed the mortgaged premises and after the bar of the statute had fallen was not effective to revive the mortgage against a grantee who took subject to it; and the statute of limitation was a complete defense to the action. The opinion of Justice Dickstein relied upon the 1895 Court of Appeals case of *Murdock* v. *Waterman*[87] as direct authority for its holding.

In Oklahoma, which state follows the Kansas decisions on this subject, Kansas, in turn, adopting the New York rule, the Supreme Court of Oklahoma held, in *Clark* v. *Grant,*[88] that a payment of interest upon a note by the mortgagor after bar, revived not only the note but also the mortgage incident thereto as against judgment lienors whose liens did not attach to the mortgage property until after the payment had been made. The Court noted that had the defendants' interest been acquired before the act of revivor, the payment would not have been effective against them. The case is not a strong application of the rule, however, because defendants were claiming merely a superior lien, the exact nature of which is not stated, and there was no conveyance and no question of reaching a subsequent grantee.

3. Payment by a grantee

(a) Payment or acknowledgment by grantee as affecting subsequent takers

The mortgaged property may pass through many hands, and the effect of payments of principal or interest upon the indebtedness as to one or more grantees in the chain often raises perplexing questions.

When the original grantee in turn becomes a grantor, of course payments by him bind subsequent grantees since they take under him and stand in his shoes just as he did with respect to his grantor, the original mortgagor.[89] And the effect upon the original grantee of payments by subsequent grantees would appear to bring into play the same rules which were applicable as between him and the mortgagor, his grantor, in particular, that since no agency exists between them a payment by a subsequent grantee does not toll the statute as to his grantor.[90]

The effect upon the mortgage of payments made by successive grantees of the premises is to continue the lien of the mortgage as against each subsequent taker, whether or not they assumed the

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[87] 145 N. Y. 55, 30 N. E. 829 (1895) discussed infra, p. 40. In the Murdock case, however, the payment was made before bar.

[88] 26 Okl. 398, 109 Pac. 234 (1910).

[89] Harrington v. Slade, 22 Barb 161 (1856) discussed, infra, p. 39.

[90] In Mack v. Anderson, 165 N. Y. 529, 59 N. E. 289 (1901) the grantor-grantee relationship is defined as that of surety and principal with the consequences which follows therefrom. Cf. Restatement of Security, "§ 120, Tolling of Statute of Limitations as to Principal or Surety. Partial payments or new promises made to the creditor by either surety or principal do not toll the running of the statute in favor of the other against the creditor." Contra: Biddle v. Pugh, 59 N. J. Eq. 480, 45 Atl. 626 (1900), discussed infra, note 125.

debt, because by making payments each one recognizes the continued existence of the mortgage as a valid lien against the land.[91]

In *Harrington* v. *Slade*,[92] suit to foreclose a mortgage was commenced in 1832. During the pendency of the proceedings Slade purchased the property from two of the defendants, and was later made a party to the foreclosure action. In his answer he stated that the mortgage was paid. However, the Court deemed any presumption of payment rebutted by an agreement of the grantee from the mortgagor, who took title subject to the mortgage and expressly agreed to pay it, to resell the property to pay off the debt. The fact that he never fulfilled his promise did not, according to the Court, alter the fact that the agreement constituted a recognition of the mortgage made less than 20 years before the commencement of the suit which was binding upon all subsequent takers. Justice Paige ruled that defendant Slade, claiming under the original grantee from the mortgagor, one Crary, was bound by the admissions and acknowledgments made by Crary while owner of the mortgaged premises, and said:

> [H]e [Slade] has no right to claim that the foreclosure suit was not commenced as against him until the filing of the supplemental bill making him a party to the original suit. He purchased *pendente lite* . . . He is, therefore, to all intents and purposes, a party to the original suit, and the time which has elapsed since that suit was commenced cannot form any part of the time since the recognition of the mortgage by Crary . . . [93]

The early Chancery decision of *Heyer* v. *Pruyn*,[94] is often cited for the proposition that payment by a person obligated to pay the indebtedness preserves the lien of the mortgage as against subsequent grantees who are thus precluded from setting up the statute of limitations in bar to a foreclosure suit.[95] The case does not,

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[91] In McLane v. Allison, 60 Kan. 441, 56 Pac. 747 (1899) foreclosure was decreed against a grantee who made payments although he merely took with notice of the existence of the mortgage and did not assume it. (Discussed infra, p. 46.) Logic would seem to justify the rule that a payment made by a grantee who holds the equity of redemption should be effective to keep the mortgage alive as against all subsequent takers, since he at the time of making payment had the power to bind the property. So the court reasoned in McLaughlin v. Senne, discussed supra, p. 30 as to a proceeding in rem.

In Zausmer v. Souzzi, 198 N.Y.S.2d 482 (Sup. Ct. Nassau Co. 1960) in an action of foreclosure brought against the mortgagor and his grantee, who neither assumed nor took the conveyance subject to the mortgage (but recognized it in a later separate agreement with plaintiffs) partial payments had been made on the mortgage through the application of rents collected from the property, and the statutory bar was held not to have even commenced to run on default in payment of the first installment of principal or interest since the mortgagee had never exercised his option to accelerate the mortgage. Foreclosure was decreed.

[92] 22 Barb. 161 (1856); accord Heyer v. Pruyn, infra, note 94.

[93] 22 Barb. 161, 165. The Court concluded that it would give defendant Slade opportunity to establish on the trial his allegation that the mortgage was paid and satisfied, but said it would avail him little if what he relied upon to prove this was a mere lapse of time. (p. 167.)

[94] 7 Paige (Ch.) 465 (1839).

[95] 1 Wiltsie on Mortgage Foreclosure, supra, note 40, § 77, p. 152, fn. 92; 2 Jones on Mortgages, supra, note 40, § 1539, p. 1037, fn. 84 and § 1540, p. 1038, fn. 90.

however, so hold. In that case, the party acting was fulfilling the obligations of the mortgagor who had become insolvent. One Van Dyke, a creditor of the mortgagor, (who ultimately became the grantor) bid in the property at an execution sale upon a junior judgment, taking subject to the mortgage along with other prior incumbrances. He agreed with other lienholders to apply the funds he would receive upon a resale to pay off the mortgage as well as the other debts of the mortgagor. In reselling the land, he covenanted in the deed to pay the mortgage. The inclusion of the mortgage in the statement of incumbrances on the property made at the time of the creditors' agreement pursuant to which Van Dyke bought, was deemed a sufficient recognition of the existence of the mortgage to preserve the lien for twenty years from that time, and to bind all those who claimed under him by subsequent conveyance. The opinion stated that it was not necessary to decide whether a $500 payment made by Van Dyke after he had sold the property would be "sufficient to rebut the presumption of payment in favor of his grantee Shaver and those claiming under him and to preserve the lien of the mortgage for twenty years after that time," since the action was brought within twenty years of the time that Van Dyke bought at the judgment sale.

A more recent case illustrating that extension of the lien of the mortgage results from a part payment by an owner liable for the debt and binds the property in the hands of a subsequent grantee is *Woolley* v. *Hoffman*.[96] In that case the grantee of the mortgagor[97] who had assumed responsibility for the mortgage debt when she accepted the conveyance of the property, sent to the mortgagee a $2,000 check not earmarked as to either principal or interest, with an accompanying letter which omitted to say for what purpose the money was enclosed, but which contained a clear reference to the mortgage debt. Six other letters of the grantor, written both before and after the making of the payment, and referring to the mortgage, were placed in evidence. The Supreme Court of New York (Special Term) held that the letters plus the payment constituted sufficient written acknowledgment of the mortgage indebtedness to toll the statute as against a subsequent grantee who acquired the property after the act of revivor.

However, an acknowledgment of the existence of the lien of the mortgage by an owner of part of the mortgaged premises (even though expressed as a part payment) will not bind other parts of the mortgaged property held by others at the time of the acknowledgment. In *Murdock* v. *Waterman*,[98] the payment was by the heirs of the mortgagor and was made at the mortgagee's request just before the bar of the statute in order that the mortgage would not outlaw.[99] It was held to be an unequivocal acknowledgment

[96] 99 N.Y.S.2d 293 (Sup. Ct. Nassau Co. 1950).

[97] The headnote to the case states that the payment was made by the "mortgagor," but it is not so stated in the opinion, which simply sets forth the series of conveyance and refers to the party making payment as the "debtor." (Payment was made by the defendant "Mrs. Rosenberg" who was the grantee of the original mortgagor, Lee Rosenberg.)

[98] 145 N. Y. 55, 39 N. E. 829 (1895).

[99] 145 N. Y. 55, 50, 39 N. E. 829, 830.

by them of the mortgage,[100] and effective to continue the lien against the part of the premises passing to them. But the primary issue in this case concerned the liability of the grantee of one-half of the mortgaged premises not a party to the payment, who had assumed no duty to pay the mortgage debt, and to whom the property had been conveyed prior to the making of the payment. Chief Judge Andrews held that as to this grantee the lien of the mortgage was not continued[101] because her relationship to the debt and to the property embraced in the mortgage, as well as to the parties making the payment, was not such as would warrant her being bound by their act; they were not her agents or in any way authorized to act for her. The opinion of Chief Judge Andrews concluded:

> The guiding and controlling consideration is that the payment must be made by a party to the obligation, or by his authorized agent. If payment by one is relied upon to take the contract out of the statute as to another, it must be shown that the party who made the payment in fact or in law the agent of the other in respect to his liability. When the person paying is bound, those in privity with him may be bound also. There is lacking in respect to the payment relied upon in this case to bind Mrs. Waterman [the grantee of the separate part], (1) any agency on the part of the Lamb heirs to act for her or to bind her interest in the land or to the debt, from which the law will imply an authority, and (3) the admission, inferable from the payment, construed in the light of the circumstances, was an admission simply that the mortgage was a subsisting lien on the part of the land then owned by them.[102]

The Court distinguished cases wherein the mortgagor had made a part payment on the debt after conveyance and within the statutory period[103] as "not the same" because in such cases the personal

[100] 145 N. Y. 55, 61, 39 N. E. 829, 830. In the Trial Court it was held that the payment of $1. "in recognition of the mortgage lien" kept the mortgage in life not only against the part of the premises held by the parties who made the payment, but also against the part of the premises conveyed to another in the lifetime of the mortgagors, who was not a party to the payment and had assumed no duty to pay the mortgage debt. The Court of Appeals reversed this ruling as to the grantee of the separate part.

[101] 145 N. Y. 55, 65, 39 N. E. 829, 832.

[102] 145 N. Y. 55, 69, 39 N. E. 829, 833. This rule was affirmed and applied as between grantees of different portions of the same mortgaged property in Mack v. Anderson, discussed infra, p. 42, and as between grantee of a part and the mortgagor in Boughton v. Harder, 46 App. Div. 352, 61 N. Y. Supp. 574 (3d Dep't 1899) where since there was no agency and no privity between the mortgagor and his grantee, payments of interest by the grantee did not remove the statutory bar as to the mortgagor who retained title to the balance of the mortgaged property. (Discussed, infra, p. 44.)

[103] The cases distinguished are New York Life Ins. & Trust Co. v. Covert, supra, note 69 and Hughes v. Edwards, supra, note 68. The opinion gives the following explanation of the rule of New York Life Insurance & Trust Co. v. Covert: "The mortgage is an incident to the debt, and when payments are made by the debtor, the mortgagee is not called upon to inquire how the mortgagor has dealt with the equity of redemption. If the mortgage is recorded the purchaser has constructive notice of its existence, and a dealing with the debt between the debtor and creditor in the usual course is not to be expected. The mortgagors until at least the debt is barred represent all persons interested in the land." (p. 66.)

liability of the mortgagor continued, where as here the death of the mortgagor separated his personal liability from the ownership of the land, and a payment by his heirs, who were not bound with respect to the obligation to the same extent as was the mortgagor, could not be effective to continue the lien of the mortgage, at least, as against a portion of the mortgaged property which had passed to another. Such language indicates that in this case the time for foreclosure against the property held by the heirs was extended independently of any tolling of the statute limiting the action on the debt. The Court stated that the part payment of one dollar by the heirs extended the time for foreclosure of the part held by them since it was made "in recognition of the mortgage lien" in order to protect their interest in the property. In effect, therefore, the payment of a nominal sum was a conventionalized form of agreement to toll the statute, starting a new period, although the transaction was given effect in terms of an "acknowledgment."

Because of its dictum that a partial payment by the mortgagor after he has conveyed the mortgaged premises but before the debt is barred continues the lien of the mortgage, *Murdock* v. *Waterman* is frequently cited as authority for this proposition. But, as the Court takes pains to explain,[104] the theory upon which the rule rests is that payment implies a new promise to pay, and this implication can only be drawn against a party making payment or when made in his behalf by one authorized to bind him.

A different problem arises when the grantees are not grantees in succession of the same property, but grantees taking under the same mortgage but receiving different parcels, the mortgaged premises having been divided. When this occurs, a payment of interest by the grantee of one part of the mortgaged property has been held inoperative to keep alive the mortgage debt or lien against the grantee of the other part. This was the holding of the New York Court of Appeals in *Mack* v. *Anderson*,[105] where after executing a mortgage of a seventy-five acre tract, the mortgagor conveyed twenty-five of those acres to Anderson by a warranty deed which made no reference to the mortgage; and two months later transferred the remaining fifty acres to grantees who covenanted and agreed to pay the mortgage and who made payments thereon. Through various mesne conveyances the title to the fifty acre tract became vested in the present holder who had made no payments. The only question decided on appeal was whether foreclosure could be decreed against the non-paying property owner of the twenty-five acre tract on the ground contended for by the plaintiff that the payments of the original grantees tolled the statute as to all the mortgaged property. Judge Werner's opinion noted the difference in the types of conveyances each grantee received,[106] and proceeded in the familiar vein that a grantee who makes payments does so to protect his own interests and not as agent to the conveyee of a separate portion (nor as agents of the mortgagor); and that having

[104] 145 N. Y. 55, 67, 39 N. E. 829, 832.
[105] 165 N. Y. 529, 59 N. E. 289 (1901).
[106] 165 N. Y. 529, 531, 533; 59 N. E. 289, 290.

no authority to bind the other conveyee, his action would not have such effect.

(b) Payment by grantee as affecting prior parties

A grantee takes the property as the grantor possesses it,[107] except to the extent that it may be agreed that his rights and duties with respect thereto shall in some way be limited. He is assumed to have actual or constructive notice of any liens against the property. If there is a mortgage outstanding, the grantee does not assume personal liability for it unless he covenants to do so.[108] A conveyance subject to a named mortgage does not necessarily give rise to an obligation to pay the mortgage debt, for such words may only be recited by way of description.[109] But if the grantee expressly agrees to pay the mortgage debt his liability is absolute and his relationship to the debt becomes such that he is the principal debtor and the mortgagor becomes the surety.[110] But no agency is thereby created. For this reason payments upon the mortgage by the grantee are regarded as taking care of his own obligation and when not authorized or demanded by the mortgagor are not effective to toll the statute of limitations as to him,[111] although the lien against

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[107] 2 Jones on Mortgages, supra, note 40, § 1540, p. 1038.

[108] Ibid. § 933, p. 291. Bennett v. Bates, 94 N. Y. 354, 370 (1884), an action of foreclosure by the assignee of the mortgage against a grantee of the property who took "subject to" an outstanding mortgage "if there shall be found anything owing and unpaid upon the same." Although the amount of the mortgage was stated to be $15,000, through error an $11,200 credit was not included. Held: that the grantee only agreed to pay so much as was actually owing on the mortgage and that since she held the title as it was possessed by the grantor, it was open to her to dispute the validity of any claim against the land which the grantor had. The mortgage was held to be a valid incumbrance only to the extent of the $3,800 still due. (p. 373.)

[109] 2 Jones, supra, note 40, § 934, p. 297.

[110] As between the mortgagor and his grantee who promises to pay the mortgage debt, such grantee (ordinarily a purchaser) is "upon the plainest principles of justice, the primary debtor." Thomas on Mortgages, supra, note 40, § 606, p. 480. Thomas goes on to explain that "[t]he land stands as the fund out of which the debt should, in the first instance, be satisfied; but if that be insufficient, it will rest upon the purchaser of the land to redeem the promise made by him on acquiring the estate, and to save the mortgagor harmless as against the debt. The land is the security both of the mortgagor and of his grantee as against their respective covenants, but the debt is that of the grantee, and the mortgagor stands merely as his surety." [Nevertheless, the liability of the original mortgagor to the mortgagee is not (in the absence of some act of the mortgagee which would have that effect) in any degree impaired by the fact that a grantee of the mortgagor has assumed the mortgage. Ibid. § 608, p. 482.] And see note 90 supra.

[111] Frost v. Johnson, 140 Ohio St. 315, 43 N.E.2d 277 (1942). This case reviews the decisions on this question and notes that the authorities in the various jurisdictions are in conflict. This case involved a suit to recover upon a debt and mortgage brought by the indorsee of the notes and assignee of the mortgage (the same individual) against the mortgagor and successive owners of the mortgaged property who assumed and agreed to pay the mortgage. No payments were made upon the debt by the mortgagor after he parted with his interest. Each of the grantees, during his period of ownership, had made payments, although the present titleholder claimed her payments were made for

the property is preserved for the mortgagee.[112] This rule represents the majority view and is adhered to by New York.[113]

In *Boughton* v. *Harder*,[114] the mortgagor conveyed one of the three parcels embraced in the mortgage to another, subject to the mortgage which the grantee assumed and agreed to pay. All grantees to whom this parcel was thereafter conveyed likewise assumed and agreed to pay the mortgage and made interest payments which kept the lien alive as to this particular parcel, but not as to the remainder of the property continuously held by the mortgagor until his death, on which no payments had been made in upwards of twenty-four years. The Court found there was no privity between the mortgagor and his grantee, and any payments by the grantee were made as principal and not as agent of the mortgagor, quoting from *Murdock* v. *Waterman*.[115]

In accord with the holding of the New York Courts is *Trent* v. *Johnson*,[116] in which payments of interest by a grantee who had assumed the mortgage continued the lien against the land as against subsequent grantees, but did not toll the statute of limitations as to

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the undisclosed principal, which absolved her from being held responsible. Held: (Modifying the judgment of the lower court) that the payments by subsequent grantees did not toll the statute as to the personal liability of the mortgagor who neither participated in or had any knowledge of such payments although it was tolled as against the present holder who had in fact made the payments.

[112] As was true in Frost v. Johnson, digested in the preceding note, the mortgagee may no longer have recourse against his original obligor, the mortgagor, but normally he can still reach the land in the hands of a subsequent grantee.

[113] Boughton v. Harder, 46 App. Div. 352, 61 N. Y. Supp. 574 (3d Dep't 1899), which represents the majority view. Accord: Trustee of Olds Alms-House Farm v. Smith, 52 Conn. 434 (1855), payments of interest upon the mortgage note made by subsequent grantees who assumed the obligation in part payment of the purchase price was held not to operate as a payment by the defendant which would have the effect of creating a new promise or acknowledgment of the indebtedness by him. The reasoning of the court was simple and direct that such payments were made by the successive owners of the equity of redemption on their own account and for their own benefit and could effect no change whatever in the legal relations between the mortgagee and the original mortgagor since they were not the agents of the latter nor did they profess to act for him. (p. 436.); Regan v. Williams, 185 Mo. 620, 84 S. W. 959 (1905), the Supreme Court of Missouri, in a per curiam opinion, held that the conveyance of the property to one who, with the mortgagee's full knowledge and approval, agreed to assume and pay the debt, placed the mortgagor and his grantee in the relationship of surety and principal, respectively, and although ordinarily, payment by a principal made while the debt is still alive, will suspend the statute as to surety, this proposition has no application where, as here, the parties are not joint obligors, the contracts under which they are bound being "separate and distinct undertakings." (p. 629, p. 961.) See also Trent v. Johnson, 185 Ark. 288, 47 S.W.2d 12 (1932), infra, note 116 and Turner v. Powell, 85 Mont. 241, 278 Pac. 512 (1929).

[114] Cited, supra, note 113.

[115] In asserting this rule the Court quoted the language of Chief Judge Andrews in Murdock v. Waterman which is set forth in the text, supra, p. 41. (46 App. Div. 352, at pp. 354–355, 61 N. Y. Supp. 574, at p. 576.) (Cited as Boughton v. Van Valkenburgh in the New York Supplement Report. Van Valkenburgh being the grantee of the premises from the executors of the mortgagor.)

[116] 185 Ark. 288, 47 S.W.2d 12 (1932) discussed, 17 Minn. L. Rev. 97 (1932).

the mortgagor, and no personal judgment could be rendered against him.[117] On this appeal by defendant mortgagor the only question before the Court was as to his personal liability on the mortgage debt which was sought to be enforced because the land had depreciated in value. The Court said quite positively that "No act of a grantee who has assumed a mortgage will toll the statute of limitations as to the mortgagor."[118]

In *Travelers Insurance Co.* v. *Stafford,*[119] an Oklahoma case, the facts were similar to those of *Boughton* v. *Harder,* the grantee of a part likewise assuming the entire obligation, and the opposite result was reached. The Court was guided by an earlier case in that jurisdiction, *Smith* v. *Bush,* in which payments by the mortgagor started the statute running anew against his grantee. The opinion stated that payment by a grantee offers even stronger justification for application of the general rule that payment tolls the statute.[120]

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[117] Accord: Home Life Insurance Co. v. Elwell, 111 Mich. 689, 70 N. W. 334 (1897), suit upon a bond secured by a mortgage on New Jersey Property brought against the original mortgagor. The property had been conveyed several times, each grantee continuing payments of interest on the bond until there was default by one owner in 1892. In a foreclosure action brought the ensuing year the plaintiff bid in the premises, thus securing title, but there was a substantial deficiency for which recovery was sought in this action, maintained in Michigan to which State the defendants had moved shortly after selling the property in 1877. The Court considered whether the payments by the successive grantees tolled the statute as to the mortgagor, and held they did not as the grantees were not the agents of the mortgagor and made the payments only for their own benefit. (p. 691, p. 335.) It should be noted that there is a reluctance to hold a party liable for a deficiency, and the general rule is that there can be no decree for the deficiency after the debt is barred. 2 Jones, supra, note 40, § 1545, p. 1044. In County Trust Company v. Harrington, 168 Md. 101, 176 Atl. 639 (1935), the mortgagee sought to recover a deficiency judgment against the mortgagor, the property having been sold at foreclosure. It was held that as to the mortgage debt, interest payments by the grantees who assumed the mortgage and thereafter paid continuously for 13 years, did not toll the statute because they were not in a relationship of principal and agent to the mortgagor, but rather of principal and surety. Furthermore, the liability of the grantees for the mortgage debt was a separate and distinct obligation from that of the mortgagor, based upon their assumption agreement. (p. 106, p. 641.)

[118] 185 Ark. 288, 292, 47 S.W.2d 12, 14. A directly contrary view is expressed in Harper v. Edwards, 115 N. C. 246, 20 S. E. 392 (1894) where the court theorized that the purchaser's position was that of "co-principal or agent of the mortgagor." However, the payments made by the purchaser of the land from the mortgagor, who assumed the mortgage, was made "with the consent of all parties." The mortgagee and mortgagor therefore, had consented to the assumption and this acquiescence prevented the statute from running against the mortgage lien so that the right to foreclose was not barred. And in Levy v. Police Jury of Pointee Coupee, 24 La. Ann. 292 (1872) the Court said, "Prescription was interrupted as to *all the parties* liable for the payment of the debt." (In this case the question was one of the priority of mortgages and it was held that payments of interest by respective owners of the mortgaged property who assumed the debt kept the first mortgage alive and preserved its priority.)

[119] 180 Okla. 606, 71 P.2d 709 (1937). The relief sought was foreclosure of the mortgage against the entire tract, no personal judgment being involved. There were two subsequent grantees who assumed the mortgage indebtedness and agreed to pay it as part of the purchase price; the mortgagors had never at any time made any payment on the obligation.

[120] 180 Okla. 606, 607, 71 P.2d 709, 710.

Thus Oklahoma aligns itself with those jurisdictions in which a payment made by either the grantor or the grantee tolls the statute as against the other.[121]

But in the Kansas case of *McLane* v. *Allison*,[122] cited with approval in the *Travelers* case, the mortgagor could not be reached on the debt although the property was foreclosed against subsequent grantees who took with notice of the mortgage but did not assume it, and who had made payments of interest on the mortgage debt.

In yet another case, *McFarland* v. *Utz*,[123] in Illinois, payments of interest by a grantee who took subject to the mortgage but did not assume it were held effective to toll the statute as to the mortgagor so that the debt was kept alive and the mortgage along with it and foreclosure could be decreed. The Court apparently assumed that the mortgage lien could not be preserved unless the debt were alive also; therefore it was necessary to find the statute tolled as to action on the debt, and as well on its "mere incident," the mortgage lien. The Court met this difficulty by reasoning that since payments by the mortgagor would have tolled the statute as to the premises held by the grantee, the converse was true, and payments by the grantee were effective to extend the period for payment of the mortgage debt.[124] Consequently, action on the debt not being barred, neither was it on the mortgage.

In none of these cases was the act of the grantee given effect as a basis of the personal liability of the mortgagor. There does not appear to be any clear-cut case in which the statute was tolled as to the mortgagor's personal liability because of payments by his grantee or subsequent takers.[125]

4. Payment as effecting extension or revival of mortgage lien as against junior encumbrancers

When the question before the Court is one concerning the priority of liens—for example, whether the junior lienholder can claim preference over the holder of the mortgage because the statute of

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[121] The Court names the following as some of the jurisdictions taking this position: Kansas, Illinois, Arizona, Oregon, Vermont and the Supreme Court of the United States. Cf. McLane v. Allison, 60 Kan. 441, 56 Pac. 747 (1899) and MacFarland v. Utz, 175 Ill. App. 525 (1912), infra, note 123.

[122] Supra, note 121.

[123] Ibid.

[124] 175 Ill. App. 525, 531, 532. And on p. 530 the Court adopts the "in rem" theory of mortgages. Cf. discussion supra, p. 30.

[125] Biddle v. Pugh, 59 N. J. Eq. 480, 45 Atl. 626, would be authority for this proposition, except that the party as against whom the statute was tolled was not the mortgagor, but a grantor who in taking the property from the original mortgagor had assumed and agreed to pay the mortgage. The Court reasoned that payments by subsequent grantees stayed the running of the statute on the bond and suit could be maintained upon it and a deficiency be recovered against the first grantee on the theory that since the mortgagor could enforce the covenant made with his grantee (the defendant) to pay the mortgage he had assumed, the mortgagee could be substituted for him in order to avoid circuity of action. (The land had previously been foreclosed.)

limitations has run against such holder,[126] there seems to be more readiness to uphold the lien of the mortgage.[127] Some jurisdictions which do not follow the rule of the *Covert* case as respects a grantee, do recognize that a mortgagor can extend or revive the lien of the mortgage as against a junior encumbrancer. In reaching a decision as to priorities the Court necessarily must determine whether the mortgagee's rights under the mortgage are barred, and it has been held that payments received upon the obligation, whether made by the mortgagor[128] or a subsequent grantee[129] are effective to remove the statutory bar.

The crucial question as to the effect upon subsequent incumbrancers is the time when the lien attached. If the junior lien was acquired before the statute of limitations has run upon the mortgage, the junior claim does not have priority and a payment or acknowledgment which is effective to renew or revive the earlier incumbrance continues its supremacy. Such is the generally accepted view, followed also in New York.[130] If the junior lien was

[126] Consolidated National Bank of Tuscon v. Van Slyke, 27 Ariz. 501, 234 Pac. 553 (1925), holding that a written acknowledgment and waiver of the statute made before the statutory period expired but after junior liens in the form of judgments had attached, by a subsequent grantee, tolled the statute as to the junior lienholders. The theory upon which the Court proceeded was similar to that applied in those cases where a payment by the mortgagor made after conveyance but before bar tolls the statute as to a subsequent grantee (New York Life Ins. & Trust Co. v. Covert, supra, note 142) namely, that such a rule imposes no inequitable burden on the junior lienholder who acquired his lien with at least constructive notice of the existence and enforceability of the prior lien. In a careful opinion, as this is a case of first impression, the Court outlines the conflict of authority. (pp. 506–507.)

[127] In those jurisdictions which assert that a mortgagor who has parted with his interest in the property cannot after bar revive the mortgage so as to affect the rights of a subsequent grantee, it is held, with respect to junior incumbrancers, that a revivor made after bar can be effective against them. Kerndt v. Porterfield, 56 Iowa 412, 9 N. W. 322 (1881), infra, note 134.

[128] Hess v. State Bank, 130 Wash. 147, 226 Pac. 257 (1924), where payments made by the mortgagor on the first mortgage were effective to toll the statute of limitations as against the holder of the second mortgage on the same property, who acquired his interest before they were made and who later foreclosed the second mortgage, buying in the property at the sale, so that at the time of this suit he is the titleholder. The Court stressed the fact that the payments were made while the mortgagor retained an interest in the property. It would appear that the payments occurred before bar.

[129] Consolidated National Bank v. Van Slyke, supra, note 126. Accord: as to the effect of payments of interest by subsequent grantees see McLaughlin v. Senn, supra, note 45, where payments by a holder of the equity of redemption who was not liable on the earlier mortgage but made the payments thereon nevertheless, were held effective to toll the statute so as to preserve the priority of the earlier mortgage over a later one given by a different person on the same property.

[130] Heyer v. Pruyn, supra, note 94. Somewhat different but related problems are presented in Tortora v. Malve Realty & Construction Corp., 96 N.Y.S.2d 388 (Sup. Ct. N. Y. Co.), where by way of dicta the Court indicated that payments of principal and interest on the senior share in a mortgage were not effective to remove the statutory bar with respect to the junior participating share, because although there was but one bond and mortgage there were two distinct debts and the owner of one had no right to extend the time of payment as to the other. (The action was to foreclose the junior share and was brought against the present owner of the premises who pleaded that action was barred by the statute as to this share since no payments had been made

acquired after bar and after the act of revivor it is likewise inferior.[131] However, when the junior incumbrance attaches after bar but before any acknowledgment has been made, it has been held that the junior incumbrance has priority and cannot be disturbed.[132] In the case in which this was decided, the Court explains that when a mortgage is revived it is superior to all liens to which it was superior when the liens attached to the property. Consequently, a lien attaching when a mortgage is outlawed takes precedence over it.

There is a clear division of authority as to whether a payment, an acknowledgment or a new promise which occurs after a junior lien has attached but before the statutory period has run can affect the rights of a junior claimant;[133] and the gulf is just as wide when revivor takes place after action on the debt and mortgage is barred. The prevailing view appears to be that the junior lienholder takes his lien subject to the possible extension or revival of the prior lien.[134] As suggested in *Burns* v. *Burns,* this principle "should be

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on it. Defendant's motion to dismiss was denied on two grounds: (1) because the defendant took the property subject to the first mortgage which comprised both shares he was estopped to deny the validity of the mortgage; and (2) because although the cause of action as to the principal sum due on the junior claim may be barred, a cause of action remained for the interest.) Accord: McLaughlin v. Senne, supra, note 45 and Kerndt & Bros. v. Porterfield, infra, note 134.

[131] Clark v. Grant, discussed supra, p. 38, where the payment took place after bar but the judgment liens attached subsequent to the payment.

[132] Burns v. Burns, 233 Ia. 1092, 11 N.W.2d 461 (1943). The written admission and promise to pay the indebtedness made by the original mortgagors (husband and wife) to the assignee of the mortgage after an action of partition was brought to determine the various priorities of the liens against the property (the lien of the mortgagee and of two holders of judgments against the original mortgagors) was held effective to revive the mortgage but did not give it priority over a judgment lien which attached after the remedy upon the debt and mortgage was barred and before the revivor. (Thus the Eichoff judgment which attached in this interim period gained superiority over the mortgage lien; but the other judgment lien, the Mitchell judgment, was deemed inferior since it was secured at a time when the remedy upon the mortgage was not barred.) (This is a 5–4 decision, with two dissents. The majority opinion is sharply criticized in the dissent of Judge Bliss which argues that the Mitchell judgment as well as the Eichoff judgment should have precedence over the mortgage lien for the reason that although the Mitchell lien attached before bar and the Eichoff after bar, in fact, as respects both, the mortgage was at one time barred and unenforceable and the happening of that event moved them both up the ladder of priorities so that a subsequent revivor could not affect either one. This dissent repudiates and would depart from the decision in Kerndt & Bros. v. Porterfield (relied on by the majority) as unsound and contrary to principle and adds, "there is no other decision in Iowa like it.")

[133] These irreconcilable views proceeding upon distinct theories are set forth in Consolidated National Bank of Tucson v. Van Slyke, supra, note 126, 27 Ariz. 501, 506–507; 234 Pac. 553, 555; and reiterated and enlarged upon in Burns v. Burns, supra, note 132; 233 Iowa 1092, 1101–1103, 11 N.W.2d 461, 466–467.

[134] Compare: Kerndt & Bros. v. Porterfield, 56 Iowa 412, 9 N. W. 322 (1881), holding that the junior lien is cut off (a written promise of the mortgage made after bar preserved the mortgage lien as against the holder of a subsequent mortgage executed before the bar of the statute had fallen.) with Boucofski v. Jacobsen, supra, note 80, holding that the junior claimant prevailed. (Here, however, the claimed tolling was based upon the absence from the state of the

equally applicable whether the revivor is before or after the expiration of the statute of limitations,"[135] although some jurisdictions make a distinction upon this basis.[136]

C. Express Acknowledgment of or New Promise to Pay the Mortgage Debt

Although there appear to be few cases[137] in which an express acknowledgment of a mortgage or a new promise to pay the mortgage debt has been held effective to take the mortgage out of the statute of limitations, textwriters[138] recognize that such a transaction does remove the bar of the statute. An analogy can be drawn from the part payment cases previously discussed, wherein the payment was effective as an "acknowledgment" to toll the statute. If a part payment has been effective for that purpose, it would seem to follow that an express acknowledgment or new promise would be also.

D. Acknowledgment of Existence of Mortgage Lien

The discussion, *supra,* of the effect of part payments on the mortgage debt to toll the statute on an action to foreclose a mortgage shows that the part payment is considered to be an "acknowledgment" of the mortgage lien.[139] The part payment cases seem therefore to indicate that an express acknowledgment of the mortgage lien would have the same effect.

Some difficulty nevertheless arises in applying to such acknowledgments the rationale of the decisions giving effect to an acknowledgment of a money obligation as tolling the statute of limitations.

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original mortgagor. Action to foreclose a mortgage was brought against the mortgagor and the subsequent owner of the property through purchase at a tax sale. Foreclosure was denied against the present titleholder who was free to plead the statute of limitations in bar; but not so the original mortgagor as to whom the statute was tolled by his absence. In an unclear opinion the Court dwells at length upon the position of subsequent incumbrancers.)

[135] 233 Iowa 1092, 1103, 11 N.W.2d 461, 467.

[136] Lord v. Morris, supra, note 49. An indorsement upon the mortgage note recognizing its validity made by the mortgagors after the period of limitation had run was ineffective to revive the mortgage and likewise ineffective against the previously acquired liens of the second and third mortgages upon the property which attached in the interval between the statutory bar and the attempted revivor. (But under the California statute which extinguishes the lien when the obligation is barred, any other result seems inescapable.)

[137] Murphy v. Coates, 33 N. J. Eq. 424 (1881) in which a foreclosure action brought by a subsequent holder of mortgaged property who had taken the precaution of securing the mortgagor's endorsement as to the validity of the mortgages involved, was successful although "nothing had ever been paid" on the mortgages. The Court found there was an acknowledgment of them. It proceeded, however, upon a presumption of payment theory, and found the presumption arising from the lapse of time rebutted by the verbal and written acknowledgment that neither principal nor interest had been paid. (There was a second issue as to the priority of plaintiff's mortgage over a second mortgage which was resolved in favor of the recorded first mortgage.)

[138] 2 Jones on Mortgages, supra note 40, § 1534, p. 1029; 1 Wiltsie on Mortgage Foreclosure, supra note 40, §§ 74 and 75.

[139] See Murdock v. Waterman, discussed supra, p. 40.

The situation presented by a mortgage lien is somewhat different. While a new promise to pay the debt, express or implied from an acknowledgment, may be described as constituting or evidencing a new "contract," a mortgage is a conveyance creating a right affecting the land and enforceable against the land and is not a promissory transaction. It is an executed one and no new promise, either express or implied, could result in a "new" mortgage. This presents no theoretical problem when the acknowledgment is made before bar for there is then no question of a new mortgage, but rather of the continuing effect of an old and subsisting one. After bar, the concept of a new "contract" in the form of a new "mortgage" would seem applicable and some difficulty is encountered if one attempts to say that a new mortgage is brought into being simply from an implied promise. This is perhaps the reason why in some jurisdictions[140] a mortgage can only be renewed or extended by following the formalities provided by statute; but there is no such legislation in New York.

Regardless of theory,[141] however, the fact is that an acknowledgment of a mortgage lien has been held to affect the running of the statute of limitations as to the time within which an action to foreclosure a mortgage can be brought.[142] Most of the decisions (other than those in which a part payment is said to be an "acknowledgment") have involved the "acknowledgment" of a mortgage by a recital in a conveyance that it is "subject to" a mortgage.

E. "Subject to the Mortgage" Clauses as an Acknowledgment of the Mortgage

There is a considerable body of authority that a recital in a deed that the property is conveyed subject to an existing mortgage may, as to both grantor[143] and grantee,[144] constitute an acknowledgment of the incumbrance that tolls the statute of limitations, removing the bar if the statute has run[145] and starting a new period if it has

[140] California Civil Code (Deering 1949) § 2922; Iowa Code (1950) § 614.21; West Virginia Code (1955) § 5397 and Virginia's somewhat similar enactment, Virginia Code (1950) §§ 8–11.

[141] The ancient theory that the statute was made inapplicable by an admission which rebutted the presumption of payment of a debt might indeed apply. A more modern theory might treat an acknowledgment of the mortgage as a present waiver of the bar of the statute, or as an agreement not to plead the statute or not to plead the time that has expired before the date of the acknowledgment.

[142] New York Life Insurance & Trust Co. v. Covert, 6 Abb. N. S. 154, 3 Abb. App. Dec. 350 (1867) discussed supra p. 35; Schmucker v. Sibert, 18 Kan. 104 (1877), discussed infra p. 58. See also Murdock v. Waterman discussed supra p. 40.

[143] Doran v. Doran, 145 Ia. 122, 123 N. W. 996 (1909). The suit was one in equity to cancel a mortgage in favor of defendant, in which he cross-petitioned for foreclosure. Plaintiff's claim that the mortgage was barred by the statute of limitations did not avail because the mortgagor's conveyance subject to the mortgage was an acknowledgment by him which revived the indebtedness and the lien of the mortgage. Foreclosure was decreed.

[144] Frost v. Johnson, supra, note 111. But cf. Schmucker v. Sibert, 18 Kan. 104 (1877), discussed infra, p. 58, to the effect that a conveyance subject to the mortgage is not an acknowledgment, but a separate and original contract.

[145] Doran v. Doran, supra, note 143.

not.[146] But the basis for the application of the rule to such transactions and the circumstances that will bring it into operation are not clear, either in New York or elsewhere. Several different explanations have been given and the decisions of other states vary as to the requirements necessary for application of the rule. The usual requirement that an acknowledgment must be made to the creditor or his agent is not observed. The mortgagee may have no knowledge of it, since he is not expected to keep abreast of conveyances of the mortgaged property,[147] nor is he regularly apprised of the various transfers that may take place, so that, ordinarily, a "subject to the mortgage" clause is seldom brought to his attention.[148] Furthermore, the theoretical justification of the rule that an acknowledgment of a debt tolls the statute because it implies a new promise to pay supported by the moral consideration of the debt[149] is seldom invoked.

Whether or not the recital that the conveyance is subject to an outstanding mortgage meets the requirements of the particular version of Lord Tenterden's Act in force in a state is a question that is ignored in most of the decisions,[150] even where the recital is described as a form of "acknowledgment." In New York, in *Shohfi* v. *Shohfi*,[151] the Court of Appeals expressly left open the question whether section 59 of the Civil Practice Act requiring a signed writing was applicable to the circumstances of the case. Later New York decisions recognize the rule only indirectly, either by holding it inapplicable on the facts presented,[152] or deferring the question entirely.[153]

A person who receives property takes it as it is (in the absence of a provision to the contrary) and therefore subject to whatever liens or incumbrances may be subsisting, and this is true whether or not the conveyance is expressly stated to be subject to them.[154]

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[146] Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107 (1900), discussed infra, p. 57.

[147] See statement to this effect by Judge Grover in New York Life Insurance & Trust Co. v. Covert, 6 Abb. N. S. 154, 3 Abb. App. Dec. 350 (1867), discussed supra, p. 35.

[148] The Courts move with more alacrity to find an acknowledgment where the assumption of the mortgage by the grantee has been consented to by the mortgagee, and mutually agreed upon between the parties. See Harper v. Edwards, 115 N. C. 246, 20 S. E. 392 (1894), supra, note 118, where the mortgagee had consented to the assumption and this was considered by the Court in holding that the mortgagee's right to foreclose was not barred.

[149] This is the rule of Van Keuren v. Parmelee, 2 N. Y. (Comstock) 523 (1849).

[150] In cases arising in Iowa and California their statutory variations of Lord Tenterden's Act were taken into consideration by the Court: Doran v. Doran, supra, note 143, and Biddel v. Brizzolara, 56 Cal. 374 (1880). Both cases are discussed infra, at pages 56 and 54 respectively.

[151] 303 N. Y. 370, 103 N. E. 330 (1952), discussed infra, p. 60.

[152] Greenfield v. Kaplan, 15 Misc. 2d 718, 179 N.Y.S.2d 381 (Sup. Ct. Kings Co. 1958), discussed infra, p. 65.

[153] Winter v. Kram, 3 App. Div. 2d 175, 159 N.Y.S.2d 417 (2d Dep't 1957), discussed infra, p. 62.

[154] 2 Jones on Mortgages, supra, note 40, § 916, p. 260.

In *Heyer* v. *Pruyn*,[155] a New York decision, there was no reference to the mortgage in the deed of conveyance to the present owner of the premises, and yet foreclosure was decreed against him. The recording of the mortgage gave notice to subsequent purchasers, so that acts constituting recognition of the validity of the lien of the mortgage, by a former owner of the premises through whom the defendant claimed title, was effective to rebut the presumption of payment and to preserve the property for the mortgagee against all parties subsequently having an interest therein, even in the absence of any recital in their deeds.

The more usual conveyance "subject to the mortgage" is one in which the grantee not only takes the land burdened with the lien of the mortgage but assumes and agrees to pay it as part of the purchase price, thus imposing upon himself personal liability for the mortgage debt.[156] But a transfer merely subject to the mortgage, without assumption, although effective to charge the land, does not involve any personal liability of the grantee.[157]

In attempting to define the term "subject to" Glenn, in an article in the University of Virginia Law Review,[158] first affirms that "this language does away with the grantor's covenants of title and warranty," then says that by the majority view it means no more than "that the grantee takes the risk of losing his land unless the mortgage debt is paid, but [that] he does not guarantee payment."[159] Osborne says also that there is danger that a transferee taking subject to the mortgage may lose his land "by having either the mortgagee or the mortgagor apply it to the indebtedness," and defines the phrase as meaning that the transferee agrees, as between him and his transferor, that the debt is to be satisfied out of the land.[160]

In any event, whether the grantee assumes or not, a conveyance subject to the mortgage effectively charges the land with the incumbrance of the mortgage debt and makes the land the primary fund for its payment.[161]

The distinction between these two types of "subject to" conveyances is apparent in another area. The rule is well established that a grantee who takes the property subject to the mortgage and assumes to pay it is estopped to question the validity of the mortgage,[162] the reason being that it is presumed that the obligation was

[155] 7 Paige (Ch.) 465 (1839), discussed supra, p. 39. The Heyer case may be continuing authority that a transaction of the kind held to constitute an acknowledgment in that case overcomes the presumption of payment, but the modern view of the statute of limitations, based upon an implied promise to pay, looks to the intent and requires that an acknowledgment do more than rebut a presumption of payment.

[156] 2 Jones, supra, note 40, § 917, p. 262.

[157] Ibid. & 933, p. 291.

[158] Glenn, "Purchasing Subject to Mortgage," 27 Va. L. Rev. 853 (1941).

[159] 27 Va. L. Rev. 853, 859–861 (1941).

[160] Osborne, Handbook of the Law of Mortgages (1951) § 252, p. 700.

[161] 2 Jones, supra, note 40 & 917, pp. 262–263.

[162] Ibid. § 928, p. 280. Bennett v. Bates, 94 N. Y. 354, 369 (1884), supra, note 108. Chief Justice Ruger says that a grantee who assumes payment of the mortgage "is precluded from disputing the validity of the mortgage, not on account of any recognition of its validity or because he is estopped in any way from so doing, but simply because, so far as the interest of the mortgagee in the land is concerned, the right thereto has been withheld from him by his

taken into consideration in determining the purchase price. But this is not necessarily true as to one who accepts the property merely subject to the mortgage because the basis for the presumption is gone, unless the amount of the mortgage has in fact been deducted from the purchase price. In *Matter of Oakes,*[163] Chief Judge Cardozo had reference, by analogy, to this rule in a case involving a gift of stock to take effect upon death "subject to all state and national taxes thereon." The opinion says that one who accepts a conveyance "subject" to a lien or claim does not estop himself from asserting that the lien or claim is without validity, unless the form of conveyance so indicates, citing *Purdy* v. *Coar*[164] as holding that "a transfer subject to 'any and all liens and incumbrances thereon'" left open the privilege of contest.

Nevertheless, there is broad language in earlier cases which makes no distinction between conveyances by which the grantee assumed and those by which he did not, indicating that an assumption clause would "have no greater effect in subjecting the premises than is imposed by" a simple subject to clause.[165] And this appears to be the position taken by Jones in stating the general rule.[166]

The extent of the grantee's preclusion includes inability to set up the defense of usury, failure of consideration, or other defenses which would have been available to the mortgagor. The question presented here is whether it also encompasses a plea in bar of the statute of limitations. According to *Purdy* v. *Coar,*[167] the "pith" of this doctrine is that the circumstances of the purchase must amount to an admission of the validity and lien of the outstanding

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grantor." As to a grantee taking a conveyance of land "subject to a mortgage unaccompanied by covenants for its payment," the Chief Justice says, "The cases which hold that a grantee of premises, who obtains title thereto under a conveyance making them subject to a mortgage, cannot contest the validity of such mortgage, do so upon the theory that he labors under a disability imposed upon him by his grantor, who has intentionally retained to himself the privity which enables a party to dispute the validity of an apparent lien upon the premises granted." But the opinion continues, "We see no reason why the grantor does not possess the power to remove this disability by afterward conferring the right which by his prior conveyance he simply withheld from his grantee." (p. 371.) The Court proceeded to look for the intent of the grantor and concluded that the most reliable evidence thereof was the deed by which the transfer had been made. It found "a clear intention to convey the grantor's entire interest in the land, and to subject it to the payment only of the sum actually owing upon the mortgage." (p. 372.) On this basis the defense existing against the mortgage (that the full face value thereof was not due and owing) was available to the defendant.

[163] 248 N. Y. 280, 284, 162 N. E. 79, 81 (1928).

[164] 109 N. Y. 448, 17 N. E. 352 (1888), discussed infra p. 62.

[165] Freeman v. Auld, 44 N. Y. 510, 55 (1870), a foreclosure action in which the defendant, holder of the property subject to the mortgage, was held estopped to question the consideration given for or the validity of the mortgage. The fact that the actual amount received by the mortgagor was $2,000 less than the face value of the mortgage did not alter the fact that the mortgage was a lien on the premises for the *entire* sum of $4,000.

[166] 2 Jones, supra, note 40, § 928, pp. 280–281. And see Osborne, supra, note 160, § 267, p. 734 et seq.

[167] Supra, note 164.

incumbrance. Thus the principle has evolved that the circumstances surrounding the transaction must be looked to and if they do not reveal an intent to recognize the validity and lien of the mortgage, the grantee is not precluded from questioning it.

This principle of *Purdy* v. *Coar* was applied in *Shohfi* v. *Shohfi*,[168] where the Court of Appeals based its decision on the fact that the "state of the record" did not show circumstances which could be taken to be an admission by the defendant of the validity or lien of an "already outlawed mortgage," and for that reason his acceptance of title "subject to the mortgage" could not amount to an acknowledgment which would either interrupt or suspend the running of the statute of limitations. The Court thus refused to apply the rule of estoppel to the defense of the statute of limitations.

There is but slight authority for holding that a conveyance subject to the mortgage is a sufficient acknowledgment by the mortgagor to toll the statute as to him on his personal liability, although its effectiveness to bind his grantee and subsequent takers to the extent of their interest in the land, as an agreement burdening the land, is widely accepted.[169]

The inclusion by the mortgagor of a "subject to the mortgage" clause in his deed of conveyance is certainly an admission that there is a mortgage outstanding, but admitting its existence is not the same thing as promising to pay it. When the grantee takes subject to the mortgage and assumes it, then it can hardly be presumed that the mortgagor is promising to pay the debt. That is exactly what he is seeking to avoid by transferring the responsibility to the grantee. This was the reasoning of the Supreme Court of California in *Biddel* v. *Brizzolara*,[170] where it was held that the mortgagor's conveyance subject to the mortgage did not constitute a sufficient recognition by him of the mortgage debt to comply with section 360 of the California Civil Code (like section 59 of the New York Civil Practice Act). The Court said, "The evidence does not show an intention on the part of the mortgagor to pay the debt to the creditor . . . but the agreement provides for the payment by another person" (the grantee who assumed[171]).

When the grantee takes simply subject to the mortgage, without assuming it, there is greater logic in finding that the mortgagor's inclusion of this clause is a recognition of the obligation by him, since no one else has assumed it. Yet it is not so interpreted, but rather is regarded as an express agreement by the grantee, made to his grantor, that the debt shall be paid out of the land,[172] and Osborne states that the rights of the mortgagee enforceable against the grantee by reason of this transaction result from the new charge

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[168] Supra, note 151.

[169] Osborne, supra, note 160, § 299, pp. 858–860.

[170] 56 Cal. 374 (1880).

[171] 56 Cal. 374, 382–383.

[172] Osborne, supra, note 160, § 299, p. 860, where the author says, "Where a grantee takes subject to the mortgage instead of assuming it, his agreement confines his liability to the land he bought as a source of payment."

upon the land.[173] The transfer, subject to the mortgage, by the majority view, effects no change in the position of the mortgagor.[174]

In a few cases, however, the Court speaks as though the mortgagor has, by his recital in the deed, recognized the mortgage, with the consequence that his grantee, or a subsequent taker, would be bound, upon the principle before enunciated that a grantee stands in the shoes of his grantor, and a new period would commence to run from the date of the mortgagor's acknowledgment by virtue of his conveyance subject to the mortgage. But the opinions do not express it exactly this way, but rather say that by the recital in the deed of conveyance *both* parties acknowledged the mortgage. In the Montana case of *Western Holding Company* v. *Northwestern Land & Loan Co.*,[175] the Court said that the affirmative recital in each deed, there being successive conveyances, "had a well defined meaning" clear to both the grantor and grantee, and "was an acknowledgment of the mortgage *by both parties* which became written into the chain of title."[176]

In *Hunt* v. *Lyndonville Savings Bank & Trust Company*,[177] the mortgagor's conveyance to his daughter, subject to the two mortgages sought to be foreclosed in this suit, and her inclusion of the same clause in her reconveyance to him, were said to be a recognition by both of them that the mortgages were valid and subsisting. However, the Court's decision that the mortgagor acknowledged the mortgage debt and lien appears to be principally based upon his acceptance of the reconveyance, which places him rather in the position of a grantee than that of mortgagor-grantor, and thereby fits in with the more generally accepted view imposing liability upon a grantee who takes subject to the mortgage.[178]

[173] Ibid. Osborne says, "Although the mortgagee's original mortgage rights in the land follow it into the hands of the grantee, the latter's agreement that it shall be subject to the mortgage is a new promise in respect to the land which has an effect upon the period for enforcing the mortgage on the land similar to that of an assumption upon the debt period." Osborne sets forth the theories upon which, in the United States (it is contra in England and Canada), the mortgagee has a right to enforce the promise of the assuming grantee. He presents them in the order of their general acceptance, thus: (1) as a third party beneficiary of the contract § 261, p. 721; (2) by invocation of the doctrine of equitable subrogation § 262, p. 724; (3) as an asset of the mortgagor of a sort that can be got at only with the aid of equity § 263, p. 727; and (4) for the procedural reason of avoiding circuity of action § 264, p. 729.

[174] Osborne, supra, note 160, § 299, pp. 858–859. Such a view is consistent with the weight of authority in the analogous instance of payment, where the rule is that the acts of the grantee will not toll the statue as to the mortgagor or grantor, Turner v. Powell, 85 Mont. 241, 278 Pac. 512 (1929).

[175] 113 Mont. 24, 120 P.2d 557 (1941).

[176] 113 Mont. 24, 32, 120 P.2d 557, 560. In Moore v. Clark, 40 N. J. Eq. 152 (1885), a foreclosure action against the grantee of part of the land, the conveyance subject to the mortgage was held to be an acknowledgment that took the case out of the statute, and the New Jersey Court of Chancery said that this acknowledgment, which binds the grantee "operates with equal force against the grantor." (p. 153.)

[177] 103 F.2d 852 (8th Cir. 1939).

[178] Those few decisions, such as this one in which it has been said that the mortgagor as well as his grantee is bound, offer no explanation of the basis for this assertion. A possible theory is that since the transaction results in

In *Doran* v. *Doran*,[179] the action was in equity to cancel a mortgage held by the defendant, who as mortgagee cross-petitioned for foreclosure. The claim to quiet title was based upon the fact that the ten year statutory period had run on the debt and mortgage. Defendant pleaded that the recital in the mortgagor's deed of conveyance to his daughter, made after bar, that it was given subject to a mortgage upon which $500 remained unpaid, constituted an admission in writing signed by the party to be charged, that was effective to revive the cause of action as provided in the Iowa Code (a provision somewhat like New York Civil Practice Act § 59). The Supreme Court of Iowa accepted defendant's contention and permitted foreclosure, holding that the conveyance subject to the mortgage was "a written admission or new promise made by [the] grantor," which revived the mortgage debt as against *him* and kept alive the lien of the mortgage thus precluding his grantee from pleading the statute of limitations in bar of foreclosure. The Court said, "the transaction amounts in effect to an express agreement that the land shall remain subject to the lien of the mortgage for the indebtedness thus revived."[180]

As the cases dealing with part payment have shown,[181] there is no question but that the grantee of the premises may, by acknowledging the mortgage debt or lien by part payment, remove or interrupt the bar of the statute of limitations so that foreclosure may be had against the property. But whether the acceptance of a deed subject to the mortgage constitutes such acknowledgment by him is more difficult to decide and the authorities are in conflict.

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providing the mortgagee with a new cause of action to foreclose the mortgage, it might be considered that the action of the mortgagor in exacting the promise which thus benefits the mortgagee, is analogous to a part payment by way of the giving of collateral security. Because the grantee is bound by a new contractual obligation of his own that the land be charged with the debt, it is as though the mortgagor acknowledged his own personal liability by proffering the agreement of another (the grantee) as part payment. The giving of security for a debt has been given the same effect as a part payment in other situations, when it was done in circumstances manifesting an intention to pay (Security Board of New York v. Finkelstein, 160 App. Div. 315, 145 N. Y. Supp. 5 (1st Dep't 1913)).

[179] 145 Ia. 122, 123 N. W. 996 (1909), noted supra, note 143.

[180] 145 Ia. 122, 129, 123 N. W. 996, 998. In Noble v. Bodovitz, 175 Okla. 432, 52 P.2d 1046 (1935), foreclosure was denied because of the insufficiency of the acknowledgment. The Supreme Court of Oklahoma leaned in the direction of a finding that a conveyance by the grantor "subject to encumbrances of record which are not assumed by the grantees" was an acknowledgment by him of the mortgage, but limited its holding to a conclusion that this was no more than an admission of the existence of an encumbrance, saying "We grant that the clause here indicates that the grantors knew of the existence of an encumbrance of record, and it may be said that they knew that such encumbrance was the mortgage securing the debt sued upon in this cause. We cannot discover, however, from the language used and the circumstances here shown that the grantors admitted thereby that they owed any valid indebtedness." (p. 435, p. 1048.)

[181] See cases supra, in Part IIIB hereof.

(a) Acceptance of a "subject to" conveyance as acknowledgment by the grantee

Quite possibly as an outgrowth of the established rule that the grantee who takes property subject to a mortgage and assumes to pay it is estopped to question its validity, there is authority for the view that a grantee who accepts a deed given subject to a mortgage which he agrees to pay thereby "acknowledges" the validity of the mortgage and as to him and those who take under him the statute of limitations is tolled. In *Daniels* v. *Johnson,*[182] the grantee's assumption of an exactly described mortgage (even down to the book and page where it was recorded) which took place before the statute had run on the debt, was held effective, in a foreclosure action, not only as an agreement to discharge the lien of the mortgage, but also as one to pay the note secured thereby. The Court said that the effect of the deed, executed as it was while the note was a subsisting obligation, was to waive so much of the period of limitations as had run in favor of the mortgagor, and to establish a continuing contract (not a new contract), which simply extended the original liability for a longer term.[183]

In the same jurisdiction, an opposite result was reached when the conveyance was merely subject to the mortgage which transaction is commonly regarded, in the absence of other facts,[184] as neither estopping the grantee from disputing the validity of the mortgage nor amounting to such an acknowledgment as will renew or extend the running of the statute. The case is *Fortana Land Co.* v. *Laughlin,*[185] an action to quiet title, in which the plaintiff received the property as the successful bidder at an Administrator's sale (held after the mortgage was outlawed). The deed recited in the *habendum* clause that it was given subject to a described mortgage in a certain amount with interest. However, this clause was omitted from the published notice of sale and from the Probate Court's order of sale, although contained in the bid. The Court adduced that the attorney for the Administrator inserted the "subject to" clause for the purpose of protecting the grantor from liability upon his covenants, and was persuaded that no reasonable person would have deliberately assumed this mortgage which was sufficiently large that if added to the purchase price it would bring it in excess of the value of the property.[186] The Court said that upon "all the facts

[182] 129 Cal. 415, 61 Pac. 1107 (1900).

[183] 129 Cal. 415, 417, 61 Pac. 1107, 1108.

[184] There is authority contrary to this proposition, and in those few jurisdictions where this is the rule, the Court seems primarily impressed with the fact that the land is burdened with the lien which the grantee through his acquisition of an interest in the property also must bear and which he recognizes. See Moore v. Clark, supra, note 176, where the Court said, *"The proceeding is against the land* and it matters not that a part has been conveyed to a grantee who took that part subject to the mortgage." (Italics supplied)

[185] 199 Cal. 625, 250 Pac. 669 (1926).

[186] 199 Cal. 625, 636; 250 Pac. 669, 674.

and circumstances'' the conclusion was ''quite irresistible'' that the language contained in the bid and the deed did not amount to an unqualified admission or assumption of an existing debt by the bidder such as to show an intention to acknowledge it. The Court concluded, with respect to the construction to be placed upon the ''subject to the mortgage'' clause:

> The greater weight of authority and the better reasoning is that, unless the grantee in the deed assumed or agreed to pay the mortgage, or unless the amount of the mortgage was deducted from the purchase price, a purchaser who merely takes subject to the mortgage is not estopped from showing that it has been paid, or that the amount claimed is not legally owing upon it. This rule, which we believe to be sound, is elaborated in Brunswick Realty Co. v. University Invest. Co., 43 Utah 75, 134 Pac. 608; [citing cases in other jurisdictions]. Many other cases, including decisions of the courts of this state, and textwriters, might be cited to the same effect. (p. 640 p. 675)

(b) Acceptance of a "subject to" conveyance as creating a separate and distinct obligation of the grantee

Osborne views the transaction by which either an assuming grantee or one who takes simply subject to the mortgage receives the property as giving rise to a liability which ''rests upon an agreement separate and independent from that of the mortgagor.''[187] For that reason although it forms the basis of the mortgagee's rights against the person so receiving the property, it does not alter the position of the mortgagor so as to give the mortgagee further remedy against him resulting from the possible tolling effect of the statute of limitations.

In *Schmucker* v. *Sibert*,[188] Judge Brewer of the Supreme Court of Kansas ingeniously circumvented the logical consequences of the Court's adherence to the rule that a barred debt also bars the mortgage, as he laid down the rule that the liability (to the mortgagee) of a grantee taking subject to the motrgage, whether or not he has assumed the debt, rests upon an agreement separate and distinct from that of the mortgagor. In this case a foreclosure action was brought against two grantees of the mortgaged premises, each having been deeded an undivided one-half by separate conveyances executed at different times. The deed relating to one undivided portion of the property recited that it was conveyed subject to the mortgage; the deed to the other one-half not only lacked a ''subject to'' clause but included an express provision that the outstanding mortgage was to be paid by the mortgagor, thus ruling out any responsibility upon the grantee. With respect to the portion of the property conveyed subject to the mortgage, the Court found the grantee bound, and decreed foreclosure (although refusing it

[187] Osborne, supra, note 160, § 299, p. 858.
[188] 18 Kan. 104 (1877).

against the other undivided half).[189] The Court treated a conveyance simply subject to the mortgage as similar in effect to an assumption.[190] Judge Brewer reasoned that a conveyance subject to an existing mortgage which the grantee assumes and agrees to pay "is not to be considered as a mere promise or acknowledgment, as named in the exceptions to the statute of limitations"[191] but as "a contract in writing" as to which the statute of limitations does not begin to run until the execution of the deed. In short, there is here a new debt, not an earlier one continued or revived; the grantee has made his first contract and assumed his first obligation.[192] The fact that the statutory period is measured from the same date as it would be if the transaction were an acknowledgment, is, according to the Court, pure coincidence. Immediately following this conclusion, the opinion states that "upon the same principle, and by the same reasoning," the result is the same if the deed merely specifies that it is made subject to a certain mortgage (with no assumption); for in that case also the grantee's acceptance of the deed "is an undertaking that to the extent at least of the value of the granted premises, the grantee shall pay the mortgage."[193] Under such a doctrine, of course, no tolling of the statute of limitations is involved. The new period starts to run because there is a new cause of action against a new person.

In *County Trust Company* v. *Harrington*,[194] the Court of Maryland likewise asserted that the liability of the assuming grantee was a separate and distinct obligation from that of the mortgagor, thus affording an additional reason why the payments of interest by the grantees who assumed were not effective to toll the statute as to the

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[189] In New York, in the case of Mack v. Anderson, 162 N. Y. 529, 59 N. E. 289 (1901), discussed supra, p. 42, of this study, there was also a division of the mortgaged premises, and a similar result was reached as to the grantee whose share was conveyed free and clear with no reference at all to the mortgage.

[190] Osborne also treats the transaction in which a grantee of the mortgaged premises takes expressly "subject to" the mortgage (the amount of the mortgage being deducted from the price) as one corresponding to an assumption of the mortgage debt under most circumstances. (Osborne, supra, note 160, § 299.)

[191] 18 Kan. 104, 112.

[192] Judge Brewer reasoned also that this being an original contract the obligor, the grantee who assumed, would not be discharged by the fact that the debt as to the original debtor was barred (which in Kansas also bars the mortgage) for the grantee's liability is independent thereof and the creditor may ignore the original debtor entirely and proceed directly against the new promisor. (p. 112.)

[193] In McLane v. Allison, 60 Kan. 441, 56 Pac. 747 (1899), foreclosure was decreed against a grantee who took simply with notice of the existence of the mortgage, but did not take subject to it or assume it. However, the grantee in this case did make payments of interest upon the mortgage, and the Court emphasizes this aspect of the case at the same time that it relies upon the authority of Schmucker v. Sibert. In the McLane case the Court stated summarily that the statutory period had run on the note so that action was barred against the original mortgagor, but it considered that whether or not to decree foreclosure presented a more difficult question. The Court concluded that the land could be reached, because "the continued payment of interest upon the mortgage debt constituted a binding admission that the land was subject to the mortgage" and was "an agreement for its payment up to the value of the mortgaged premises." (p. 445, p. 749.)

[194] 161 Md. 101, 176 Atl. 639 (1935).

mortgagor's personal liability for the deficiency which resulted when the property was sold on foreclosure.

The theory of "separate and distinct" obligation precludes any application of the doctrine of tolling of the statute of limitations by acknowledgment. It does, however, offer a theoretical basis for treating the acceptance of a conveyance subject to the mortgage as creating a new cause of action to subject the land to the payment of the debt in the same way that a new promise is, in acknowledgment cases, deemed to give rise to a new cause of action on the debt.[195]

3. A conveyance subject to the mortgage in New York

The proposition that a conveyance "subject to the mortgage" may constitute a sufficient acknowledgment by either the mortgagor or a grantee, to revive the lien of the mortgage, has been before the New York Courts in recent years in cases in which section 59 of the Civil Practice Act has been considered but has not been found applicable.[196]

The Court of Appeals, in *Shohfi* v. *Shohfi*,[197] by a 4-3 decision, with a vigorous dissent by Judge Froessel,[198] held that the circum-

[195] Judge Learned Hand speaks of the new promise which revives the debt as creating a new obligation in Wood Selick v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930). Professor Glenn seems to regard the result of either an assumption of the mortgage debt or a taking "subject to" the mortgage as giving rise to a new obligation, on which the statute runs from the maturity of the mortgage debt. Glenn, supra, note 158, 27 Va. L. Rev. 853, 865 (1941).

[196] Section 59 of the Civil Practice Act in terms provides that an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing "contract" whereby to take a case out of the provisions of the statute relating to the limitations of time within which an action must be brought other than for the recovery of real property. Section 47-a governs both the action on the bond or note and the action on the mortgage and is classified, along with section 59, in Article 2 of the Civil Practice Act, under the heading "Actions Other Than for Recovery of Real Property".

Provisions concerning acknowledgment of and promises to pay a debt are predominantly found in the procedural divisions of the laws of the various states, as is true in New York. Of the 35 states in which this is true, in 30 cases the provision appears under the heading "Civil Procedure" or its equivalent; and in the other five it falls under "Actions" or "Commencement of Actions." Eight of the 50 states of the United States have no enactment similar to New York's section 59 (Delaware, Hawaii, Kentucky, Maryland, New Hampshire, Pennsylvania, Rhode Island, Tennessee). These states rely, therefor on the common law for rules governing acknowledgments and new promises to pay. The remaining seven states place their provision under the general title or chapter heading "Limitations of Actions".

[197] 303 N. Y. 370, 103 N.E.2d 330 (1952), discussed supra, pp. 51, 54. And see Zausmer v. Suozzi, supra note 91, where the Shohfi case is cited by analogy. (p. 487).

[198] The dissent points out that the principle of estoppel applied "with special force" in this case (aside from the fact that, in the view of the minority, the husband by accepting the deed "subject to" his own mortgage acknowledged the debt) because for 13 years the husband let his wife continue unmolested in possession. As owner and mortgagee in possession she could not be expected to go through the idle ceremony of paying interest to herself. [The dissent begins on p. 377, p. 333.]

stances surrounding a conveyance "subject to the mortgage" did not give rise to an acknowledgment so as to permit a wife to successfully maintain a foreclosure action against her husband and the grantee (from him) of an undivided one-half interest in the property. The ruling of the Court reversed the Appellate Division, Second Department, and upheld the Referee's dismissal of the complaint and judgment for defendants upon their counterclaim for cancellation and discharge of the mortgage. The transactions between the wife and her husband were complicated by the passage of the property back and forth between them. The wife, as owner, first conveyed to her husband in 1929 taking back a purchase-money mortgage for $10,000. In 1934 he reconveyed to her, subject to a first mortgage (since paid off) and a second mortgage, the $10,000 mortgage here involved. The deed recited that this second mortgage was not to merge. Prior to the bringing of this suit by the wife in December 1949, there was litigation between the parties as a result of which the wife was ordered by the Court to convey the premises to her husband "subject to the $10,000 mortgage."[199] In all transactions between the parties, care was taken to preserve the plaintiff's rights in the mortgage. No payments were ever made upon the mortgage indebtedness and the Court of Appeals took the position that section 47-a of the Civil Practice Act operated to limit the period of foreclosure and the statutory bar had fallen. Chief Judge Loughran said,

> The principle that acceptance of a title subject to a mortgage can interrupt or suspend the Statute of Limitations has never been declared by this court to be a hard and fast rule. On the contrary, the principle applies, as we have said, only when "the circumstances of the purchase amount to an admission of the validity and lien of the outstanding incumbrance" (*Purdy* v. *Coar*, 109 N. Y. 448, 453; *Morrill Realty Corp.* v. *Rayon Holding Corp.*, 254 N. Y. 268, 275). . . . [T]he acceptance by the defendant husband of the plaintiff wife's reconveyance to him of his own property subject to the already outlawed mortgage thereon cannot, in our judgment, be taken to have been an admission by him of the validity and lien of that mortgage within the principle of *Purdy* v. *Coar* and *Morrill Realty Corp.* v. *Rayon Holding Corp. (ubi supra*[200]*)*.

Since the Court ruled that for the acknowledgment of a mortgage to be effective to toll the statute, the circumstances must show that its validity has been admitted, and this cannot be true with respect to an already outlawed mortgage (at least under the facts of this case), there was no acknowledgment to which section 59 could be applied. That provision is alluded to, however, when it is said that possibly "the Statute of Limitations could have been avoided" had the defendant husband signed a written acknowledgment "in

[199] 277 App. Div. 390, 392, 100 N.Y.S.2d 497, 499 (2d Dep't 1950). The facts are more fully stated in the opinion of the Appellate Division.

[200] 303 N. Y. 370, 376, 103 N.E.2d 330, 332.

accordance with section 59 of the Civil Practice Act''—the court adding, that this ''is a question we do not reach.''[201]

It will be noted that the opinion in the *Shohfi* case placed considerable reliance upon the principle of *Purdy* v. *Coar*.[202] In this relatively early case, decided in 1888, a foreclosure action was brought by an assignee of the mortgage against a grantee who was the present owner of the property. The question before the Court was whether the grantor-mortgagor's declaration in a certificate made after he had conveyed the property, to the effect that a previously executed mortgage was a valid incumbrance, could estop the grantee from questioning it. It was held that the grantor was himself estopped, but that after parting with his interest he lost the power to affect the title of the grantee. The plaintiff's argument had been that since the grantee took ''subject to'' the mortgage she could not contest it. The language in the deed of conveyance was ''subject, nevertheless, to all liens of mortgages and taxes.'' The Court stated that acceptance of a deed containing this ''ordinary phrase'' was not an admission that such liens existed, but rather that if they did exist, title was taken subject to them; and that such language could not be applied to any invalid mortgage that might be set up, but only to one that was a lien and so actual and real and valid. There was held to have been error in denying the defendant the opportunity to prove that the particular mortgage sought to be foreclosed was an invalid one.[203]

Winter v. *Kram*[204] was likewise an action to foreclose a mortgage which had outlawed. The plaintiff maintained that the applicable period of limitation was extended by the transfer of the property in 1945 to defendant's predecessor in interest, ''subject to'' the mortgage as one of the ''liens affecting'' the premises. The Appellate Division, Second Department concluded that the circumstances of the purchase did not amount to an admission of the validity and lien of the mortgage. Section 59 was cited as controlling ''the only manner in which a period of limitation can be extended'' and that is by a signed written acknowledgment or a payment of principal or interest. No part of the principal had ever been paid, and there was no evidence of any payments of interest. But this Court like the Court of Appeals in *Shohfi* v. *Shohfi*, (upon which it relied) reached its decision independently of section 59 on the ground of lack of privity between the mortgagor, or anyone else responsible for the mortgage debt, and subsequent grantees who took simply ''subject to existing mortgages.'' The Court said:

> Irrespective of the effect of section 59, the taking of the deed by Edna Kram [defendant's predecessor in interest] could not serve to revive the outlawed lien. There was no privity between the mortgagor or anyone assuming payment on the one hand, and Levlock or Kram [subsequent grantees] on the other. Levlock and its grantor had taken ''subject to existing mort-

[201] Ibid.
[202] Supra, note 164; discussed, supra, p. 53.
[203] Cf. Bennett v. Bates, supra, note 108.
[204] 3 App. Div. 2d 175, 159 N.Y.S.2d 417 (2d Dep't 1957).

gages." They were not obliged to pay the mortgage in suit. In the absence of other proof it can only be assumed that Levlock, in subjecting title to the payment of the mortgage debt, did so for its own protection as against Kram, its grantee. As between them, the "subject" provision barred the grantee from urging that the mortgage was an encumbrance rendering unmarketable the title which was conveyed. There was not, so far as appears, any intention on the part of either Levlock or Kram to admit the validity of a mortgage for the benefit of a holder in whom they had no interest *(cf. Matter of Kendrick,* 107 N. Y. 104, 109–110).[205]

At this point the Court noted that even if the acceptance of the deed could be construed as an acknowledgment, the extended period would still not bring the case within the statutory limit, and that this difficulty could not be obviated by tacking on the 18 months allowed under section 21 of the Civil Practice Act in the case of deceased persons liable upon a debt, for the action was maintainable against the land and not against Edna Kram personally. The remarks of the Court, therefore, respecting the effect of "subject to the mortgage" clauses as an acknowledgment would appear to be dicta only.

In *Mintz* v. *Greenberg,*[206] the Court of Appeals affirmed, without opinion, the Appellate Division's memorandum opinion denying recovery to an assignee of the mortgage who, in an action brought by another (Mintz), to foreclose tax liens on the mortgaged property, sought to redeem it from foreclosure. The defense to the attempted redemption was the statute of limitations. The mortgagee-assignee maintained, however, that the statute was tolled by the provision in a quitclaim deed executed in 1955 by the original owner, mortgagor and obligor, to a third person by which he conveyed the property "subject to all tax liens, unpaid taxes, assessments and encumbrances of record"—which provision, it was contended, amounted not only to an admission of the validity and lien of the mortgage, but also to "an acknowledgment or promise" on the part of the original obligor sufficient to continue and renew his personal liability on the debt under the requirements of section 59 of the Civil Practice Act. Factors that may have influenced the Court's denial of the right to redeem are several. First, the recital was contained in a mere quitclaim deed, and in giving and receiving such a conveyance neither the grantor nor the grantee would be presumed to have acknowledged the validity of any incumbrance. By such a transfer the grantor simply disclaims any responsibility for the condition of the title and the grantee is put on notice that liens may be outstanding. Second, there is no specific reference to the mortgage sought to be foreclosed, so that for the purposes of an acknowledgment it might well be considered not sufficiently identified. Third, the alleged acknowledgment through a recital in the

[205] 3 App. Div. 2d 175, 177, 159 N.Y.S.2d 417, 420.

[206] 5 N.Y.2d 909, 156 N.E.2d 716 (1959). The mortgage had been assigned 26 years before, and no payments were made thereon for over 30 years.

deed was not communicated to the owner of the cause of action, but was given merely to a stranger, which in New York is not effective.[207]

In *Karp* v. *Alshek Realty Corp.*,[208] in seeking to foreclose otherwise barred mortgages, the plaintiff relied upon the tolling effect of a clause in a quitclaim deed by which the property had been conveyed to defendant in 1955, reading, "Subject to all incumbrances, including existing mortgages *except that the parties do not waive the* Statute of Limitations." This underscored language (italicized by the Court), is significant since its presence led Judge Pette to conclude that the subject clause could "hardly amount to an admission of the validity and lien of the outstanding incumbrances."[209] He intimated that the acceptance of such a deed might be sufficient acknowledgment by the grantee of the validity of the lien of the mortgage, except that the express reservation of the right to plead the statute of limitations would seem to negate such a conclusion. The opinion noted that the quitclaim deed was signed by the grantor alone and not by the grantee who was presently being sought to be charged, but the Court made no reference to this as not meeting the requirements of section 59 of the Civil Practice Act, and in fact did not refer to this section of the Act at all.

Carlos Land Company v. *Root*[210] was a foreclosure action in which the clause invoked to toll the statutory period appeared in a fire insurance policy taken out by the defendant mortgagor in 1950 and delivered by him to an officer of the Company. Defendant executed the mortgage in 1922 to plaintiff Company but had made no payments of principal and the last interest payment was in 1937. The Land Company sought to counter defendant's plea of the statute by claiming that the policy was given to them as security and therefore constituted an acknoweldgment of the debt due on the bond and mortgage within the requirements of section 59 of the Civil Practice Act. The policy contained a New York standard mortgagee clause, making any loss or damage payable to the mortgagee. The Court summarily stated that the essentials of section 59 were not met as "[t]here was no acknowledgment or promise in writing signed by Root."[211] It next looked into the question of whether the issuance of the fire insurance policy constituted a payment of principal or interest which would make it unnecessary that

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[207] Wakeman v. Sherman, 9 N. Y. 85, 91 (1853) where an oral promise to pay was made to a stranger and so ineffective, for it could not be said that it was calculated or intended to influence the action of the creditor.

[208] 6 Misc. 2d 837, 164 N.Y.S.2d 63 (Sup. Ct. Queens Co. 1957). In an action to foreclose two mortgages executed in 1926 brought against the defendant as grantee of the premises, no attempt was made to establish payments which would toll the statute, but instead plaintiff relied upon a quitclaim deed executed in 1955 by which the property was conveyed to defendant "subject to all incumbrances of record including existing mortgages." The additional stipulation "that the parties do not waive the statute of limitations" led the Court to deny any tolling effect. Defendant's motion for summary judgment was granted and the case dismissed.

[209] 6 Misc. 2d 837, 839, 164 N.Y.S.2d 63, 65.

[210] 282 App. Div. 349, 122 N.Y.S.2d 650 (4th Dep't 1953).

[211] 282 App. Div. 349, 351, 122 N.Y.S.2d 650, 651.

section 59's requirements be met. It was held, disapproving *Scott* v. *Armstrong*[212] that issuance of a fire insurance policy with loss payable to a mortgagee is not the giving of collateral securtiy[213] for the payment of the debt effective as a part payment so as to toll the statute of limitations. A fire insurance policy is solely one of indemnity, and adds nothing to the total security already given by the lien of the mortgage. The Court made special note of the fact that the bond and mortgage were already barred, and that in such case "more evidence is required to start running a new Statute of Limitations than would be required as to a debt not barred."

In the Supreme Court case of *Greenfield* v. *Kaplan*,[214] instead of a foreclosure action there is a suit to cancel a 1937 mortgage of record because it was barred by the statute of limitations. The deed by which the purchaser acquired the property in 1956 contained a general "subject to recorded mortgages" clause. Defendant, owner of the mortgage (by assignment in 1947), pleaded in defense that by taking title subject to recorded mortgages the purchaser acknowledge the validity of the mortgage. The Court granted the purchaser's motion for summary judgment, holding that a transfer subject to no specific mortgage does not preclude the grantee from pleading the statute of limitations. From such a "mere statement in the deed" the Court did not find it possible to "spell out" an acknowledgment and promise meeting the requirements of section 59 of the Civil Practice Act, so as to be effective to revive a mortgage already outlawed. The Court said that the mortgage must be

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[212] 193 Misc. 220, 86 N.Y.S.2d 32 (Sup. Ct. N. Y. Co. 1948). In Scott v. Armstrong, the action was to foreclose a mortgage, brought by the holder of it against the Executors of the deceased owner of the property and her predecessor in title. There is a familial relationship between the plaintiff and decedent which should be recognized in appraising the facts and considering the outcome. Decedent property owner, a person of means, purchased the property subject to a $20,000 mortgage which she later bought from the mortgagee and assigned to her brother George Scott, the plaintiff. No payments of principal or interest were ever made, but decedent did make regular premium payments to maintain the fire insurance, the policy stating that any loss was payable to her brother as mortgagee. The Court held these premium payments kept alive the insurance policies, which policies were security for the debt, and their delivery to and acceptance by plaintiff, "was sufficient to constitute a renewal of the debt" (p. 223, p. 34–35) and remove the bar of the statute. The Court stressed the fact that the decedent was proud of her brother and yet had made small provision for him in her will, evidently assuming that he would realize on the mortgage.

[213] In Smith v. Ryan, 66 N. Y. 352, 354 (1876) it was said that the transfer by the debtor to his creditor of the promissory note of a third person as collateral security for the debt was the equivalent of part payment and was therefore an acknowledgment of the debt as existing from which the law would imply a promise to pay the residue so as to suspend the operation of the statute of limitations. The Court went on to hold that the statute thus commenced to run from the time of the delivery of the collateral, and had in this case fully elapsed before action was brought, and that the payments upon that note by the third person were not operative as repeated acknowledgments to keep the statute running beyond that time, since they were not made by a person in relationship of agent to the primary debtor: "The transfer of an obligation does not constitute the obligor the agent of the transferrer." (p. 358.)

[214] 15 Misc. 2d 718, 179 N.Y.S.2d 381 (Sup. Ct. Kings Co. 1958).

specifically mentioned and there must be an unconditional promise to pay it,[215] citing the *Shohfi* case.[216]

In no case was the party successful who relied upon the "subject to" clause as an acknowledgment that would toll the statute. In each instance in which an opinion was rendered[217] the Court looked to the circumstances of the purchase to determine whether they could give rise to an admission of the validity of the lien or an acknowledgment of the debt sufficient to toll the statute of limitations. Although in every case the alleged acknowledgment (the transfer subject to the mortgage) occurred after bar, this fact was not given special emphasis by the Court, except in the case of *Shohfi* v. *Shohfi*.[218] In all cases but one (the *Karp* case), what transpired was viewed in relation to section 59 of the Civil Practice Act, and was deemed not to meet the requirements of an acknowledgment as demanded by that section, although the same result could have been reached without recourse to it.

Except for the holding of the Court of Appeals in *Shohfi* v. *Shohfi*, that a person receiving property subject to an already outlawed mortgage did not thereby recognize the validity or lien of the mortgage, and therefore there was nothing upon which to base an acknowledgment, there is no controlling decision shedding light on the question of the effect of "subject to" conveyances as tolling the statute of limitations in New York and the applicability thereto of section 59 of the Civil Practice Act. However, section 59 would have no application if the point of view represented by the holding of *Schmucker* v. *Sibert*, that a conveyance subject to the mortgage preserves the lien for the mortgagee as a separate and independent agreement and not as an acknowledgment, should be followed in New York. That this theory has not been adopted is evidenced by the fact that section 59 is alluded to in the opinions of the New York courts in "subject to" cases. It may be noted, however, that adoption of the theory might be thought to bring into operation the provisions of section 1083-c of the Civil Practice Act, which require that an assumption of the mortgage be contained in a written statement which is acknowledged by the assuming grantee.

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[215] 15 Misc. 2d 718, 720; 179 N.Y.S.2d 381, 383.

[216] In Greenfield v. Kaplan the defendant also placed reliance on the fact that a fire insurance policy issued to the former owner of the premises contained a clause making any loss payable to him as first mortgagee which, it was argued, was sufficient to toll the statute of limitations. The Court, citing Carlos Land Co. v. Root, discussed supra, p. 60, found such a proposition untenable. Cf. Winter v. Kram, supra, p. 62, where too the defendant sought to invoke fire insurance policies, but the Court refused to recognize the issuance of the policy or premium payments as an acknowledgment or part payment. (3 App. Div. 2d 175, 178, 159 N.Y.S.2d 417, 421.)

[217] In Mintz v. Greenberg, supra, note 206, the Court of Appeals affirmed without opinion the Appellate Division's memorandum opinion.

[218] Discussed supra, p. 60.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On January 12, 2022

deponent served the within: **Brief for Plaintiff-Appellant**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on January 12, 2022

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

Job# 308000