UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 8 | Number 4 Article 21

6-1-1930

Mortgages -- Tenancy in Common -- Rights to Improvements

J. G. Adams Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

 Part of the Law Commons

Recommended Citation

J. G. Adams Jr., *Mortgages -- Tenancy in Common -- Rights to Improvements*, 8 N.C. L. Rev. 469 (1930).
Available at: http://scholarship.law.unc.edu/nclr/vol8/iss4/21

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

statutory requirement that awards are to be made for actual loss suffered.[10]

T. J. GOLD, JR.

Mortgages—Tenancy in Common—Right to Improvements

In the case of *Layton v. Byrd*[1] the defendant had purchased a tract of land from three tenants in common, *A, B,* and *C*. The interests of *B* and *C* were unencumbered, that of *A* was subject to a mortgage to *T,* unknown to the defendant. Defendant before foreclosure by *T,* and after purchase from *A, B,* and *C,* made permanent improvements on the land. Plaintiff subsequently purchased the one-third undivided interest formerly owned by *A* at foreclosure sale by *T*. In a bill for partition by plaintiff, *Held,* The rule entitling the tenant in common to the value of his improvements on partition[2] is inapplicable, the rule that improvements made on mortgaged lands by the mortgagor or one claiming under him inure to the benefit of the mortgagee[3] must be applied, and the plaintiff is entitled to a proportionate part of the improvements.

The court reaches its conclusion on the reasoning that, at the time the improvements were put upon the land, there was no tenancy in common in existence, but the land was held by Byrd, defendant, as sole owner. Consequently, since there was no co-tenant against whom he could assert his equity the tenant in common rule cannot

[10] Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374 (1875); WILLISTON ON CONTRACTS (1920) §1338. Several cases have recognized the anomalous but equitable doctrine that occasionally the measure of damages cannot be determined by reference to either the wholesale or retail price. See Clark v. Parsons, 109 Mo. App. 432, 84 S. W. 1019 (1905). Thus in the United States v. New River Collieries Co., 262 U. S. 341, 43 Sup. Ct. 565, 67 L. ed. 1014 (1923) it was held that where coal was appropriated by the government, and where there was a free market for export coal, and the coal could have been sold in such market, the owner was entitled to the export price, although this was higher than domestic rates.

[1] 198 N. C. 466, 152 S. E. 161 (1930).

[2] If one tenant in common makes improvements on the common property he will be entitled upon partition to the value of his share in the land in its unimproved condition and the value of the improvements, if this can be done without prejudice to his co-tenants. Pope v. Whitehead, 68 N. C. 191 (1873); Collett v. Henderson, 80 N. C. 337 (1879); Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887 (1916); see Note (1919) 1 A. L. R. 1189; Bayley v. Nichols, 263 Ill. 116, 104 N. E. 1054 (1914); Crafts v. Crafts, 13 Gray 360 (Mass. 1859); Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384 (1898).

[3] Wharton v. Moore, 84 N. C. 479 (1881); Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655 (1898); see also Note (1926) 41 A. L. R. 601.

be applied. The mortgage was a conveyance of the legal title to the mortgagor's interest to *T* as security for the debt; the mortgagor to all other purposes remained owner, and continued so until his conveyance to Byrd. By operation of the mortgage rule the lien of the mortgage extends over one-third of the improvements.

A mortgage can convey no more to the mortgagee than an absolute conveyance can convey to the grantee. If *A* had deeded his interest in the land to *T*, the mortgagee, instead of making the mortgage, neither *T* nor his vendee could have obtained an interest in the improvements, by application of the tenant in common rule. Does it not follow, *a fortiori*, that *T* cannot obtain a benefit from the mortgage which he could not have obtained had he become absolute owner of the *A* interest? It is interesting, as well, to note that Byrd, by his purchase from *A*, *B*, and *C* was placed in a worse position than had he merely purchased the interests of *B* and *C*. Clearly, had *A* remained owner of his equity Byrd would have had a co-tenant against whom the tenant in common rule could be applied, and an indisputable claim to the whole of the improvements. In the instant case he lost the *A* interest by foreclosure, together with one-third the value of the improvements. It cannot be said that he was compensated by way of an increase in the value of the equity of redemption[4] in the *A* interest—the plaintiff bought without knowledge of the improvements, and there was no surplus of purchase money to go to Byrd.

If the improver himself had mortgaged the one-third undivided interest, or had he assumed payment of the mortgage, other considerations than those present in the principal case might well justify the court in holding as it did. However, the natural justice of the situation seems heavily on the side of the defendant—not only did the plaintiff, to the extent of his knowledge, buy and pay for the *A* interest in its unimproved condition, but, as well, Byrd made his improvements in good faith without any actual notice of the existence of the mortgage. The cases cited in the opinion in support of the mortgage rule[5] refer without exception to situations where the

[4] It has been argued in support of the mortgage rule that it not only adds to the value of the mortgagee's security, but also it increases the value of the mortgagor's equity, Butler v. Page, 7 Metc. 40 (Mass. 1843).

[5] Martin v. Beatty, 54 Ill. 100 (1870); Mutual Life Insurance Co. v. Huntington, 57 Kan. 744, 48 S. W. 19 (1897); Rice v. Dewy, 54 Barb. 455 (N. Y. 1862); Gibson v. American Loan and Trust Co., 58 Hun. 443, 12 N. Y. S. 444 (1890); Childs v. Dolan, 5 Allen 319 (Mass. 1862); Ivey v. Yancey, 129 Mo. 501, 31 S. W. 937 (1895).

mortgage wholly covers the mortgaged land, as distinguished from a mortgage of an undivided interest. The only case in point,[6] not cited by court or counsel in the Layton case, reaches a contrary result, applying the tenant in common rule denying the mortgagee's assignees the right to share in the improvements, and logic at least seems to support that holding. If *A*, the mortgagor, had retained his equitable title, as co-tenant he could not have shared in the improvements on partition, nor could *T* as mortgagee claiming under him.[7] Should the fact that the improver has purchased the interest of *A* increase the rights of the mortgagee? Could it not be strongly argued that there was a tenancy in common at the time the improvements were made? Since undeniably *T* was a legal tenant in common by virtue of his holding legal title, it seems that the tenant in common rule could be applied as against *T*.

J. G. ADAMS, JR.

Municipal Corporations—County Bonds—Effect of Thirty Day Limitation on Validity of Bond Ordinance

The County Finance Act of North Carolina provides, among other things, that ". . . no order shall be passed (by any county) for the issuance of bonds other than school bonds unless it appears from said sworn statement (order) that the net indebtedness for other than school purposes does not exceed five per cent of said assessed valuation (of the county). . . ."[1] It further provides, that the validity of a bond order shall not "be open to question in any court upon any ground whatsoever," unless the proceeding shall be commenced "within thirty days after the first publication of notice" of the bond order.[2] In *Kirby v. Board of Commissioners of Person County*,[3] a bond ordinance was adopted by the board of commissioners authorizing the issuance of bonds for court house and jail purposes. The amount of this bond order raised the total indebtedness of Person County above five per cent of its assessed valuation. Some ninety days after notice of the bond order had been published, the

[6] The defendant purchased all the shares of several co-tenants in land and erected improvements believing himself to be sole owner. The plaintiffs, assignees of the holder of a prior mortgage on the share of one co-tenant, sue to foreclose. Annely v. DeSaussure, 17 S. C. 394 (1881).

[7] Note (1926) 41 A. L. R. 621; Annely v. DeSaussure, *supra* note 6.

[1] N. C. Code (Michie, 1927) §1334 (17).

[2] N. C. Code (Michie, 1927) §1334 (20).

[3] 198 N. C. 440, 152 S. E. 165 (1930).