

mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the redemption of the mortgage, is a sufficient payment. A payment by the principal debtor was held sufficient to create a new starting point as against a surety. *Lewin v. Wilson* (1886), 11 App. Cas. 639, at 644, 646. So a payment is sufficient if made by a person who has become bound to the debtor to pay (e.g., a transferee of the equity who is bound as between himself and the transferor to pay), notwithstanding that such transferee has himself transferred the equity to a third person. *Trust and Loan Co. v. Stevenson* (1892), 20 A.R. (Ont.) 66.

4. FORECLOSURE GIVES NEW STARTING POINT.

In *Heath v. Pugh* (1881), 6 Q.B.D. 345, 16 R.C. 376, it was held by the Court of Appeal (Lord Selborne, A.C., Baggallay and Brett, L.JJ.) reversing the judgment of the Common Pleas Division (Lord Coleridge, C.J., and Lindley, J.), that the effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership of and beneficial title to the mortgaged land for the first time in the mortgagee, so that an action, brought within 20 years next after the order of foreclosure, by the mortgagee to recover possession of the land was not barred by the Statutes of Limitations (3 & 4 Wm. IV. ch. 27 and 1 Vict. ch. 28), although more than 20 years had elapsed since the legal estate in the land had been conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage. This decision was affirmed by the House of Lords (Earl Cairns, Lord Hagan, Lord Blackburn and Lord Watson) *sub nomine Pugh v. Heath* (1882), 7 App. Cas. 235, 16 R.C. 389, and in effect is a decision that since the passing of the Judicature Acts an action for foreclosure is an action to recover land (but not an action to recover possession of land: *Wood v. Whetun* (1882), 22 Ch.D. 281.)

From a theoretical point of view the correctness of the decision in *Pugh v. Heath* is open to question, because a suit for foreclosure was, prior to the Judicature Acts, not a proceeding *in rem* for the purpose of recovering the land but was merely a suit *in personam* brought by the mortgagee (the legal owner) for the purpose of depriving the mortgagor of the equitable right to redeem. The effect of the Judicature Acts, it is submitted, was merely to confer upon one Court the jurisdiction formerly possessed by different Courts and not to change the character of the rights which might be claimed by suit or action. The Judges of the Common Pleas Division were therefore logical in holding that the suit for foreclosure did not confer upon the mortgagee any title to the land which he did not possess before; that the action for possession was the first proceeding brought by the mortgagee to recover the land, and that as it was not brought within the statutory period, the mortgagee was barred. Practically, however, the result of such a decision was almost grotesque, as it would have deprived the mortgagee of the whole benefit of the foreclosure proceedings which had been brought to a successful conclusion in the year immediately preceding that in which the action for possession was commenced. A similar case will not often arise because the mortgagee now has the right to claim foreclosure and possession in the same action. Formerly he would have had to sue in equity for foreclosure and to bring an action at law for possession although he might have pursued his different remedies concurrently.