

The State of Alabama }
Baldwin County }

CIRCUIT COURT

No. 96325 Term, 1933

To Any Sheriff of the State of Alabama--Greeting:

You are hereby commanded, That of the goods and chattels, lands and tenements of

William Peterson Defendants,

you cause to be made the sum of Fifty Seven and $\frac{40}{100}$ Dollars.

which State Bank of Alberta Plaintiffs

recovered of him on the term day of October 1932 by 23

the Judgment of our Supreme Court, held for the County of Baldwin, besides the sum of _____

Dollars

costs of suit, and have the same to render to the said.

and make return of this Writ and the execution thereof, according to law.

Interest from _____, 193____, to date of collection.

Witness my hand, this 20 day of Sept., 1933

..Clerk

[illegible]
$$\begin{array}{r} 94.25 \\ - 7.40 \\ \hline 86.85 \end{array}$$

1165
1940
7452

LAW OFFICES
ELLIOTT G. RICKARBY
ROBERTSDALE, ALA.

Fairhope, Alabama.
September 9, 1933.

Mrs. Mary Alice Stone
Clerk Circuit Court
Bay Minette, Alabama.

Dear Mrs. Stone:-

On the 22nd. of December last in the case of State Bank of Elberta vs. William Peterson the Supreme Court rendered a decision in favor of the bank for the lands sued for and for a judgment of \$5740 damages together with the costs. Before we obtained an order of execution a friend of the defendant made arrangements by which Peterson was permitted to stay a while longer on the place under certain conditions which were not fulfilled. We now desire to have him evicted and to collect our judgment and costs and will ask you to issue the proper writ and also place an execution in the hands of the Sheriff for the 5740 judgment and \$37.25 costs. These under the decision of the Supreme Court can be issued at once and we will appreciate your giving the matter your attention immediately as Peterson is working a distinct ^{injury} ~~to~~ to the place. When you put these papers in the Sheriff's hands instruct him to see Mr. Neumann of the Bank before executing them and also remind him that the defendant has repeatedly made threats to kill anyone who attempts to put him off the place. As you see the situation is a serious one. Please also let me know when the papers have been turned over to Mr. Stewart.

R:L

Very truly yours, *Elliott G. Rickaby*

foreclosure of our mortgage dated prior to September, 1932, is valid, but we have ample authority to sustain our position regardless of this. The first case cited by Defendant, Kelly Realty Company vs McDavid, 211 Ala. 575, 100 So. 873, does not bear him out. This case, on page 577 holds that where there has been any kind of notice whatever, even if this be defective, the foreclosure deed is only voidable and can be declared void only by seasonable procedure. In an action at law such as the present, therefore, where the fact of notice is not controverted, the foreclosure deed must be admitted and cannot be collaterally attacked.

We readily admit that notice of a mortgage foreclosure must be strictly in accordance with the power of sale in the mortgage. We contend that we have followed this meticulously. 27 CYC page 1469 in its article on "Mortgages" says, "The notice must specify the place with such degree of certainty that intending bidders will easily find it." Page 1472 adds that the mortgagors must show good faith. We contend that we have done so. Advertising the place of sale at Elberta where the land is located and where possible bidders live rather than at Bay Minette certainly gave absolute certainty of location and facilitated the attendance of any one who might possibly be interested. The Defendant does not claim that he was prejudiced in any way. He was present at the sale and could have had any bidder that he could secure present to assist him.

"Equity does not set aside foreclosure sales merely for trifling irregularities in notice or procedure which would not appear capable of prejudice to the mortgagor or those claiming under him." Farmers Savings Bank vs Murphee, 200 Alabama 574, 575, 76 So. 932.

"If the property brings its full value and the proceeds are properly applied, the sale will not be set aside for defects in the notice, as no one has been injured." Defendant's authority, Kelly vs McDavid, supra.

To Recapitulate:

1. The Mortgage is not silent as to place of sale. It must be a public sale, i e in a public place, which the Elberta Post Office certainly was.
2. The statute is not mandatory.
3. Had the notice been defective, the foreclosure deed could only be declared void by equity procedure--not by collateral attack.
4. The statute declaring a foreclosure deed void, by its terms does not apply to one under a mortgage made in 1922.
5. Equity will not set aside a foreclosure for a technical defect when the mortgagor was not injured.

We therefore respectfully submit that Defendant's objection is without merit either in law or morals; that he has been treated with fairness and liberality, and that when a mortgage nine years over-due is finally foreclosed under conditions of absolute good faith he cannot now complain.

Respectfully submitted,

Elliott G. Rickarby,
Attorney for Plaintiff.

STATE BANK OF ELBERTA

NO: 9635

plaintiff,

LAW-----

VS.

IN THE CIRCUIT COURT OF

WILLIAM PETERSEN

BALDWIN COUNTY, ALABAMA.

Defendant.

REPLY BRIEF OF PLAINTIFF

The Defendant's claim is based, not upon any injury suffered by Defendant by reason of the way in which notice of foreclosure was given, but solely by authority of Code Section 9011, under which he contends that because, after notice fully and legally given, the land was sold in front of the Post Office at Elberta rather than forty one miles distant at Bay Minette, the foreclosure deed is void. We submit that this position is not tenable.

We take issue with the Defendant primarily on his premises.

FIRST: The Statute quoted reads "If a -----mortgage, with power of sale, be silent as to the place or terms of sale or as to the character or mode of notice." The mortgage is not silent; the power of sale reads "To sell their interest in the above described property at public sale for cash." While this does not in so many words name either the Elberta Post Office or the Court House as the place, it specifically provides a public sale--a sale in a public place. "A public sale is a sale in pursuance of a notice, by auction or public outcry", 4th Words & Phrases, Second Series, on page 33.

Citing Robins vs Bellas, 4th Watts (Pa.) 255, 258.

The same work cites In re Nevada, Utah M. & S. Corp., 198 Federal, 497, 498, thus:

"There is a public sale when all persons are permitted to bid, when bids are not held open except with the bidder's consent and when notice inviting bids is publicly given."

That the post Office in the community is a public place was definitely settled by our Supreme Court in the case of Edwards Hudmon & Company vs Meadows, 71 Alabama, 42, where, on page 47, Judge Somerville said:

"The Court erred, however, we think, in charging that the posting of one notice at the court-house door, and another at the post-office, in the City of Opelika, was not a strict compliance with the requirement of the mortgage, which was that advertisement of foreclosure should be made by posting written notices "in two public Places in Lee County". No two places in the entire County could probably have been selected which were more public, or where the attention of more persons would have been called to the intended sale."

SECOND: But even were the mortgage silent as to the place of sale, the language of Section 9011 is "A sale may be made at the Court House door" showing that the statute is not mandatory. Defendant may say that Section 9018 supplies the mandatory feature. This section reads:

"All sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of this article shall be null and void, notwithstanding any agreement or stipulation to the contrary."

Let us go one step further to Section 9019 which reads:

"The provisions of the three preceding sections shall not apply to mortgages or deeds of trust executed before the 29th day of September, 1923." Our Mortgage was dated April 15th, 1922.

We respectfully and urgently insist that no further argument is necessary and that the Code Section last cited clearly implies that a

foreclosure of our mortgage dated prior to September, 1932, is valid, but we have ample authority to sustain our position regardless of this. The first case cited by Defendant, Kelly Realty Company vs McDavid, 211 Ala. 575, 100 So. 873, does not bear him out. This case, on page 577 holds that where there has been any kind of notice whatever, even if this be defective, the foreclosure deed is only voidable and can be declared void only by seasonable procedure. In an action at law such as the present, therefore, where the fact of notice is not controverted, the foreclosure deed must be admitted and cannot be collaterally attacked.

We readily admit that notice of a mortgage foreclosure must be strictly in accordance with the power of sale in the mortgage. We contend that we have followed this meticulously. 27 CYC page 1469 in its article on "Mortgages" says, "The notice must specify the place with such degree of certainty that intending bidders will easily find it." Page 1472 adds that the mortgagors must show good faith. We contend that we have done so. Advertising the place of sale at Elberta where the land is located and where possible bidders live rather than at Bay Minette certainly gave absolute certainty of location and facilitated the attendance of any one who might possibly be interested. The Defendant does not claim that he was prejudiced in any way. He was present at the sale and could have had any bidder that he could secure present to assist him.

"Equity does not set aside foreclosure sales merely for trifling irregularities in notice or procedure which would not appear capable of prejudice to the mortgagor or those claiming under him." Farmers Savings Bank vs Murphee, 200 Alabama 574, 575, 76 So. 932.

"If the property brings its full value and the proceeds are properly applied, the sale will not be set aside for defects in the notice, as no one has been injured." Defendant's authority, Kelly vs McDavid, supra.

To Recapitulate:

1. The Mortgage is not silent as to place of sale. It must be a public sale, i e in a public place, which the Elberta Post Office certainly was.
2. The statute is not mandatory.
3. Had the notice been defective, the foreclosure deed could only be declared void by equity procedure--not by collateral attack.
4. The statute declaring a foreclosure deed void, by its terms does not apply to one under a mortgage made in 1922.
5. Equity will not set aside a foreclosure for a technical defect when the mortgagor was not injured.

We therefore respectfully submit that Defendant's objection is without merit either in law or morals; that he has been treated with fairness and liberality, and that when a mortgage nine years over-due is finally foreclosed under conditions of absolute good faith he cannot now complain.

Respectfully submitted,

Elliott G. Rickarby,
Attorney for Plaintiff.

STATE BANK OF ELBERTA

NO; 9635

plaintiff,

LAW-----

VS.

IN THE CIRCUIT COURT OF

WILLIAM PETERSEN

BALDWIN COUNTY, ALABAMA.

Defendant.

REPLY BRIEF OF PLAINTIFF

The Defendant's claim is based, not upon any injury suffered by Defendant by reason of the way in which notice of foreclosure was given, but solely by authority of Code Section 9011, under which he contends that because, after notice fully and legally given, the land was sold in front of the Post Office at Elberta rather than forty one miles distant at Bay Minette, the foreclosure deed is void. We submit that this position is not tenable.

We take issue with the Defendant primarily on his premises.

FIRST: The Statute quoted reads "If a -----mortgage, with power of sale, be silent as to the place or terms of sale or as to the character or mode of notice." The mortgage is not silent; the power of sale reads "To sell their interest in the above described property at public sale for cash." While this does not in so many words name either the Elberta Post Office or the Court House as the place, it specifically provides a public sale--a sale in a public place. "A public sale is a sale in pursuance of a notice, by auction or public outcry", 4th Words & Phrases, Second Series, on page 33.

Citing Robins vs Pellas, 4th Watts (Pa.) 255, 258.

The same work cites In re Nevada, Utah M. & S. Corp., 198 Federal, 497, 498, thus:

"There is a public sale when all persons are permitted to bid, when bids are not held open except with the bidder's consent and when notice inviting bids is publicly given."

That the post Office in the community is a public place was definitely settled by our Supreme Court in the case of Edwards Hudmon & Company vs Meadows, 71 Alabama, 42, where, on page 47, Judge Somerville said:

"The Court erred, however, we think, in charging that the posting of one notice at the court-house door, and another at the post-office, in the City of Opelika, was not a strict compliance with the requirement of the mortgage, which was that advertisement of foreclosure should be made by posting written notices "in two public Places in Lee County". No two places in the entire County could probably have been selected which were more public, or where the attention of more persons would have been called to the intended sale."

SECOND: But even were the mortgage silent as to the place of sale, the language of Section 9011 is "A sale may be made at the Court House door" showing that the statute is not mandatory. Defendant may say that Section 9018 supplies the mandatory feature. This section reads:

"All sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of this article shall be null and void, notwithstanding any agreement or stipulation to the contrary."

Let us go one step further to Section 9019 which reads:

"The provisions of the three preceding sections shall not apply to mortgages or deeds of trust executed before the 29th day of September, 1925." Our Mortgage was dated April 15th, 1922.

We respectfully and urgently insist that no further argument is necessary and that the Code Section last cited clearly implies that a

STATE BANK OF ELBERTA

PLAINTIFF

VS

WILLIAM PETERSEN

Defendant.

vs. CASE

L A W .

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

REPLY BRIEF OF PLAINTIFF.

The defendant's claim is based, not upon any injury suffered by Defendant by reason of the way in which notice of foreclosure was given, but solely by authority of Code Section 9011, under which he contends that because, after notice fully and legally given, the land was sold in front of the Post Office at Elberta rather than forty one miles distant at Bay Minette, the foreclosure deed is void. We submit that this position is not tenable.

We take issue with the Defendant primarily on his premises.

FIRST: The Statute quoted reads "If a - - - mortgage, with power of sale, be silent as to the place of terms of sale or as to the character or mode of notice." The mortgage is not silent; the power of sale reads "To sell their interest in the above described property at public sale for cash." While this does not in so many words name either the Elberta Post Office or the Court House as the place, it specifically provides a public sale-- a sale in a public place. "A public sale is a sale in pursuance of a notice, by auction or public outcry", 4th Words & Phrases, Second Series, on page 33.

Citing Robins vs Bellas, 4th Watts (Pa.) 255, 258.

The same work cites In re Nevada, Utah M. & S. Corp., 198 Federal, 497, 498, thus:

There is a public sale when all persons are permitted to bid, when bids are not held open except with the bidder's consent and when notice inviting bids is publicly given."

That the post Office in the community is a public place was definitely settled by our Supreme Court in the case of Edwards Hudmon & Company vs Meadows, 71 Alabama, 42, where, on page 47, Judge Somerville

said:

"The court erred, however, we think, in charging that the posting of one notice at the court-house door, and another at the post-office, in the city of Opelika, was not a strict compliance with the requirement of the mortgage, which was that advertisement of foreclosure should be made by posting written notices "in two public places in Lee County". No two places in the entire county could probably have been selected which were more public, or where the attention of more persons would have been called to the intended sale."

SECOND: But even were the mortgage silent as to the place of sale, the language of Section 9011 is "A sale may be made at the court house door" showing that the statute is not mandatory. Defendant may say that Section 9018 supplies the mandatory feature. This section reads:

"All sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of this article shall be null and void, notwithstanding any agreement or stipulation to the contrary."

Let us go one step further to Section 9019 which reads:

"The provisions of the three preceding sections shall not apply to mortgages or deeds of trust executed before the 29th day of September, 1923." Our mortgage was dated April 15th, 1922.

We respectfully and urgently insist that no further argument is necessary and that the Code Section last cited clearly implies that a foreclosure of our mortgage dated prior to September, 1923, is valid, but we have ample authority to sustain our position regardless of this. The first case cited by Defendant, Kelly Realty Company vs McDavid, 211 Ala. 575, 100 So. 873, does not bear him out. This case, on page 577 holds that where there has been any kind of notice whatever, even if this be defective, the foreclosure deed is only voidable and can be declared void only by seasonable procedure. In an action at law such as the present, therefore, where the fact of notice is not controverted, the foreclosure deed must be admitted and cannot be collaterally attacked.

We readily admit that notice of a mortgage foreclosure must be strictly in accordance with the power of sale in the mortgage. We contend that we have followed this meticulously. 27 CYC page 1469 in its article on "Mortgages" says, "The notice must specify the place with such degree of certainty that intending bidders will easily find it." Page 1472 adds that the mortgagors must show good faith. We contend that we have done so.

Advertising the place of sale at Elberta where the land is located and where possible bidders live rather than at Bay Minette certainly gave absolute certainty of location and facilitated the attendance of any one who might possibly be interested. The Defendant does not claim that he was prejudiced in any way. He was present at the sale and could have had any bidder that he could secure present to assist him.

"Equity does not set aside foreclosure sales merely for trifling irregularities in notice or procedure which would not appear capable of prejudice to the mortgagor or those claiming under him." Farmers Savings Bank vs Murphee, 200 Alabama 574, 575, 78 So. 932.

"If the property brings it s full value and the proceeds are properly applied, the sale will not be set aside for defects in the notice, as no one has been injured". Defendant's authority, Kelly vs McDavid, supra.

To recapitulate:

1. The mortgage is not silent as to place of sale. It must be a public sale, i.e. in a public place, which the Elberta Post Office certainly was.
2. The statute is not mandatory.
3. Had the notice been defective, the foreclosure deed could only be declared void by equity procedure-- not by collateral attack.
4. The statute declaring a foreclosure deed void, by its terms does not apply to one under a mortgage made in 1922.
5. Equity will not set aside a foreclosure for a technical defect when the mortgagor was not injured.

We therefore respectfully submit that Defendant's objection is without merit either in law or morals; that he has been treated with fairness and liberality, and that when a mortgage nine years over-due is finally foreclosed under conditions of absolute good faith he cannot now complain.

Respectfully submitted,

William B. Rinsley
Attorney for Plaintiff.

The State of Alabama {
Baldwin County--Circuit Court }

TO ANY SHERIFF OF THE STATE OF ALABAMA--GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the _____

3rd ~~Monday~~ day in SEPTEMBER 1932

in a certain cause in said Court wherein STATE BANK OF ELBERTA, a corporation

Plaintiff, and WILLIAM PETERSEN

Defendant, a judgment was rendered against said

STATE BANK OF ELBERTA, a corporation

to reverse which judgement the said STATE BANK OF ELBERTA,
a corporation

has on this day applied for and obtained from this office an APPEAL, returnable to the

FALL Term of our SUPREME Court of the State of Alabama, to

Beginning on the THIRD DAY OF
 be held at Montgomery, ~~on the XXXXXXXXXX day of~~ OCTOBER, 1932 ~~next,~~

and the necessary bond having been given by the said STATE BANK OF ELBERTA,

a corporation with ALFRED M. NEIUMANN

AND HENRY W. GEBERT sureties,

Now, You Are Hereby Comanded, without delay, to cite the said

WILLIAM PETERSEN

or LLOYD A. MAGNEY attorney, to appear at the

FALL Term of our said Supreme Court, to defend against the said

Appeal, if THEY think proper.

WITNESS, T. W. Richerson, Clerk of the Circuit Court of said County, this: 29th

day of October, A. D., 1932

Attest:

T. W. Richerson
 Clerk.

Deed not Page 26

RECORDED

9635

ORIGINAL

CIRCUIT COURT

BALDWIN COUNTY, ALA.

STATE BANK OF ELBERTA,

a corporation

vs. { Citation in Appeal

WILLIAM PETERSEN

State of Georgia
County of Longview
City of Marietta, Georgia

Issued 29th day of Oct. 1932

Moore Ptg. Co., Bay Minette

RECORDED

Excluded Nov 30 1932
by serving copy of within 30 days and
Complaint on

Citation of Appeal
With Loy & Maguire
Attorneys

W. R. Stewart

Sheriff

Deputy Sheriff

By

The State of Alabama,

Baldwin County

No.

CIRCUIT COURT.

Term 1932

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon

WILLIAM PETERSEN

to appear within thirty days from the service of this writ, in the Circuit Court to be held for said County, at the place of holding the same, then and there to answer the complaint of

STATE BANK OF ELBERTA,Witness my hand this 17th day of April 1932

Clerk.

Complaint**STATE BANK OF ELBERTA,**

A corporation,

WILLIAM PETERSEN

vs.

Plaintiff.

Defendant.

~~THE PLAINTIFF claims of the defendant the sum of~~~~DOLLARS~~

1. The plaintiff sues to recover possession of the following tract of land, namely the Northwest Quarter of the Northeast Quarter of Section Six, Township Eight South of Range Five East of the St. Stephens Meridian in Baldwin County, Alabama, of which it was in possession and before the commencement of this suit the defendant entered and unlawfully withholds, together with TWO HUNDRED DOLLARS damages for the detention thereof.

2. The Plaintiff sues to recover possession of the following tract of land, namely, the Northwest Quarter of the Northeast Quarter of Section Six, Township Eight South of Range Five East of the St. Stephens Meridian in Baldwin County, Alabama, to which it has the legal title and right of possession and which land, before the commencement of this suit the defendant occupied and still unlawfully with holds, together with two hundred dollars damages for the detention thereof.

Elliot B. Ristaby
Attorney for Plaintiff.

Plaintiff's Attorney

Original 1

ALABAMA
No. _____

The State of Alabama,
Baldwin County

CIRCUIT COURT

STATE BANK OF FLORIDA

Plaintiffs.

VS.

WILLIAM PETERSEN

Defendants.

SUMMONS AND COMPLAINT

Filed Apr 7th 1932

D. W. Williams Clerk,

Defendant lives at

Wiffin, Alabama

ELLIOTT G. RICKARD Plaintiff's Attorney,

_____, Defendant's Attorney.

Received in Office

192

Sheriff.

I have executed this Writ

This 9th April, 1932

by leaving a copy of the within summons and
complaint with

Summons

Complainant

with

William Petersen

M. W. Williams

Sheriff.

M. W. Williams Deputy Sheriff.

Moore Printing Co. Bay Minette, Ala.

DEC 22 1932

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1932-33.

1 Div. 747.

State Bank of Elberta

v.

William Peterson,

Appeal from Baldwin Circuit Court.

FOSTER, J.

The mortgage here under consideration was executed in April, 1922, and the power of sale was performed in March, 1932. The power of sale did not specify the place where the sale must be had, but did provide that thirty days' notice should be given and that the sale should be for cash at public outcry, and that the mortgagee might bid at the sale. There is no claim of irregularity except that the sale was conducted before the Post-office at Elberta, in Baldwin County, where the land is situated, pursuant to the notice, but not before the court-house door of the county, which we judicially know is not at Elberta.

2.

Reliance is had upon section 9021, Code, which provides that if the mortgage is silent as to the place of sale under such a power, it must be made at the courthouse door of the county wherein the land is situated. That section of the Code became law by virtue of its incorporation into the Code of 1923, written by the legislative Code Commission, and as written adopted by the Legislature. It therefore became effective with the effective date of the Code, to-wit, August 17, 1924, by virtue of the proclamation of the Governor.

The general rule is that statutes are intended to operate in the future, unless a contrary effect is expressly declared or necessarily implied. - Hawkins v. Peoples Finance & Thrift Co., 219 Ala. 558, 122 So. 650, and cases cited; 59 Corpus Juris 1159, 1160. This includes the concept that existing contracts are impliedly not affected. We think also that because section 9019, Code, declares that the provisions of the Act of September 29, 1923, shall not apply to mortgages executed before that date, shows a purpose to make the entire article operative only upon mortgages made before the effective date of its several provisions. There is authority for the exact question we have here, that, statutes which fix the place of sale under a power are said not to apply to mortgages containing such power executed before their enactment. - 41 Corpus Juris 967, 925; Belcher Land Co. v. Taylor, 212 S. W. 647; McConnorshey v. Rogers, 106 Ill. 321; White v. Malcolm, 15 Md. 529; Palmer v. Latham, 173 N. C. 60, 91 S. E. 525; Davis v. O'Connell, 92 Miss. 348, 47 So. 672.

3.

It seems also to be the settled construction of a power, that if its provisions do not specify a place of sale, and none is then provided by law, the selection of a place is left to the reasonable and prudent discretion of the grantee of the power. - 41 Corpus Juris 967, cases in note 8; McLendon v. Equitable Mortgage Co., 122 Ala. 384; 391, 25 So. 30. So that the right to exercise such prudent discretion is thereby as much a part of the contract as if written in it. A subsequent statute which might operate upon such a situation affects an existing contractual status the same as though the place had been specified in the power. The right to make such a selection is or may be a valuable consideration for entering into the transaction. At least such was the agreement here. To change its meaning by statute may subject the statute to attack as for impairing the obligations of a contract. - Cowley v. Shields, 180 Ala. 48, 60 So. 267. All of such thoughts impel us to the conclusion that it is not here controlling, and that the mortgagee had the right under the power to exercise a reasonable and prudent discretion in the matter. No sort of effort is made to show that it was not reasonably and prudently exercised so as to conserve the best interests of the mortgagor. On the other hand, the reasonable inference from the facts is that the selection of the place of sale was wise and prudent.

The agreed statement of facts show the defendant and his wife executed a mortgage to plaintiff conveying to it the legal title of the land sued for in this action, which is in the nature of ejectment. But it also states that

4.

the issue submitted, is whether the foreclosure was valid and whether the foreclosure deed should be admitted in evidence as a valid instrument entitling plaintiff to possession. We have responded to that issue as we understand the principles which control it. But we do not think that plaintiff's right to recover possession is thereby controlled. There is here no effort to have the benefits of section 7465, Code. The only question was whether plaintiff had such legal title as justified a recovery of the land in such an action as this.

It has been frequently pointed out in the decisions of this Court that the conception of a mortgage, duly executed, as here entertained, is that it passes the legal title such as will support ejectment, without foreclosure. - Jackson v. Tribble, 156 Ala. 430 (14), 47 So. 310; Jordan v. Summers, 222 Ala. 314, 132 So. 427; Brown v. Lamb, 177 Ala. 106 (3), 58 So. 330; Lamb v. Pioneer S. & L. Co., 106 Ala. 591, 17 So. 670; Stanley v. Johnson, 113 Ala. 344, 21 So. 823.

Nothing more need be said, it seems to us, to justify a judgment for plaintiff. While the foreclosure deed was not necessary to enable plaintiff to recover the land, it was proper matter for consideration in an orderly exposition of the status of the title. The judgment of the circuit court must therefore be reversed. The agreed facts provide that in such event damages for detention shall be calculated at the rate of ten per centum of \$739.16 per annum since March 12,

5.

1932. This being nine and one-third months, we fix the damages at \$57.40. Judgment is therefore rendered in favor of appellant for the land sued for and \$57.40 damages for detention and the costs of the cause.

Reversed and rendered.

Anderson, C.J., Gardner and Bouldin, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 747

State Bank of Elberta

, Appellant,

VS.

William Peterson

, Appellee,

From

Baldwin

Circuit Court.

The State of Alabama,
City and County of Montgomery.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to 5 inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme

Court of Alabama, at the Capitol, this the

22 day of Dec, 1923

Robt F Ligon

Clerk of the Supreme Court of Alabama.

Dunham 5740
Vance
95

The Supreme Court of Alabama.

OCTOBER TERM, 1923 2-3

1 Div., No. 747

State Bank of Elberta

Appellant,

VS.

Peterson

Appellee.

From Baldwin Circuit Court.

COPY OF OPINION

BIGAN PRINTING CO. MONTGOMERY.

STATE BANK OF ELBERTA

Plaintiff.

VS

WILLIAM PETERSEN

Defendant.

LAW.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

We, the STATE BANK OF ELBERTA, ALFRED M. NEUMANN and
Henry W. Gebert acknowledge ourselves
security for the costs of the appeal taken by the Plaintiff
to the Supreme Court of Alabama from the judgment rendered by
the Circuit Court in said cause.

STATE BANK OF ELBERTA, ALA.

CASHIER.

Taken and Approved
this 29th day of
October 1932
D. W. Dickinson
Clerk

Henry W. Gebert

7
STATE BANK OF ILLINOIS

Plaintiff.

VS

WILLIAM PETERSEN

Defendant.

Ind Oct 29 1928

Michigan

Security for costs

on appeal.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
WAT TA

STATE BANK OF EUBANK, ALA.

PLAINTIFF

WILLIAM PETERSEN,

DEFENDANT

comes now the Defendant and for answer to the complaint
and to each Count thereof separately and severally says that
he is not guilty of the matters and facts therein alleged.

WILLIAM PETERSEN
DEFENDANT

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

AT LAW

PIBA

PIBA

Attorney for Defendant
THOMAS A. WAGGONER

Attorney for Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW

STATE BANK OF ELLERBE

WILLIAM PETERSEN

PLAINTIFF

DEFENDANT

VS

WILLIAM PETERSEN
DEFENDANT

he is not guilty of the matters and facts therein stated
and so each count thereof separately and severally
and he now the defendant and for answer to the
complaints

PLEA

FILE

LLOYD A. MAGNEY
Attorney for Defendant

BALDWIN COUNTY, ALABAMA
IN THE CIRCUIT COURT OF

Filed May 12 1932
D. M. [Signature]
clerk

[Signature]

Attorney for Defendant

STATE BANK OF ALBERTA,
PLAINTIFF
VS
WILLIAM PETERSEN,
DEFENDANT

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW
ANSWERS TO INTERROGATORIES

Comes now William Petersen, the above named Defendant, and
for answer to the interrogatories propounded by the Plaintiff says:

ANSWER TO INTERROGATORY ONE.

Yes

ANSWER TO INTERROGATORY TWO.

Yes

ANSWER TO INTERROGATORY THREE

Yes

ANSWER TO INTERROGATORY FOUR

Yes

ANSWER TO INTERROGATORY FIVE

I bought the land in 1905 and lived on it for about two (2)
years. From 1907 until 1922 I did not live on the land. From 1922
until this time I have lived continuously on this land.

ANSWER TO INTERROGATORY SIX.

Yes.

ANSWER TO INTERROGATORY SEVEN

I was present at our near the Post Office in Alberta at noon
of March 12, 1932 but I did not hear nor see any sale conducted.

ANSWER TO INTERROGATORY EIGHT

I did not refuse to take from Mr. Alfred Neuman a paper which
he tried to hand me. He had a paper which he said was for me and I
told him to mail it to me and he said he would.

ANSWER TO INTERROGATORY NINE.

No

ANSWER TO INTERROGATORY TEN.

I am refusing to give up possession of this land to the bank
but no demand for possession has ever been made upon me either verbally

or in writing.

ANSWER TO INTERROGATORY ELEVEN

I have told no one I would move out.

ANSWER TO INTERROGATORY TWELVE

I am not willing to move out now.

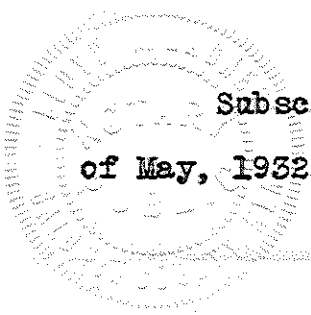
William Petersen

STATE OF ALABAMA)
 (
BALDWIN COUNTY.)

William Petersen, being first duly sworn on his oath deposes and says that he has read the foregoing answers to interrogatories and that the same are true.

William Petersen

Subscribed in my presence and sworn to before me this 13 day of May, 1932.



[Signature]

Notary Public.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW

RECORDED

STATE BANK OF EIBERTA,

PLAINTIFF

VS

WILLIAM PETERSEN,

DEFENDANT

*Filed May 14/1932
Pro Se*

ANSWERS TO INTERROGATORIES

LLOYD A. MAGNEY,
Attorney for Defendant.

STATE BANK OF ELBERTA,
PLAINTIFF

VS

WILLIAM PETERSEN,
DEFENDANT

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW

BRIEF OF DEFENDANT

This statutory action of ejectment is based upon a real estate mortgage and an attempted foreclosure of that mortgage resulting in the foreclosure deed attached to the agreed Statement of Facts as Exhibit "C".

The agreed Statement of Facts is intended to present to the Court for decision only one question, viz: The legal effect of this foreclosure deed.

It is the contention of the Defendant that the deed is void, conveys no rights to the Plaintiff and that as a consequence thereof this action of ejectment must fail by reason of the failure of Plaintiff's legal title.

It is contended that the foreclosure deed is void for only one reason. It will be observed that the mortgage, Exhibit "A" to the agreed Statement of Facts, makes no provision as to the place at which the sale shall be held in the event that an exercise of the power of sale is elected by the mortgagee. The mortgage is silent as to the place of sale.

Under such circumstances the Code of Alabama provides a place at which the sale may be made. The matter is not left to the discretion of the mortgagee, he is given neither by the instrument itself nor by any statutory provision, any discretion in the matter at all. If his mortgage is silent as to the place of sale the statutes supply this omission and direct where the sale shall be held in the following language:-

"9011. WHERE INSTRUMENT SILENT AS TO METHOD OF FORECLOSURE. - If a deed of trust or mortgage, with power of sale, be silent as to the place or terms of sale, or as to the

character or mode of notice, a sale may be made at the Court House door of the County wherein the land is situated, after condition broken, for cash to the highest bidder, after thirty days' notice of the time, place and terms of sale by publishing such notice once a week for four consecutive weeks in a newspaper published in the County wherein said lands or property in said mortgage or deed of trust are situated."

It is a general rule that the power of sale granted by a mortgage must be strictly complied with, else the attempted exercise of the power will fail and no title will pass by a conveyance based upon proceedings which are not in strict compliance with the power and, of course, this section of the Code of Alabama must be construed as a part of the power of sale in this and in every other mortgage which is silent on any of the matters covered by Section 9011.

(#1415) 3. CONDUCT OF SALE - a. IN GENERAL.

A sale under a power in a mortgage or deed of trust must be conducted in strict compliance with the terms of the power....."
41 C. J. Page 968.

"As a power of sale contained in a deed of trust must be strictly followed to render its exercise valid, a sale at a place other than that designated in the deed does not deprive the grantor of the right to redeem." 19 R. C. L. Page 595.

"In Wood vs Lake, 62 Ala. 489, 491, quoting from Sugden on Powers, 212, it was said: 'The general rule is, that one, not the owner, who sells another's lands, must comply substantially with all the directions, stipulations and conditions * * * * * or the title will not pass.'" Kelly Realty Co. vs McDavid 211 Ala. 575 - 100 So 873.

In this case there was no compliance, either literal or substantial, with the power of sale, The instrument itself being silent as to the place at which the sale must be held, we are required to read into it the statutory provision made for such cases which is, that the sale must be held at the door of the Court House.

It appears from the agreed Statement of Facts, from Exhibit "B", the Affidavit of Publication, that the sale under this mortgage was advertised to be held "in front of the Post Office at Elberta, Alabama" and it further appears from the recitations of the so-called foreclosure deed, Exhibit "C" to the agreed statement of Facts, that the sale was held in front of the Post Office in

STATE BANK OF ELBERTA

Plaintiff.

VS

WILLIAM PETERSEN

Defendant.

NO. 9635.

LAW.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

Come the parties to this cause by their respective attorneys and pursuant to the agreement made in open court August 16th, 1932, do hereby agree on the following as uncontroverted statements of fact to be considered by the court as evidence in determining upon the judgment.

This is a statutory action of ejectment brought by the Plaintiff as mortgagee claiming under a foreclosure deed, the validity of which is controverted as a matter of law.

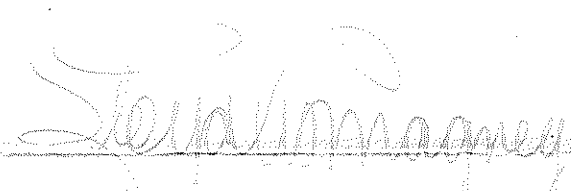
It is agreed that the defendant was, on April 15th, 1922, a resident of Baldwin County and the owner of the NORTHWEST QUARTER of the NORTHEAST QUARTER of SECTION SIX, TOWNSHIP EIGHT SOUTH of RANGE FIVE EAST, containing forty acres more or less. On that date, he and his wife, ELSE PETERSEN, executed a mortgage in favor of Plaintiff for SIX HUNDRED DOLLARS, which mortgage was properly executed before a notary with a separate acknowledgment of the wife on that date. A copy of this mortgage is hereto attached as exhibit "A".

No part of said mortgage has been paid other than interest to January 10th, 1932, nor have the taxes for 1930 or 1931 been paid. Said mortgage being in default, Plaintiff in February, 1932, commenced foreclosure proceedings under the power of sale in said mortgage and a notice as per copy attached marked Exhibit "B" was duly published in the Baldwin County "News Herald" a newspaper of general circulation in Baldwin County for four insertions under dates of February 11th, 18th and 25th, and March 3rd, 1932. Pursuant to said advertisement, the property was sold at public outcry in front of the post office in

Elberta, Alabama and it further appears from the agreed Statement of Facts, on the bottom of the first page and the top of the second page that "pursuant to said advertisement, the property was sold at public outcry in front of the Post Office in Elberta, Alabama."

As a consequence of the failure of the Plaintiff, the mortgagee in said mortgage and the purchaser at said pretended sale, to hold its sale at the place fixed by law it is obvious that there has been no such compliance with the requirements of the power of sale and of the statutes of Alabama as to affect a valid sale and as a consequence the purported foreclosure deed is void and conveyed no title to the Plaintiff. It follows, of course, that the Plaintiff having failed to make out a legal title to the property his action must fail and be dismissed.

Respectfully submitted,


Attorney for Defendant.

Elberta, Alabama, on March 12th, 1932, at noon by Plaintiff's attorney Elliott G. Rickarby and at such sale was purchased by the mortgagee, to whom the said Rickarby, attorney for mortgagee, executed a foreclosure deed on March 12th, 1932, which deed was duly recorded in the Probate Court of this County on the 17th of March following. A copy of said deed is also attached as Exhibit "C".

At the time of the sale the defendant was standing in front of Hanselmann's store in Elberta, not over one hundred feet north of the front of the Post Office where the sale was conducted. Immediately after the sale, Alfred M. Neumann, Cashier of the Plaintiff Bank, sought to hand the defendant a typewritten signed demand for possession, which defendant refused to accept, stating that it could be sent by mail. Neumann then attempted to put the notice in defendant's pocket which he would not permit. Two days later on March 14th Neumann, together with his counsel, called at the residence of defendant on the mortgaged property and knocked at the front door, which was not then opened. He then shoved under the door two type written notices signed by plaintiff and addressed one each to Mr. and Mrs. Petersen. A copy of the one addressed to Mr. Petersen is hereto attached as Exhibit "D". As soon as this was shoved under the door, the door was opened and Mrs. Petersen took the two notices and threw them outside. Later Plaintiff's counsel called on the defendant and his wife and endeavored to get them to surrender possession of the premises thereby avoiding forfeiture of right of redemption, but defendant refused to move or to accept plaintiff's offer to bear all expenses of transferring defendant's property.

If plaintiff is entitled to damages by reason of defendant's unlawful detention it shall be assessed as interest at the rate of ten per cent upon the amount bid at the sale, namely, \$739.16, from March 12th, 1932, to the date of judgment.

The issue in this case submitted for the determination of the Court is whether the foreclosure under the terms of the mortgage was a valid foreclosure and whether said deed should be admitted

in evidence as a valid instrument, entitling plaintiff to possession.

Executed by the parties hereto this the 18th day of
August, Nineteen Hundred and Thirty Two.

Elliot S. Rinkley

Attorney for Plaintiff.

Steph. Homagney

Attorney for Defendant.

STATE OF ALABAMA)
BALDWIN COUNTY.)

MORTGAGE DEED.

THIS MORTGAGE DEED, made this 15th day of April, 1922, between WILLIAM PETERSEN and ELSE PETERSEN of the first part and THE STATE BANK OF ELBERTA of the second part,

WITNESSETH: That the party of the first part, in consideration of SIX HUNDRED dollars received, the receipt of which is hereby acknowledged, grants, bargains, sells, conveys and delivers unto the said party of the second part, heirs and assigns forever, all that real property in Baldwin County, Alabama, described as follows, to-wit:

The Northwest Quarter (NW¹/₄) of the Northeast Quarter (NE¹/₄) of Section Six (6) Township Eight (8) South Range Five (5) East of St. Stephens Meridian. Said parcel of land containing forty acres more or less.

Together with all appurtenances thereunto belonging to have and to hold forever.

PROVIDED, and these presents are upon the expressed condition that if the party of the first part shall well and truly pay to the party of the second part the sum of SIX HUNDRED DOLLARS as evidenced by one note hereto attached, with interest at eight per cent per annum and payable six months after date; then these presents shall cease determine and be void, otherwise to remain in full force and effect.

The said party of the first part, hereby vests the said party of the second part or assigns with full power and authority upon the happening of a default in payment upon the note or any of the notes above described, to sell their interest in said above described property at public sale for cash giving thirty days notice in a newspaper published in Baldwin County, Alabama the proceeds to apply; first, to the payment of the amount due on said note or notes with interest on same, second, to the payment of the costs, including a reasonable attorney's fee, and if there shall be a surplus, then the balance is to be paid over to the party of the first part, and said party of the first part authorizes the said party of the second part, agent or attorney, to conduct the sale, and to make deed to the purchaser, and the title so made the party of the first part hereby agrees to defend against all persons. It is agreed that the mortgage herein may bid at said sale as if he were a stranger to this instrument.

IN WITNESS WHEREOF, the party of the first part, hereunto set their hands and seals, the day and year above written.

WILLIAM PETERSEN.

WITNESS:

ELSE PETERSEN.

STATE OF ALABAMA.)
BALDWIN COUNTY.)

I, L. Lindoerfer, a Notary Public in and for said State and County hereby certify that WILLIAM PETERSEN and ELSE PETERSEN, husband and wife, whose names are signed to the foregoing conveyance, and who are known to me acknowledged before me on this day that, being informed of the contents of conveyance they executed the same voluntarily on the day the same bears date Given under my hand and notarial seal this 15th day of April, 1922

L. LINDOERFER, Notary Public, Baldwin Co., Ala.

STATE OF ALABAMA.)
BALDWIN COUNTY.)

I, L. Lindoerfer, a Notary Public in and for said state and County do hereby certify that on the 15th day of April, 1922; came before me the

within named ELSE PETERSEN, known to me to be the wife of the within named WILLIAM PETERSEN, who, being examined separate and apart from her husband and in reference to her signature to the within conveyance, acknowledged that she signed the same of her own free will and accord and without fear, constraint or threats on the part of her husband.

In witness whereof I hereunto set my hand and notarial seal the 15th day of April, 1922. L. LINDORFER, Notary Public.

Baldwin County, Alabama.

Recorded April 24th, 1922, Mortgage Book 26, pages 592-3.

Exhibit "B."

STATE OF ALABAMA }
County of Baldwin }

G. G. Stephenson, being first duly sworn, deposes and says that he is the publisher of THE BALDWIN COUNTY NEWS, a newspaper published every Thursday at Robertsedale, Baldwin County, Alabama, in the English language and of general circulation in said Baldwin County, Ala-

bama; that the notice hereto attached of _____

Foreclosure Notice

State Bank of Elberta vs William Petersen and

Elsé Peterson

FORECLOSURE NOTICE

Default being made in the payment of the debt secured by that mortgage heretofore made by WILLIAM PETERSEN and ELSE PETERSEN, his wife, to the STATE BANK OF ELBERTA on April 15th, 1922, and recorded in Mortgage Book 26, pages 592-3 of the Probate Records of Baldwin County, the undersigned, as such mortgagee, by authority of the power of sale contained in said mortgage, will proceed to sell at public outcry to the highest bidder for cash in front of the Post Office at Elberta, Alabama, on March 12th, 1932, at noon, the property described in said mortgage, namely:

The Northwest Quarter of the Northeast Quarter of Section Six, Township Eight, South Range Five East of the St. Stephens Meridian in Baldwin County, Alabama, containing forty acres more or less.

STATE BANK OF ELBERTA,

Mortgagee.

ELLIOTT G. RICKARBY,

Attorney.

feb11-18-25-mar3-4t

was published in said newspaper for 4 consecutive weeks in the following issues:

Date of first publication Feb 11 1932 Vol. 10 No. 44

Date of second publication Feb 18 1932 Vol. 10 No. 45

Date of third publication Feb 25 1932 Vol. 10 No. 46

Date of fourth publication Mar 3 1932 Vol. 10 No. 47

And said affiant further states that there is no contract, agreement or

understanding between himself and _____ the officer charged with the duty of advertising said notice in a newspaper, for any advantage, gain or profit to accrue to such officer, and that the sum charged for the publication of said notice is the actual, lowest, regular price for such advertisement.

G. G. Stephenson

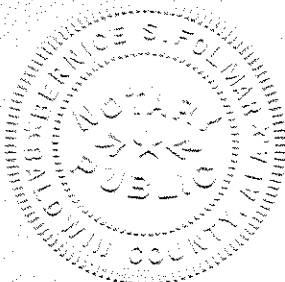
Subscribed in my presence and sworn to before me, this 5th day of March, 1932.

Bernice S. Folmar

Cost of Publication \$ 6.39

Cost of Affidavitt, .25

Total \$ 6.64



Paid 3/12/32 B. G. Stephenson

KNOW ALL MEN BY THESE PRESENTS that whereas WILLIAM PETERSEN and ELSE PETERSEN, his wife, did heretofore on the 16th day of April, 1922, execute a mortgage to the STATE BANK OF ELBERTA to secure the payment of a debt, which mortgage is recorded in Mortgage Book 26, pages 492-3 of the Probate Records of Baldwin County and whereas default has been made in the payment of the debt secured by said mortgage for which reason the mortgagee has foreclosed same, and by authority of the power of sale contained therein had given notice of the time, place, and terms of sale by publication for thirty days in the "Baldwin News Herald", a newspaper of general circulation in Baldwin County and has strictly complied with all conditions in said power of sale, and WHEREAS, pursuant to the notice so given and the power of sale aforesaid, the property described in said mortgage was sold at public outcry for cash at noon in front of the Post Office of Elberta, Alabama, on March 12th, 1932, and then and there bought by the STATE BANK OF ELBERTA for the sum of SEVEN HUNDRED THIRTY NINE and 16/100 DOLLARS, that being the highest and best bid at said sale.

NOW THEREFORE, ELLIOTT G. RICKARBY as attorney for the STATE BANK OF ELBERTA, the mortgagee aforesaid, by authority of the said power of sale and in consideration of the sum of SEVEN HUNDRED THIRTY NINE and 16/100 DOLLARS, the receipt of which is hereby acknowledged, does hereby sell and convey unto the said STATE BANK OF ELBERTA all of the interest of the mortgagors in the property described in the mortgage, namely:

The NORTHWEST QUARTER OF THE NORTHEAST QUARTER of SECTION SIX, TOWNSHIP EIGHT SOUTH OF RANGE FIVE EAST OF THE ST. STEPHEN'S MERIDIAN containing forty acres more or less.

TO HAVE AND TO HOLD unto the said STATE BANK OF ELBERTA, its successors and assigns forever.

The title here conveyed the said WILLIAM PETERSEN by the terms of the mortgage aforesaid, hereby agrees to defend against the lawful claims of all persons whomsoever.

IN WITNESS WHEREOF, the said ELLIOTT G. RICKARBY AS attorney for the mortgagee aforesaid and by authority contained in said mortgage, does hereby execute these presents in behalf of the mortgagors on this the Twelfth day of March, Nineteen Hundred and Thirty Two.

ELLIOTT G. RICKARBY (SEAL)
As attorney for mortgagee.

STATE OF ALABAMA.
COUNTY OF BALDWIN.

I, Bernice S. Folmar, a Notary Public in and for said County in said State, hereby certify that ELLIOTT G. RICKARBY, whose name as attorney for the State Bank of Elberta is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day, that, being informed of the contents of the conveyance, he, in his capacity as such attorney, executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this the 12th day of March, 1932

Bernice S. Folmar,

Notary Public, Baldwin County, Alabama

Recorded March 17th, 1932, in Deed Book 52 pages 205-6.

Exhibit "C"

To Mr. William Petersen
Elberta, Alabama

You are hereby notified that in consequence of the termination of your title by foreclosure procedure had this day on the premises heretofore occupied by you, namely the Northwest Quarter of the Northeast Quarter of Section Six, Township Eight, South Range Five East of the St. Stephens Meridian in Baldwin County, Alabama, your right to remain on the premises has terminated and you are hereby notified to quit and deliver up possession of the same to me within ten days of this date, I having purchased said property at foreclosure sale by public outcry this day.

Dated this 12th day of March, 1932.

STATE BANK OF ELBERTA

By A. M. Neumann

Cashier.

Exhibit "D"

STATE BANK OF ELBERTA, A Corp.,)

Plaintiff.)

VS)

WILLIAM PETERSEN,)

Defendant.)

L A W.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

INTERROGATORIES PROPOUNDED BY PLAINTIFF
TO DEFENDANT:

Interrogatory One: On April 15th, 1922, did you own and were you in possession of the Northwest Quarter of the Northeast Quarter of Section Six, Township Eight South of Range Five East, in Baldwin County, the land involved in this suit?

Int. Two: Are you still living on this land?

~~Inty. Three: Did not you and your wife, Mrs. Else Petersen, execute a mortgage on this land on April 15th, 1922 to the State Bank of Elberta to secure a loan of six hundred dollars.~~

Inty. Four: Did you have good title to this land when you made the mortgage to the Bank?

Inty. Five: How long have you lived on this land? When did you buy it?

Inty. Six; Did you not pay interest on this mortgage up to the year 1931?

Inty. ⁴Seven: Were you not present near to the Post Office in Elberta on March 12th, 1932, at noon when this mortgage was foreclosed at public sale?

Inty. Eight: Did you not refuse to take from Mr. Alfred Neumann a paper that he tried to hand you just after the sale was over?

Inty. Nine: Have you ever delivered possession of this

property to the Bank since the sale?

Inty. Ten: Are you still refusing to give up possession of this land to the Bank, even though this possession has been demanded of you both verbally and in writing?

Inty. Eleven: If you are not refusing to surrender possession whom did you tell that you would move out?

Inty. Twelve: Are you willing to move out now?

Elliott G. Rickarby
Attorney for Plaintiff.

STATE OF ALABAMA,
COUNTY OF BALDWIN;

Before me, the undersigned Notary, appeared this day ELLIOTT G. RICKARBY, who, being sworn says that he is attorney for the Bank of Elberta, Plaintiff in this cause, and that he believes that the answers of the Defendant to the foregoing interrogatories, if true, will be material evidence for the Plaintiff.

Elliott G. Rickarby

Subscribed and sworn to before me on this the 6th day of April, 1932.

Bernice S. Johnson

Notary Public, Baldwin County,
Alabama.

But, Plaintiff contends, Section 9011 uses the word "may" instead of "must" and as a consequence a mere permission is granted and the Section is not mandatory. The law as to when a statute is directory and when mandatory, regardless of whether the words used are permissive or imperative is settled in this State by a long line of cases culminating in the case of Board of Education of Jefferson County vs The State ex rel. Kachins, 131 So. Page 239 in which case it is said:-

"In Alabama Pine Company vs Merchants Farmers Bank of Aliceville, 215 Ala. 66, 109 So 358, correct observation is made that:-

'There is no universal rule by which directory provisions of a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the Act in relation to the subject of legislation and general object intended to be accomplished.

'Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done; that is, to matters of substance, are mandatory." 25 R. C. L. 767 #14."

It would seem that it would be impossible to find a clearer example of a mandatory statute, notwithstanding the use of the word "may", than this. The very essence of the statute is the sale of the real estate and the fixing of a place for such sale to be held. If the mortgage itself provides the place the statute has no operation; if the mortgage itself does not provide the place then the statute comes into operation and must be observed, particularly as Plaintiff admits that the law is settled; that strict compliance with the terms of the power of sale in the mortgage is necessary to validate the sale.

If his argument be sound the statute has no meaning and notwithstanding the fact that the mortgage provides for no place of sale, is silent as to the place of sale, yet the sale can be held at any Post Office in the County which the mortgagee may select.

Plaintiff argues that we are compelled to look to Section 9018 to supply the mandatory feature, but this Section has no application at all to Section 9011 and by its own terms is confined to Sections 9016, 9017 and 9018 by Section 9019. In so far as Section 9011 is concerned, it is the same as though these four sections were not in the Code at all and we are obliged to consider Section 9011 under the general rule hereinbefore announced.

There is no distinction in any of the Sections of Article Three of Chapter 320, including Sections 9010 to 9015, inclusive, between mortgages executed before the 29th day of September, 1923 and those executed after that date except in the last four paragraphs of the Article which deal with entirely different matters and are entirely foreign to the provisions of Section 9011.

Plaintiff would have it appear that the objections of the Defendant to his foreclosure and foreclosure deed turns on a question of notice. There is no question raised as to the notice in this case and while it is true that the Supreme Court has held that a failure to strictly comply with the requirements as to notice makes the sale voidable only no such decision can be found when the objection to the sale is not as to the notice but, instead, to an absolute disregard of the requirements of the statute as to where sales must be held.

True it is that if the sale is voidable only because of some defect in the notice or some other irregularity then the sale cannot be attacked collaterally but it is the contention of the Defendant that this absolute disregard of the plain requirements of the statute effectuates no mere^{ly} voidable sale but, rather, renders the pretended sale and the conveyance based upon it an absolute nullity. Any other construction will wipe out of existence Section

9011 of the Code as effectively as though it had never been written.

We repeat, therefore, that the foreclosure deed on which Plaintiff's suit is based is void, conveying no rights to Plaintiff and that as a consequence his action must fail and his Complaint be dismissed.

Respectfully submitted,

Stephen A. McQuinn
Att'y for Defr.

STATE BANK OF ELBERTA

Plaintiff.

VS

WILLIAM PETERSEN

Defendant.

NO. 9635.

L A W.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

This cause, being tried without a jury and upon an agreed statement of facts and having been submitted to the consideration of the Court upon the pleadings, statement of fact, and briefs of the parties and same having been duly considered the Court finds for the Plaintiff and that the Defendant unlawfully withholds and detains from Plaintiff the following lands:

~~The NORTHWEST QUARTER of the NORTHEAST QUARTER of Section Six, Township Eight, South of Range Five East of the St. Stephens Meridian in Baldwin County, Alabama;~~

And that the Plaintiff's damages amount to TWENTY SEVEN AND 75/100 DOLLARS.

IT IS THEREFORE CONSIDERED by the Court that the Plaintiff have and recover of and from the Defendant the possession of the lands described above and the sum of TWENTY SEVEN and 75/100 DOLLARS as damages ascertained to be due together with the costs in this behalf expended, for which execution may issue.

Done at Monroeville, Alabama, This the day of
1932.

Judge Circuit Court.

STATE BANK OF ALBERTA

Plaintiff.

VS

WILLIAM PETERSEN

Defendant.

JUDGMENT ENTRY.

Judgment Entry.

State Bank of Alberta
vs Plaintiff
William Peterson,
Defendant.

Circuit Court Baldwin
County Alabama.

this the 3rd day of September, 1932.
This cause coming on to be heard, came the ~~parties~~
parties by their attorneys, and issue being joined and it
appearing to the Court that a trial by jury has been waived
as provided by law, the Court proceeds to hear and determine
said cause, whereupon it is ordered by the Court that the
the defendant go hence without a day and have and
recover of the defendant have and recover of the Plaintiff
his costs in this behalf expended.