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Security Transactions

Coleman Karesh
University of South Carolina School of Law

SECURITY TRANSACTIONS

COLEMAN KARESH*

Real Estate Mortgages

In the only case involving a genuine mortgage question in the period under survey, the Supreme Court has further expanded the role of the mortgagee in possession and has again considered the question of adverse possession by a mortgagee against the mortgagor. In *Knight v. Hilton*,[1] the Court affirmed the position taken in previous cases that adverse possession by the mortgagee does not arise unless and until there is a distinct disavowal and repudiation of the mortgage relationship and the fact is brought home to the mortgagor or those succeeding to his interest.[2] Here the possession of the mortgagee's heir was held, under the facts, not to be adverse. Accordingly, the party in possession was treated as a mortgagee in possession, entitled to retain the land until the mortgage debt was paid, with the mutual right and duty to an account: charged with rents and income received from the property, but entitled to repayment of the principal sum and interest and reimbursement for taxes paid. The accounting ordered follows the rule laid down in *Ham v. Flowers*.[3]

The original feature of the case lay in the fact that the lien of the mortgage involved had been extinguished through lapse of time, and if the mortgagee had sought to foreclose, the mortgagor could have successfully defended. Under principles well established in other jurisdictions, the Court held that the mortgagee could retain possession until the debt was paid, even though the debt had been barred by the Statute of Limitations and an action to foreclose would likewise have been barred. Here the Court applied the maxim "he who seeks equity must do equity." As applied to barred debts, the maxim can be observed also in the doctrine of equitable retainer which permits the personal representative of a decedent to retain

*Professor of Law, University of South Carolina, School of Law.

1. 224 S.C. 452, 79 S.E. 2d 871 (1954).
2. Ham v. Flowers, 214 S.C. 212, 51 S.E. 2d 753, 7 A.L.R. 2d 1124 (1949); Fogle v. Void, 223 S.C. 83, 74 S.E. 2d 358 (1953); Frady v. Ivester, 129 S.C. 536, 125 S.E. 134 (1923).
3. See note 2, *supra*.

from the share of the distributee or legatee what that beneficiary may owe the estate even though the debt may be barred by the Statute of Limitations or bankruptcy;[4] and in mortgage foreclosures where the defendant is allowed to interpose by way of counterclaim or set off barred debts owed by the mortgagee to the mortgagor.[5]

An important feature of *Knight v. Hilton* is the Court's prescription for the procedure to be followed. After declaring that the mortgagor was entitled to possession upon payment of the balance found due on accounting, the Court directed that "Should appellants fail to pay said balance within such reasonable time as may be fixed by the Circuit Court, their right of redemption shall be forever barred." This method of barring the equity of redemption is a form of strict foreclosure, which virtually disappeared with the Act of 1791, which changed the character of the mortgagee's interest from title to lien.[6] This remnant of strict foreclosure would seem necessary in a case such as the instant one where foreclosure by sale could not be utilized.

Chattel Mortgages

In *Sanders v. Home Finance Co.*,[7] the issue before the Supreme Court was the fairness of the sale price of an automobile sold after default at public sale by the mortgagee. The mortgagors complained that the sale conducted by the mortgagee was improper because of the alleged disproportion between the value of the car and the amount brought at the sale. The Court did not find it necessary to go into the law concerning the fairness of price at such a sale, contenting itself with reviewing the testimony and affirming a lower court finding that the sale was otherwise regular and that the sale price was not less than the value of the car at the time of sale. There is no abundance of local authority on the question of the proper amount of the successful bid on foreclosure of a chattel, but, beginning with *Black v. Hair*,[8] in

4. Sartor v. Beaty, 25 S.C. 293 (1886); McNamara v. Ayers, 191 S.C. 228, 196 S.E. 545 (1937).
5. Anderson v. Purvis, 211 S.C. 255, 44 S.E. 2d 611 (1947).
6. 5 STAT. 170, now CODE OF LAWS OF SOUTH CAROLINA, 1952 § 45-51. See Anderson v. Pilgram, 30 S.C. 499, 9 S.E. 587 (1888), discussing this point.
7. 224 S.C. 390, 79 S.E. 2d 367 (1953).
8. 2 Hill Equity 622 (1837). This case also holds, importantly, that while a chattel mortgagee is in a sense a trustee, he is not disqualified from purchasing at his own sale.

1837, there seems to be the requirement that, at least where the mortgagee buys in the property, the price must be fair.[9] Whether "fair" means equal in value, not inadequate, or not grossly inadequate, does not clearly appear, but it is certain that the mortgagee-purchaser cannot buy in the chattel for a nominal sum.

Contracts of Sale

Although involving essentially matters of Equity, the case of *Dempsey v. Huskey*[10] recognizes the basic security features of an executory contract for the sale of land. The circuit court decree in this case, which was affirmed and made the order of the Supreme Court, declares:

> It would appear beyond dispute that in this State in a case of an agreement to buy and sell real estate, where the vendee defaults the vendor has a right to foreclose as in the case of a mortgage. The equitable title is in the vendee. The legal title is in the vendor. When such an action is brought to adjudicate the rights of the vendor and vendee the vendor corresponds to the mortgagee and the vendee corresponds to the mortgagor. The Court may sell the property and pay to the vendor the remaining amount of the purchase price, together with costs of the action, and interest in a proper case.

In thus recognizing the character of the transaction, the Court, while noting the division of title as between vendor and vendee, avoids the customary treatment of the vendor and vendee as trustee and beneficiary and strikes through to the true nature of the relationship. The mortgagor-mortgagee relationship has been previously accepted in South Carolina. In *Whitmire v. Boyd*,[11] it is said that " . . . such a relation is practically that of mortgagor and mortgagee . . . that is to say, the vendor continues to hold the legal title as security for the payment of the balance of the purchase money, and the vendee, while he has no legal title, does acquire an equitable title, subject to the payment of the balance due on the purchase money . . . ."

9. Britton v. Lewis, 8 Richardson Equity 271, 284 (1856); Mills v. Williams, 16 S.C. 593 (1880).
10. 224 S.C. 536, 80 S.E. 2d 119 (1954).
11. 53 S.C. 315, 341, 31 S.E. 306, 319 (1898).

Suretyship

The rights of a surety to proceed in arrest and bail against his principal whose obligation he has satisfied are dealt with in a limited way in *Ramantin v. Miller*.[12] A surety on a replevin bond given to retain possession of an automobile in an action for injury done to the plaintiff's property paid the judgment recovered against the defendant principal, and took from the plaintiff an assignment of the judgment and all remedies which the plaintiff had against the defendant. Thereafter, the surety, plaintiff in the instant case, brought an action against the principal to recover the amount owing him and attached the same automobile. He recovered judgment by default and the car was sold, the sale not bringing enough to pay the judgment. The defendant in this case, Clerk of Court, refused to issue execution against the person of the principal, and this action was for mandamus. Lower court denial of the order sought was sustained. The Supreme Court's holding was based on the fact that the complaint did not set out a statement of the cause for the arrest as required by Section 10-1705 of the 1952 Code. Apparently, the plaintiff sought the arrest on the ground of injury done to property, as set out in Section 10-802 of the 1952 Code. The Court pointed out, however, that the plaintiff's action was not in reality based on injury to property but on the judgment which he had recovered against his principal — which, although it may have had its origin in an injury to property, was not a judgment giving damages for such an injury.

Since it was not necessary to go beyond the narrow confines of the presented facts, the Court did not discuss the right of a surety by virtue of subrogation, either by operation of law or conventional assignment, to proceed against the principal under the arrest and bail statutes.

12. 80 S.E. 2d 925 (S.C. 1954).