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reading the publication could not ascertain that either of the plaintiffs was referred to. Was the reason for this irreconcilable result couched in the court's statement that plaintiffs were not persons of prominence or in the public eye?

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Mortgages—Adverse Possession by Mortgagor's Grantee Against the Mortgagee.

The mortgagor sold the mortgaged realty to his tenant, the claimant, who remained in possession under bond for title, paid substantial back taxes, and on payment of the purchase price took a duly recorded deed. The claimant occupied the land for more than seven years, making valuable improvements and had no notice of the mortgage, except that of registration, until execution under foreclosure, at which time he filed his claim. Although the mortgagee did not know of the improvements, and although the mortgagor had kept up payments of interest on the debt until foreclosure, verdict was directed for the claimant on the ground that improvements and payment of taxes constituted sufficient notice of adverse possession to start prescription running against the mortgagee.[1]

The court, in construing a Georgia statute, took the view that only the claimant's actual knowledge of the mortgage, or bad faith, could make his holding permissive; that record notice is effective only to prevent subsequent deeds from passing clear title, but not to preclude possession adverse in character; and that mere occupancy, plus improvements under bond for title, known or unknown to the mortgagee, is hostile.[2] A former case holding that the sale of mortgaged premises did not repudiate the mortgage is distinguished by the court on the ground that the grantee did not take possession, but the mortgagor stayed on as tenant.[3] Though distinctly representing the minority rule, the principal case does not stand entirely alone.[4]

[1] Chandler v. Douglas, 172 S. E. 54 (Ga. 1933).

[2] GA. CODE ANN. (Michie, 1926) §4164, providing that "Possession to be the foundation of a prescription must be in the right of the possessor, and not of another; must not have originated in fraud. . . . Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party." Although it cited the statute, the court said: "The absence of actual notice on the part of Mrs. Chandler cannot alter the result because Douglas was never in possession by permission of [the mortgagee]."

[3] Melson v. Leigh, 159 Ga. 683, 126 S. E. 718 (1925).

[4] Shreeve v. Harvey, 74 N. J. Eq. 336, 70 Atl. 671 (1910); Ely v. Wilson, 65 N. J. L. 544, 47 Atl. 806 (1900) (Except from this jurisdiction, there is almost no direct authority in support of the instant case); see Denbo v. Boyd, 194 Mo. App. 121, 185 S. W. 236, 238 (1916); Ma Haffy v. Farris, 144 Ia.

Ordinarily the possession of the mortgagor or his grantee is consistent with and not adverse to the rights of the mortgagee, this being true whether the mortgage passes to the mortgagee legal title or equitable lien.[5] However, it is not true unless the grantee of the mortgagor has constructive or actual notice of the mortgage,[6] but for this purpose record is usually sufficient.[7] Even if the claimant has notice, still his permissive occupancy may be changed to adverse possession through repudiation of the mortgage: (1) in most states by acts or words that bring to the mortgagee's actual notice[8] the fact that his rights are denied by the grantee claiming in his own right; (2) in other states by acts or words that would put a reasonable man on notice of such claim;[9] and (3) in a few states, possibly only by surrendering the possession entirely and returning as a stranger in his own right.[10]

In all cases, the repudiation must be absolutely clear. Generally, sale by the mortgagor, together with the recording of his deed, occupancy, payment of back taxes, and improvements by the grantee, will

220, 122 N. W. 934, 935 (1909); Jamison v. Perry, 38 Ia. 14, 17 (1873) (This case seems to be squarely in accord with the instant case, but it is declared dictum by the Iowa court in Dodgon v. Heidman, 66 Ia. 645, 24 N. W. 257 (1885), which follows the majority rule).

[5] Zeller v. Eckert, 4 How. 289, 11 L. ed. 979 (U. S. 1846); Bristol Lumber Co. v. Derby, 114 Conn. 88, 157 Atl. 640 (1931); Weathersby v. Goodwin, 175 N. C. 234, 95 S. E. 491 (1918); 2 CLARK, RECEIVERS, §935 (At common law the mortgagee had legal title to the mortgaged property; today almost all the states are numbered among the so called "lien" jurisdictions, legal title remaining in the mortgagor; North Carolina retains the common law rule).

[6] Lemker v. Unknown Claimant, 201 Ia. 902, 208 N. W. 290 (1926); Baker v. Evans, 4 N. C. 417 (1816).

[7] Christopher v. Shockley, 199 Ala. 681, 75 So. 158 (1917); Baker-Matthews Lumber Co. v. Bank of Lepanto, 170 Ark. 1146, 282 S. W. 995 (1926); Parker v. Banks, 79 N. C. 480 (1878).

[8] Dobbins v. Economic Gas Co., 182 Cal. 616, 189 Pac. 1073 (1920); Bristol Lumber Co. v. Derby, *supra* note 5; Alsup v. Stewart, 194 Ill. 959, 62 N. E. 795 (1902); see Johnson v. Bean, 119 Mass. 271, 272 (1876); 2 JONES, MORTGAGES (8th ed. 1928) §830. Practically all states require that the mortgagee have actual knowledge of the adverse claim.

[9] Ringo v. Ruff, 43 Ark. 469 (1884); Talbot v. Cook, 57 Ore. 535, 112 Pac. 709 (1911); 1 WILTSIE, MORTGAGES (4th ed. 1927) §80; JONES, MORTGAGES (8th ed. 1928) §830. Nowhere do judges or writers say just what acts will put a reasonable man on notice.

[10] See Parker v. Banks, 79 N. C. 480 (1878); Williams v. Kerr, 113 N. C. 306, 18 S. E. 501 (1891) (The North Carolina court takes the position that the grantee of the mortgagor cannot hold adversely to the mortgagee unless he occupies without notice, but that record is notice; that "nothing short of payment of the mortgage debt will end the mortgage relation"; that the grantee has only the right of redemption, and is the tenant of the mortgagee); N. C. CODE ANN. (Michie, 1931) §433 (provides that a tenant remaining in possession holds in subordination to his lord for twenty years after the end of the term.).

not suffice, even though such facts are known to the mortgagee, because they could easily be consistent with a continued recognition of the mortgage.[11] Any act done in deference to the mortgage, such as payments on the debt, conclusively rebuts any possibility of repudiation.[12]

Even in its own jurisdiction, the instant case is not unquestioned. It is weakened by the fact that the authority upon which the court expressly bases its decision is not only not squarely in point, but also rests ultimately upon the dictum of another case.[13] In two other Georgia cases a clear inference and a strong dictum seem flatly contra to the result reached in the principal case.[14] Furthermore, there is an early decision of the Supreme Court of the United States overruling a very similar holding by a circuit court sitting in Georgia.[15]

In those jurisdictions in which a mortgagee is held to get only a lien to secure his debt, the grantee of the mortgagor has legal title and the right to possession, and the mortgagee cannot bring ejectment.[16] It is difficult to see how possession by the grantee of the mortgagor can be adverse to the mortgagee who cannot sue to recover the land. It follows that the lien cannot be "repudiated," but lives until the debt is paid or barred by the statute of limitations. Hence it appears that the position of those states which allow hostile words or acts to constitute adverse possession against the mortgagee to defeat his lien, he having no title which prescription can take out

[11] New England Mortgage Co. v. Fry, 143 Ala. 637, 42 So. 57 (1904); Harding v. Durand, 36 Ill. App. 238 (1890) (The claimant cannot break the mortgage relation by allowing the land to be sold for taxes and buying it back); cases *supra* notes 7 and 8.

[12] Hughes v. Edwards, 9 Wheat 489, 6 L. ed. 142 (U. S. 1824); Wright v. Eaves, 10 Rich. Eq. 582 (S. C. 1858).

[13] Baxter v. Phillips, 50 Ga. 498, 104 S. E. 196 (1920) (Here the mortgagee had actual notice of the improvements and claims of the grantee, whereas he did not have in the instant case); Garrett v. Adrian, 44 Ga. 274 (1871) (This case was cited by the court in Baxter v. Phillips as grounds for its decision, yet it does not clearly appear from the facts of Garret v. Adrian that the prior incumbrance was ever recorded, as it was in the instant case).

[14] Parker v. Jones, 57 Ga. 204 (1876) (The court said that since the mortgage was not recorded, the grantee of the mortgagor held adversely to the mortgagee, the inference being that in case of registration the result would be contra); Dearing v. Hawkins, 93 Ga. 108, 19 S. E. 717 (1894) (Of a claimant in a situation exactly similar to that of the principal case, except for the time element, the court said that even if the grantee had stayed on the land seven years, the lien of the mortgagee would not thereby be destroyed.

[15] Higginson v. Mein, 4 Cranch 415, 2 L. ed. 664 (U. S. 1808).

[16] Green v. Coast Line Railroad, 97 Ga. 15, 24 S. E. 814 (1895); GA. CODE ANN. (Michie, 1926) §3256.

of him and put into the claimant, is anomalous,[17] and that the view of the instant case in its own jurisdiction is altogether untenable.

In jurisdictions in which it is held that the mortgagee gets legal title to the land the situation is reversed and, nothing to the contrary appearing in the mortgage, the mortgagee has the right to sue for the recovery of the land, whereas the grantee of the mortgagor has only the right of redemption.[18] Hence the Georgia view is at least arguable in such states on the ground that, given the usual elements of adverse possession, it would be possible for prescription to transfer title from the mortgagee to the claimant. In North Carolina, which belongs to the "title jurisdiction" category, any such argument is defeated by the fact that the record is held to be even better than actual notice.[19]

J. L. CARLTON.

Mortgages: Assumption of the Debt: Defenses.

A mortgaged land to *B*. *C* mortgaged other land to *D*. *A's* property was immediately conveyed to *X*. Co., which was controlled by *A*. Pursuant to an agreement between *A*, acting for *X*. Co., and *C*, each deeded his property to the other. Each assumed the debt secured by the property conveyed to him. In an action by *B* against *C* on his assumption of the debt, *C* set up the defense that *A* had made no attempt to pay *D* and, hence, had breached a condition of the contract which *C* agreed to pay *B*. *Held*, a valid defense.[1]

It is no longer open to serious doubt that when a purchaser of the equity of redemption assumes payment of the mortgage debt, the mortgagee may proceed against him directly; however, the decisions are in conflict as to the theory under which liability attaches. Some hold that the purchaser becomes the principal debtor and the grantor a surety.[2] Others allow the mortgagee to recover upon the broad principle that a promise made by one person to another for the benefit of a third may be enforced by that third person.[3] Formerly North Carolina did not recognize this latter ground for recovery by

[17] Templeman & Son v. Kemper, 223 S. W. 293 (Tex. Civ. App. 1920) (The court says that title is not in issue in a suit to foreclose the mortgage lien, and hence that title by prescription cannot be set up as a defense.).
[18] Stephenson v. Turlington, 186 N. C. 191, 119 S. E. 210 (1923); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§161, 211.
[19] *Supra* note 10.

[1] Land Bank v. Page, 206 N. C. 18 (1934).
[2] (1932) 11 N. C. L. REV. 96.
[3] Marble Sav. Bank v. Mesarvey, 101 Iowa 285, 70 N. W. 198 (1897).