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## Mortgages - Redemption - Right of Mortgagee to Require Partial Redemption

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MORTGAGES — REDEMPTION — RIGHT OF MORTGAGEE TO REQUIRE PARTIAL REDEMPTION—The mortgagor of the premises in question died leaving as his heirs-at-law the plaintiff and eight other children. Shortly thereafter, the mortgagee commenced proceedings to foreclose the mortgage under a power of sale. Pending these proceedings the plaintiff entered the military service of the United States and thus became entitled under the Soldiers and Sailors Civil Relief Act of 1940<sup>1</sup> to protection against the exercise of the power of sale. The mortgagee purchased at the foreclosure sale and thereafter made extensive improvements on the land. Plaintiff brought a bill to redeem the premises, tendering the entire amount of the mortgage debt. Mortgagee's demurrer to the bill was sustained. On appeal, *held*, affirmed. The rule that a part owner of the equity of redemption must redeem the entire premises is for the benefit of the mortgagee, and the mortgagee may at his election insist upon a partial redemption. *Cooper v. Peak*, 258 Ala. 167, 61 S. (2d) 62 (1952).

The rule is well settled that any person who holds a legal estate in mortgaged land, derived through, under, or in privity with the mortgagor, is entitled to redeem the land,<sup>2</sup> and this equity of redemption cannot be extinguished by a foreclosure to which he is not a party.<sup>3</sup> At the same time, the

<sup>1</sup> 54 Stat. L. 1178, §302(3) (1940). For the purposes of this case the court assumes the act would cover the situation here presented although there appears to be substantial doubt as to its applicability. See generally 130 A.L.R. 774 (1941).

<sup>2</sup> 2 JONES, MORTGAGES §1352 (1928); *Smith v. Austin*, 9 Mich. 465 at 474 (1862). But cf. *Western Union Telegraph Co. v. Ann Arbor Railroad Co.*, (6th Cir. 1898) 90 F. 379.

<sup>3</sup> *Byron v. Kales*, 162 U.S. 411, 16 S.Ct. 802 (1895); 2 JONES, MORTGAGES §1342 (1928).

mortgagee has an entire debt secured on the whole property, and no party interested in the whole premises or in any portion of them can compel the mortgagee to accept a part of the debt and to relieve a part of the property from the lien.<sup>4</sup> However, the mortgagee or his purchaser at the foreclosure sale may waive the right to enforce redemption for the whole amount of the mortgage debt, and accept a proportionate part of the debt from one entitled to redeem it.<sup>5</sup> Thus in the usual case where the owner of a partial interest in the equity of redemption seeks to redeem only his interest in the land by payment of his proportionate share of the debt, the mortgagee may insist upon full redemption or none at all. The principal case suggests a corollary to this rule, viz., that the mortgagee has a right to insist upon partial redemption when the owner of a partial interest in the mortgaged land seeks to redeem the entire premises.<sup>6</sup> While the rule is generally unequivocally stated that one owning such partial interest is entitled to redeem the entire mortgage,<sup>7</sup> there have been few cases dealing with the question of whether this is an absolute right, or a right conditioned upon the will of the mortgagee. It may be argued that since the mortgagee claims only a security interest in the mortgaged land, prior to foreclosure he is entitled to nothing more than payment of the secured debt by one not a volunteer; since one having an interest in the land to protect is not a volunteer, the mortgagee should be required to accept payment from such a person and relieve the entire premises from the mortgage.<sup>8</sup> However, this reasoning has not been rigidly adhered to where the equities of the mortgagee are such that injustice will be done to him if he is compelled to convey the whole mortgaged premises upon receipt of the mortgage debt.<sup>9</sup> The rule requiring full redemption is for the benefit and protection of the mortgagee and should not be invoked to work an injustice upon him. There are no compelling

<sup>4</sup> *Taylor v. Porter*, 7 Mass. 355 (1810); 2 JONES, MORTGAGES §1362 (1928). But see notes 6 and 12 *infra*. A part owner may not require other part owners to join with him in redeeming from the mortgage. If he elects to redeem he must pay the whole amount due on the mortgage and hold it to his own use, unless the other part owners elect to contribute, in which case he will be subrogated to the rights of the mortgagee. *Calkins v. Munsel*, 2 Root (Conn.) 333 (1795); *Taylor v. Porter*, *supra*.

<sup>5</sup> *Union Mutual Life Ins. Co. v. Kirchoff*, 133 Ill. 368, 27 N.E. 91 (1890). See also *Quinn Plumbing Co. v. New Miami Shores Corp.*, 100 Fla. 413, 129 S. 690 (1930); annotation, 73 A.L.R. 600 (1931).

<sup>6</sup> The mortgagee has been held to have a right to insist upon partial redemption where he has become an owner of the equity of redemption apart from that share belonging to the plaintiff. If the plaintiff were required to pay the entire mortgage debt he would at once acquire the right of reimbursement against the mortgagee as owner of the other share of the redemption interest and be subrogated to the mortgage to collect the share held by the mortgagee. As a short cut it is said that the mortgagee may insist upon partial redemption. See OSBORNE, MORTGAGES 877, n. 62 (1951).

<sup>7</sup> *Rothschild v. Bay City Lumber Co.*, 139 Ala. 571, 36 S. 785 (1904); *Owens v. Commonwealth Trust Co.*, 183 Ill. App. 605 (1913) (redemption from sale). See also 59 C.J.S., Mortgages §848(b) (1949).

<sup>8</sup> See 3 WASH. & LEE L. REV. 328 (1941).

<sup>9</sup> *Dougherty v. Kubat*, 67 Neb. 269, 93 N.W. 317 (1903); *Boquet v. Coburn*, 27 Barb. (N.Y.) 230 (1858); *Wilson v. Tarter*, 22 Ore. 504, 30 P. 499 (1892). See also *Parker v. Dendy*, 203 Ark. 188, 157 S.W. (2d) 48 (1941), criticized in 3 WASH. & LEE L. REV. 328 (1941).

equities to be protected when a part owner seeks to redeem prior to foreclosure, for in such a case the entire equity of redemption is outstanding and the mortgagee knows his interest in the land is subject to complete defeasance.<sup>10</sup> The injustices arise only where the mortgagee is in possession believing himself to be the absolute owner of the land, e.g., where there has been a foreclosure to which an owner of a partial interest was innocently omitted as a party.<sup>11</sup> Given this situation, some courts hold that the mortgagee may insist upon partial redemption, and conversely cannot insist upon full redemption.<sup>12</sup> This result is justified on the grounds that, by voluntarily foreclosing, the mortgagee has "severed his right, and changed his interest in the land, so that he has an absolute indefeasible title to a part of it but a defeasible title to the balance."<sup>13</sup> However, other courts go further and hold that since the rule requiring full redemption is for the benefit and protection of the mortgagee, the mortgagee should be allowed to elect whether he will insist upon full or partial redemption in such cases.<sup>14</sup> This is the position taken by the court in the principal case. The result seems to be desirable for it tends toward the equitable adjustment of the rights of the parties, and at the same time induces higher bids at the foreclosure sale by bolstering the confidence of purchasers in the title thereby acquired.<sup>15</sup>

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<sup>10</sup> Compare *Parker v. Dendy*, note 9 *supra* (foreclosure was valid as to all except the party not joined and the court held that the mortgagee could insist upon partial redemption), with *Baker v. Boyd*, 196 Ark. 563, 119 S.W. (2d) 524 (1938) (foreclosure was entirely void because of a misdescription in the deed and the part owner was allowed to redeem the entire premises). But see *French v. Burns*, 35 Conn. 359 (1868).

<sup>11</sup> See cases cited in note 9 *supra*. Similar equities are present when there has been a release of the equity of redemption in lieu of foreclosure and the mortgagee has taken possession in the belief that the release was valid. 2 JONES, MORTGAGES §1484 (1928). *Parker v. Dendy*, note 9 *supra*, indicates that the foreclosure of all other interests is sufficient in itself to establish the requisite equities of the mortgagee. However, in every other case that this writer has examined there has been some additional factor making full redemption inequitable. E.g., in the principal case the mortgagee had made extensive improvements on the land, and there were also facts tending to establish an estoppel against the redemptioner. Cf. *MacKenna v. Fidelity Trust Co.*, 184 N.Y. 411, 77 N.E. 721 (1906), where it appeared that the owner of a dower interest, knowing of the foreclosure, unduly delayed in seeking redemption. See also cases cited in note 9 *supra*.

<sup>12</sup> *Green v. Dixon*, 9 Wis. 485 (1859). *Contra*, *Street v. Beal*, 16 Iowa 68 (1861).

<sup>13</sup> *Green v. Dixon*, note 12 *supra*.

<sup>14</sup> See cases cited in note 9 *supra*.

<sup>15</sup> "A rule so drastic [allowing full redemption against the will of the mortgagee] would have the effect of making insecure property holdings acquired in the utmost good faith, and would render uncertain many titles based upon foreclosure and confirmation decrees. . . ." *Parker v. Dendy*, note 9 *supra*, at 190.