

Mortgages--Limitations--Conveyance Subject to a Mortgage Which Has Become Barred (Shohfi v. Shohfi, 277 App. Div. 390 (2d Dep't 1950))

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has the right to withhold.¹⁶ Banking, however, is affected with a public interest.¹⁷ Thus, should not banks be limited in their ability to exercise their right to withhold prepayment?

If the market value of mortgaged property rises during the term of a mortgage the risk lessens and the mortgage, as a lien, becomes more valuable. Prepayment, then, deprives a bank of an asset that has become more secure and therefore more valuable. Conversely, prepayment when the property's value falls is more desirable for a bank but less likely to be requested by the mortgagor. Why, then, should not a bank be permitted to bargain for its right to retain the lien?

It has been the policy of certain federal and state enactments to control the prepayment of mortgages by requiring the inclusion of prepayment provisions in mortgages.¹⁸ Possibly, New York should follow this trend as a matter of public protection. A proposed addition to the New York Real Property Law recently considered in the State Senate¹⁹ would require the inclusion of a borrower's prepayment option in all mortgages and extension agreements of amounts less than fifteen thousand dollars. This option would be exercisable at any time, but if exercised within eighteen months of the execution of the mortgage, the debtor would forfeit ninety days interest. This measure would protect small property owners who frequently enter mortgage contracts without legal counsel. Creditors holding the larger, more valuable liens would still have the right to bargain for prepayment.



MORTGAGES—LIMITATIONS—CONVEYANCE SUBJECT TO A MORTGAGE WHICH HAS BECOME BARRED.—Prior to this litigation there was a complicated series of transactions between plaintiff wife and defendant husband. In 1929, the wife conveyed the property which was the subject matter of this action to the husband who gave a bond and purchase money mortgage for 10,000 dollars on the property. In 1934, a short time after due date of the mortgage, the husband reconveyed to his wife. The deed stated that the mortgage was not

¹⁶ See 5 WILLISTON, CONTRACTS § 1601 *et seq.* (rev. ed. 1938).

¹⁷ *Leary v. Capitol Trust Co. of Schenectady*, N. Y., 238 App. Div. 661, 265 N. Y. Supp. 856 (3d Dep't 1933), *aff'd*, 263 N. Y. 640, 189 N. E. 735 (1934).

¹⁸ U. S. CODE, LAWS OF THE 78TH CONGRESS, SECOND SESSION 1944, c. 268, p. 313 (Serviceman's Readjustment Act of 1944), permits the Veteran's Administrator to require "G.I." mortgages to contain prepayment provisions. New York Banking Law, Section 393, requires that Savings and Loan Association mortgage loans shall be repayable upon forfeiture of ninety days' interest or one year's interest if the loan has not yet run for one year.

¹⁹ N. Y. State Assembly Introductory No. 16. Other compulsory prepayment bills are pending review in committee.

to be merged in the title. In 1948, pursuant to a judgment of the court, the wife reconveyed the premises to the husband. The conveyance recited that the property was "subject to the mortgage." In 1949, the wife commenced an action to foreclose the 10,000 dollar mortgage. In the lower court the wife's complaint was dismissed on the merits on the ground that the statute of limitations barred the enforcement.¹ *Held*, judgment reversed. *Shohfi v. Shohfi*, 277 App. Div. 390, 100 N. Y. S. 2d 497 (2d Dep't 1950).

The agreement that the mortgage should not be merged in the fee, as between the parties constituted the mortgaged premises the primary fund for the payment of the debt.² When mortgaged premises are transferred or sold and the deed recites that the property is conveyed "subject to the mortgage," the court held it constitutes a written acknowledgment³ of the mortgage debt and therefore the six year limitation period⁴ began to run again from the date of such recognition of the debt. This acknowledgment is also binding on the grantee.⁵ Moreover, it is of no consequence that it is made by a grantor who is not the mortgagor because the land is the primary fund for the debt.⁶ There being, however, no written acknowledgment by the husband of the obligation on the bond the period of limitation is a proper affirmative defense⁷ in reference to his *personal liability*. In a word the mortgage could be foreclosed and the property sold on

¹ *Shohfi v. Shohfi*, 124 N. Y. L. J. 7, col. 2 (Sup. Ct. July 3, 1950). See also *Shohfi v. Shohfi*, 123 N. Y. L. J. 634, col. 3 (Sup. Ct. Feb. 20, 1950), wherein motion to dismiss complaint on ground of statute of limitations was granted but with leave to plaintiff to plead anew.

² The general rule is that, unless there is an express or implied intent to the contrary, when a greater and lesser estate meet in the same person, without any intermediate estate, the lesser estate is at once merged in the greater. A merger ordinarily occurs when the fee and a charge or mortgage thereon vest in the possession of one person. *Eagan v. Engeman*, 125 App. Div. 743, 110 N. Y. Supp. 366 (1st Dep't 1908); *cf.* *Hubbell v. Blakeslee*, 71 N. Y. 63 (1877); *Central Hanover Bank v. Roslyn Estates*, 266 App. Div. 244, 42 N. Y. S. 2d 130 (2d Dep't 1943). 2 JONES, MORTGAGES §§ 1080, 1088, 1094 (8th ed. 1928); WILTSIE, MORTGAGE FORECLOSURE § 265 (Eager ed. 1927); RESTATEMENT, SECURITY § 83, comment *c* (1941); see Note, 95 A. L. R. 94 (1935).

³ N. Y. CIV. PRAC. ACT § 59. "An acknowledgment . . . in a writing signed by the party to be charged . . . is . . . competent evidence . . . to take a case out of the operation of the provisions of this article relating to the limitation of time. . . ."; WILTSIE, MORTGAGE FORECLOSURE § 85 (Eager ed. 1927); *Moore v. Clark*, 40 N. J. Eq. 152 (1885).

⁴ N. Y. CIV. PRAC. ACT § 47a. "1. An action . . . upon a mortgage of real property . . . must be commenced within six years after the cause of action has accrued."

⁵ 2 JONES, MORTGAGES § 1539 (8th ed. 1928); WILTSIE, MORTGAGE FORECLOSURE § 88 (Eager ed. 1927).

⁶ *Heyer v. Pruyn*, 7 Paige Ch. 465 (N. Y. 1839); WILTSIE, MORTGAGE FORECLOSURE §§ 87, 88 (Eager ed. 1927); 2 JONES, MORTGAGES § 1487 (8th ed. 1928).

⁷ "The statute of limitations must be pleaded in order to secure the protection of it." 2 JONES, MORTGAGES § 1497 (8th ed. 1928).

the foreclosure sale but no deficiency judgment could be obtained against the husband.

For some time it has been the inclination of the legislature to shorten the periods of limitation.⁸ Formerly the foreclosure of a mortgage on real estate was barred after twenty years.⁹ But recently the legislature reduced the time to six years and now, if no interest or amortization is paid on a past due mortgage for six years after its maturity and no action is commenced to enforce collection within that time, the mortgagee ordinarily¹⁰ loses all right to foreclose for the *principal* of the mortgage debt. It is to be noted, however, that although the mortgagee's right to foreclose for the *principal* may be barred by the statute of limitations, he still may foreclose for the installments of *interest*¹¹ due for a period between two dates, namely, from a date six years prior to the commencement of his suit for interest down to the date at which the principal debt was barred by the statute of limitations.¹²

When the statute of limitations on mortgages was twenty years there were comparatively few cases in which owners claimed that the mortgage had been outlawed. When the time was reduced to six years it was only natural to anticipate that many more cases would arise in which it would be claimed that the right to foreclosure has been lost; and the courts thus will have the occasion to consider more often the means of waiving (as was done in the principal case) and suspending the statute of limitations in an action for foreclosure. Thus, it would be advantageous to reconsider the above-named methods of overcoming the affirmative defense of the statute.

Waiver of the bar of the statute of limitations may be effected by (1) a written promise to pay;¹³ or (2) a written acknowledg-

⁸ PRASHKER, *NEW YORK PRACTICE* 17 (1947). "In 1936, . . . libel and slander actions [were] reduced from two years to one year In the same year, the period of limitation applicable to actions to recover damages for injury to property was reduced from six years to three years In 1941, the period of limitation applicable to instruments under seal was reduced from twenty years to six years. . . ." *Id.* at n. 4. The legislature's "reluctance" to increase the statute of limitations directly or indirectly is evidenced by their refusal to amend the malpractice statute of limitations notwithstanding the proposed amendment's beneficent features. See 1942 LEG. DOC. NO. 65(E), 135, 167, 1950 REPORT, N. Y. LAW REVISION COMMISSION.

⁹ Section 47a of the New York Civil Practice Act was added by the Laws of N. Y. 1938, c. 499.

¹⁰ This qualification is hereinafter explained in the text.

¹¹ A cause of action for interest may be the subject of a separate suit. *Kirschner v. Cohn*, 270 App. Div. 126, 58 N. Y. S. 2d 561 (2d Dep't 1945); *Union Trust Co. v. Kaplan*, 249 App. Div. 280, 292 N. Y. Supp. 152 (4th Dep't 1936).

¹² *Ernst v. Schaack*, 271 App. Div. 1012, 68 N. Y. S. 2d 95 (2d Dep't), *aff'd mem.*, 297 N. Y. 566, 74 N. E. 2d 482 (1947); *Kirschner v. Cohn*, 270 App. Div. 126, 58 N. Y. S. 2d 561 (2d Dep't 1945).

¹³ ". . . a debt barred . . . may be revived by a new promise . . . such new promise may be either an express or an implied promise. . . ." If the promise is conditional the occurrence of the condition must be established. *WILTSIE, MORTGAGE FORECLOSURE* § 86 (Eager ed. 1927).

ment of the debt;¹⁴ or (3) part payment of the principal or interest.¹⁵ A payment on a mortgage by a co-mortgagor, present owner of the equity of redemption, although not a co-obligor on the bond is an acknowledgment of the existence of the lien of the mortgage upon the property.¹⁶ An agreement by the mortgagor to the appointment of an agent to collect the rents from the premises and after payment of ordinary operating expenses to remit to the arrears of interest on the mortgage extends the time.¹⁷

Tolling of the statute may be effected by (1) defendant's absence from the state when the cause of action accrued; or (2) defendant's departure from the state for four continuous months or more subsequent to its accrual; or (3) defendant's residence in the state under a false name unknown by the plaintiff.¹⁸ The limitation on the action to foreclose a mortgage was suspended as to the defendant absent from the state even though the complaint did not seek a personal deficiency judgment.¹⁹ Suspension is also effected for the period of military service of the defendant.²⁰

It is important to note the effect of the decision in the principal case. Since most deeds conveying mortgaged property include a reference to the mortgage the parties will always extend the period of limitation for six years from the date of conveyance of the mortgaged premises even though the original limitation of time is about to be or is exhausted. Generally this consequence will be entirely equitable and just.

Property conveyed "subject to a mortgage" usually means that the charge of the mortgage is deducted from the purchase price and the grantee thereby obtains the benefit of the mortgage. Consequently, he should not escape paying the mortgage debt merely because the former owner, the mortgagor, had failed to pay interest or amortization for a number of years.

¹⁴ From an unqualified written acknowledgment of a debt an implied promise to pay is established. If there are qualifications to the acknowledgment which negate or repel an intention to pay, an implied promise will not be created. PRASHKER, NEW YORK PRACTICE 39 (1947).

¹⁵ "Part payment of a debt is not of itself conclusive to take the case out of the statute. In order to have that effect it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought. . . . The payment must be made under such circumstances as to show a recognition of a larger debt remaining unpaid." *Crow v. Gleason*, 141 N. Y. 489, 493, 36 N. E. 497, 500 (1894).

¹⁶ Although the defendant was not *personally* liable the land could be foreclosed. *Gorgas v. Perito*, 299 N. Y. 265, 86 N. E. 2d 742 (1949).

¹⁷ *Haloke Realty Corp. v. Sininsky*, 117 N. Y. L. J. 2423, col. 4 (Sup. Ct. June 19, 1947).

¹⁸ N. Y. CIV. PRAC. ACT § 19.

¹⁹ *Chapin v. Posner*, 299 N. Y. 31, 85 N. E. 2d 172 (1949).

²⁰ N. Y. STATE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT § 308. Cf. *Travis v. Lynch*, 115 N. Y. L. J. 958, col. 1 (Sup. Ct. March 9, 1946).