MICHIGAN LAW REVIEW

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NOTE AND COMMENT

THE MORTGAGES IN POSSESSION IN NEW YORK AND IN MICHIGAN.—It is interesting to observe how tenaciously the old common law of mortgages has persisted in the state of New York, the very cradle of the modern lien theory of the mortgage. As early as 1802 Chancellor KENT began the importation into that state of Lord MANSFIELD'S Civil Law doctrines of mortgage. *Johnson* v. *Hart*, 3 Johns. Cas. 322. In 1814, in the case of *Runyan* v. *Mersereau*, 11 Johns. 534, the lien theory definitely triumphed over the old law. In other cases, both before and since the statute of 1828 denying ejectment to the mortgagee, the details of mortgage law were worked over to harmonize with the central theory.

Yet at all times there was a discordant element in the cases dealing with the mortgagee in possession. This became most obvious in the case of *Phyfe* v. *Riley*, 15 Wend. 248, decided by the Supreme Court in 1836. It was there held that to an action of ejectment it was a complete defense to show that defendant was an assignee of a mortgage past due. Three distinct arguments are advanced in the opinion: one of policy, that litigation and expense are saved by permitting the mortgagee in possession to retain possession until redeemed, instead of allowing him to be turned out by an action of ejectment and so putting him to an action of foreclosure; an argument as to the technical nature of a mortgage, that the mortgagee "is still considered as having the