

8. NATURE OF POSSESSION REQUIRED.

Time will not run against the mortgagor so long as the possession of the mortgagee may be referred to another title and is not adverse. Thus in *Hyde v. Dallaway* (1843), 2 Hare 528, a person to whom property was mortgaged by the tenant for life and remainderman, after having been in possession for 6 years without any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life, and then continued in possession for 20 years. It was held that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Wm. IV., ch. 27, sec. 28, was not, therefore, a bar to a suit for redemption by the remainderman or reversioner. See also *Raffety v. King* (1836), 1 Keen 601.

In *Faulds v. Harper* (1886), 11 Can. S.C.R. 639, an action for foreclosure had been brought and a decree had been made for a sale. The lands were sold pursuant to the decree and were purchased by one Harper, who acted for and in collusion with the mortgagee. Harper then conveyed to the mortgagee, who took possession and thenceforth dealt with the lands as absolute owner. In an action to redeem it was held that as the mortgagee had been in possession not as mortgagee, but as purchaser, the Statute of Limitations did not apply. The action was virtually one to impeach a purchase by a trustee for sale, to which no Statute of Limitations was applicable. See the cases cited by Strong, J., at pp. 647 ff.

Similarly if a mortgagee sells under a power of sale according to the terms of which he is an express trustee of the surplus, the Statutes of Limitation do not apply to an action by the mortgagor to make the mortgagee account for the surplus. *Banner v. Beveridge* (1881), 17 Ch.D. 254; *Re Bell, Lake v. Bell* (1886), 34 Ch.D. 462; *Biggs v. Freehold Loan and Savings Co.* (1899), 26 A.R. (Ont.) 232 (a case under the Short Forms of Mortgage Act), reversed on another point, 1901, 31 Can. S.C.R. 136.

A security for money lent was expressed in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than 20 years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount owing for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited. It was held that the security was simply a mortgage, that the Statutes of Limitations applied, that the devisees in trust sold as owners in fee and that the mortgagors had no right to the surplus of the purchase money. *Re Alison, Johnson v. Mounsey* (1879), 11 Ch.D. 284.

If, however, the mortgagee conveys the lands to a purchaser who goes into possession, the mortgagee may set up the possession of the purchaser in addition to his own possession, if any, as mortgagee, so as to bar the mortgagor's claim. *Bright v. McMurray* (1882), 1 O.R. 172.

The possession required by the statute must be the possession of one person, or of several persons claiming one from or under another by conveyance, will or descent. *Doe d. Carter v. Barnard* (1849), 13 Q.B. 945, at 952; *Dedford v. Boulton* (1878), 35 Gr. 561.

Where the solicitor of a mortgagor paid off the mortgage for his own benefit, but did not take an assignment of the mortgage, it was held that his possession was the possession of his client and that time did not run against the client. *Ward v. Cartlar* (1865), L.R. 1 Eq. 29.