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Mortgages: Clogging the Equity of Redemption

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and his band used the defendant's musical instruments exclusively. Upon proof that the plaintiff's band did not use the defendant's instruments exclusively the trial court denied recovery on the ground that the misrepresentation was contrary to public policy and to WIS. STAT. (1933) §343.413 (1). On appeal, *Held,* affirmed; the agreement being in violation of a penal law, no recovery may be had under it. *Kryl* v. *Frank Holton & Co.,* (Wis. 1935) 259 N.W. 828.

The statute in question originated in the 1913 session of the legislature, Wis. Laws 1913, c. 510, and forbids the use of false advertising statements by anyone interested in the sale of anything to the public. The statute provides that violation of it shall be a misdemeanor but does not determine the court's decision in a civil action in which a violation of the statute is involved. In the case of the *Street Railway Adv. Co.* v. *Lavo Co.,* 184 Wis. 395, 198 N.W. 595 (1924), a foreign corporation was denied recovery of damages for breach of contract because of its failure to obtain a license to do business in the state as required by WIS. STAT. (1921) §1770b(2) [See WIS. STAT. (1933) §226.02(1)]. However, the statute specifically provided that contracts made in violation of it should be void. WIS. STAT. (1921) §1770b (10) [See WIS. STAT. (1933) §226.02(9)]. Consistent with the holding of the *Street Railway* case, *supra,* was the decision of *Coules* v. *Pharris,* 212 Wis. 558, 250 N.W. 404 (1933), denying an alien illegally in this country the right to sue for services rendered. This case is criticized, however, in Gellhorn, *Contracts and Public Policy* (1935) 35 Col. L. Rev. 679, 696, and in (1934) 18 Marq. L. Rev. 133. In *Washington County* v. *Groth,* 198 Wis. 56, 223 N.W. 575 (1929), however, the court abandoned the doctrine of strict illegality and allowed the plaintiff county to enforce the liability of the county clerk's surety on a contract illegal because of the clerk's financial interest therein. The court in the *Washington County* case, *supra,* formulated the rule that where the contract is not strictly prohibited nor *malum in se,* or where the parties are not *in pari delicto,* the court will look to the purpose and intent of the statute. In the instant case the court might well have followed this rule.

The problem, of course, is an administrative one and while on the one side there is the danger of enforcing a statute to an end ultimately contrary to its purpose, *Short* v. *Bullion-Beck & Champion Mining Company,* 20 Utah 20, 57 Pac. 720 (1899), on the other hand it seems that the common weal will best be served by the court's refusing to listen to petitions to enforce a right obtained through the violation of a statute. In the instant case the legislature no doubt had the intention of protecting the buying public and limiting the advertising activity of selling to the public. The extension of the statute to include the fact situation of the instant case seems not unwarranted.

JOHN L. WADDLETON

MORTGAGES—CLOGGING THE EQUITY OF REDEMPTION.—In default on interest and taxes, the mortgage indebtedness also having accrued, the mortgagors, husband and wife, executed a conveyance, in form a deed absolute, to the mortgagee. The testimony is conflicting as to the nature of parol agreements made when the deed was given. The mortgagors contend that the mortgagee promised them the same right to redeem as they would have under a mortgage. The mortgagee claimed the oral agreement was to the effect that the mortgagors would be entitled to any money, exceeding $6,000, realized by a resale of the premises within a year; $6,000 was approximately the amount of the indebtedness and represented the consideration for the deed. Eight months later the mortgagee gave

the mortgagors $225, the mortgagors giving a receipt "fulfilling all verbal agreements." The mortgagors in this action, about a year and one-half after giving the deed, ask that the deed be declared a mortgage. Witnesses for the mortgagors testified that the value of the premises when the deed was given was about $12,000. The trial court found that the mortgage indebtedness had been satisfied but that there had been overreaching by the mortgagee, that the consideration for the deed was inadequate, and gave the grantors the relief they sought. On appeal, *Held,* judgment reversed. The extinguishment of the mortgage debt *ipso facto* extinguished the mortgage. *Connors* v. *Connors,* (Wis. 1935) 259 N.W. 729 (Justice Fowler dissenting).

Where it is shown that the transfer of real estate was made merely to secure an obligation, the rights of the transferee are those of a mortgagee although the conveyance may be in form a deed absolute. *Hoile* v. *Bailey,* 58 Wis. 434, 17 N.W. 322 (1883); *Cumps* v. *Kiyo,* 104 Wis. 656, 80 N.W. 937 (1899). Parol evidence is admissible to show the nature of the transaction. *Plato* v. *Roe,* 14 Wis. 490 (1861); *Pierce* v. *Robinson,* 13 Cal 116 (1859). When the parties intend the conveyance to be for security merely, their relationship, mortgagor-mortgagee, prevents the borrower from cutting off his right to redeem by any agreement executed at that time. *Brockington* v. *Lynch,* 119 S.C. 273, 112 S.E. 94 (1922). The Wisconsin court has said that a mortgagor cannot gratuitously release his right to redeem or bar himself from exercising it by any agreement, whether made contemporaneously with the mortgage or subsequent thereto. *Lynch* v. *Ryan,* 132 Wis. 271, 111 N.W. 707 (1907). To obviate foreclosure a deed absolute is sometimes made from mortgagor to mortgagee, thereby attempting to extinguish the right of redemption. To uphold such a transaction it must be clearly shown that the conveyance was voluntary on the part of the mortgagor, that there was adequate consideration, and that the transaction was untainted by fraud or overreaching by the mortgagee. *Lynch* v. *Ryan, supra.* Release of the mortgage indebtedness *may* be adequate consideration for the deed. *Gutschenritter* v. *Hosterman,* 201 Wis. 558, 230 N.W. 610 (1930) (discharge of an indebtedness of $6,000 held sufficient to support a deed to grantee who, eighteen months later, on a resale, realized only $600 more than the indebtness); *Coutes* v. *Marsden,* 142 Wis. 106, 124 N.W. 1057 (1910). *Contra: Lynch* v. *Ryan, supra* (where it did not appear that the mortgage debt had been released or any other consideration passed, a deed was held to be a mortgage); *Young* v. *Miner,* 141 Wis. 501, 124 N.W. 660 (1910) (where a transfer of land, worth between $2,000 and $3,000 for no consideration but the mortgage debt and some trifle in addition, aggregating $900, was set aside). In the instant case the mortgage indebtedness had been satisfied, such satisfaction being the consideration for the deed. While the transferors asked that the deed be declared a mortgage, they did not also literally agree to reinstating the debt; therefore the court disclaimed power to reinstate the debt, and because "a mortgage cannot exist without an indebtedness which is secured by it," relief was denied. In this regard the contention of the dissenting justice is that the transferors' asking that the deed be declared a mortgage implies that the mortgage and mortgage debt would be restored. The dissenting justice would have granted the relief requested. It is submitted that the fundamental inquiry in the case remains whether or not the consideration for the conveyance was adequate. The prevailing opinion, although it reversed the trial court and found no fraud, did not pass on the sufficiency of the consideration for the conveyance. The evidence as to the value of the premises is only the testimony of the transferors' witnesses, namely, $12,000. Had the court found that the premises were

worth $12,000, the consideration for which was about $6,000, under *Young* v. *Miner, supra,* some relief ought to be granted whether technically by way of *recision* as pointed out by the majority as the proper remedy, or granted in the pending action following the dissenting justices' view. The case may very well have been sent back to the trial court for a finding as to the value of the premises.

ROBERT P. HARLAND

MORTGAGES—PLEDGE OF RENTS AND PROFITS—POWER OF MORTGAGEE TO COLLECT RENT BEFORE FORECLOSURE.—Plaintiff, mortgagee, seeks to collect rent installments from the tenant of the mortgaged premises basing his right thereto upon an assignment of the lease executed as collateral security with the mortgage. The assignment provided that the mortgagee might collect the rent if the mortgagor-landlord defaulted on the mortgage. Such default occurred. The mortgagee gave the tenant notice of the assignment, and thereafter the tenant paid the rent to the mortgagee. Subsequently the wife of the original mortgagor-landlord entered into an agreement with the tenant reducing the rent. The tenant paid such reduced rent to the mortgagee. The latter, however, seeks to collect the rent according to the original terms of the lease less the amount paid by the tenant under the agreement with the landlord, made after default in the mortgage payments had occurred. *Held:* The mortgagor and the tenant, having notice of the assignment, were powerless to modify the terms of the lease after default without the consent of the mortgagee. *Franzen* v. *G. R. Kinney Co., Inc.,* (Wis. 1935) 259 N.W. 850.

Unless a mortgagee has stipulated for a specific pledge of the rents and profits of the land as part of his security he has no claim on them until he takes possession *under his mortgage. Teal* v. *Walker,* 111 U. S. 242, 4 Sup. Ct. 420, 28 L. ed. 415 (1884); *Myers* v. *Brown,* 92 N. J. Eq. 348, 112 Atl. 844 (1921). Under a mortgage pledging rents and profits the benefit thereof does not pass to the mortgagee until the mortgagor has been dispossessed. *Grether* v. *Nick,* 193 Wis. 503, 213 N.W. 304, 55 A. L. R. 525 (1927); *Ottman* v. *Tilbury,* 204 Wis. 56, 234 N.W. 325 (1931). Dispossession in such situations is usually construed to mean the action of foreclosure and the appointment of a receiver. *Ransier* v. *Worrell,* 211 Iowa 606, 229 N.W. 663 (1930); *Pines* v. *Equitable Trust Co.,* 263 Mich. 458, 249 N.W. 32 (1934); see *Zimmerman* v. *Walgreen Co.,* 215 Wis. 491, 501, 255 N.W. 534, 539 (1934). A mortgagee, to be entitled to collect the rent, must have obtained actual possession of the premises, entered for the purpose of foreclosure, or procured the appointment of a receiver. *Byers* v. *Byers,* 65 Mich. 598, 32 N.W. 831 (1887); *First Joint Stock Land Bank of Chicago* v. *Beall,* 208 Iowa 1107, 225 N.W. 943 (1929). Some courts look with disfavor upon assignments of leases to mortgagees, and have a tendency to construe such methods of pledging rents and profits so that the mortgagee can collect only the rent which accrues after entry by the mortgagee. *Mass. Mut. Life Ins. Co.* v. *Ruetter,* 268 Mich. 175, 255 N. W. 754 (1934); *Smith* v. *Grilk* (N. D. 1934) 250 N.W. 787.

Whether there is a pledge of the rents and profits or not, a *dispossession* of the mortgagor or an *entry* by the mortgagee is a condition to collection of the rents by the latter, but if such *dispossession* or *entry* has taken place the mortgagee has the right to collect from the tenant and apply the rents on the mortgage debt. *Keeline* v. *Clark,* 132 Iowa 360, 106 N.W. 257 (1906); *Attwood* v. *Warner,* 92 Neb. 370, 138 N.W. 605 (1912); *Grether* v. *Nick, supra.* Unless there is waste, the mortgagee has no legal right to the rent even during foreclosure