

mortgagee was dead, the money was payable to the executor, not to the heir, even though the heirs were named in the contract. In such a case the contractual right of the mortgagor to pay the heir instead of the executor was forfeited. The mortgagee's right to the land was in essence merely a right to a security for money, and the money, when paid, was part of his personal estate. Consequently the heir was bound to reconvey on payment to the executor. It has long been settled that the mortgage security is personal estate (d).

2. Equitable right to redeem and the correlative right to foreclose.—

Equity carried to its logical conclusion the principle that the mortgage transaction was in essence merely the giving of security, by incorporating in the contract certain inevitable terms which were not in accordance with the language of the contract and which the parties to the contract could neither dispense with nor modify (e). One of these terms was that after the mortgagor's estate had become forfeited at law, equity would relieve against the forfeiture and allow him to redeem (f), or, in other words, would give him an equitable right to redeem after his contractual right was gone. In substance it is obvious that this equitable rule is more just than the legal rule according to which, no matter how valuable the estate was in comparison with the debt secured, the estate was forfeited on default in payment exactly on the day (g). In point of form the equitable rule is objectionable because

(d) 21 Halsbury, Laws of England, p. 182, note (g).

(e) Ashburner, Principles of Equity, 258ff. In a modern mortgage it is customary to insert special contractual provisions, such as a power of sale, a right to distrain, etc., and such provisions are binding in so far as they are consistent with the "inevitable terms" incorporated by equity in the mortgage transaction.

(f) Cf. *Kreglinger v. New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 35.

(g) H. D. Hazeltine in *Die Geschichte des englischen Pfandrechts* (Breslau, 1907), 249, refers to some passages in the old dramatists as shewing that the harshness of the common law rule as to forfeiture on default was not in accord with the public sentiment as to what was just and that the mortgagee who took advantage of the forfeiture might have qualms of conscience. From Fletcher's *The Night Walker or Little Thief*:

*Alathe.*—Thou hast undone a faithful gentleman,

By taking forfeit of his land.

*Algripe.*—I do confess. I will henceforth practise repentance.

I will restore all mortgages, forswear abominable usury.