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Even so, there will be no loss to statecraft if in the daily activities of courts the needs of practical judicial administration may have some sway to persuade against compelling two lawsuits where one will more completely serve the interests of the litigants."[38]

ERNEST W. MACHEN, JR.

Mortgages—Foreclosures—Partial Sale of Land

A executed a deed of trust on four tracts of land to *T* to secure the payment of a series of notes payable to *C* and maturing in 1925. In 1926, *T* advertised under the power of sale of the deed and sold one of the tracts of land included therein. In 1928, *T* advertised and sold two additional tracts of land. The latter tracts were bought in by *C*, who went into possession, but no deed was given him for the land until 1943, some 18 years after the maturity of the debt. Under the law then existing, unless a mortgagee was in possession, the foreclosure sale and the execution and delivery of the deed pursuant thereto, in order to be valid, must have been completed within 10 years from the date the debt matured. In a suit by the heirs of *A* against the heirs of *C* to quiet title to the land, the issue became one of whether or not *C* was a mortgagee in possession of the two tracts to which he had no deed. *Held:* For the heirs of *A*. It is a general rule that there can be only one foreclosure of a mortgage or deed of trust. When a mortgagee or a trustee under a deed of trust elects to sell only a portion of the pledged property to satisfy the debt, the remainder of the security is released, and he cannot thereafter assert any right to it. Therefore, *C* was not and could not have been a mortgagee in possession after the execution and delivery of the deed made pursuant to the foreclosure sale held in 1926.[1]

The rule against successive foreclosures of the mortgage security has been widely applied where a decree is sought in a court of equity,[2] on the theory that a mortgage represents but a single security and therefore but a single cause of action, which cannot be split. Therefore, the foreclosure cannot be piecemeal. The basic idea of not splitting the mortgagee's cause of action has, in several states, been enacted into statutes which set out that "there shall be but one single action for the enforce-

[38] Judge Clark, dissenting in Lewis v. Vendome Bags, Inc., 108 F. 2d 16, 20 (C. C. A. 2d 1939).

[1] Layden v. Layden, 228 N. C. 5, 44 S. E. 2d 340 (1947).

[2] Dumont v. Taylor, 67 Kan. 727, 74 Pac. 234 (1903) (mortagee got one decree and order of sale, but withdrew it; second foreclosure refused); Hanson v. Dunton 35 Minn. 189, 28 N. W. 221 (1886) (mortagee had foreclosed once for part of the debt, sought a second foreclosure for the remainder); Long v. W. P. Devereux Co., 87 Mont. 209, 286 Pac. 406 (1930) (no second foreclosure on wheat grown on mortgaged land, where mortgagee had failed to assert his right to the wheat in the first foreclosure by having a receiver appointed); Nebraska Loan and Trust Co. v. Damon, 4 Neb. (unof.) 334, 93 N. W. 1022 (1903) (foreclosure of mortgage for interest only, where whole debt is due, exhausts lien); Dooly v. Eastman, 28 Wash. 564, 68 Pac. 1039 (1902).

ment of any right secured by a mortgage."[3] Indeed, the problem of successive foreclosures is but one of many which the "one single action" theory raises.[4]

To say, absolutely, that a mortgagee may foreclose but one time in any situation would be a harsh rule, and strictly applied, a trap for many an unwary mortgagee. As a result, courts of equity, in their decrees, have made several provisions for his benefit. As might be suspected, where it is a procedural impossibility to foreclose in one suit, a second suit is not barred.[5] Likewise, where, inadvertently, all parties having an interest in the property are not joined the first time, a second foreclosure may be had on the interest of the omitted party.[6]

The rest of the cases fall into two general groups—(1) where the debt has matured only in part and (2) where the debt has matured in whole. The first concerns the situation which arises where the mortgage secures a debt which falls due in successive installments, and the mortgage contains no acceleration clause. If a foreclosure decree is had for a part of the debt due (i.e., upon default of an installment where other installments have yet to mature), the property is discharged from the lien of the mortgage, and the mortgagee cannot foreclose again when the subsequent installments are not paid[7] To save this situation, equity courts will treat as incorporated into the decree a provision for the preservation of the lien, enabling the mortgagee to sell later under the same decree other parcels of land to satisfy subsequent installments.[8] Or, if the property is not readily divisible, the whole may be sold, and the court will direct that the sale be subject to a lien for the unmatured portion of the debt;[9] or, will direct that the whole security be sold, and after the due portion of the debt is paid, that the surplus be applied to the unmatured installments; or, will direct that the surplus be invested until such installments become due.[10] Accordingly, though there is a

[3] CALIF. CODE CIV. PROC. (Deering, 1941) §726; IDAHO LAWS ANN. (1943) §9-101; MONT. REV. CODES (Anderson and McFarlane, 1935) §9567; NEV. COMP. LAWS (Hillyer, 1929) §9048; UTAH CODE ANN. (1943) §104-55.1.

[4] 1 GLENN, MORTGAGES §96 (1st ed. 1943).

[5] Widman v. Hammack, 110 Wash. 77, 187 Pac. 1091 (1920) (land in two different states).

[6] Brackett v. Barnegas, 116 Cal. 278, 48 Pac. 90 (1897) (mortgage foreclosed without making wife a party where homestead had been previously declared); Chrystal River Lumber Co. v. Knight Turpentine Co., 69 Fla. 288, 67 So. 974 (1915) (holders of contract rights to timber on land not made parties); McCague v. Eller, 77 Neb. 531, 110 N. W. 318 (1906) (equity of redemption left in part of the premises in heirs at law of mortgagor).

[7] Curtis v. Cutler, 76 Fed. 16 (C. C. A. 8th 1896); Cadd v. Snell, 219 Iowa 728, 259 N. W. 590 (1935).

[8] Black v. Reno, 59 Fed. 917 (C. C. Mo. 1894).

[9] Light v. Federal Land Bank of St. Louis, 177 Ark. 846, 7 S. W. 2d 975 (1928); Chicago Title and Trust Co. v. Prendergast, 335 Ill. 646, 167 N. E. 769 (1929).

[10] *See* Black v. Reno, 59 Fed. 917 (C. C. Mo. 1894).

rule against partial foreclosure, proper steps in equity may preserve the lien of the mortgage.[11]

In several states these principles have been incorporated into statutes which are expressly designed to save the mortgage lien from extinction when foreclosure is made on one installment of an obligation.[12]

Where the whole debt is due, there are no piecemeal foreclosure provisions in favor of the mortgagee, unless there exists some special equity in his favor.[13] He has his opportunity then and there to realize on all of his security. If he forecloses on only a portion of a divisible security for the whole of the debt, then the partial foreclosure rule bars him from a second action.[14]

In the subject case, the court found no reason why the rule should not be applied to a power of sale in a deed of trust. The extension seems a legally logical one. Foreclosure by decree in equity and by advertisement under a power of sale, though different in method, are similar in principle. The mortgage still represents a single security which should not be foreclosed piecemeal, whether the foreclosure be inside the court or out. Moreover, one purpose of the rule is to prevent the harassment of the debtor by continued sales, and a power of sale, not being exercised under the guidance of the court, is more capable of being so used.

In other states where the power of sale is frequently used, the application of the rule has been recognized,[15] and statutes have been passed to protect the lien of the mortgage where the debt matures in installments.[16]

North Carolina has no statute protecting any piecemeal foreclosure.[17]

[11] 2 WILTSIE, MORTGAGE FORECLOSURE §832 (5th ed. Fribourg, Elting and Fribourg, 1939).

[12] ARIZ CODE (1939) §21-1226; IDAHO LAWS ANN. (1943) §9-103; MICH. STAT. ANN. (Henderson, 1935) §27-1145 through 1148; MINN. STAT. (Henderson, 1941) §580.09; MONT. REV. CODES (Anderson and McFarlane, 1935) §9469; NEV. COMP. LAWS (Hillyer, 1929) §9050; N. J. STAT. ANN. (1939) §2:65046 through 65058; N. D. REV. CODE (1943) §32-1915; N. Y. CIV. PRAC. ACT §1086; S. D. CODE (1939) §37:2909; UTAH CODE ANN. (1943) §104-55-5; WASH. REV. STAT. ANN. (Remington, 1931) §1127; WISC. STAT. (Brossard, 1943) §278:06.

[13] Gerig v. Loveland, 130 Cal. 512, 62 Pac. 830 (1900); Berrie, Sheriff v. Smith, 97 Ga. 782, 25 S. E. 757 (1896); Swift and Co. v. First National Bank of Barnesville, 161 Ga. 547, 132 S. E. 99 (1926); Herzog v. Union Debenture Co., 94 Neb. 820, 144 N. W. 814 (1913).

[14] Long v. W. P. Devereux Co., 87 Mont. 209, 286 Pac. 406 (1930).

[15] Walton v. Hollywood, 47 Mich. 385, 11 N. W. 209 (1882) (no second foreclosure for taxes and insurance premiums paid subsequent to foreclosure under power of sale).

[16] MICH. STAT. ANN. (Henderson, 1935) §27. 1222, *applied in* Bridgman v. Johnson, 44 Mich. 491, 7 N. W. 83 (1880); MINN. STAT. (Henderson, 1941) §580.09; N. D. REV. CODE (1943) §35-2205; S. D. CODE (1939) §37:3003; WISC. STAT. (Brossard, 1943) § 297:03 (if the mortgage be payable by installments, each installment after the first is deemed to be secured by a separate mortgage and foreclosure may be had for each installment as if a separate mortgage had been given for each).

[17] But see in this connection N. C. GEN. STAT. (1943) §45-27 (sale of land where land consists of two separate tracts lying wholly in different counties).

This creates a problem from the standpoint of both the debtor and the creditor where the land is divisible into parcels and foreclosure is made under a power of sale. The mortgagee, when only part of his debt is matured, must sell the whole security subject to a lien for the remainder of the debt. There is no equitable decree to provide for saving the lien, so that he may sell in parcels as the debt matures. Moreover, when he sells, whether only part or all of the debt is due, he must be sure that he sells enough of the land to make him whole. He has no second opportunity to foreclose if the first foreclosure does not provide enough.

From the viewpoint of the mortgagor, the rule designated to aid him becomes a detriment where he has pledged land grossly in excess of the amount of his debt. The mortgagee will sell all of the security, or at least substantially more than is necessary, in order to protect himself, regardless of whether the mortgagor would rather have the surplus land than the surplus from the proceeds of the sale.

For those who want to avoid the problem so raised, the simplest method seems a provision in the mortgage contract providing for a continuing power of sale authorizing the mortgagee to sell the mortgaged property in parcels from time to time until the whole debt is satisfied; but directing that only so much of the property be sold as is necessary to satisfy the debt then due. The court, in the instant case, indicated the propriety of such a clause.[18]

As has been pointed out, many states protect the lien of the mortgage where the debt matures in installments. Alabama, evidently feeling that the rule against partial foreclosure should not apply to the sale of land in parcels whether the debt had matured in part or in whole, has made such a clause statutory. The statute sets out that foreclosure, either by power of sale or in equity, shall operate as foreclosure only as to the property sold, and provides that every power of sale contained in a mortgage shall be a continuing power of sale unless it is expressly provided otherwise.[19]

The need for such a statute in North Carolina must be determined by a balancing of the respective interests of the mortgagor and the mortgagee. Since the rule against partial foreclosure may operate to the detriment of the mortgagor where the land is divisible, and is a detri-

[18] Layden v. Layden, 228 N. C. 5, 8, 44 S. E. 2d 340, 342 (1947).

[19] ALA. CODE (1940) tit. 47, §169: "The sale of any part of the property conveyed by mortgage, either under power of sale contained in the mortgage or by foreclosure in a court of equity, shall operate as a foreclosure of the mortgage only as to the property sold, and if the mortgage indebtedness is not thereby settled in full, the other property contained in the mortgage continues as security for the mortgage debt and there may be a further foreclosure of the mortgage, either by sale under power of sale or in equity. Every power of sale contained in the mortgages hereafter executed shall, unless otherwise expressly provided therein, be held to give a continuing power of sale authorizing the mortgagee or his assignee after the law day of the mortgage to sell the mortgaged property from time to time in separate lots or parcels as it comes into his possession."

ment in any event to the mortgagee, it is submitted that a statute in the nature of the one in Alabama would best serve the interests of both. It should include, in addition, a clause providing that only so much property should be sold as is necessary to satisfy the debt then due. Under such a statute partial foreclosure would then operate to cut off the lien of the mortgage in one case: that is, where only a portion of the debt had matured and the mortgagee foreclosed on the whole property without preserving the lien.

LEMUEL H. GIBBONS

Workmen's Compensation—Falls Due to Dizziness, Vertigo, Epilepsy and Like Causes

It was recently held by the Georgia Court of Appeals that a fractured skull sustained by a department store salesman, when he suffered an epileptic attack and fell against a sharp cornered table, was an accident arising out of the employment. The State Board of Workmen's Compensation granted the award on a finding that the exertion of the work brought on the attack.[1] Without rejecting the finding of the Board, the Court rather ambitiously advanced an entirely different theory. It was said that irrespective of whether the exertion caused the attack, the injury was compensable, since the table which claimant struck constituted a "special hazard" of the employment.[2] That anything so commonplace as a table should be denominated a "special hazard" and made the basis of liability for an injury may shock those employers who are not aware of some of the recent trends in workmen's compensation.

The Georgia statutes[3] do not make the employer liable for every accident which happens while the worker is on the job, but require the employment in some manner contribute to the injury. In theory, at

[1] The finding of exertion was not based on any immediate act, instead the whole nature of the employment was examined, which included climbing stairs and standing for a ten-hour work day.

Note that North Carolina apparently requires some particular act of exertion beyond the usual requirements of the employment. Neely v. Statesville, 212 N. C. 365, 193 S. E. 664 (1937); Moore v. Engineering & Sales Co., 214 N. C. 424, 199 S. E. 605 (1938); For annotations of N. C. Industrial Commission decisions, see N. C. W. C. A. Ann. (1946) p. 25-26. *But see* Edwards v. Piedmont Publishing Co., 227 N. C. 184, 187, 41 S. E. 2d 592, 594 (1947) (concurring opinion).

[2] United States Casualty Co. v. Richardson, — Ga. App. —, 43 S. E. 2d 793 (1947). Compare language of same court twelve years before where workman fainted and fell at water fountain. The decision was found not to be in conflict with the main case. "The better and more generally followed rule would seem to be that followed by Judge Stanley of the Department of Industrial Relations, to the effect that an injury arising from a physical seizure not induced by or related to the employment is not such an accident as would afford compensation, even though it might appear that the particular consequences of the seizure were such as would not have resulted elsewhere than at the place of the employment." Bibb Mfg. Co. v. Alford, 51 Ga. App. 277, 179 S. E. 912, 914 (1935).

[3] GA. CODE ANN. (Park, 1937) §114-102 (1935). "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment. . . ."