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give traffic on a through highway the right of way[7] and prevent just what happened in this case—a car turning from a side road into a highway immediately in front of a car thereon. The court says, ". . . the object of the statute is not to delay or impede travel. . . ." This is no doubt true. In fact, it is probable that the legislature was seeking to speed up travel. But it is also probable that it had in mind travel on the main highway.

If it be admitted that the purpose of the statute was to give traffic on main highways the right of way, the instant situation then becomes similar to that in the New York case of *Shirley v. Larkin Co.*,[8] in which *X* entered an intersection immediately in front of *Y*, who had the right of way. The court there said that in disregard of the statute, *X* "recklessly went on when it was his duty to wait for the other car" and "precipitated the accident."

It is a familiar rule of bailments that when a carrier has deviated from his proper course, and goods in his possession have been damaged, ". . . he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done."[9] It is interesting to speculate as to what would be the result if a rule analogous to this were applied in situations like the present one, and a defendant were required to show that compliance with the statute would not have prevented the result complained of instead of the prosecution being required to show that compliance would have prevented such result.[10]

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## Damages—Measure of Recovery on Dissolution of Injunction Restraining Foreclosure Sale

A recent North Carolina case raises the interesting question as to the measure of damages that should be allowed to a defendant who has been restrained from selling land under a power contained in a deed of trust.[1]

[7] See Roe v. Kurtz, 203 Iowa 906, 210 N. W. 550 (1926).

[8] 239 N. Y. 94, 145 N. E. 751 (1924). A fact situation very similar to the instant case is involved in Lasene v. Syvanen, 123 Ore. 629, 263 Pac. 59 (1928). But *cf.* Teissier v. Stewart, 11 La. App. 164, 123 So. 174 (1929).

[9] Davis v. Garrett, 6 Bing. 716 (1830).

[10] In Conrad v. Springfield Con. Ry. Co., 240 Ill. 12, 88 N. E. 180 (1909) it is said that one charged with a tort resulting from violation of an ordinance may show *in defense* that compliance would not have prevented the injury complained of.

[1] Gruber v. Ewbanks, 199 N. C. 335, 154 S. E. 318 (1930).

In North Carolina, an undertaking is required as a condition precedent to obtaining a restraining order or an injunction "to the effect that the plaintiff will pay to the party enjoined such damages . . . as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it."[2] Subject to certain limitations to be set forth, the injunction defendant may recover all damages which are the natural and proximate results of the wrongful issuance of the injunction. In the situation where a mortgagee is restrained from selling land under the mortgage, one of the chief elements of damage is loss of security. Any such loss may be recovered provided that the amount realized, or to be realized at the sale, is inadequate to satisfy the mortgagee's interest—i. e., the debt, interest thereon to the time of sale, and costs.[3] The language used by most courts in prescribing the measure of damages for loss of security is loose and ambiguous.[4] It seems that any diminution in value occurring between the time the sale would have taken place but for the injunction and the time it actually has or, in the exercise of due diligence after the dissolution, should have taken place is a result of the injunction. Accordingly, recovery should be allowed for the difference between the amount actually realized, or to be realized, at the later sale and what would have been realized at the one enjoined.[5] The postponement of the sale has delayed the mortgagee in the receipt of money which he was entitled to. He should thus recover interest on the money he would have received at the enjoined sale until the time of the actual sale[6] and interest on the difference between the

[2] N. C. ANN. CODE (Michie, 1927) §854; Davis v. Champion Fiber Co., 175 N. C. 25, 94 S. E. 671 (1918) (Held damages might be recovered where there was a partial dissolution of the injunction.).

[3] Fidelity and Deposit Co. of Md. v. Walker, 158 Ala. 129, 48 So. 600 (1909); Schening v. Cofer, 97 Ala. 726, 12 So. 414 (1893); Foster v. Goodrich, 127 Mass. 176 (1879); Edwards v. Bodine, 4 Edw. Ch. 292 (N. Y. 1843).

[4] Hill v. Thomas, 19 S. C. 230 (1882) (during delay of the sale); Belmont Mining Co. v. Costigan, 21 Colo. 465, 42 Pac. 650 (1895) (from issuance to dissolution); Gibson v. Reed, 54 Neb. 309, 75 N. W. 1085 (1895) (during the time the injunction is in force); Meysenburg, Trustee for Sternberger v. Schlieper, 48 Mo. 426 (1871) (during the time the sale is suspended).

[5] This diminution in value may be caused by any of several things. Gibson v. Reed, *supra* note 4 (depreciation in value of the property); Osage Oil Refining Co. v. Chandler, 287 Fed. 848 (C. C. A. 2nd, 1923) (decline in value of stock); Aldrich v. Reynolds, 1 Barb. Ch. 613 (N. Y. 1846) (removal of emblements); Moore v. Maryland Casualty Co., 280 Pac. 1008 (Cal. 1929); De St. Aubin v. King, 209 Ill. App. 419 (1918); White v. Brooke, 11 Wash. 99, 39 Pac. 237 (1895) (sale of property under another mortgage).

[6] Hill v. Thomas, *supra* note 4; Johnson v. Moser, 72 Iowa 654, 34 N. W. 459 (1887); Holthaus v. Hart, 9 Mo. App. 1 (1880); Aldrich v. Reynolds,

two amounts from the time of the actual sale until the time of judgment on the injunction bond.[7] When the mortgagee is entitled to receive the rents and profits of the land as additional security and is restrained from collecting these, the reasonable value thereof should be allowed during the period of restraint.[8]

Other items of damage not dependent upon injury to the mortgagee's interest and unrestricted by the limitation that no more than the debt, interest and costs may be recovered, are allowed. These include the cost of the enjoined sale[9] and the reasonable value of the use of the land where the mortgagee can prove to a reasonably certain degree that he would have purchased at the enjoined sale.[10] North Carolina refuses recovery for attorney's fees[11] and expenses[12] incurred in obtaining a dissolution of the injunction. But these items are permitted by a majority of the states.[13]

*supra* note 5; Pepper v. Dunlap, 19 La. 491 (1841) (no recovery for interest on notes falling due after the injunction issues); Belmont Mining and Milling Co., *supra* note 4 (error to allow interest on whole debt in the absence of a showing that the property would have brought as much).

[7] Aldrich v. Reynolds, *supra* note 5.

[8] Schening c. Cofer, *supra* note 3 (recoverable if debt is not satisfied by the sale); Metz v. Brodfuehrer, 214 Ill. App. 458 (1919) (reasonable rental value and not amount of rents actually received); Curry v. American Freehold Land Mortgage Co., 124 Ala. 614, 27 So. 454 (1900) (no recovery because a receiver could and should have been appointed to collect the rents).

[9] De St. Aubin v. King, *supra* note 5; Edwards v. Bodine, *supra* note 3; Alliance Trust Co. v. Stewart, 115 Mo. 236, 21 S. W. 793 (1893).

[10] Belmont Mining and Milling Co. v. Costigan, *supra* note 4 (court willing to assume claimant would have bought in the absence of proof that others would have, but not allowed because no evidence of the value of possession); Holthaus v. Hart, *supra* note 6 (as purchaser at the foreclosure sale he might have demanded the rent at once); Johnson v. Moser, *supra* note 6 (no recovery because the sale did not take place and it is impossible to know who would have bought); Bullard v. Harkness, 83 Iowa 373, 49 N. W. 855 (1891) (too speculative).

[11] Midget v. Vann, 158 N. C. 128, 73 S. E. 801 (1912). The federal courts and a respectable minority of the states also refuse recovery for this item. Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43 (1872); Note (1927) 55 A. L. R. 452. The leading North Carolina case, Hyman v. Devereaux, 65 N. C. 588 (1871), permits recovery for counsel fees fixed by statute at that time, but refuses to allow them if fixed by the parties.

[12] Midget v. Vann, *supra* note 11 (refusing recovery for expenses in attending the hearing on the injunction); Gruber v. Ewbanks, *supra* note 1 (refusing the expense of obtaining the presence of a non-resident witness).

[13] Permitting recovery for counsel fees: Jesse French Piano and Organ Co. v. Porter, 134 Ala. 302, 32 So. 678, 92 AM. ST. REP. 31 (1902); Burglass v. Villere, 129 So. 209 (La. 1930); Oklahoma Cotton Growers Ass'n v. Hooven, 272 Pac. 852 (Okla. 1928); Aldrich v. Reynolds, *supra* note 5. Permitting recovery for reasonable expenses: Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926) (expenses in preparing for and attending trial); Alliance Trust Co. v. Stewart, *supra* note 9 (cost of taking a deposition out of the state); Bartram v. Ohio and B. S. Ry. Co., 141 Ky. 100, 132 S. W. 188 (1910) (refusing value of time spent in attending trial but allowing traveling expenses).

In all cases where malice or want of probable cause is absent, no liability exists apart from the injunction bond and recovery is limited to the penal sum thereof.[14] In North Carolina, the judgment dissolving the injunction carries with it a judgment for damages against the parties procuring it and the sureties on the undertaking, to be ascertained by reference or otherwise as the judge directs.[15] But there can be no assessment of damages until the final determination of the cause in which the injunction is obtained.[16] A motion for damages must be made at or before the time the final judgment is entered and no separate action can be maintained upon the bond.[17] This procedure raises difficult problems where a foreclosure sale is restrained and the injunction continues until the final adjudication. In such cases it will be necessary to assess damages before there can be a sale. It must be shown that the debt, interest, and costs will not be realized on a sale and that the value of the security has been impaired. An actual sale is the easiest and most reliable way to establish this. The difficulty is obviated by permitting a separate action on the bond after the sale has taken place.[18]

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**Equity—Injunction to Prevent Garnishment of Wages—Effect of Usury**

In a recent Georgia case,[1] a wage earner sought an injunction against the enforcement of a "sale of wages" given as a security for a loan alleged to have been usurious, on the ground that the plaintiff would lose his job if garnishment proceedings were brought. The

[14] 10th Ward Rd. District v. Texas and Pac. Ry. Co., 12 F. (2d) 245; 45 A. L. R. 1513 (C. C. A. 5th, 1926); Mark v. Hyatt, 135 N. Y. 306, 31 N. E. 1099; 18 L. R. A. 275 (1892); McAden v. Williams, 191 N. C. 105, 131 S. E. 375 (1926); Nausemond Timber Co. v. Rountree, 122 N. C. 51, 29 S. E. 61 (1898).

[15] N. C. ANN. CODE (Michie, 1927) §855.

[16] Raleigh and Western Ry. Co. v. Glendon and Gulf Mining and Manufacturing Co., 117 N. C. 191, 23 S. E. 181 (1895); Thompson v. McNair, 64 N. C. 448 (1870) (an injunction is an ancillary remedy and until the final determination of the cause, it cannot be said as a matter of law that the order was not rightfully obtained).

[17] Crawford v. Pearson, 116 N. C. 718, 21 S. E. 561 (1895); Shute v. Shute, 180 N. C. 386, 104 S. E. 764 (1920). See McCall v. Webb, 135 N. C. 356, 365, 42 S. E. 802, 805 (1904).

[18] Okla. Cotton Growers Ass'n v. Hooven, *supra* note 13; Belmont Mining Co. v. Costigan, *supra* note 4; Gibson v. Reed, *supra* note 4. In the absence of a statute permitting damages to be recovered in the same action, they cannot be allowed. Chicago, R. I. & P. Ry. Co. v. Dey, 76 Iowa 278, 41 N. W. 17 (1888); American Bonding Co. v. State, 120 Md. 305, 87 Atl. 922 (1913).

[1] Lawrence v. Patterson, 153 S. E. 29 (Ga. 1930).