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Phillip C. Ransdell

greater clarity the rationale behind its decision, it has created numerous potential difficulties in other areas of both labor law and federal jurisdiction.

RICHARD P. WEITZMAN

Mortgages—Effect of Assignment without Assigning the Debt—Formalities Necessary to Transfer the Mortgagee's Title to the Mortgaged Property

In a recent North Carolina case,[1] *X*, *Y*, and *Z* together held a recorded mortgage. *X* and *Y* made a marginal entry on the mortgage as follows: "For value received we hereby transfer and assign the within mortgage deed from [mortgagors] to [*Z*] without recourse."[2] Concerning this assignment, the court uttered dicta to the effect that: (1) The assignment sufficed to transfer only the debt which the mortgage had been given to secure, and (2) The assignment did not pass any title to the *land*. *Z* later conveyed the mortgaged land to a third party by warranty deed. Concerning this conveyance, the court in a dictum stated that the grantee in the warranty deed became a mere trustee chargeable with a duty and responsibility to both the owner of the equity of redemption and the owner of the debt secured by the instrument. The court did not elaborate on any of these dicta and it is the purpose of this Note to examine the validity thereof.

The statement that the assignment sufficed to transfer the debt only seems to assume that it was sufficient to transfer the debt. No authority for that assumption was cited. It seems to be well settled in North Carolina that an assignment of the debt draws with it the mortgage.[3] But there seems to be a dearth of authority in North Carolina as to the effect of assigning a mortgage without transferring the debt also. One

[1] Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

[2] The plaintiff in this case claimed title through various conveyances of the mortgaged land beginning with a deed from *Z* to a third party. The defendants claimed title under a deed from the original mortgagors which was executed about thirty years after the mortgage. The defendants contended that the land was free from the mortgage since no one had filed an affidavit or made a marginal entry on the mortgage showing that the debt was alive within fifteen years after due date of the secured debt as is required by N.C. GEN. STAT. § 45-37(5) (1950), which accordingly creates a conclusive presumption in favor of a purchaser of the land that the debt is satisfied. The plaintiff contended that the statute was unconstitutional since it was retroactive in effect and thus impaired the obligation of the mortgage. The court dismissed the plaintiff's appeal on the grounds that he was not an aggrieved party since the statute concerned only the holder of the secured debt and the plaintiff did not claim to hold the debt. The court also said the statute was not unconstitutional since the owners of debts affected by the statute were given one year after enactment of the statute to comply with its provisions.

[3] Citizens' Savings Bank & Trust Co. v. White, 189 N.C. 281, 126 S.E. 745 (1925); Hussey v. Hill, 120 N.C. 312, 26 S.E. 919 (1897); Hyman v. Devereux, 63 N.C. 624 (1869). However, the court stated in the principal case that the transfer of a note secured by a mortgage does not transfer title to the mortgaged property nor the power of sale nor the right to release the mortgage.

case was found where the court stated that an endorsement on the mortgage would not convey the debt.[4] But in a case involving a chattel mortgage, the court stated that an assignee of a chattel mortgage acquires an " 'interest in the debt secured and the property pledged, which courts of law as well as courts of equity, will recognize.' "[5] There does not seem to be any reason for giving different effect to an assignment of a chattel mortgage and a mortgage on real property so far as transferring the debt is concerned.

The courts in other jurisdictions seem to be in conflict on the point. One court flatly stated that an assignment of the mortgage alone and separate from the note it was given to secure would not transfer the note unless it was in fact delivered.[6] Where a mortgage securing a negotiable note is assigned to one, and the note negotiated to another, it has been held that the assignment of the mortgage did not carry title to the note and that the assignment of the mortgage alone was a nullity.[7] In one case a mortgagee assigned the mortgage but kept the secured notes, and the court held that the assignee acquired only a bare legal title to the land to hold in naked trust for the owner of the debt.[8] Notwithstanding these dogmatic statements, it is believed that most courts, in equity, will decree that the mortgage debt is transferred where such was the intention of the parties.[9] Where there is no bond or note given as evidence of the indebtedness, there is some authority that an assignment

[4] Hodge v. Hudson, 139 N.C. 358, 359, 59 S.E. 954, 955 (1905). This case is weak authority on the point because the court merely ruled that the endorsements on the mortgage were properly excluded from evidence. The case did not indicate what language was endorsed on the mortgage. The defendant was attempting to prove he had bought the mortgage debt. The court said: "The mortgage note was not produced, the alleged endorsements on the mortgage would not have conveyed the debt, nor the property (for title in the endorsers was not shown), and it does not appear that the signatures of the alleged endorsers were proven." *Ibid.*

[5] Hodges v. Wilkinson, 111 N.C. 56, 63, 15 S.E. 941, 943 (1892). The assignment stated: "Value received, I hereby transfer this mortgage to [*X*]." The court ruled that this assignment was admissible into evidence to show superior title to the mortgaged property in *X*.

[6] *In re* Tobin's Estate, 139 Wis. 494, 121 N.W. 144 (1909).

[7] Rockford Trust Co. v. Purtell, 183 Ark. 918, 39 S.W.2d 733 (1931); Connally v. State, 90 Tex. Crim. App. 284, 234 S.W. 886 (1921).

[8] Averill v. Cone, 129 Me. 9, 149 Atl. 297 (1930). The assignment was without consideration, but the court made no point of this.

[9] Union Bank and Trust Co. v. Thompson, 202 Ala. 537, 81 So. 39 (1919); Hawkins v. Elston, 58 Cal. 400, 146 Pac. 254 (1915); Bank v. Dyer, 121 Conn. 263, 184 Atl. 386 (1936); Parks v. Skipper, 164 Md. 388, 165 Atl. 319 (1933); Geffen v. Palatz, 312 Mass. 48, 43 N.E.2d 133 (1942); Brown v. Yarborough, 130 Miss. 715, 94 So. 887 (1923); Merritt v. Bartholick, 36 N.Y. 44 (1867); Campbell v. Birch, 60 N.Y. 214, 218 (1875) (dictum).

But if the evidence of the debt were in the hands of another party, or was later sold to another party, the intention to assign it with the mortgage would be ignored. Literer v. Huddleston, 52 S.W. 1003 (Tenn. App. 1898). Where the mortgagee assigned the mortgage and a duplicate of the note secured thereby to *D*, and transferred the original note to *E* to secure a debt of the mortgagee to *E*, the court held that title to the mortgage and note vested in *D* subject to the lien of *E* but was complete against all other persons. Miller v. Hicken, 92 Cal. 229, 28 Pac. 339 (1891).

of the mortgage will also transfer the debt even though there is no evidence, other than assignment of the mortgage, that such was the intention of the parties.[10]

It is submitted that the intention of the parties should control even where there is a separate instrument embodying the debt if the rights of innocent third party transferees of the note or bond evidencing the debt would not be injured thereby. Also, such an intention should be presumed from the assignment of the mortgage because it is surely more logical to presume that the parties intended for the assignment to have legal effect than for it to be a nullity or a mere trust without substantial interest in the assignee.[11] A fortiori, such a presumption should be made where the mortgage is the only written evidence of the indebtedness.

The second point of dictum in the principal case raises the question as to why the assignment did not pass title to the land. It is well settled that North Carolina is a "title" jurisdiction, *i.e.*, a mortgagee acquires legal title to the mortgaged property.[12] Therefore, a mere assignment of the mortgagee's right, title, and interest in the mortgage will not transfer the legal title to the subject-matter of the mortgage. Such an assignment merely transfers the mortgage deed, the written instrument of conveyance, and the security it affords to the holder of the debt.[13] The assignment in the principal case seems to fall clearly within this rule since the assignment mentioned only the mortgage and said nothing of the mortgaged property. However, an assignment written on the mortgage may convey the legal title to the land when it purports to act on the land itself.[14]

[10] Carpenter v. O'Dougherty, 67 Barb. 397, 399 (N.Y. 1873) (dictum). In this case there was some question as to whether there had been a bond given as evidence of the secured debt. The court found that a bond had been given but stated that if there had been no bond, the mortgage would have been the principal and only security and the only evidence of indebtedness, and that an assignment of the mortgage would give the assignee a good title thereto. To the same effect, see Earl v. Stumpf, 56 Wis. 50, 52, 13 N.W. 701, 702 (1882). However, in this case, the court also said: "The intention of the mortgagees to assign an interest in the mortgage debt being clear, we apprehend the same result would follow had the mortgagees held a note, or an obligation of the mortgagor other than the mortgage, for such debt." *Ibid.*

[11] OSBORNE, MORTGAGES § 226 (1951).

[12] Lewis v. Nunn, 180 N.C. 159, 104 S.E. 470 (1920); Kiser v. Combs, 114 N.C. 640, 19 S.E. 664 (1894).

[13] Hussey v. Hill, 120 N.C. 312, 26 S.E. 319 (1897); Williams v. Teachey, 85 N.C. 402 (1881). The assignment in the latter case read: "For value received I sell and transfer to [*X*] all my right, title, and interest in and to the following mortgages . . . ." No mention was made of the mortgaged property.

[14] *In re* Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921). The assignment of the mortgage was in these words: "I hereby transfer and assign all my right, title, and interest and estate in and to the within mortgage and the property conveyed therein to . . . ." The court held that the assignment transferred the mortgaged property. Thus it seems that the formalities of a deed are necessary for an assignment of a mortgage to be effective as a transfer of the legal title to the mortgaged land. Where a seal is not required, the formalities seem to be merely a writing, signed by the holder of the legal title, purporting to transfer the assignor's interest in the land with a reference to the description of the

The third point of dictum in the principal case is related to the attempted conveyance of the mortgaged property by *Z*, who was the assignee of the mortgage and also one of the mortgagees. The court stated that conceding that one of the joint tenants had the right to convey his interest in the land which was held as security for the debt, his grantee becomes a mere trustee chargeable with a duty and responsibility to both the owner of the equity of redemption and the owner of the debt secured by the instrument. Once it is conceded that the deed was sufficient to transfer *Z*'s legal title, and his legal title only, the court seems correct in saying the grantee would hold it in trust.[15] However, there seems to be some question as to whether the bare legal title of the mortgagee can be conveyed without also transferring the debt.[16] Assuming that such a conveyance is possible in North Carolina, as the court does, why did the court not say that the grantee acquired an interest in the secured debt in proportion to the interest he acquired in the mortgaged property, namely one-third? In the first point of

mortgaged land in the mortgage. See also Weil v. Davis, 168 N.C. 298, 84 S.E. 395 (1915), where the court found that the general scope of the assignment indicated an intention to part with everything; therefore, title to the land passed to the assignee. The court stated that it was a problem of construing the assignment so as to arrive at the intention of the parties, the form of the expression being immaterial. *But see* Morton v. Lumber Co., 154 N.C. 336, 339, 70 S.E. 623, 624 (1911), where the assignment stated: "For value received, The Farmers and Merchants Bank hereby bargains and sells to J. A. Morton, his heirs and assigns, this mortgage and all its right, title, and interest to the property described therein, together with all rights and powers contained in said mortgage, without recourse to said bank." The court held that the assignment was not a deed because it lacked the corporate seal. The court further said that even if the assignment had been sealed, legal title to the mortgaged land would not pass because the assignment did not in terms profess to act on the land. The court gave no explanation as to why it considered the assignment as not purporting to act on the land. This dictum seems to be *contra* to the holding in *In re* Sermon's Land, *supra*. Moreover, the court stated that this assignment was in terms very similar to that in Williams v. Teachey, *supra* note 13. The terms of the assignments in the two cases seem to be clearly different.

[15] Where a mortgagee assigned the secured note and the mortgage, but retained legal title to the mortgaged property, the court held that the mortgagee held the legal title in trust for the owner of the debt and equity of redemption. Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903). By analogy, when the mortgagee conveys only the bare legal title to the mortgaged property, the grantee would hold the legal title in trust.

[16] Two North Carolina cases were found concerning the effect of a deed by a mortgagee of only the mortgaged property. One case stated that no estate will pass by such a deed unless the debt is transferred at the same time, though in some cases such a conveyance may operate as an assignment of the mortgage. Stevens v. Turlington, 186 N.C. 191, 194, 119 S.E. 210, 211 (1923) (dictum). The other case stated flatly that a conveyance by the mortgagee, except under foreclosure, merely operates as an assignment of the mortgage as distinguished from an assignment of the mortgage debt. Cleve v. Adams, 222 N.C. 211, 214, 22 S.E.2d 567, 569 (1942) (dictum). Neither of these cases have been subsequently cited for the point. Collins v. Davis, *supra* note 15, is good authority for the point that the legal title to the mortgaged property may be separated from the secured debt. Thus it seems that the dictum in the two cases above is not well considered and that bare legal title to the mortgaged property could be conveyed without a transfer of the secured debt or an assignment of the mortgage.

dictum the court stated that the assignment of the mortgage sufficed to transfer the debt, so why should a transfer of a mortgagee's interest in the mortgaged property not have the same effect? No North Carolina cases on this point were found. The courts in other jurisdictions adopt various views. One view is that the grantee acquires at least an equitable right to the secured indebtedness.[17] Another view is that the grantee acquires the secured indebtedness only if the mortgagee was in possession of the mortgaged property at the time he executed the deed.[18]

It is submitted that the better view is to give effect to the intention of the parties where such can reasonably be done. Normally, it seems the intent would be to transfer all the mortgagee's interest in the property and the debt, else the grantee would receive nothing of value. However, where the mortgagee has transferred the secured debt to a third party for value and then conveys the mortgaged property, the grantee of the mortgaged property would have to suffer for his own negligence or ignorance of the facts.[19]

PHILLIP C. RANSDELL

Partnerships—Liability of Partners—Marshalling Assets

The law in North Carolina relative to the rule of marshalling assets for the benefit of firm and individual creditors is somewhat uncertain. Before the Uniform Partnership Act[1] was passed in 1941, the court held in *Virginia-Carolina Chemical Co. v. Walston*[2] that the firm creditor did not have to exhaust the firm assets before reaching the individual assets of the partners. The firm was in the hands of receivers who were in the process of settling the affairs of the business. Partner *A* had died, thus dissolving the partnership. Partner *B* was insolvent and the firm owed some $62,000, of which $12,500 was owed to the Chemical Company. *A*'s personal estate was valued at $9,000, with $3,000 outstanding personal debts against it. The Chemical Company sought to share in the personal assets of *A* along with the open unsecured creditors of the personal estate. The trial court held that the Chemical Company could share in the individual assets of *A* only to the extent of the balance unpaid after all dividends from the firm assets had been received. From this ruling the Chemical Company appealed and the court, looking to C.S. § 3259,[3] reversed the holding of the lower court.

[17] Sadler v. Jefferson, 143 Ala. 669, 39 So. 380 (1905); Hawkins v. Elston, 58 Cal. 400, 146 Pac. 254 (1915).
[18] Wyman v. Porter, 108 Me. 110, 79 Atl. 371 (1911).
[19] For a general discussion of this problem, see Ross, *The Double Hazard of a Note and Mortgage*, 16 MINN. L. REV. 123 (1932).

[1] UNIFORM PARTNERSHIP ACT, N.C. GEN. STAT. §§ 59-31 to 59-89 (1950).
[2] 187 N.C. 817, 123 S.E. 196 (1924).
[3] N.C. CODE ANN. § 3259 (Michie 1935). The statute provided in part: