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Equity of Redemption--Right to Redeem Within Ten Days After Sale if Pawnbroker is Himself the Purchaser

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fixed period of sixty years was established by the Statute 31 Henry 8, c. 2. It was not until the Statute of Limitations, 21 James 1st, c. 16 (1623) that twenty years was recognized as the limited period. And this was the New York limit up to the time of the modifications in question. In England, however, the period of limitation has been twelve years since 1879.⁴

It is interesting to note that in England the statute provides that adverse possession for the twelve years or more gives the possessor title to the property.⁵ In New York such possession merely bars the original owner from asserting his claim.⁶ But whether the statute gives the adverse possessor title or not he becomes as completely vested with the title in fee as he would upon a conveyance in due form from the owner of record.⁷

The legislature of the state in reducing the time within which the true owner can set up his title aids in the more efficient settlement of conflicting rights. An individual who for fifteen years has held adversely to the true owner, with all the necessary essentials of actual, open, exclusive, hostile and continuous possession, should then be given priority over one who fails to exercise his rights during all this period. To say that fifteen years is not sufficient time to allow the rightful owner to assert his claim is to provide an extension of time that is not only a retarding of the progressive tendencies of our times but an encouragement to retain an indolent attitude in the voicing of one's rights.

WILLIAM B. SMITH.

EQUITY OF REDEMPTION—RIGHT TO REDEEM WITHIN TEN DAYS AFTER SALE IF PAWNBROKER IS HIMSELF THE PURCHASER.—To the oppressiveness, harshness and impracticability of many of the common law principles, courts of chancery owe an indebtedness for their existence. The granting of relief to the unjustly oppressed to whom the common law refused aid constitutes equity's aim.

Perhaps the most noteworthy achievement of chancery concerns itself with mortgages. Dissatisfied with the common law rule that forever lost to the mortgagor his property upon default, equity ignored the law theory which interpreted a mortgage as a conditional conveyance of title, made absolute by a failure to perform the condition.¹ To equity, a forfeiture is to be avoided whenever it is pos-

⁴ STAT. 37 and 38 VICT. c. 57.

⁵ *Supra* note 2.

⁶ Baker v. Oakwood, 123 N. Y. 16, 25 N. E. 312 (1890).

⁷ Barnes v. Light, 116 N. Y. 34, 22 N. E. 441 (1889).

¹ POMEROY, EQUITY JURISPRUDENCE (1881) §§162 and 1179; STORY'S COMMENTARIES ON EQUITY JURISPRUDENCE (13th ed. 1886) §1004; JONES, MORTGAGES (8th ed. 1928) §§9 and 12.

sible to do so. At the time of making the mortgage, neither party contemplates a sale of the property. The only intention is to obtain a loan protected with security; repayment of the loan being the principal aim, security the secondary objective.² If the mortgagee has his advance repaid in full, why should he complain, though it be not in point of time, and why should he not reconvey the property upon the belated performance where a change in his position has not occurred so as to occasion an injustice to him? Repayment carries out the intention of the parties, whereas forfeiture does not. Applying the principle that all things are considered done, which in good conscience ought to be done, chancery bestowed upon the mortgagor a right of action in that court against the mortgagee whereby the mortgagee was compelled to accept deferred payment and ordered to reconvey the property.³ The result was a dual system of law in respect to mortgages. This gift of equity, an estate in the land,⁴ became known as the "Equity of Redemption."⁵

A distinction now virtually obsolete between a right to redeem and the "equity of redemption" should be made. The right to redeem is a broad term covering all redemptions, whereas the equity of redemption is purely an action in equity to redeem from a forfeiture resulting from a default. The terms are now used as synonyms. A right to redeem property from the mortgagee existed at common law, but it was limited to performance of the condition on the due date. So valuable is the right to redeem, that the courts have held a waiver of it in the agreement or before default void as being unconscionable.⁶

In England and many of the states, the dual system of mortgages still exists,⁷ *i.e.*, in law, a mortgage is a conditional conveyance of title, while in equity it is merely a lien on the property, but New York has held, from 1828, when the legislature deprived the mortgagee of an ejectment action against the mortgagor,⁸ a mortgage on real property to be solely a lien in both law and equity.⁹ Title remains in the

² POMEROY, *supra* note 1, §1181; JONES, *supra* note 1, §12.

³ POMEROY, *supra* note 1, §§162 and 1180; STORY, *supra* note 1, §1013; JONES, *supra* note 1, §12.

⁴ "The equity of redemption, at first, was considered merely a right to recover land after condition breached, but in 1737 Lord Hardwick, in the case of *Casborne v. Scarfe*, 1 Atk. 603, held it to be an estate in land, devisable, grantable or entailable." POMEROY, *supra* note 1, §162; JONES, *supra* note 1, §7.

⁵ POMEROY, *supra* note 1, §376.

⁶ STORY, *supra* note 1, §1019.

⁷ Alabama, Arkansas, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and West Virginia.

⁸ "The right to take possession even upon a breach of the condition was finally taken away by statute, and thereafter it was held that the legal title to the mortgaged premises remained in the mortgagor, and that title was not affected by default in payment, or by surrender of possession, or the taking of possession by the mortgagee." JONES, *supra* note 1, §14. The statute referred to is 2 REV. STAT. 312, §57, enacted 1828.

⁹ POMEROY, *supra* note 1, §163; JONES, *supra* note 1, §14; WASHBURN, REAL PROPERTY (4th ed. 1876) c. XVI, §4, par. 7a.

mortgagor until the lien is foreclosed by an action in equity¹⁰ or by publication.¹¹ And until such be done, after a default the mortgagor can redeem from the lien.¹² There being no forfeiture in this jurisdiction, such a redemption, strictly speaking, is not the "equity of redemption."¹³ The closest approach to it occurs where a necessary party to a foreclosure is not made a party defendant and, although a sale be had, the omitted party can redeem the title,¹⁴ but it is not a title by forfeiture.

While the lien theory applies to real property, that is not the case where a mortgage of personalty is concerned. Such a mortgage in New York is a conveyance of title upon condition,¹⁵ and with it the mortgagee acquires the right to possession unless an agreement to the contrary is made or implied from the circumstances.¹⁶ On the due day, if the mortgagor fails to perform, absolute title automatically is in the mortgagee, together with the immediate right to possession,¹⁷ subject, however, to the mortgagor's equity of redemption, which is cut off only by a sale pursuant to the terms of the agreement¹⁸ or by an action foreclosing the chattel mortgage.¹⁹ An irregular sale, at which the mortgagee purchases the property, is of no effect, and the mortgagor, by paying the debt and interest, can

¹⁰ C. P. A. §§1077-1088.

¹¹ REAL PROPERTY LAW §§540-563.

¹² Where action to foreclose is brought, it must be dismissed upon defendant paying into court, before final judgment, the sum due plus plaintiff's costs. C. P. A. §1081.

After judgment is had, but before a sale, the proceedings will be stayed if the defendant pays into court the amount due, interest, costs of the action and expenses of the proceeding to sell. C. P. A. §1084.

Mechanic's liens on real property are discharged when the amount of the lien is paid into court. LIEN LAW §55.

¹³ JONES, *supra* note 1, §14.

¹⁴ Silver v. Babitzky, 228 App. Div. 591, 240 N. Y. Supp. 468 (3rd Dept. 1930): "Thus Sarah Berger became one of the persons owning the equity of redemption and was a necessary party defendant to the foreclosure action, and the judgment below cannot be sustained so far as it decreed a judgment of foreclosure and sale under such third mortgage." As to who are necessary parties, see C. P. A. §1079.

¹⁵ Sheldon v. McFee *et al.*, 216 N. Y. 618, 111 N. E. 220 (1916); Harrison v. Hall *et al.*, 239 N. Y. 51, 145 N. E. 737 (1924).

¹⁶ Hall v. Simpson, 35 N. Y. 274, 276 (1866), Porter, J., "The execution of the chattel mortgage invested the plaintiff with title, subject to be defeated by subsequent performance of the condition. The right of possession ordinarily follows that of property, and both would have passed under the transfer in absence of an express or implied agreement for the retention of the goods by the mortgagor."

¹⁷ Cases cited notes 15 and 16 *supra*.

¹⁸ Fleischman v. Clausen *et al.*, 222 App. Div. 7, 225 N. Y. Supp. 288 (1st Dept. 1927); Ballou v. Cunningham, 60 Barb. 425 (N. Y. 1871); Morrisania Laundry Service, Inc. v. Strauss *et al.*, 137 Misc. 488, 242 N. Y. Supp. 579 (1930).

¹⁹ O. B. Brush Corp. v. Weiner Bookbinding Co., Inc., 120 Misc. 101, 198 N. Y. Supp. 566 (1922); Lembeck & Betz Eagle Brewing Co. v. Thomas E. Sexton *et al.*, 184 N. Y. 185, 77 N. E. 38 (1906); Holliday v. McGraw, 106 Misc. 661, 176 N. Y. Supp. 661 (1919).

recover the property from the mortgagee.²⁰ Where, by an irregular sale to a bona fide purchaser, the property is put beyond the reach of the mortgagor, as well as where the mortgagee retains the property for an unreasonable time without a sale, the mortgagee is liable for any excess the value of the property (not the value at the sale) has over the debt.²¹

Pledges of personal property are likewise subject to redemption by the pledgor prior to a valid sale.²² Generally, in a pledge, title remains in the pledgor;²³ but possession must necessarily go to the pledgee²⁴ who has a lien on the goods to the amount of the debt enforceable by sale (except pledges of notes, bills of lading, drafts, choses in action, but not stocks and bonds), in accordance with the terms of sale in the agreement,²⁵ or, if no provision for sale is made therein by a bona fide public sale after reasonable notice to pledgor,²⁶ or by an action to foreclose the lien.²⁷ The loss of possession by the pledgee, excepting a return of the goods for a special purpose, terminates the lien.²⁸ The pledgor may waive notice, demand for payment,²⁹ and private sale,³⁰ but not the right to redeem.³¹ Furthermore, the pledgee cannot purchase the goods at the sale unless provision is expressly made to that effect; and if he does, he holds the property as though no sale had taken place.³² If he sells them irregularly³³ to a third party, the pledgor may sue the pledgee in conversion.

A transaction whereby a purchaser of goods obtains the possession of the goods but the title to them is reserved by the vendor until

²⁰ *Morrisania Laundry Service, Inc. v. Strauss et al.*, *supra* note 18.

²¹ *Ibid.*; *Harrison v. Hall*, *supra* note 16.

²² *Wilson v. Little*, 2 N. Y. 443 (1849); *Lawrence v. Maxwell*, 53 N. Y. 19 (1873); *Manning v. Heidelberg*, 153 App. Div. 790, 138 N. Y. Supp. 547 (1912)—In a pledge of stock by plaintiff to defendants, who purchased the stock after an unauthorized sale, the plaintiff, by failing to redeem after two years, was held to have ratified the sale.

²³ *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 100 N. E. 806 (1912).

²⁴ *Wilson v. Little*, *supra* note 22; *McCoy v. American Express Co. et al.*, 253 N. Y. 477, 171 N. E. 749 (1930); *Titusville Iron Co. v. City of New York*, *supra* note 24.

²⁵ *Greene v. Faber*, 158 App. Div. 149, 143 N. Y. Supp. 27 (2d Dept. 1913); *Williams v. United States Trust Company*, 133 N. Y. 660, 31 N. E. 29, *aff'g*, 60 Hun 578 (N. Y. 1892); *Smith v. Craig*, 211 N. Y. 465, 105 N. E. 798 (1914).

²⁶ *Small v. Housman*, 208 N. Y. 115, *aff'd*, 220 N. Y. 504, 101 N. E. 700 (1913).

²⁷ An action to foreclose a pledged note is maintained in a court of equity. *Queen v. Fryer*, 232 App. Div. 222, 249 N. Y. Supp. 651 (1st Dept. 1931).

²⁸ *McCoy v. American Express Co. et al.*, *supra* note 24.

²⁹ *Greene v. Faber*, *supra* note 25; *Stevens v. Mutual Life Ins. Co.*, 227 N. Y. 524, 125 N. E. 682 (1920); *Smith v. Craig*, *supra* note 25.

³⁰ *Greene v. Faber*, *supra* note 25; *Smith v. Craig*, *supra* note 25.

³¹ *Vickers v. Battershall*, 84 Hun 496, 32 N. Y. Supp. 314 (1895).

³² *Duncomb v. N. Y., N. H. & H. R. R. Co.*, 84 N. Y. 190 (1881).

³³ *Toplitz v. Bauer*, 34 App. Div. 526, *aff'd*, 161 N. Y. 325, 55 N. E. 1059 (1898).

the vendee completes payment therefor is a conditional sale.³⁴ If the vendee defaults, two courses are available to the vendor. He may retake the goods after having given not less than twenty nor more than forty days notice of his intention and if the vendee does not redeem by the date for retaking and the vendor retakes, the vendee's interest in the property is terminated except in certain instances hereafter mentioned,³⁵ or he may retake without notice in which case the vendee has ten days in which to redeem.³⁶ When more than fifty per cent of the price has been paid, the vendor must resell within thirty days of the retaking at public auction.³⁷ Likewise, the vendor must resell if the vendee, within ten days after the retaking, serves a demand on him to do so.³⁸ If the vendor desires to hold the vendee for a deficiency, he must sell, whether fifty per cent has been paid or not.³⁹ Upon a sale the proceeds are applied, 1. To expenses of the sale, 2. To the cost of retaking, 3. To the satisfaction of the balance due on the price, and the balance of the proceeds, if any, belong to the vendee.⁴⁰ Where a sale is necessary either because more than fifty per cent has been paid or demand for sale has been served and the sale is had but not in conformity with the statute, the vendee can recover actual damages but in no event less than one-fourth of the amount he has paid.⁴¹ None of the foregoing provisions may be waived.⁴² Thus, it follows that the right to redeem is cut off by retaking after notice, or after ten days have elapsed since the retaking without notice, or after a valid sale where one is necessary.

So, too, with the statutory liens on personal property, until a sale by a right given by statute⁴³ or by an action foreclosing the

³⁴ *Edson v. Hudson Motor Car Co.*, 132 Misc. 223, 228 N. Y. Supp. 582 (1928).

³⁵ PERSONAL PROPERTY LAW §77.

³⁶ *Ibid.* §78.

³⁷ *Ibid.* §79.

³⁸ *Ibid.* §80.

³⁹ *Ibid.* §80b.

⁴⁰ *Ibid.* §80a.

⁴¹ *Ibid.* §80e.

⁴² *Ibid.* §80f.

⁴³ Liens on personal property, other than a mortgage on chattels, lien of keeper of hotel, apartment hotel, inn, boarding house or lodging house keeper, except an immigrant lodging house, if in possession of lienor, may be satisfied by a sale of such property, pursuant to Lien Law, §§200-1-2. A notice setting forth nature of debt, a brief description of the property, its estimated value, amount of lien and a request for payment within ten days from date of service, time and place of sale, must be served on the owner of the property. If not paid at the end of the ten days, notice of sale is published once a week for two consecutive weeks, in a local newspaper, the sale not to take place less than fifteen days from the first publication, or if no newspaper in the locality, such notice is to be posted in at least six conspicuous places in that locality. When these formalities have been performed, the property is sold at the time specified at public auction by a licensed auctioneer. Similar provision is made for the satisfaction of a warehouseman's lien by General Business Law §118.

lien,⁴⁴ redemption may be had by paying the amount of the lien and expenses.⁴⁵ If the property is not redeemed from the lien and the property is validly sold, the proceeds are first applied to the debt and expenses of sale and any balance remaining belongs to the former owner.⁴⁶

The general rule as deduced from the foregoing is that, until a valid sale, the right to redeem property from a mortgage or a lien exists, and that a valid sale cuts off the right to redeem. For most general rules exceptions may be found. In the case of redemptions of property many are statutory. For example, real property sold by virtue of execution may be redeemed by the owner within a period of one year following the sale,⁴⁷ and his creditors have an additional three months to do the same.⁴⁸ No such right is given to redeem personalty sold on execution. Another exception is the right of an owner or occupant of land sold by the state or county treasurer, pursuant to Tax Law sections 122 and 151, respectively, to redeem within one year after the tax sale upon payment of the tax lien, ten per cent interest per annum, and the amount of any taxes or assessments paid since the sale.⁴⁹ Should there be no redemption within the year, the grantee within the second year is to give notice to any occupant of the land, stating the sale and conveyance of the land, the person to whom made and the amount necessary to redeem, and that unless the occupant redeems within six months thereafter,⁵⁰ the title in the grantee shall become absolute.⁵¹ An occupant, if no notice has been served upon him, may redeem any time within two years from the expiration of the period of redemption provided for by Tax Law section 127, but not thereafter.⁵²

Pawnbroker's pledges are regulated by statute.⁵³ A pawnbroker may sell property pawned with him after the expiration of one year,

Hotel, apartment hotel, inn and boarding house keeper's liens are satisfied by sale, pursuant to General Business Law, §209, not less than eighteen months after lien arose at public auction for cash, upon mailing a notice, directed to the person who left the property, at least fifteen days before the sale.

⁴⁴ LIEN LAW §206: "An action may be maintained to foreclose a lien upon a chattel, for a sum of money in any case where such a lien exists at the commencement of the action. The action may be brought in any court of record, or not of record, which would have jurisdiction to render a judgment in an action founded upon a contract for a sum equal to the amount of the lien. The sale is held according to the provisions of C. P. A. §§706-7, which are the provisions for a sale of personal property upon execution. LIEN LAW §208.

⁴⁵ Property being sold under §§201-2 of the Lien Law may be redeemed at any time prior to the sale by paying the lienor the amount of the lien and his expenses. LIEN LAW §203.

⁴⁶ LIEN LAW §§204 and 208.

⁴⁷ C. P. A. §§724-25. Heirs, devisees and grantees of owner included.

⁴⁸ *Ibid.* §727.

⁴⁹ TAX LAW §127.

⁵⁰ *Ibid.* §136.

⁵¹ *Ibid.* §134.

⁵² *Ibid.* §137.

⁵³ GENERAL BUSINESS LAW §§40-52.

pursuant to General Business Law sections 48 and 49.⁵⁴ The latter section was recently amended so as to provide for a redemption by the pledgor within ten days following an authorized sale in the event the pawnbroker purchases.⁵⁵ Here, then, is another exception. It seems that the motivating force in back of the legislation is the existing financial conditions. Admitting it to be an expedient measure, and necessary, yet if the same end could have been accomplished without making another exception, the wisdom of it is doubtful. A provision of twenty days' notice, in place of ten days, for the sale would accomplish the same end and give an identical period for redeeming to the pawnor. The sole objection might be that a hardship is worked upon the pawnbroker in that he is delayed ten days in making a sale, but that is reduced somewhat in effect by the fact that, under the amendment, if the pawnbroker purchases at the sale he has not the ownership of all rights in the property for an equivalent period. The value of an additional ten days in which to get together sufficient funds to repay the loan is often beyond determination, because, among other reasons, of some personal attachment the owner may have to the property, and would be by itself a sufficient justification for this hardship; just as it was sufficient to justify the amendment. Added to this is the preservation of the uniformity of the law as it existed prior to the amendment. The law, with a multitude of general rules and their modifications and ramifications, was sufficiently complicated without unnecessarily adding another exception to one of its general principles.

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⁵⁴ "No pawnbroker shall sell any pawn or pledge until the same shall have remained one year in his possession, and all such sales shall be at public auction and not otherwise, and shall be conducted by licensed auctioneers of the city where the business shall be carried on or of an adjoining city."

⁵⁵ "No pledge shall be sold unless written or printed notice of intention to sell with a statement of the article, or articles, to be sold has been first mailed by letter addressed to the pledgor at the address given at the time of pledging at least ten days prior to the date of sale. Notice of every such sale shall be published for at least six days previous thereto, in at least two of the daily newspapers printed in the city where the business shall be carried on, and also in two daily newspapers of the city where the sale is to take place and to be designated by the mayor, and such notice shall specify the time and place at which such sale is to take place and the name of the auctioneers by whom the same is to be conducted, together with a statement of the class of pledges to be sold and the inclusive dates and numbers of the pawn-tickets of the pledges to be sold. If the pledge, at such sale, shall be purchased by the pawnbroker, the pledgor shall be entitled to redeem same within ten days thereafter by tendering to the pawnbroker the amount of the loan with the interest due thereon."