Credit Transactions -- Mortgages and Deeds of Trust -- Application of Statute of Limitations to Promise of Assuming Grantee

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Fortunately, litigation involving failure to obtain the necessary consent is rare. As a matter of policy, many corporations ask for shareholder approval when an important disposition is made, regardless of whether consent is required. Obviously, this policy is desirable, and the fact that consent is granted does not affect a subsequent claim for appraisal rights. Unfortunately, shareholder approval is not always possible. In such situations, the directors should have the power to make necessary dispositions, unless the sale, not in the furtherance of the actual business of the corporation, destroys the corporation's ability to continue its present operations. Such an approach reaches the desired practical balance between protecting the shareholder's investment and having an efficient centralized management.

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Credit Transactions—Mortgages and Deeds of Trust—Application of Statute of Limitations to Promise of Assuming Grantee

Debtors gave notes secured by deeds of trust on certain realty. Seven years thereafter, during which period no payments of either principal or interest had been made on the obligations, the equity of redemption in the land was conveyed to grantee who thereupon executed an instrument acknowledging that the land was encumbered by the deeds of trust, that no payments had been made to date, and further that he agreed "to pay the full sum of both notes . . . together with all accrued interest thereon." This instrument was attached to the notes and deeds of trust found among the valuable papers of the creditor after his death. Five years after the conveyance to the grantee, there still having been no payments on the obligations, the defendant trustee attempted to exercise the power of sale contained in the first of the deeds of trust, and this action was instituted by debtors and their grantee to restrain such foreclosure. The North Carolina Supreme Court, in Lowe v. Jackson, affirmed the trial court's judgment granting the injunction. The grantee's

338 (1961); Garvin v. Pythian Mut. Industrial Ass'n, 263 S.W.2d 114 (Ky. 1953) (lapse of fourteen years).


1 Lowe v. Jackson, 263 N.C. 634, 635, 140 S.E.2d 1, 2 (1965).

2 263 N.C. 634, 140 S.E.2d 1 (1965).
agreement to assume the indebtedness was not a novation of the notes and deeds of trust; thus, exercise of the power of sale was barred by the ten year statute of limitations, there having been no payment to interrupt the running of the period.

The case presents the interesting and perplexing question: should the promise of assumption made by a grantee of encumbered lands be sufficient to start anew the running of limitations against him and the security in his hands, even though the circumstances fall short of a novation? The answer, in the vast majority of jurisdictions which have considered the question, has been in the affirmative. As put by Professor Osborne:

Although a grantee should not be able to bind the mortgagor by any acts which have the effect of extending or reviving the statute of limitations, he clearly should be able to and can bind himself and the property he acquired. If he is an assuming grantee his act will affect his personal liability as well as the time within which the mortgage can be enforced against the property. Indeed, the very act of assuming or of taking subject to the mortgage is one which starts a new period of limitations so far as rights against the grantee [are concerned].

While the indicated result seems generally accepted, there has been disparity in the rationale given by the courts. Some have held that the assuming grantee is estopped to assert the lapse of that portion of the period which occurred prior to the conveyance. The better-reasoned cases, however, have relied upon the principle that the liability of the grantee arises from an agreement independent of that between the grantor and the creditor, and that limitations obviously cannot begin to run on liability before that liability is created.

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9 OSBORNE, MORTGAGES § 299, at 859 (1951).


In North Carolina, as in most other jurisdictions, the law in the fields of limitation and foreclosure is largely statutory. Of primary concern in this state are sections 1-47(3) and 45-21.12 of the General Statutes. The first of these provides that actions for foreclosure must be brought within ten years "after the forfeiture of the mortgage, or after the power of sale has become absolute, or . . . after the last payment on the same." Since it was held for many years that foreclosure under a power of sale was not an "action" within the meaning of this statute, section 45-21.12 was enacted providing that the right to exercise any power of sale is barred where a corresponding "action" would have been barred.

The court in the principal case first concluded that there was no novation of the mortgage contract. This had been determined by the trial court, and no exception had been taken thereto by the defendant. Quoting from Strong's North Carolina Index, the court said: "A debt assumption agreement by the purchaser of the equity of redemption is not a novation of the mortgage note, there being no element of a further consideration passing between the parties or a substitution of a new for an old or subsisting debt." Then, applying the statutes discussed above, it was concluded that "the right to exercise any power of sale contained in a deed of trust is barred after ten years from the maturity of any note or notes secured thereby, where no payments have been made thereon extending the statute."

Thus, it appears that, as against an assuming grantee, the court

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1 The statutes vary as to what acts of the parties will lead to interruption of the period. Compare N.C. Gen. Stat. § 1-47(3) (1953) with 12 Okla Stat. Ann. § 101 (1960) which starts the statute running over "when any part of principal or interest shall have been paid, or acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made. . . ."
7 263 N.C. at 636, 140 S.E.2d at 2.
8 Ibid.
9 3 Strong, Index to the North Carolina Supreme Court Reports, Mortgages & Deeds of Trust § 14 (1960).
10 263 N.C. at 636-37, 140 S.E.2d at 3.
11 Id. at 637, 140 S.E.2d at 3. (Emphasis added.)
recognizes two methods whereby the bar of the statute may be extended beyond ten years from the date of maturity of the original obligation. First, it is implicit in the language of the Lowe decision quoted above, as well as in that of section 1-47(3), that a payment on the obligation would have interrupted the statute. Second, the statute would have run anew had there been a novation. In the instant litigation there had been no payments whatever; and it was obvious that the intentions and acts of the parties fell far short of a novation that would have discharged the grantor from the contract altogether. And since the case was apparently tried and appealed solely upon the theory of novation, it is difficult to find fault with the decision reached. But the language of the court seems to indicate that the two methods discussed are the only means whereby the statute may be interrupted in a mortgage-assumption case. If this is true, then it is submitted that the Lowe opinion is open to serious question; for the North Carolina limitations statutes, when viewed as a whole, do not seem to require any such conclusion.

There appear to be at least two arguments based upon the statutes that could be successfully advanced in behalf of those in the position of this secured creditor. First: In section 1-26, it is provided that a written acknowledgment of an obligation, made to the creditor and signed by the person to be charged, will start the statutory period running from the date of such acknowledgment. Clearly, had there been no conveyance in the principal case, and had this acknowledgment been made instead

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18 See text accompanying note 17 supra.
19 See Harper v. Edwards, 115 N.C. 246, 20 S.E. 392 (1894), where it was held that payments by an assuming grantee on the obligation arrested the running of the statute. For the effect of such a payment upon the liability of the grantor, see the discussion in note 27 infra.
20 In its opinion, the court quotes the following language from Spain v. Hines, 214 N.C. 432, 434, 200 S.E. 25, 27 (1938): “The evidence . . . shows no payment or other transaction which would take the note out of the bar of the statute of limitations. . . .” 263 N.C. at 637, 140 S.E.2d at 3. (Emphasis added.) The court thus recognizes that there are “other transactions” which would interrupt the running of the statutory period, but it is not clear whether or not novation is the only “other transaction.”
21 N.C. GEN. STAT. § 1-26 (1953).
22 The cases construing the statute have held that, in order to repel the statute, the promise or acknowledgment must be made to the creditor or his agent. See, e.g., Hussey v. Kirkman, 95 N.C. 63 (1886). In the principal case, it is not made clear to whom the assumption promise was addressed, but the fact that the instrument was found among the papers of the deceased creditor, attached to the notes and deeds of trust, indicate strongly that the promise was in fact directed to him.
by the original debtor, the period would have been interrupted.\(^{23}\) Equally clear is the fact that a payment on the obligation made by either the grantor\(^{24}\) or grantee\(^{25}\) would have had similar effect. "A payment of part of a debt resting upon a promise has the same effect in continuing or reviving it, as a new promise itself; and the very act is deemed a promise to pay the residue."\(^{26}\) Part payment, then, is equivalent to a new promise to pay. And, if a payment by a grantee interrupts the statute because it is deemed equivalent to his written promise to pay, then it follows logically that his actual written promise should effect the same result. It must be remembered that, while the statute would be interrupted where the grantee made a payment, such payment would not work a novation—the grantor would remain a party to the obligation.\(^{27}\) It seems that grantor could also remain a party where grantee made a promise instead of a payment. Thus, grantee's assumption ought to re-start the statute, notwithstanding the absence of novation.

Second: The same result may be reached by employing a slightly different approach. In a dictum in the Lowe opinion, the court, while analyzing the relationships among the parties after an assumption agreement, again quoted from Strong's Index\(^ {28}\) to the following effect:

As between the mortgagor and his grantee assuming the debt, the mortgagor is a surety. But as between the mortgagor and mortgagee he remains primarily liable for the mortgage debt . . . even though the mortgagee . . . extends the time of payment without notice to the mortgagor.\(^ {29}\)

This is an accurate statement of the law as it existed in North Carolina for many years.\(^ {30}\) In 1961, however, this rule was changed

\(^{23}\) N.C. GEN. STAT. § 1-26 (1953).
\(^{24}\) N.C. GEN. STAT. §§ 1-26, 1-47(3) (1953).
\(^{26}\) McDonald v. Dickson, 87 N.C. 404, 406 (1882) (a case not involving a mortgage assumption).
\(^{27}\) Although the grantor would remain a party, he would not be bound by a revival of the statutory period occasioned by his grantee's acknowledgment or payment. N.C. GEN. STAT. § 1-27 (Supp. 1963). See generally Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).
\(^{29}\) 263 N.C. at 637, 140 S.E.2d at 3.
materially by a statute\textsuperscript{31} that puts the grantor in the position of a
surety not only as to the assuming grantee, but as to the mortgagee
as well. While this enactment has no direct application to the
problem at hand, it does make the liability of the assuming grantee
primary. By virtue of his assumption of the indebtedness, the
grantee becomes the principal debtor, the grantor remaining on
the obligation as surety. With this in mind, it seems that under
section 1-26, the grantee is also the "party to be charged"\textsuperscript{33} on the
acknowledged obligation, and that his promise should therefore be
one which would interrupt the running of the statute.

Reasoning either that the written promise of the grantee is, for
the purposes of the statute of limitations, as effective as a payment
by him, or that the grantee's act of assumption renders him the
principal debtor so that his promise is an acknowledgment by the
person to be charged, it becomes abundantly clear that the statutes
permit interruption of the period as against an assuming grantee
in three ways: (1) by part payment on the obligation or (2) by a
written promise to assume it, both of which fall short of a novation,
and (3) by a true novation agreement. It appears that the defendant
in the principal case, instead of electing to ground his case entirely
upon the theory of novation, might well have profited by urging
upon the court arguments similar to the ones outlined. More im-
portantly, however, it may be that the court in \textit{Lowe} has established
a precedent dangerous to future litigants.\textsuperscript{3} It is therefore submitted

\textsuperscript{31}N.C. GEN. STAT. § 45-45.1 (Supp. 1963). The provisions of the
statute are summarized as follows:

[W]here there is an assuming grantee an extension of time to him or
his release by the secured creditor discharges the mortgagor or grantor,
and a release of any of the security property by the creditor or the
trustee acting for him releases the mortgagor or grantor to the extent
of the value of the property released. When the property is sold
expressly subject to the mortgage or deed of trust, but the grantee
does not assume it, the binding extension of time releases the mortgagor
or grantor to the extent of the value of the property; and the release
of any of the security property releases the mortgagor or grantor to
the extent of the value of the property released.

Hanft, \textit{Credit Transactions—Some Statutory Changes in 1961}, 40 N.C.L.
Rev. 82, 84 (1961).
\textsuperscript{32}N.C. GEN. STAT. § 1-26 (1953).
\textsuperscript{33}See note 20 \textit{supra}. It bears repeating at this point that the court, in a
case where the question is squarely and properly raised, may well find that
an assumption agreement is one of the "other transactions" from which the
statute will run anew. The statements of the court to date do not preclude
such a result; and it could be reached without the necessity of overruling
established precedent.
that while the conclusion in *Lowe* was apparently inescapable, its use as precedent should not be extended beyond cases identical to it in all essential elements.

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Criminal Law—Admissibility of Confessions

Davis, a prison escapee, was captured by police, who requested and received permission of the warden of the state prison to keep him temporarily in their custody. They suspected him of a recent rape-murder. On Davis's being delivered to the city jail a notation was made upon the arrest sheet that he was not to be allowed to use the telephone and that no one was to be allowed to see him. Davis was held in the city jail for the next sixteen days. During that time, according to trial court findings, he was adequately fed, never threatened, and, though questioned daily, not questioned overbearingly. On the sixteenth day of his detention, while he was being questioned alone by a police officer acquainted with him and his family, the officer made reference to a Bible held by Davis. Upon inquiry he learned that Davis had been reading from the Bible, but had not been praying because he did not know how. The police officer recited a short, innocuous prayer. A moment later, Davis confessed to the rape-murder.

In December of 1959 Davis was convicted of the offense largely on the basis of his confession. As is the practice in North Carolina, determination of the "voluntariness" of the confession was made by

1 The facts as alleged by the prosecution and as alleged by defendant are in complete conflict. Davis contended the instruction on the arrest sheet was carried out; the state that it was ignored, which the trial court so held. The defendant alleged that incarceration in the city jail was improper since it was only an "over-night" jail and that prisoners held for more than a day or two were normally detained in the county jail, which had proper facilities for long detention; that rights under N.C. GEN. STAT. § 15-46 (Supp. 1963) had been violated because he had not been properly arraigned; that he had been inadequately fed (the evidence established that he was offered four sandwiches a day); that he was beaten and continually questioned. The trial court found no merit in any of these contentions.

2 The federal district court, upon hearing for application of a writ of habeas corpus, found that the defendant requested that the officer pray for him. The state court record indicated that the idea of the prayer originated with the police officer. Davis v. North Carolina, 339 F.2d 770, 773 n.6 (4th Cir. 1964).

3 The terminology "voluntary" and "involuntary" is uncertain of meaning but popular among the judiciary not to be used. See Kamisar, *What Is*