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1. BANK OR BUILDING AND LOAN ASSOCIATION — WHERE MORTGAGEE UNDER MORTGAGE IN DEFAULT — PROCEEDS TO PROCURE PURCHASER FOR DESCRIBED PROPERTY IN MORTGAGE — ON BEHALF OF MORTGAGOR — HAS NO INTEREST IN SUCH PROPERTY — NOT THE OWNER OF AN INTEREST IN REAL ESTATE — NOT WITHIN EXCEPTION CONTAINED IN SECTION 6373-25, SUB-PARAGRAPH a G. C.

2. STATE BANK OR BUILDING AND LOAN ASSOCIATION — MORTGAGEE UNDER MORTGAGE IN DEFAULT — NO LEGAL CAPACITY TO ACT AS BROKER TO SOLICIT PURCHASER FOR SUCH PROPERTY — MAY NOT OBTAIN LICENSE AS REAL ESTATE BROKER TO ENGAGE IN SUCH TRANSACTIONS — SECTIONS 6373-25 TO 6373-51 G. C.

SYLLABUS:

1. A bank or building and loan association which is the mortgagee under a mortgage in default, which undertakes to procure a purchaser for the property described in the mortgage on behalf of the mortgagor, has no interest in such property and, therefore, does not come within the exception contained in sub-paragraph (a) of Section 6373-25 of the General Code as being the owner of an interest in real estate.

2. A state bank or building and loan association which is the mortgagee under a mortgage which is in default, does not have the legal capacity to act as broker to solicit a purchaser for such property and may not, therefore, obtain a license as a real estate broker under the Real Estate License Law of Ohio (Sections 6373-25 to 6373-51 of the General Code) to engage in such transactions.

Coumbus, Ohio, July 6, 1944

State Board of Real Estate Examiners
Columbus, Ohio

Dear Sir:

In your request for my opinion you ask the following question:

> "If a building and loan company, a bank, who has only a mortgage on the premises and have not closed on mortgage, can they legally sell that property without a real estate license."

I assume from your request that your inquiry is concerning cases where either a bank or building and loan association being the mortgagee by virtue of a mortgage under the terms of which there has arisen a condition of default in the payment of the indebtedness secured thereby but with reference to which the lien has never been foreclosed and in which the mortgagee undertakes to sell at private sale, on behalf of the mortgagor, the mortgaged property and as to whether, under such circumstances, the mortgagee must possess a real estate license.

Two considerations arise by reason of your inquiry: First, assuming that a bank or building and loan association has the power to act as a real estate broker, must it have a license to sell properties under the conditions mentioned in your inquiry; second, whether either a bank or building and loan association has the legal capacity to engage in the

real estate brokerage business and be the possessor of a real estate license.

Section 6373-25 of the General Code defines the term "real estate broker" and contains the following language:

> "The term 'real estate broker' shall include any person, partnership, association, or corporation, foreign or domestic, who for another and for a fee, commission, or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases, or negotiates the sale, exchange, purchase, rental, or leasing of, or offers, or attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to auction, any real estate, or the improvements thereon; or who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon; or who operates, manages, or rents, or offers or attempts to operate, manage, or rent, other than as custodian, caretaker or janitor, any portion or portions of office or loft buildings to the public as tenants; or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term 'real estate broker' shall also include any person, partnership, association, or corporation employed by or on behalf of the owner or owners of lots, or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission basis or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate. * * *
>
> Neither of the terms 'real estate broker' or 'real estate salesman' hereinbefore defined includes a person, firm or corporation, or the regular salaried employes thereof, who performs any of the aforesaid acts:
>
> (a) With reference to real estate or any interest therein owned by such person, firm or corporation, or acquired on his or its own account in the regular course of, or as an incident to the management of such property and the investment therein;
>
> (b) In pursuance of a duly executed power of attorney from the owner of the real estate or any interest therein; * * *"

From the definition above set forth it is apparent that the Real Estate License law does not purport to include within the term "real es-

tate broker" a corporation selling or offering for sale real property unless such service is "for a fee, commission, or other valuable consideration" or in expectation thereof. The term "real estate broker" includes (1) one who "for another" performs such acts, (2) one who buys or sells options on real estate, and (3) one who rents or manages property. It would seem that the term does not include a person or corporation who buys property for or on behalf of himself or itself or who sells his or its own property. Such is clearly indicated by sub-paragraph (a) of Section 6373-25, above quoted.

In your request you do not specify whether the bank or building and loan association under consideration charges a commission or fee for its services in obtaining a purchaser for the property or whether it receives or hopes to receive any remuneration for such services. If the services are furnished by the bank or building and loan association without a consideration or without expectation thereof, the bank or building and loan association, under the circumstances in your letter, would not come within the scope of the definition of a "real estate broker" above quoted.

In your inquiry you appear to intimate that there is some question in your mind as to whether, after default in the terms of the mortgage, the bank or building and loan association is not the owner of an interest in the real property and, therefore, the transaction would come within the exception contained in sub-paragraph (a) of Section 6373-25, General Code.

In Ohio, at least until the default in the terms of the mortgage, the mortgage constitutes but a lien on the property described.

Phelps v. Butler, 2 Ohio 224
Rands v. Kendall, 15 Ohio 671
Fritche v. Kramer, 16 Ohio 125
Woodruff v. Robb, 19 Ohio 212
Allen v. Everly, 24 O. S. 97
Sun Fire Office v. Clark, 53 O. S. 414
Bradfield v. Hale, 67 O. S. 316

After default in the obligation secured by the mortgage, the mortgagee has two remedies for its enforcement. First, he may foreclose the

mortgage lien in an action in equity, or, second, he may enter into possession of the mortgaged property and hold possession as against the mortgagor and others by virtue of his mortgage and take the rents, fruits and profits arising from the property until they are equal to the amount due upon the mortgage indebtedness. To obtain such possession he may maintain an action in ejectment. However, when the rents, fruits and profits so retained by the mortgagee have paid the mortgage indebtedness, the right of possession by the mortgagee ceases and from such time not only the legal title, but the right of possession, is complete in the mortgagor, free from any claim of the mortgagee.

Baumgard v. Bowman, 31 O. App. 266
Anderson v. Lauterman, 27 O. S. 104
O'Donnell v. Dumm, 10 O. Dec. Rep. 48

During all times after the execution and delivery of the mortgage, the mortgagor's interest in the land may be sold and conveyed by deed and by virtue of such deed the grantee obtains complete title to the premises, subject to the mortgage. The interest of the mortgagor in the land may be sold upon execution; his spouse is entitled to dower therein; the land passes as real estate by devise; it descends to his heirs by virtue of his death as real estate; he is a freeholder because of such ownership.He may maintain ejectment to gain possession of the real estate as against any person in the world, other than the mortgagee, after default.

See: Martin v. Alter, 42 O. S. 94
Fidelity Mortgage Company v. Mahon, 31 O. App. 151

The mortgagor, either before or after "condition broken", may sell and convey his interest in the property and the grantee thereby obtains good title subject to the lien of the mortgage and even after condition broken, the mortgagor may re-mortgage the property and create a good mortgage estate in such mortgagee, subject to the rights of the prior mortgagee to enforce his lien.

On the other hand, the mortgagee has no interest in the mortgaged premises that can be reached by execution either before or after condition broken. If a creditor seeks to subject the rights of the mortgagee under the mortgage to a payment of a judgment against the mortgagee, such must be done by virtue of a creditor's bill. The mortgagee's widow has no interest by way of dower and upon his death the interest of the

mortgagee passes to his personal representative and not to his heirs at law.

When the debt to the mortgagee is paid the mortgage is extinguished, regardless of whether the payment is made before or after condition broken. The mortgagor thereupon has the title to the property free from the mortgage and holds such title not by virtue of a new title, but by virtue of the title which he always possessed. There is no occasion for a new deed. Such is true because the note, which is the principal thing, is extinguished by the payment and the incident or mortgage is extinguished by the extinguishment of that to which it is incident. See Lessee of Simon Perkins v. Dibble, 10 O. Rep. 434.

It would thus appear that the only semblance of title or ownership in the mortgagee is the right to maintain ejectment after condition broken for the purpose of subjecting the rents, fruits and profits of a mortgaged property to the payment of the obligation. Upon obtaining such possession the mortgagee has only a possessory right. He holds such possession somewhat in the nature of a trustee. He is liable to the mortgagor for the commission of waste and must account to the mortgagor concerning the rents, fruits and profits and their application to the payment of the indebtedness. His possessory right can thus never ripen into absolute ownership.

See: Anderson v. Lauterman, 27 O. S. 104
O'Donnell v. Dumm, 10 O. Dec. Rep. 48
Also article of Charles White "Ohio Theory of a Mortgage", 3 Cin. L. R. 405, which analyzes the Ohio case law on the subject.

It is, therefore, my opinion that after condition broken and before entry into possession by the mortgagee, a mortgagee is possessed only of a lien upon the mortgaged premises, plus the right to obtain possession and is not the owner of an interest in "real estate" as such term is used in sub-paragraph (a) of Section 6373-25, General Code. It is also my opinion that even after condition broken and entry into possession by the mortgagee, the only right of the mortgagee is a right of possession, plus a right to the rents, fruits and profits and that if, under such cir-

cumstances, he were then to lease the property for the purpose of producing rents, fruits or profits, he would conduct the transaction on his own behalf, rather than on behalf of the mortgagor and would not come within the definition of "real estate broker" contained in Section 6373-25, General Code. Applying such opinion to your request, assuming a bank or building and loan association has the legal capacity to act as broker, it would appear that if, being a mortgagee under a mortgage which is past due, it undertakes on behalf of the mortgagor to sell the premises for a fee, commission or other valuable consideration, it would be required under the provisions of the Ohio Real Estate License Law to obtain a license as a "real estate broker".

However, it must be borne in mind that corporations possess only the powers granted to them by their charters which consist of their articles of incorporation and the laws under which they are incorporated. Such powers are of three kinds: express powers, those expressly enumerated in the charter; inferred powers, those not expressly granted but which are necessarily inferred in order to enable the corporation to perform the purpose of its incorporation; and implied powers, those which are not expressly granted but which are reasonably necessary to enable the corporation to perform its express powers.

Banks and building and loan associations are incorporated under specific acts and not under the General Corporation Act. We must, therefore, refer to such acts for descriptions of their powers.

Section 710-2, General Code, defines a bank and in so far as corporate banks are concerned, the term "bank" includes (a) commercial banks, (b) savings banks, (c) trust companies, and (d) special plan banks. Sections 710-5 and 710-47, General Code, specify some of the powers of banks. Section 710-41, General Code, provides that a banking corporation may provide in its articles of incorporation that it may be engaged in one or more of the types of banking above enumerated. Section 710-108, General Code, defines the extent to which a bank may buy and sell real estate. Sections 710-111, 710-111(a), 710-112, 710-126, 710-140, 710-154, 710-160 and 710-180, General Code, further define the powers of the various types of banks. However, in no one of the sections above mentioned is there any grant of authority to act in an agency or brokerage capacity. Section 710-156, General Code, provides

that:

> "A trust company may receive and hold moneys, or property in trust, or on deposit from executors, adminstrators, assignees, guardians, trustees, corporations or individuals upon such terms and conditions as may be agreed upon between the parties."

Section 710-159, General Code, further provides that:

> "A trust company may act as agent, and take, accept and execute any and all trusts, duties and powers in regard to the holding, management and disposition of any property or estate, real or personal, which may be committed or transferred to, or vested in said trust estate, and the rents and profits thereof or the sale thereof, as may be granted or confided to it by any person, association, corporation, municipal or other authority; and may act as trustee under any will or deed or other instrument creating a trust for the care and management of property under the same circumstances and in the same manner, and subject to the same control by the court having jurisdiction of the same as in the case of a legally qualified person."

Section 710-158, General Code, authorizes a trust company to act as registrar and stock transfer agent of a corporation for the registry and transfer of its stocks and bonds. In all of such provisions it will be observed that the powers are of a fiduciary or trust nature, using such terms in the more restricted sense rather than in the sense of solicitation of purchasers of property.

The powers of a building and loan association are contained in the acts authorizing their creation and are much more limited than in the case of banks. See Sections 9643, 9655, 9657, 9657-1, 9660, 9660-1 and 9668, General Code. At no place in such statutes is contained any provision authorizing a building and loan association to act as an agent or broker in the acquisition or sale of real property.

In view of such conditions of the banking and building and loan statutes, it would seem that except as to a trust company acting in a trust capacity neither a bank nor a building and loan association has the power to act as broker in the sale of real property.

Specifically answering your inquiry, it is my opinion that:

1. A bank or building and loan association which is the mortgagee

under a mortgage in default, which undertakes to procure a purchaser for the property described in the mortgage on behalf of the mortgagor, has no interest in such property and, therefore, does not come within the exception contained in sub-paragraph (a) of Section 6373-25 of the General Code as being the owner of an interest in real estate.

2. A state bank or building and loan association which is the mortgagee under a mortgage which is in default, does not have the legal capacity to act as broker to solicit a purchaser for such property and may not, therefore, obtain a license as a real estate broker under the Real Estate License Law of Ohio (Sections 6373-25 to 6373-51 of the General Code) to engage in such transactions.

Respectfully,

THOMAS J. HERBERT

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