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Mortgages -- Deeds of Trust -- Power of Sale -- Rights of Mortgagor Not in Default After Wrongful Sale

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malice. Malice may be shown if the plaintiff can prove that the communication was not made in good faith,[35] but that the defendant availed himself of the privileged occasion wilfully and knowingly for the purpose of defaming the plaintiff,[36] or made the communication in reckless disregard of the justifiability of the defamatory statements.[37]

It seems rather unfortunate that the North Carolina court, in deciding its first case on this point, should base its opinion on the artificial holding that there is no publication to the stenographer because she is not a third person in her duties as an employee of a corporation, when the same result could have been more logically reached on the grounds of a privileged publication. If this latter method had been used, subsequent plaintiffs would be more adequately protected against similar communications maliciously dictated.

J. B. CHESHIRE, IV.

Mortgages—Deeds of Trust—Power of Sale—Rights of Mortgagor Not in Default After Wrongful Sale.

P procured a loan from *D* land bank, securing the bank by a deed of trust on her farm. *P* then made an agreement with *W*, joined as a defendant, whereby he became her tenant and agreed to apply a certain rental each year toward discharging the principal of the obligation and the interest thereon. *P* alleges that *W* failed to apply the rents and profits properly, and that instead he entered a separate agreement with the bank whereby he became its tenant; and that after several years, during which *W* and *D* failed properly to apply rental value, and committed waste by selling timber, *D* declared *P* in default, and procured a sale by the trustee. The bank, *D*, was the purchaser, and later conveyed to *H*, also joined as a defendant, from whom *W* subsequently acquired through purchase. *P* claims that she was improperly deprived of her land through the fraud of the defendants, and of others whose mention is not necessary; she asks for an accounting as to rents and profits, for the sale of the land to be set aside as void, for recovery of the amount of waste and of timber cut, and for a chance to redeem her land.

P was nonsuited in the lower court, and the Supreme Court sustained this as to all defendants save *D*. The court was of the opinion that the evidence in the light most favorable to *P* showed that *D* had become

[35] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[36] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[37] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937).

mortgagee in possession, and that *P* was consequently entitled to an accounting for rents and profits during the period of such relationship. The court said, further, that if, as *P* claims, nothing was due *D* at the time of the sale, and the latter brought about the sale wrongfully, *P* would ordinarily be entitled to redeem the land, unless this has been rendered impossible by *D*'s conduct, in which eventuality the remedy of damages is available.[1] The case raises the question as to what rights a mortgagor not actually in default has when his land is conveyed to an innocent purchaser under the power in the instrument, and leaves a good deal of doubt as to what "conduct" by the mortgagee would render redemption impossible.

Even in lien states, where the mortgagor and not the mortgagee is entitled to possession, the latter may obtain the rights of a "mortgagee in possession". Some states allow him these rights only if he enter with the express or implied consent of the mortgagor;[2] others extend the doctrine to peaceable entry in good faith under color of law;[3] a third group requires only that the possession be peaceably acquired.[4] One who has become a "mortgagee in possession" may not be divested of this status until the obligation is satisfied.[5] Once the character of mortgagee in possession has been assumed, whether the jurisdiction be title or lien, he enters into some well settled rights and obligations. He is chargeable with the rents and profits from such land,[6] which he must apply as payment on the debt and interest thereon accruing;[7] with waste;[8] and with acts amounting to flagrant mismanagement.[9] He must keep the premises in such repair as will conserve the property and prevent ruin and decay, and he must account for losses resulting from

[1] Fleming v. North Carolina Joint Stock and Land Bank, 215 N. C. 414, 2 S. E. (2d) 3 (1939).

[2] Jones v. Rigby, 41 Minn. 530, 43 N. W. 390 (1899); Herrmann v. Land Cabinet Co., 217 N. Y. 526, 112 N. E. 476 (1916).

[3] Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961 (1917); Pettit v. Louis, 88 Neb. 496, 129 N. W. 1005 (1911).

[4] Stouffer v. Harlan, 68 Kan. 135, 74 Pac. 610 (1903); Jagar v. Plunkett, 81 Kan. 565, 106 Pac. 280 (1910); (1928) 7 TEX L. REV. 170.

[5] Cory v. Santa Ynes Land Co., 151 Cal. 778, 91 Pac. 647 (1907). An exception to the rule occurs when there is gross mismanagement by the mortgagee in possession. Harding v. Garber, 20 Okla. 11, 93 Pac. 539 (1907); 3 JONES, MORTGAGES (8th ed. 1928) §1931; note (1935) 35 COL. L. REV. 1248, 1253, n. 31.

[6] Union Bank of Columbia v. Cook, 110 S. C. 99, 96 S. E. 484 (1918) (in absence of evidence, the rent may be assumed to equal the interest); 2 JONES, MORTGAGES §1425.

[7] Peugh v. Davis, 113 U. S. 542, 5 Sup. Ct. 622, 28 L. ed. 1127 (1885); Green v. Rodman, 150 N. C. 176, 63 S. E. 732 (1909); 2 JONES, MORTGAGES §1437; WALSH, MORTGAGES (1934) §§19, 20.

[8] American Freehold Land Mortgage Co. v. Pollard, 132 Ala. 155, 32 So. 630 (1902) (timber removed); Smith v. Stringer, 228 Ala. 630, 155 So. 85 (1934) (grapevines destroyed).

[9] Baumgard v. Bowman, 31 Ohio App. 266, 167 N. E. 166 (1928); see note 5, *supra*.

his failure to discharge such duty.[10] He is credited with reasonably necessary repairs,[11] but not with what are clearly improvements, unless these were made under the mistaken belief that he was actually the owner in fee.[12] He can usually demand credit for tax payments,[13] for the paying off of prior liens,[14] and for any insurance outlay,[15] unless this is made solely for his own purposes.[16]

The right of the mortgagor in the instant case to an accounting from the mortgagee is therefore clear, since the mortgagee was in possession because the mortgagor's tenant had become its tenant. If on such an accounting it turns out that there was nothing due the mortgagee at the time of the foreclosure, the problem is raised as to the rights of *P* as against the bank, *D*, purchaser at the sale, and *W*, who eventually acquired the title. This is a phase of the larger question: "What rights and remedies does a mortgagor have after a foreclosure sale, or sale under power, which is in some way defective?"

In general, sales under power in a mortgage or deed of trust may be set aside at the instance of the mortgagor where he suffers injury by reason of fraud or deceit on the part of the mortgagee or trustee making the sale;[17] where the price received has been so grossly inadequate as to shock the conscience, if there is also any evidence of collusion, oppression, or even gross mismanagement by the mortgagee or the trustee:[18] or where the mortgagee or trustee becomes purchaser at his own sale, unless specifically authorized to do so either by the terms of the

[10] Dozier v. Mitchell, 65 Ala. 511 (1880); 3 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) §1217; WALSH, MORTGAGES (1934) §21; *cf.* Brown v. South Boston Savings Bank, 148 Mass. 300, 19 N. E. 382 (1889).

[11] Lynch v. Ryan, 137 Wis. 13, 118 N. W. 174 (1908); 3 POMEROY, EQUITY JURISPRUDENCE §1217; WALSH, MORTGAGES (1934) §21.

[12] Mickle v. Dillaye, 17 N. Y. 80 (1858); Turk v. Page, 64 Okla. 251, 167 Pac. 462 (1917); WALSH, MORTGAGES (1934) §21.

[13] Hays v. Christiansen, 114 Neb. 764, 209 N. W. 609 (1926).

[14] Harper v. Ely, 70 Ill. 581 (1873); Madison Baptist Church v. Oliver Street Baptist Church, 73 N. Y. 82 (1878).

[15] Hays v. Christiansen, 114 Neb. 764, 209 N. W. 609 (1926); 2 JONES, MORTGAGES §1452.

[16] Wise v. Layman, 197 Ind. 393, 150 N. E. 368 (1926).

[17] The mortgagor can usually proceed against the mortgagee for damages at law, or have the deed canceled; but if the land goes to an innocent purchaser, the only recourse is a suit for damages against the offending mortgagee. Warren v. Susman, 168 N. C. 457, 84 S. E. 760 (1915); Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803 (1912); *cf.* Carr v. Graham, 128 Ga. 622, 57 S. E. 875 (1907); Rich v. Brooks, 179 N. C. 204, 102 S. E. 207 (1920).

[18] Sargent v. Shumaker, 193 Cal. 122, 223 Pac. 464 (1924); *cf.* Holton Park Co. v. Gary, 133 Md. 509, 105 Atl. 751 (1919). Mere inadequacy of price, standing alone, cannot upset a duly advertised sale. Gadreault v. Sherman, 250 Mass. 145, 145 N. E. 49 (1924); Roberson v. Matthews, 200 N. C. 241, 156 S. E. 496 (1931); Elkes v. Interstate Trustee Corp., 209 N. C. 832, 184 S. E. 826 (1936); note (1933) 11 N. C. L. REV. 172. Also see in this connection N. C. CODE ANN. (Michie, 1935) §2593(b) (statutory provision for enjoining sales at which the price offered is inadequate).

instrument or by statute.[19] It is widely held that a sale which fails to comply with requirements as to notice and advertisement which are specified in the instrument, or by statute, is void and ineffective to pass legal title.[20] A sale will not usually be set aside on the ground of mere informality or irregularity not affecting the right to sell or the substantial rights of the parties involved.[21]

The instant case raises the question of the effect of a sale when there has been no default. Here the decisions are somewhat conflicting. It has been indicated in a few cases that if the mortgage has been paid before the sale, such sale is voidable, and a purchaser obtains at most a bare legal title which he holds in trust for the benefit for the mortgagor, or owner of the mortgaged estate,[22] but this view does not seem to be very generally followed. A number of states, in which payment of the debt automatically extinguishes the mortgage securing it and the power of sale contained therein, have adopted the rule that any sale made under the power after the debt is paid is void, even as against a bona fide purchaser.[23] The reason for this rule, as stated in *Rogers v. Barnes*,[24] a leading case, is that since default of the mortgagor is a condition precedent to the right of sale, this right does not accrue and cannot be exercised until default occurs. According to this case, the mortgagor may elect whether to recover full damages on account of the unlawful sale of the land, thus ratifying the title of the innocent purchaser; or to repudiate the sale and redeem the premises.[25] It has

[19] There is a presumption of fraud at such sale, although there may be none. Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766 (1887). The mortgagor can usually affirm the sale and thus ratify it; or he may avoid it and set it aside. Joyner v. Farmer, 78 N. C. 196 (1878). But an innocent purchaser for value gets a good title even from a mortgagee who thus buys. Very v. Russell, 65 N. H. 646, 23 Atl. 522 (1874); see Froneberger v. Lewis, 79 N. C. 426, 431 (1878); *cf.* Smith v. Greensboro Bank, 213 N. C. 343, 196 S. E. 481 (1938).

[20] Cox v. American Freehold & Land Mortgage Co., 88 Miss. 88, 40 So. 739 (1906). *Contra:* Fountain v. Pateman, 189 Ala. 153, 66 So. 75 (1914); see Everett v. Woodward, 162 Va. 419, 422, 174 S. E. 864, 867 (1934). A subsequent purchaser is protected from defects in the proceedings which do not appear of record, and of which he had no notice, actual or constructive. Fountain v. Pateman, 189 Ala. 153, 66 So. 75 (1914); Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721 (1930); see Laramore v. Jones, 157 Ga. 366, 372, 121 S. E. 411, 414 (1924). WALSH, MORTGAGES (1934) §85.

[21] Farmers Bank v. Murphree, 200 Ala. 574, 76 So. 932 (1917); Flynn v. Curtis & Pope Lumber Co., 245 Mass. 291, 139 N. E. 533 (1923); Jessup v. Nixon, 186 N. C. 100, 118 S. E. 908 (1923); Brown v. Sheets, 197 N. C. 268, 148 S. E. 233 (1929).

[22] See Askew v. Sanders, 84 Ala. 356, 358, 4 So. 167, 168 (1888); Chapin v. Billings, 91 Ill. 539, 544 (1879); Fleming v. Barden, 126 N. C. 450, 456, 36 S. E. 17, 19 (1900); note (1903) 92 Am. St. Rep. 597.

[23] Redmond v. Packenham, 66 Ill. 434 (1872); Crowley v. Adams, 226 Mass. 582, 116 N. E. 241 (1917); Huntington v. Crafton, 76 Tex. 497, 13 S. W. 542 (1890); see Wells v. Estes, 154 Mo. 291, 299, 55 S. W. 255, 257 (1900); Ferguson v. Coward, 59 Tenn. 572, 573 (1872).

[24] 169 Mass. 179, 47 N. E. 602 (1897).

[25] The Massachusetts court said further, however, that a parol ratification of the sale and the deed thereunder would make the purchaser's title secure, and that

also been indicated that if the innocent purchaser is in possession after the sale, a court of equity may set the sale aside and compel a reconveyance of the legal title, so as to remove the cloud on the mortgagor's title.[26]

As opposed to this, however, there is the more general rule governing defective sales, which is followed in North Carolina, that a purchaser without actual or constructive notice of irregularity in the proceedings, gets a valid title, although the mortgagor might redeem as against the person making the sale.[27] A subsequent or remote grantee is not bound to look beyond the recitals of the trustee's deed, and, when he acts in good faith, he takes a good title as against any defects in the sale of which he had no actual or constructive knowledge.[28] In accordance with this, it has been held a number of times that where a mortgage containing a power of sale has in fact been discharged, but the mortgagor has failed to have such release made of record, an innocent purchaser at a sale made thereafter will be protected, the mortgagee being held responsible to the mortgagor for whatever damage he suffers through this wrongful sale.[29] In North Carolina, in the leading case of *Burnett v. Dunn Commission and Supply Co.*,[30] the court held invalid an attempted exercise of a power of sale after the debt had been satisfied. According to this case, the mortgagor has an election of remedies: he can ratify the sale and accept the proceeds thereof in settlement; he can, by repudiating the sale, sue the trustee or mortgagee for the wrong done in making such sale and hold him liable for the worth of the property;[31] or he can mantain an action to set aside the sale, "assuredly so as against the defendant [mortgagee], and one purchasing with notice".[32] The implication is that if the land has gone to an innocent third person, the mortgagor might, perforce, be remitted to his

laches or acts amounting to an estoppel might prevent the mortgagor from contesting the validity of such a title.

[26] Redmond v. Packenham, 66 Ill. 434 (1872).

[27] Shillaber v. Robinson, 97 U. S. 68, 24 L. ed. 967 (1878); Hinton v. Hall, 166 N. C. 477, 82 S. E. 847 (1914); 3 JONES, MORTGAGES §2441; WALSH, MORTGAGES (1934) §85.

[28] Hinton v. Hall, 166 N. C. 477, 82 S. E. 847 (1914); Brewington v. Hargrove, 179 N. C. 279, 100 S. E. 308 (1919).

[29] Garrett v. Crawford, 128 Ga. 519, 57 S. E. 792 (1907); Merchant v. Woods, 27 Minn. 396, 7 N. W. 826 (1881); Bausman v. Eads, 46 Minn. 148, 48 N. W. 769 (1891); 2 JONES, MORTGAGES §2453 (the measure of damages allowed is usually the full worth of the property at the time of the sale since that is the amount the mortgagor has lost through the mortgagee's tort).

[30] 180 N. C. 117, 104 S. E. 137 (1920).

[31] *Cf.* Stansberry v. McDowell, 194 Mo. 194, 186 S. W. 757 (1916) (an allowance of punitive damages when the mortgagee's tortious foreclosure is intentionally oppressive and wanton).

[32] Burnett v. Dunn Commission and Supply Co., 180 N. C. 117, 118, 104 S. E. 137, 138 (1920).

remedy of damages, as in the cases involving other irregularities in the sale.

In the principal case (assuming the accounting will show that nothing was owing at the time of foreclosure) the right to exercise the power of sale had not yet accrued, and hence the sale was unauthorized. Since *D* bank, the creditor secured by the deed of trust, purchased at the sale and could not be considered a purchaser without notice of the defect, the sale could be avoided as to *D*. But the bank sold to *H*, who sold to *W*. If *H* is a purchaser for value without notice, then under the general rule followed in North Carolina that a subsequent grantee is not charged with defects in the foreclosure sale of which he had no notice, *P* could not avoid the sale and recover the land if *H* still held it.[33] Although, in such a situation, as that in the principal case, *W* would certainly be no grantee without notice, still if the land goes from the bona fide purchaser to a subsequent vendee with notice, the latter's title is unassailable, provided he did not participate in the wrong.[34] Here it would by no means be clear that *W* did not so participate. Therefore, even admitting that a bona fide purchaser would take title under the defective sale, whether any cause of action existed as against *W* would seem to depend on whether *H* was indeed a bona fide purchaser, and whether *W* was a participator in the bank's wrong.

In support of the rule that a purchaser without notice should keep the land as against the mortgagor, it may be argued that there is little danger that an innocent mortgagor will suffer any great injustice if he takes any reasonable precautions in safeguarding his interests. If the debt has in fact been paid, the mortgagor may protect himself against any sale to an innocent purchaser by having this discharge made of record with the register of deeds in compliance with our North Carolina recordation statute.[35] There is small likelihood of any sale being held without the mortgagor's knowledge in view of the customary notice and advertisement before sale.[36] He has the right to file in the register of deeds office a *lis pendens,* which is notice to all subsequent purchasers of land in such county that they buy subject to the outcome of a suit which the mortgagor is to bring.[37] Simpler still, the mortgagor could appear at the sale and give unmistakable notice that he protests; this certainly would give any immediate purchaser notice. Since silence or failure to give any protest at the sale,[38] or subsequent ratification and

[33] Brown v. Sheets, 197 N. C. 268, 148 S. E. 233 (1929); Lockridge v. Smith, 206 N. C. 174, 173 S. E. 36 (1934); Davis v. Doggett, 212 N. C. 589, 194 S. E. 288 (1937).

[34] Brown v. Sheets, 197 N. C. 268, 148 S. E. 233, 63 A. L. R. 1362 (1929).

[35] N. C. CODE ANN. (Michie, 1935) §2594.

[36] *Id.* §687. [37] *Id.* §§500-502.

[38] Lewis v. Nunn, 180 N. C. 159, 104 S. E. 470 (1920).

rental from the purchaser,[39] or unreasonable delay such as to constitute laches,[40] may preclude the mortgagor from getting his equitable relief, he would do well to assiduously avoid any conduct or inactivity which might work an estoppel on him in his attempt to have the sale set aside. This would seem true in some measure of this case. The mortgagor, so far as appears, made no attempt to warn prospective buyers, and waited five years after the sale to bring this bill to account and redeem. On the other hand, instances of hardship are quite conceivable in cases where, through absence, mistake, or ignorance, the mortgagor may not have actually known of the sale, and hence have given no notice or indication that the sale was wrongful before an innocent purchaser for value bought. If, in addition, the mortgagee who has perpetrated the wrong prove insolvent, under North Carolina law as it has been shown to be, it would seem that an innocent mortgagor would have no remedy. Albeit this may work hardships in isolated cases, it is submitted that from the standpoint of logic as well as of social policy, the North Carolina court is entirely consistent in upholding the rights of an entirely innocent purchaser without notice, as against those of an innocent mortgagor who through some inadvertence has failed to make use of the safeguards afforded him in his character of landowner.

A. H. GRAHAM, JR.

Municipal Corporations—Power to Exercise Previous Restraint on Freedom of Speech and Assembly.

An ordinance forbade public parades or public assemblage in or upon the public streets, highways, public parks or public buildings of Jersey City without a permit from the Director of Public Safety, who could only refuse a permit for the purpose of preventing a riot, disturbances, or disorderly assemblage. The circuit court of appeals,[1] modifying and affirming the district court,[2] held the ordinance unconstitutional on the ground that it permitted previous restraint upon the right of freedom of speech in a public place and forbade peacable assemblage except upon terms repugnant to free speech, contrary to the provisions of the Fourteenth Amendment. On certiorari the United States Supreme Court affirmed this decision, with modifications.[3]

[39] Flake v. High Point Perpetual Bldg. & Loan Ass'n., 204 N. C. 650, 169 S. E. 223 (1933).

[40] Schwartz v. Loftus, 216 Fed. 320 (C. C. A. 8th, 1914); see First Nat. Bank of Opp v. Wise, 235 Ala. 124, 128, 177 So. 636, 639 (1937); Walker v. Schultz, 175 Mich. 280, 292, 141 N. W. 543, 548 (1913).

[1] Hague v. Committee for Industrial Organization, 101 F. (2d) 774 (C. C. A. 3rd, 1939).

[2] Committee for Industrial Organization v. Hague, 25 F. Supp. 127 (D. N. J. 1938).

[3] Hague v. Committee for Industrial Organization, — U. S. —, 59 Sup. Ct. 954, 83 L. ed. Adv. Ops. 928 (1939).