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mortgage wholly covers the mortgaged land, as distinguished from a mortgage of an undivided interest. The only case in point,⁶ not cited by court or counsel in the Layton case, reaches a contrary result, applying the tenant in common rule denying the mortgagee's assignees the right to share in the improvements, and logic at least seems to support that holding. If *A*, the mortgagor, had retained his equitable title, as co-tenant he could not have shared in the improvements on partition, nor could *T* as mortgagee claiming under him.⁷ Should the fact that the improver has purchased the interest of *A* increase the rights of the mortgagee? Could it not be strongly argued that there was a tenancy in common at the time the improvements were made? Since undeniably *T* was a legal tenant in common by virtue of his holding legal title, it seems that the tenant in common rule could be applied as against *T*.

J. G. ADAMS, JR.

Municipal Corporations—County Bonds—Effect of Thirty Day Limitation on Validity of Bond Ordinance

The County Finance Act of North Carolina provides, among other things, that “. . . no order shall be passed (by any county) for the issuance of bonds other than school bonds unless it appears from said sworn statement (order) that the net indebtedness for other than school purposes does not exceed five per cent of said assessed valuation (of the county). . . .”¹ It further provides, that the validity of a bond order shall not “be open to question in any court upon any ground whatsoever,” unless the proceeding shall be commenced “within thirty days after the first publication of notice” of the bond order.² In *Kirby v. Board of Commissioners of Person County*,³ a bond ordinance was adopted by the board of commissioners authorizing the issuance of bonds for court house and jail purposes. The amount of this bond order raised the total indebtedness of Person County above five per cent of its assessed valuation. Some ninety days after notice of the bond order had been published, the

⁶ The defendant purchased all the shares of several co-tenants in land and erected improvements believing himself to be sole owner. The plaintiffs, assignees of the holder of a prior mortgage on the share of one co-tenant, sue to foreclose. *Annely v. DeSaussure*, 17 S. C. 394 (1881).

⁷ Note (1926) 41 A. L. R. 621; *Annely v. DeSaussure*, *supra* note 6.

¹ N. C. Code (Michie, 1927) §1334 (17).

² N. C. Code (Michie, 1927) §1334 (20).

³ 198 N. C. 440, 152 S. E. 165 (1930).

plaintiff instituted an action to restrain the commissioners of said county "from proceeding further in the issuing and sale of said court house and jail bonds and from levying said tax," because the issue exceeded the five per cent limitation. The Supreme Court of North Carolina held that "after the lapse of thirty days, if no suit had been instituted, the bond ordinance is deemed to be valid for all purposes." The broad language of this thirty day statute of limitation raises the question whether it extends to every defect which might possibly occur in the issuance of bonds under the Finance Act.

One of the main objects of the Finance Act was to raise the credit standing of the counties by creating a uniform system of issuing bonds and other instruments for obtaining money and of providing the means of paying therefor. The statute of limitation was inserted in the Act for the purpose of insuring the ready marketability of county bonds by precluding any attack upon the validity of the bonds after thirty days from publication of notice of bond orders.⁴ It is doubted, however, if the curative effect of this provision is as broad as its language would seem to indicate, namely, that a bond order shall not "be open to question in any court upon any ground whatsoever" after thirty days from publication of notice. For, although the failure to attack a bond order within the prescribed period would admittedly validate the bond issue as to any statutory defects,⁵ it ought not to apply to constitutional defects.

⁴ The County Finance Act and the County Fiscal Control Act were both passed in 1927, at which time the financial status of several of the counties was deplorable. County debts were growing larger year by year and from administration to administration. Consequently, their credit standing was lowered. Also, these debts had to be paid. The Finance Act in providing for the funding and refunding of county debts remedied the situation as it then existed. The Fiscal Control Act, in requiring a yearly budget by each county of its expenditures, sought to prevent a recurrence of county deficits as existed prior to 1927.

The Finance Act, after setting forth certain purposes for which bonds may be issued, provides, in general, the following procedure which a county must comply with in issuing bonds: (1) The county commissioners must first introduce a resolution to issue bonds. This is known as an "order," and it cannot be passed at the meeting at which it is introduced. (2) This order shall state: (a) the purpose for which the bonds are to be issued; (b) the amount of the bonds; (c) that a tax sufficient to pay off these bonds, when due, shall be annually levied and collected; (d) that a statement of the county debt has been filed with the clerk, and is open to public inspection; (e) "and a clause stating the conditions upon which the order will become effective, and the same shall become effective in accordance with such clause, which clause shall be as follows:" [see N. C. Code (Michie, 1927) §1334 (9)].

⁵ The General Assembly of North Carolina has the power over and control of taxation in the state (Art. II, §14, Const. of N. C.), thus, the Assembly may provide, in any way it deems wise, for the issuance of bonds by counties and prescribe the conditions upon which they shall become effective—so long

That is to say, the failure of the order to comply with any constitutional provision might be urged in attacking the validity of the bonds, at any time. For example, where the authority to issue bonds is not given in accordance with the constitutional provision, or where bonds are issued for other than necessary purposes, a vote of a majority of all the registered voters is required by the Constitution.⁶ The Finance Act, in compliance with the Constitution, requires that "if the bonds are for a purpose other than the payment of necessary expenses, . . . the order shall take effect when approved by the voters of the county. . . ."⁷ Suppose then, that a bond order stated that the bonds were to be issued for a necessary purpose, and was therefore not submitted to a vote of the people, when, in fact, the purpose for which they were issued was not a necessary one at all. To validate the bonds in the face of such a defect by holding that "after the lapse of thirty days, if no suit had been instituted, the bond ordinance is deemed to be valid for all purposes," would be to uphold a statutory enactment in direct contravention of a constitutional limitation.⁸

It is conceded that in the instant case plaintiff's failure to object within thirty days was fatal because the objection was based upon a statutory defect. It is submitted, however, that when the Supreme Court is called upon to review an attack on a bond issue which is based upon a failure to comply with some constitutional provision, the thirty day statute of limitation, as provided for in the Finance Act, will be held not to apply. It would seem that such a result was contemplated by the legislature, for the Finance Act provides that "every provision of this act shall be construed as being qualified by constitutional provisions whenever such construction shall be necessary in order to sustain the constitutionality of this act."⁹

J. FRAZIER GLENN, JR.

as such legislative action is in accordance with the constitutional limitations (Art. VII, §7, Const. of N. C.). See, *Com'rs v. Smuggs*, 121 N. C. 394, 28 S. E. 539 (1897); *Claybrook v. Com'rs*, 114 N. C. 453, 19 S. E. 593 (1894).

⁶ Const. of N. C., Art. VII, §7.

⁷ N. C. Code (Michie, 1927) §1334 (9).

⁸ "In the absence of special constitutional restriction, the legislature may confer the taxing power upon municipalities in such measure as it deems expedient—in other words, with such limitations as it sees fit, as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons, business and property) which shall be subjected to taxation; but it cannot, of course, confer greater power than the state itself possesses, and it must observe the restrictions and limitations of the organic law." DILLON, *MUNICIPAL CORPORATIONS* (5th ed.), §1376 (640); *Ex parte Montgomery*, 64 Ala. 463 (1879).

⁹ N. C. Code (Michie, 1927) §1334 (3).