JUSTICE BURNETT SEES IT IN A DIFFERENT LIGHT

And Expresses His Views in an Able Dissenting Opinion—Wades Through Wills, Sheriffs' Sales, Deeds, Mortgages and a Mass of Other Things Bewildering to a Layman, and Makes His Own Conclusions.

OREGON SUPREME COURT DECISIONS

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President and Trustees of Tualatin Academy and Pacific University v. Keene, et al, Linn County.

The president and trustees of Tualatin Academy and Pacific University, respondent, v. Emma A. Keene, R. G. Keene, her husband, Charta O. Zimmerman, and Florence S. Zimmerman, his wife, Ida B. Wickham, Lafayette Townsend, Samuel M. Garland as administrator of the estate of M. L. Zigler, deceased, F. P. Bodwell and Ora M. Bodwell, his wife, Mamie L. Burkhart, guardian Alma L. Allen, and E. E. Ferguson, Belle C. Ferguson and J. A. Ruyter, partners doing business as Ferguson & Ruyter, appellants. Appeal from the circuit court for Linn county. Hon. William Galloway, judge. Argued and submitted June 8, 1911. Milton W. Smith for respondent. H. H. Hewitt for appellants. Burnett, J. Dissenting.

On November 7, 1887, Robert McCullough and Carrie A. Talbott were the owners of certain lands in Linn county, and at that time mortgaged the same to Jacob Kees to secure the payment of $900. On August 25, 1891 they gave Kees a further mortgage on the same premises for $700. In July, 1892, they sold about 20 acres of the land to Mary Cady. Subsequent to the mortgages, McCullough and Talbott made a contract with M. L. Zigler for the sale to Zigler of still another tract of said land. McCullough, on the 8th of December, 1892, executed a will in which he provided for the payment of his debts and funeral expenses and the erection of a monument over his grave, and then gave, devised, and bequeathed the use of all the residue of his property, both real and personal, to his wife, Lavina H. McCullough, during her natural lifetime and directed that at the death of his wife, all that remained of his property should go to The Congregational Seminary, at Forest Grove in Washington county, state of Oregon." McCullough died December 13, 1892, seized of an undivided half of the lands mentioned, except what had been sold, as stated, and subject to the mortgages given to Kees. The will was admitted to probate and recorded in Linn county, Oregon, December 17, 1892. Kees afterwards began suit in the circuit court of Linn county to foreclose the two mortgages, making parties defendant of all persons having an interest in the land, including Zigler and excepting the plaintiff herein, either in its name as the President and Trustees of Tualatin Academy and Pacific University, or as designated in the will, "Congregational Seminary at Forest Grove." That suit went to decree of foreclosure, Zigler withdrawing his answer before decree. At the sale of the premises, the mortgagee, Jacob Kees, bought the property and afterwards received a sheriff's deed which, in pursuance of the decree and sale, purported to convey to him the entire fee simple estate in the whole tract. He subsequently sold to various persons, in separate parcels, all the land in question, having entered into possession of the whole under the sheriff's deed. Among others he quit claimed to Mary Zigler and Ellen Zigler for $350 the tract bargained by McCullough and Talbott to M. L. Igler and another parcel for $100.

On the 9th of March, 1907, the plaintiff commenced this suit, alleging in its complaint, in detail, all the transactions above alluded to, except that it states that it is advised and believes, and therefore, alleges the fact to be that Robert McCullough never made nor executed the second mortgage mentioned above. However, the plaintiff offered no testimony in support of this attack upon that mortgage. It made defendants of all the parties claiming interest in the land subsequent to and as grantees of Kees whether by deed, mortgage or judgment. It sates further "that each and all of the defendants herein claim that said foreclosure proceedings hereinbefore referred to, and the sheriff's deed made thereon to said Jacob Kees, in effect, conveyed the entire title in the said premises to the said Jacob Kees, and that the subsequent deeds and mortgages hereinbefore referred to, have the effect of transferring the entire title to the premises herein described, whereas in truth and in fact said foreclosure proceedings and said sheriff's deed conveyed unto said Jacob Kees only the undivided half interest in said premises formerly owned by Carrie A. Talbot and the life estate of the said Lavina H. McCullough." The plaintiff also avers "that it is ready, willing, and able to pay such sum, if any, as may be equitably due and chargeable against the undivided half interest of said premises described in this complaint, owned by the plaintiff, but plaintiff has been unable to learn or ascertain what amount, if any, is chargeable against plaintiff's said interest in said premises, or to which of the defendants such payment should be made; that a discovery and accounting is necessary in order to determine what amount, if any, is chargeable against plaintiff's said interest in said premises on account of any taxes paid thereon by said defendants, or either of them, since the death of the said Lavina H. McCullough and to determine what portion of said premises defendants, or any thereof, have been in possession of, and what they have received from the rents, issues, use, occupation, or profits of such portions subsequent to the death of the said Lavina H. McCullough," and prays that its title to the undivided half interest, formerly owned by the said Robert McCullough be declared established; that an accounting may be had between the plaintiffs and the defendants herein to determine what amount, if any, plaintiff should pay to defendants, and to which of the defendants such amount, or any portion thereof, is payable; that upon payment of such amount, if any be found due to the defendants, each and all defendants may be adjudged to have no right, title, interest, lien, or claim, or estate whatsoever against plaintiff's undivided one-half interest in said premises; that they be enjoined and restrained from claiming, or attempting to claim, any estate, right, title, lien, or interest in the premises; that the mortgage first above referred to be cancelled, and that the defendants who failed to appear shall be adjudged to have no estate in the lands." The plaintiff claims that it is the residuary devisee under the will of McCullough, and that he intended the designation of "Congregational Seminary of Forest Grove" to apply to the plaintiff herein.

The widow of the testator had been dead nearly six years when this suit was commenced. The defendants answered, giving the history of their title, deraigning the same from Jacob Kees, under his sheriff's deed, and alleged that they had been in possession, claiming to own the property under color of title, adversely to all persons, for more than 10 years. The cause being at issue, the circuit court rendered a decree in favor of the plaintiff, in substance, that it is the owner in fee and entitled to the possession, use, and enjoyment of an undivided half interest in the premises, free of all encumbrance, and barred the defendants from claiming any interest in the same. From this decree, the defendants have appealed.

Burnett, J. The bill has some of the aspects of a complaint to determine an adverse interest in lands, under Lord's Oregon Laws Sec. 516, as indicated by the extract quoted above, but it cannot be entertained as such, because it fails to allege that the land is not in actual possession of another. It is contended in the argument on the part of the plaintiff that it is a suit against the defendants as co-tenants with the plaintiff for an accounting for the rents and profits, but it nowhere alleges that any of the demendants ever received any of the debts or profits, or were even in possession of the lands in dispuate. So far as that is concerned, it is, from the complaint, just as apparent that the plaintiff should make such an accounting as that the defendant should. The bill is manifestly, in substance, one exhibited for the purpose of redeeming the land from the effect of the foreclosure sale in question. If it were not so, why should it go to such extreme particularity in relating the history of the title and setting out the claims of the defendants, and then pray for a decree enjoining the defendants from claiming any right or title in the premises?

For the purposes of this opinion, it is not necessary to determine whether the "Congregation Seminary at Forest Grove" is a sufficient designation of the plaintiff. The first question which presents itself is, what was the effect of the foreclosure of Keene's mortgage without making the plaintiff there a party to that suit?

We are told in DeLashmutt v. Sellwood, 10 Or. 326, that the true doctrine in this state is that a junior lien holder is not in any way affected by the proceedings to foreclose, to which he is not a party; that his right to sell on execution and convey the title remains unimpaired; and that as to the purchaser at the sale under his judgment, the purchaser at the prior sale under the decree of foreclosure must be considered as an assignee of the mortgage, and successor in interest of the mortgagor, simply, and as in the same position he would have occupied had he taken a simple assignment of the mortgage from the owner, and a conveyance of title from the mortgagor, and made no attempt to foreclose.

In that case, the purchaser at a sale under an execution, issued upon a junior judgment, the owner of which had not been made a party to the foreclosure, was sustained in his possession of the land as against the purchaser at the foreclosure sale, although the mortgage foreclosed was prior in effect to the judgment.

This learning is further exemplified in Sellwood v. Gray in 11 Or. 539. This case grew out of the same proceeding in question in DeLashmutt v. Sellwood, supra, and it was held in the later case, that when the plaintiff in the foreclosure suit obtained a decree for the sale of property without making the defendant Gray a party, the proceeding as to him was a nullity; but that the sale effected some important results. In this: that as to the defendant Gray, it stood as if no such sale had been made. He had a right to redeem by paying the amount of the encumbrance. The plaintiff as purchaser at the foreclosure and sale took all the rights of his senior mortgagee, and so much of the mortgagor's equity of redemption as was not bound by the subsequent lien of the defendant Gray.

Still further, in Osborn v. Logus, 28 Or. 310, this court says that the owner of the equity or redemption is an indispensable party and without him the suit cannot proceed. Subsequent lienors are considered necessary parties, but their absence from the record does not perforce of that fact render the proceedings a nullity.

In Wilson v. Tartar, 22 Or. 504, a purchaser at a foreclosure sale, in which the owner of an integral part of the land included in the mortgage was not made a party to the foreclosure, was given the option of compelling the owner of the parcel to redeem by paying the full debt or conveying to the subsequent owner the parcel in question.

In Sellwood v. Gray, supra, Judge Lord says, referring to the mortgagor: "His equity of redemption is the right to redeem from the mortgage—to pay off the mortgage debt—until this right is barred by decree of foreclosure; but until this right is barred, his estate, in law or equity, is just the same after, as it was before default. It is a right, though, of which the law takes no cognizance, and is enforceable only in equity, and has nothing to do without statute of redemptions. This is a valuable right, and exists not only in the mortgagor himself, but in every other person who has an interest in, or legal or equitable lien upon, the mortgaged premises, and includes judgment creditors, all of whom may insist upon redemption of the mortgage."

Conceding, as we must, for the purposes of this opinion, that the plaintiff was the residuary devisee under the McCullough, will within the meaning of the excerpt just quoted, it had an interest in the mortgaged premises. Indeed, it stood in the shoes of one of the mortgagors, to-wit: its testator. As such, it had a right to sue for the redemptiontion of the premises, that right not having been barred by the foreclosure suit. Considering it even as a tenant in common, it still had a right to sue for redemption, under the authority of Merritt v. Hosmer 11 Gray 276; 71 Am. Dec. 713.

An analysis of the cases quoted will show that the right of the purchaser at the sale to compel a redemption on the one hand, and of a person interested in the premises to sue for redemption, on the other, do not depend on the decree of the foreclosure being wholly void as to all claimants. In all the cases mentioned, the decree was valid as to some of the defendants in the suit, but, of course, ineffectual as to parties in interest who were not made defendants.

The right of a purchaser at such a sale to compel a redemption by strict foreclosure is a right which is the complement of the right on the part of one claiming a subsequent interest in the land to bring a suit to redeem. The situation is this: The tenant in common, not being made a party to the suit to foreclose, finds some one in possession of the whole of the land with whom he has no privity, who is not a tenant in common under the original holding and his suit to redeem is an effort to rid the land of the one who has thus intruded. The result of his effort if successful is to terminate the effect of the sale and restore the estate to its former owners, for his redemption inures to their benefit. Dray v. Dray 21 Or. 59. What must he do to effect that purpose? He must do equity by redeeming the land, and to do so, in the language of Williams v. Wilson, 42 Or. 307, he must pay the entire mortgage debt and interest under the equitable rule, and not under the statute as from a sale under the decree."

All the decisions of this court above noted, so far as the sum to be paid is concerned, contemplate nothing less that the full amount of the mortgage debt. It must be so, for the object of redemption is not to establish cotenancy with the purchaser, but rather to terminate the effect of the sale and exclude him from participation in the title. He must, therefore, have his full debt with interest without deducting the amount bid at the sale or any part thereof. Neither should the amount required for redemption, if allowed in this case, be diminished by the $350 forming the consideration paid to Kees to induce him to quit claim the tract to Mary and Ellen Zigler. If those two grantees were claiming under the bond for deed from McCullough and Talbott to M. L. Zigler, their interest was subsequent and subordinate to both the Kees mortgages, the latest of which bore date August 25, 1891, while the Zigler bond was executed August 1, 1892. Moreover, although Zigler was made a party to the Kees foreclosure suit as a junior incumbrancer under the bond, he withdrew his answer and the decree barred and foreclosed him from any further interes in he premises. By his purchase at the foreclosure sale, Kees took the land free from any claim on the part of Zigler. In a paraphrase upon the language of Williams v. Wilson, 42 Or. 308, there must have been some purpose in making Zigler a party to the foreclosure suit and what purpose can be subserved thereby if the decree denied or curtailed none of his rights under his junior bond for a deed? The title he contracted for having been extinguished by the foreclosure, not only because of the juniority of his bond for a deed, but also because he did not set it up as his defense in that suit, he might have had recourse upon his obligors to recover what he had paid them, but he had no claim upon the purchaser at the sale for the latter took a title by paramount to Zigler's bond. Kees had the right to sell whatever he had acquired by the sale to Zigler or Keene or anyone else but the deal would not inure to the benefit of the plaintiff, a stranger to the transaction.

To charge the $350 against the present defendants, if a redemption is permitted here, would be in effect to declare that notwithstanding the Zigler bond was subsequent to the Kees mortgages and was foreclosed and its effect terminated by the decree yet it survives the grave of foreclosure and is resurrected into a position paramount to that of the purchaser at he sale. Of course if the plaintiff in this suit had alleged that Kees or his grantees had received anything from the land in excess of maintenance and taxes, it might by that much reduce the amount to be paid for redemption, within the principle laid down in Cartwright v. Savage, 5 Or. 397; but nothing of that kind appears in the complaint.

Manifestly, in this case, the plaintiff is not trying to redeem its own undivided half separately, for as we have seen, its title is not affected by the foreclosure suit to which it was not a party; but in order to do equity, it must redeem the whole property by paying the whole mortgage debt. The property was pledged as a whole, the plaintiffs testator was liable for the whole debt, and

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