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For the Minnesota State Bar Association

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MORTGAGES—MORTGAGEE IN POSSESSION—ACQUIRING TITLE BY ADVERSE POSSESSION.—A recent case in South Carolina held, under a vigorous dissent, that a mortgagor was not barred by adverse possession from redeeming his land twenty years after he had surrendered possession to the mortgagee in payment of the debt.¹ The decision is of interest in that it calls attention to the rights and liabilities of a mortgagee in possession.

A mortgagee in possession is generally defined as one who has possession under his mortgage lawfully and with the consent, express or implied, of the mortgagor.² Thus the mortgagee may

¹Frady v. Ivester, (S.C. 1921) 110 S. E. 135.

²19 R. C. L. 327; 2 Jones, Mortgages, 7th Ed., sec. 702.

enter into possession under an agreement to collect the rents and profits to apply on the mortgage debt as an additional security for the debt.³ And a mortgagee or purchaser entering by virtue of a defective foreclosure sale is considered a mortgagee in possession.⁴ Some courts hold that the possession need not be taken with the consent of the mortgagor, if it is peaceably and legally taken.⁵ A mortgagee in possession cannot be ejected until the debt is paid.⁶ He is accountable for the fair rental value of the property determined on its condition at the time he entered, but he can apply the rents and profits in payment of the mortgage debt.⁷ He can not make unnecessary improvements on the land except at his own risk, since he can not demand payment for them upon redemption.⁸

After a mortgagee has been in possession for a length of time sufficient to bar ordinary rights, the question arises whether the right of redemption is barred, giving the mortgagee an absolute title. Where the mortgagee enters under an agreement with the mortgagor, i. e., where the possession is permissive and in recognition of the right of redemption, the statute of limitations

³Longfellow v. Fisher, (1897) 69 Minn. 307, 72 N. W. 118; Catlin v. Murray, (1905) 37 Wash. 164, 79 Pac. 605.

⁴Russell v. H. C. Akeley Lumber Co., (1891) 45 Minn. 376, 48 N. W. 3; Haggart v. Wilczinski, (1906) 143 Fed. 22, 26, 74 C. C. A. 176. One who takes possession under a conveyance from a purchaser at a void foreclosure sale is a mortgagee in possession, Kaylor v. Kelsey, (1912) 91 Neb. 404, 136 N. W. 54, 40 L. R. A. (N.S.) 839 and note. New York, however, does not allow a third person who has entered as purchaser under a void foreclosure sale the rights of a mortgagee in possession, Shriver v. Shriver, (1881) 86 N. Y. 575, 581. And Michigan permits the mortgagor to eject the mortgagee who is in possession by virtue of a void foreclosure, Bowen v. Brogan, (1899) 119 Mich. 218, 77 N. W. 942, 75 A. S. R. 387.

⁵Jaggar v. Plunkett, (1910) 81 Kan. 565, 106 Pac. 280; Investment Securities Co. v. Adams, (1905) 37 Wash. 211, 216, 79 Pac. 625. Backus v. Burke, (1895) 63 Minn. 272, 277, 65 N. W. 459, holds that a purchaser entering under void foreclosure proceedings is a mortgagee in possession regardless of the consent of the mortgagor. This is squarely opposed to the view expressed in the earlier case of Rogers v. Benton, (1888) 39 Minn. 39, 44, 38 N. W. 765, 12 A. S. R. 613, to the effect that the consent of the mortgagor, express or implied, is the essence of "a mortgagee in possession."

⁶Stouffer v. Harlan, (1903) 68 Kan. 135, 146, 74 Pac. 610, 64 L. R. A. 320, 104 A. S. R. 396; 2 Jones, Mortgages, 7th Ed., sec. 674; see also Becker v. McCrea, (1908) 193 N. Y. 423, 428, 86 N. E. 463, 23 L. R. A. (N.S.) 754 and note.

⁷Anderson v. Minnesota Loan & Trust Co., (1897) 68 Minn. 491, 71 N. W. 665; Grannis v. Hitchcock, (1912) 118 Minn. 462, 137 N. W. 186; Bowen v. Boughner, (1920) 189 Ky. 107, 113, 224 S. W. 653; 2 Jones, Mortgages, 7th Ed., sec. 1114.

⁸Bowen v. Boughner, (1920) 189 Ky. 107, 224 S. W. 653; 2 Jones, Mortgages, 7th Ed., sec. 1127.

will not begin to run until the mortgagee disavows the right of redemption by some act giving notice of his adverse claim to the mortgagor.⁹ It is assumed that there can be no adverse holding so long as the mortgage relation continues,¹⁰ but a strict application of this rule leaves the mortgagee in this disadvantageous position. He can not sell the land, since he cannot give an indefeasible title, nor make permanent improvements, rendering it profitable for the mortgagor to redeem, yet in many cases his right to foreclose is barred by the statutory period and if he declares an adverse intent he becomes a mere trespasser, liable to an action of ejectment.¹¹ California circumvents this difficulty by allowing the mortgagee in possession a prescriptive title in five years after his right to foreclose is barred.¹² Other jurisdictions hold that no affirmative showing of an adverse intent is necessary, that mere possession by the mortgagee for twenty years without an accounting or active admission of the mortgage relation is sufficient to cut off the right of redemption.¹³ Another view is based on the theory that the rights of the mortgagor and mortgagee are reciprocal, with the result that the right to redeem is barred when the statute cuts off the right to foreclose.¹⁴

A different situation is presented where the mortgagee takes possession under a void foreclosure sale. Here, according to the view of the Minnesota court, the mortgagee's possession is adverse from the beginning and his entry starts the statute of limitations running in his favor.¹⁵ Since the mortgagee is entitled to

⁹Becker v. McCrea, (1908) 193 N. Y. 423, 429, 86 N. E. 463, 23 L. R. A. (N. S.) 754; Blessett v. Turcotte, (1912) 23 N. D. 417, 425, 136 N. W. 945; Frady v. Ivester, (S. C. 1921) 110 S. E. 135; West v. Banking Co. et al., (1914) 33 S. D. 465, 485, 146 N. W. 598; 2 Jones, Mortgages, 7th Ed., sec. 1152.

¹⁰2 Jones, Mortgages, 7th Ed., sec. 1152; Catlin v. Murray, (1905) 37 Wash. 164, 79 Pac. 605.

¹¹Backus v. Burke, (1895) 63 Minn. 272, 279, 65 N. W. 459; Cory v. Santa Ynez Land, etc., Co., (1907) 151 Cal. 778, 782, 91 Pac. 647.

¹²Cory v. Santa Ynez Land, etc., Co., (1907) 151 Cal. 778, 783, 91 Pac. 647. The mortgagee can bring an action in equity to compel redemption if he desires, Jaggard v. Plunkett, (1910) 81 Kan. 565, 106 Pac. 280.

¹³Batchelder v. Bickford, (1918) 117 Me. 468, 104 Atl. 819; see also Dixon v. Hayes, (1911) 171 Ala. 498, 55 So. 164.

¹⁴Haskell v. Bailey, (1853) 22 Conn. 569, 573; Adams v. Holden, (1900) 111 Ia. 54, 60, 82 N. W. 468; Brown v. Berry, (1918) 89 N. J. Eq. 230, 108 Atl. 51; 2 Jones, Mortgages, 7th Ed., sec. 1146. See Bradley v. Norris, (1895) 63 Minn. 156, 165, 65 N. W. 357.

¹⁵Backus v. Burke, (1895) 63 Minn. 272, 279, 65 N. W. 459; Nash v. Land Co., (1906) 15 N. D. 566, 574, 108 N. W. 792. Rigney v. De Graw, (1900) 100 Fed. 213, cited in 2 Jones, Mortgages, 7th Ed., sec. 1152 as authority for the contrary view was reversed on appeal in Stout v. Rigney, (1901) 107 Fed. 545, 549, 46 C. C. A. 459.

possession, the consent of the mortgagor is unimportant and is nothing more than acquiescence in the adverse holding. It should be noted, however, that one who enters under a void foreclosure but before receiving a deed acquires the status of a mortgagee in possession only by virtue of the consent of the mortgagor. Accordingly the statute does not begin to run until the mortgagee disavows the mortgage relation by some act evidencing an adverse intent. This distinction between entry under a void foreclosure sale before and after receiving a deed is adverted to by the South Dakota court in an opinion¹⁸ which holds that a mortgagee entering adversely under a deed at a void foreclosure is given the rights of a mortgagee in possession only through an equitable fiction created to afford equitable relief. The opinion commends the early Minnesota rule of *Rogers v. Benton* that to be a mortgagee in possession in fact the mortgagee must enter with the consent of the mortgagor.

VENDOR AND PURCHASER—CONTRACT TO SELL REAL ESTATE—RISK OF LOSS PENDING CONVEYANCE.—Suppose that in March, A contracts to sell and B contracts to buy a piece of realty, conveyance to be made in May, and suppose further that in April the buildings are destroyed. Who bears the loss?²

1. In England³ and in most jurisdictions in the United States⁴ the loss is placed on the vendee,⁴ on the theory that by

¹⁸*West v. Banking Co.*, (1914) 33 S. D. 465, 486, 487, 146 N. W. 598. See note, 23 L. R. A. (N.S.) 754, 757.

²It is obvious that loss caused by the negligence of either party must be borne by that party. *Lynch v. Wright*, (1899) 94 Fed 703, by the vendor; *Styles v. Blume*, (1895) 12 Misc. 421, 33 N. Y. S. 620, by the vendee; 39 Cyc. 1643.

³*Poole v. Adams*, (1864) 33 L. J. Ch. 639, 10 L. T. (N.S.) 287, 12 W. R. 683; *Rayner v. Preston*, (1881) 44 L. T. (N.S.) 787, 29 W. R. 547. The early English rule seems to have been that the vendor bore the risk. See dictum in *Stent v. Bailis*, (1724) 2 P. Wms. 217, 220. The present rule was first laid down in *Paine v. Meller*, (1801) 6 Ves. Jr. 349. Here the premises burned after the vendee had accepted the title, but before a deed had been executed. The court held that since the vendee was in equity the owner, he should bear the loss. It should be noted, however, that in England, contrary to the custom in the United States, the vendee prepared the deed and presented it to the vendor for execution. For this reason, if the vendee actually accepted the title, it can well be argued that loss occurring before the execution of the deed should fall upon him. The rule of *Paine v. Meller*, as it is broadly stated, would therefore seem unwarranted by the particular facts of the case. For a discussion of the misinterpretation of the case, see 23 Yale L. J. 266-270.

⁴*Woodward v. McCollum and State Bank*, (1907) 16 N. D. 42, 49, 111 N. W. 623; *Bautz v. Kuhworth*, (1869) 1 Mont. 133, 25 Am. Rep. 737; *Sewell v. Underhill*, (1910) 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N.S.)

virtue of the equitable doctrine of specific performance he is in effect the owner.⁵ It is submitted, however, that this line of reasoning is not conclusive. To say that the vendee bears the loss because he is in equity the owner merely begs the question, for it assumes the point in issue, i. e., is the vendee the owner? By well settled rules the vendee is the owner only in case the contract is enforceable against him. Thus the courts accepting the majority rule properly hold that the vendee does not bear the loss if at the time of the destruction the vendor had not good title to convey.⁶ But if a condition is implied in this connection, why is there not also an implied condition that the subject matter of the contract shall be in existence when the time for performance arrives? If the vendee's liability is a consequence of the contract, his liability should attach only to the extent of the vendor's compliance therewith.⁷ A promise to convey a house and lot is no more fulfilled by conveying the lot without the house than by conveying nothing at all. In either case there is a failure of consideration, and if total failure is a total defense, partial failure should be at least a partial defense. A contract to buy land, without anything further, does not, properly speaking, render the vendee the "owner" in equity. This statement is not inconsistent with a recognition of the fact that under certain conditions equity will recognize in the vendee vested rights. But these rights differ from those of an owner to the same extent and degree as the right to future ownership differs from present ownership.⁸ The two are fundamentally unlike in fact and in legal effect, but the distinction generally overlooked in the argument on behalf of the

233 and note, 18 Ann. Cas. 795, 134 A. S. R. 863; *Fouts v. Foudray*, (1912) 31 Okla. 221, 120 Pac. 960, 38 L. R. A. (N.S.) 251, 30 Ann. Cas. 301 and note; *O'Brien v. Paulsen*, (Ia. 1922) 186 N. W. 440; 27 R. C. L. 556; 39 Cyc 1641. Note that where the subject matter of the sale is mixed realty and personalty, the vendor must bear the loss. *Clinton v. Hope Ins. Co.*, (1871) 45 N. Y. 454, 466.

⁵The term "vendee" is used throughout in the sense of a vendee under an executory contract for the sale of realty.

⁶For a compilation of rules illustrating a vendee's equitable ownership, see 1 Col. L. Rev. 1. For adverse comment as to the application of these rules to the question of the risk of loss, see 2 Williston, Contracts, sec. 936.

⁷2 Williston, Contracts, sec. 932.

⁸The early English cases in accord with the majority rule might be justified on the grounds that they were decided at a time when mutual promises were considered independent. If this be true, then since a party to a contract today cannot sue without alleging full performance on his part, the reason for the English rule has ceased, and the rule itself should cease. 2 Williston, Contracts, sec. 933.

⁹2 Williston, Contracts, sec. 929.

majority rule that the vendee having the benefits of ownership should also bear the burdens.⁹ These so-called "benefits of ownership" exclude the right of possession,¹⁰ and, furthermore, in the absence of recording acts, are entirely destroyed by the vendor's fraudulent sale to a bona fide purchaser.¹¹ It would seem that ownership which gives neither present possession nor guarantees it for the future, but which all the while carries with it the risk of loss is not the kind of ownership the ordinary vendee looks forward to. It has sometimes been suggested that the majority rule is justifiable on the theory that the vendor in possession is in effect a mortgagee, holding his legal title for security purposes only. But this rule does violence to the intent of the parties, and moreover the legal rights and liabilities of a vendor in possession are essentially different from those of a mortgagee.¹²

II. A few jurisdictions hold that the vendor must bear the risk until the actual conveyance of the premises.¹³ This rule is the same as that applied to sales of personalty,¹⁴ and, while ordinarily correct, it is questionable in that it arbitrarily fixes the burden of loss, like the majority rule, without regard to the circumstances of each case.¹⁵ It can hardly be denied that the situation might be such that before the actual conveyance of the premises the loss should properly fall on the vendee.

III. To remedy the unavoidable evils arising from the application of either of the preceding extreme rules, a third rule, ably

⁹The objection to this theory is that there are practically no chance improvements analogous to chance destruction. 2 Williston, Contracts, sec. 941, p. 1789. But even so, some jurisdictions inconsistently charge the vendee with the costs of improvements made by the vendor under compulsion of law. King v. Ruckman, (1873) 24 N. J. Eq. 556, 566.

¹⁰Cartin v. Hammond, (1890) 10 Mont. 1, 24 Pac. 627.

¹¹27 R. C. L. 562.

¹²This is shown by the following rules: an agreement between a mortgagor and a mortgagee declaring that the mortgaged property will be forfeited in case of nonpayment will not be enforced, see Peugh v. Davis, (1877) 96 U. S. 332, 24 L. Ed. 775; whereas an agreement between vendor and vendee that time is of the essence will generally be enforced. 2 Williston, Contracts, sec. 937. Furthermore, unlike a mortgagor, a vendee is not entitled to possession or to the rents and profits. Iowa Ry. Land Co. v. Boyle, (1912) 154 Ia. 249, 134 N. W. 590, 38 L. R. A. (N.S.) 420. See further, Kirby v. Harrison et al., (1853) 2 Ohio St. 327, 334, 59 Am. Dec. 677; 2 Williston, Contracts, sec. 937.

¹³Wells v. Calnan, (1871) 107 Mass. 514, 9 Am. Rep. 65; Powell v. Dayton, etc., R. Co., (1885) 12 Ore. 488, 8 Pac. 544; 27 R. C. L. 557.

¹⁴Thompson v. Gould, (1838) 20 Pick. (Mass.) 134, 139; 3 Cyc. 343.

¹⁵It is true that many of the cases placing the loss on the vendor are actions at law, as distinguished from suits in equity; yet in jurisdictions where equitable pleadings are allowable at law, the decisions on this point, whether made by a court of equity or law, should be the same. 2 Williston, Contracts, sec. 934.

championed by Professor Williston, chooses the middle ground and puts the loss upon the party in possession.²⁶ Thus, a vendee in possession bears the risk, not however because he is the "owner" in equity, but because he is in effect a mortgagor, the relation between the parties being the same as though the vendor had actually given a deed and taken a mortgage back. In this situation the objection to the mortgage theory propounded under the majority rule is removed, for, by the transfer of possession, the parties show an intent that the vendor should hold his legal title merely for security,²⁷ and the vendee, so long as he respects the vendor's security title, has all the so-called "benefits of ownership."

All things considered the last rule would seem the best of the three. It is therefore regrettable that in a recent case,²⁸ where the question arose for the first time, the court, unhampered by precedents of its own, nevertheless followed the English rule, and put the loss on the vendee not in possession.

RECENT CASES

ACTIONS—LOCAL OR TRANSITORY—COURTS—JURISDICTION—NEGLIGENCE—RIGHT TO SUE IN A FOREIGN JURISDICTION FOR INJURY TO REAL ESTATE.—The defendant through negligence caused the destruction, by fire, of valuable timber on property owned by the plaintiff. The property is in the state of Washington, but the suit for damages was instituted in Idaho. *Held*, that only courts of the jurisdiction wherein the land is situated can entertain actions for trespass to realty. *Taylor v. Sommers Bros. Match Co.*, (Idaho, 1922) 204 Pac. 472.

The instant case is in accord with the great weight of authority, which holds that an action for trespass to realty is local, not transitory, and therefore cannot be brought in a foreign jurisdiction. 2 Cooley, Torts, 3rd Ed., 901; notes, 26 L. R. A. (N.S.) 933, 44 L. R. A. (N.S.) 267, 268,

²⁶Williston, *The Risk of Loss*, 9 Harvard L. Rev. 106; 2 Williston, *Contracts*, sec. 940. And see *Good v. Jarrard*, (1912) 93 S. C. 229, 239, 76 S. E. 698, 43 L. R. A. (N. S.) 383 and note; dissenting opinion in *McGinley v. Forrest*, (Neb. 1921) 186 N. W. 74.

²⁷In criticism of this statement, it has been said: "It is submitted that if the court of equity is justified in treating the title as if it had passed in a case where the parties have manifested an intention that the title be retained simply as security, then the same result should be reached when that court, in the absence of any indication of the intention of the parties to the contract has, because of the rights conferred upon the vendee, treated the vendor as holding the property simply as security." Keener, *The Burden of Loss*, 1 Col. L. Rev. 1, 5. The fallacy of this argument lies in the fact that it assumes that the rights conferred on the vendee, possession or no possession, warrant equity's calling the vendor's title merely one of security.

²⁸*McGinley v. Forrest*, (Neb. 1921) 186 N. W. 74.