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Credit Transactions -- Deficiency Judgment Statute -- Suit on the Note

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validity of state statutes and court rules relating to notice by publication would be limited, especially as applied in probate proceedings and other actions similar to common trust settlements. This was followed by statutory changes[25] varying considerably in their provisions and in the scope of their coverage. *The Walker* decision calls for a close reexamination of notice requirements in all of the states, and for provision to be made for at least a letter in all cases where an address is available.[26]

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Credit Transactions—Deficiency Judgment Statute—Suit on the Note

In *Fleishel v. Jessup*,[1] plaintiff was holder of promissory notes secured by deed of trust executed by defendant for the purchase price of land, equipment, and machinery. After sale, plaintiff sued for deficiency judgment. The trial court excluded defendant's evidence bearing on the question of whether certain structures were real or personal property. Judgment for plaintiff was reversed on appeal on the ground that defendant was entitled to have the jury decide the question of what proportion of the value of all the property was realty.[2] As to such proportion plaintiff was not entitled to deficiency judgment under G. S. § 45-21.38.[3]

PA. L. REV. 305 (1952); Hayward, *The Effect of Mullane v. Central Hanover Bank and Trust Company Upon Publication of Notice in Iowa*, 36 IOWA L. REV. 47 (1950); Tilley, *The Mullane Case: New Notice Requirements*, 30 MICH. ST. B. J. 12 (1951).

[25] IOWA RULES CIV. P., Rule 60 (1943) (revised in 1951 so that now in all cases of service of original notice upon known persons by publication, a copy of the notice must be sent by ordinary mail to such person); ME. REV. STAT. 114 § 7 (1954) (common trust fund statute whose notice provisions were influenced by the Mullane case); MICH. STAT. ANNO. § 27.3178(32) (1943) (revised in 1951 to require mailing of all probate and other legal notices); OKLA. STAT. ANNO. TITLE 60 § 162 (Supp. 1951) (common trust fund statute).

[26] *Quaere* the validity of N. C. GEN. STAT. § 105-377 (1950), which states: "All persons who have or may acquire any interest in any property which may or may become subject to a lien for taxes are hereby charged with notice. . . . Such notice shall be conclusively presumed, whether such persons have actual notice or not." Also, N. C. GEN. STAT. § 160-219 (1952), providing for notice by publication as to property owners who are nonresidents of the state when condemnation proceedings are brought by a municipal corporation.

[1] 244 N. C. 451, 94 S. E. 2d 308 (1956).

[2] The court points out that as between vendor and vendee, personal property affixed to land passes by a conveyance of the land unless expressly excepted. Horne v. Smith, 105 N. C. 322, 11 S. E. 373 (1890) (engine and boiler connected to main building of saw mill); Moore v. Valentine, 77 N. C. 188 (1877) (mining machinery); Bryan v. Lawrence, 50 N. C. 337 (1858) (planks laid down, but not nailed, on the upper floor of gin house). As between landlord and tenant, fixtures placed on the land for purposes of trade are removable by the tenant at the expiration of the term without provision in the lease for removal. Springs v. Atlantic Refining Co., 205 N. C. 444, 171 S. E. 635 (1933), Note, 12 N. C. L. REV. 273 (1934).

[3] *Cf.* CALIF. CODE CIV. PROC. § 580 (b) (1955), which provides that where both a chattel mortgage and real estate deed of trust are given to secure payment of the balance of the combined purchase price of real and personal property, no deficiency

The provisions of G. S. § 45.21.38 are as follows: "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . . or where judgment or decree is given for the foreclosure of any mortgage . . . to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate. . . .

"Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer. . . ."

A question still unanswered in North Carolina is whether the holder of a note secured by mortgage or deed of trust given for the purchase price of land can disregard the security and sue on the note. It is settled in North Carolina and elsewhere that a creditor holding collateral security may ignore the security and bring action on the note,[4] absent a statute restricting the right.[5] It is apparent that G. S. § 45-21.38 does not expressly restrict the right. By its terms the statute is applicable only when there has been a sale or foreclosure. The thing prohibited is a deficiency judgment, which by definition is a judgment for the difference between the amount realized on a sale of security and the amount of the debt.[6] "There can be no deficiency until there is a sale."[7]

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judgment lies under either. Other state statutes abolishing deficiency judgments on purchase price transactions are applicable only to real property. See, *e.g.*, MONT. REV. CODES ANNOT. § 93-6008 (1949); ORE. REV. STATS. § 88.070 (1955).

As to sales where both real and personal property are involved, N. C. GEN. STAT. §§ 45-21.8, 9 seem to put it within the discretion of the person exercising the power of sale as to whether the sale shall be in whole or in parcels. Where the sale is of all the property securing the debt, the principal case indicates that a deficiency judgment can be obtained as to the proportion of the value of all the property which is personal property.

[4] Brown v. Turner, 202 N. C. 227, 162 S. E. 608 (1932); Silvey v. Axley, 118 N. C. 959, 23 S. E. 933 (1896); Beckett v. Clark, 225 Iowa 1012, 282 N. W. 724 (1938). "The obligation of the debtor to respond in his person and property is the same as if no security had been given. The promise to pay, as evidenced by a promissory note, is one distinct agreement and, if couched in proper terms, is negotiable, while the pledge of real estate to secure that promise, as evidenced by a mortgage, is another distinct agreement which is not intended to affect in the least the promise to pay, but only to provide a remedy for the failure of performance." 37 AM. JUR. MORTGAGES § 517 (1941).

[5] An example of such a statute is CALIF. CODE CIV. PROC. § 726 (1955), which prevents the personal action against the debtor until the creditor has exhausted the security.

[6] In Phillips v. Union Central Life Ins. Co., 88 F. 2d 188 (8th Cir. 1937), it was held that an action for personal judgment on mortgage notes before foreclosure

The real question, then, is whether the statutory policy will be extended to cut off the heretofore recognized right of the creditor to proceed against the debtor in personam on the note.

The court has said that the statute is a limitation upon the jurisdiction of the courts, operative only upon the adjective or procedural law and not upon the substantive law.[8] The right to payment of a debt evidenced by a promissory note is a substantive right. It logically follows that the statute has left untouched the creditor's right to recover on the note.

In *Brown v. Kirkpatrick*,[9] the purchase money note was secured by a second deed of trust. The land had been sold for only enough to satisfy the first deed of trust. It was held that the statute did not prohibit plaintiff from obtaining judgment on the note.[10] The court said: "In this situation the court will not extend by judicial interpretation the provisions of the statute, and deny him the right to judgment for a valid debt."[11] The decision may indicate a reluctance to extend the operation of the statute beyond its express terms.

More significant is the fact that the court, in sustaining its interpretation of the statute in the *Brown* case, cited *Page v. Ford*,[12] which holds that an Oregon statute[13] substantially identical to G. S. § 45-21.38 does

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was not an action for deficiency judgment within the Minnesota Moratorium Act (which provided that there could be no deficiency judgment until the expiration of the period fixed for redemption), the words, "deficiency judgment," referring to the balance of personal indebtedness above the amount realized on sale of mortgaged property securing such indebtedness.

[7] Fleishel v. Jessup, 242 N. C. 605, 89 S. E. 2d 160 (1955), a prior action between the same parties and on the same facts as in the principal case. The trial court accepted the value of the land as agreed, deducted the amount from the total amount of the notes, and rendered deficiency judgment for the balance. The Supreme Court reversed, holding that the judgment was premature because there had been no sale.

[8] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941), holding that the statute deprived the court of jurisdiction to grant a deficiency judgment in favor of a citizen of Virginia suing on purchase money notes executed in Virginia and secured by land located in that state.

[9] 217 N. C. 486, 8 S. E. 2d 601 (1940).

[10] *Contra*, Brown v. Jensen, 41 Cal. 2d 219, 259 P. 2d 425 (1953), *cert. denied*, 347 U. S. 905 (1954). CALIF. CODE CIV. PROC. § 580 (b) (1955) provides in part, "No deficiency judgment shall lie in any event after sale of real property . . . under deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property." The words, "deficiency judgment . . . after sale," in the statute were construed to mean judgment after actual sale or a situation where a sale would be an idle act, *i.e.*, where the security is exhausted. The court said that since a deficiency is nothing more than the difference between the security and the debt, the deficiency judgment prohibited is still a deficiency judgment even though it consists of the whole debt. The dissent emphasized the fact that the term, "deficiency judgment," refers to a judgment for the balance due on the personal obligation after sale. Though § 580 (b) was held to bar suit, the court rejected defendant's argument that the statute preventing a personal action until the creditor has exhausted the security (*supra* note 5) precludes suit on the note when the security is valueless.

[11] Brown v. Kirkpatrick, 217 N. C. 486, 488, 8 S. E. 2d 601, 602 (1940).

[12] 65 Ore. 450, 131 P. 1013 (1913).

[13] ORE. REV. STATS. § 88.070 (1955). "When a decree is given for the fore-

not prevent plaintiff from ignoring the security and suing on the note.[14] The rationale of the Oregon court is that the title and text of the act confine its effect to foreclosure suits, leaving intact plaintiff's independent action at law on the note.[15]

It may seem that the arguments in favor of allowing the creditor to sue on the note are of a rather technical, legalistic nature, when balanced against what seems to be the legislative policy to restrict the creditor to the property conveyed in purchase money transactions.[16] It is arguable, however, that restriction of the creditor's right of independent suit for the debt might work to the disadvantage of the purchaser of land, the very class the statute was designed to protect. ". . . [I]f it be understood that the would-be purchaser lawfully may repudiate his direct promise to pay the contract price absolutely and at all events, as evidenced by his promissory note, property owners will not deal with him."[17] It would be more realistic to say that property owners will deal with the buyer, but will require a larger down payment on the purchase price.

Assuming that suit on the note will be permitted, the next inquiry is as to the effect of judgment in such suit on the right to forclose. Oregon decisions intimate, contrary to the usual rule absent a statute,[18] that the right to foreclose a purchase money mortgage is waived by suit on the note.[19] This result seems clearly sound against the statutory

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closure of any mortgage given to secure payment of the purchase price of real property . . . the mortgagee shall not be entitled to a deficiency judgment on account of the mortgage or note or obligation secured by the same."

[14] In Union Trust Co. v. Wiseman, 10 F. 2d 558 (D. C. D. Ore. 1926), it was held that a prior action to foreclose the purchase money mortgage dismissed at the instance of plaintiff did not bar later suit on the note, the institution of the suit to foreclose not being so inconsistent with the suit on the note as to constitute an election of remedies. Had plaintiff carried the foreclosure suit to final determination, he would thereafter have been barred from suing on the note, though he did not realize the full amount of the debt. Wright v. Wimberly, 94 Ore. 1, 184 P. 740 (1919).

[15] In Wright v. Wimberly, 94 Ore. 1, 44-47, 184 P. 740, 754-755 (1919) (concurring opinion), *Harris,* J., points out that the real intent of the statute is to confine the holder of a purchase money note and mortgage to the mortgaged lands for satisfaction of the debt. He sustains the holding in Page v. Ford, however, on the ground that the court could not carry out the real intent of the legislature without resorting to "judicial legislation." Compare Winkelman v. Sides, 31 Cal. App. 2d 387, 88 P. 2d 147 (1939), holding that the statute preventing a personal action until the creditor has exhausted the security (*supra* note 5) is declarative of the public policy of the state and may not be waived by a deed of trust purporting to authorize action to enforce payment of a secured debt without a sale of the property.

[16] *Statute Survey,* 11 N. C. L. Rev. 191, 219 (1933).

[17] Wright v. Wimberly, 94 Ore. 1, 57, 184 P. 740, 758 (1919) (concurring opinion), as against the argument that the statute prohibiting deficiency judgments should be liberally construed in favor of those who buy land.

[18] Silvey v. Axley, 118 N. C. 959, 963, 23 S. E. 933, 934 (1896) (dictum); 37 Am. Jur., *Mortgages* § 523 (1941).

[19] Wright v. Wimberly, 79 Ore. 626, 631, 156 P. 257, 258 (1916); Walters v. Cooper, 71 Ore. 139, 142 P. 359 (1914).

background. It is one thing to allow the creditor to exercise his traditional right to pursue either remedy in the first instance; but it is quite a different thing to nullify the statutory policy against deficiency judgments by circumlocution. If the creditor may obtain judgment on the note, levy on the debtor's general assets, and then make up any balance due by foreclosure, he would be in effect obtaining a deficiency judgment in advance.

It is held in North Carolina that a mortgagee cannot subject the mortgagor's equity of redemption to sale under execution for the mortgage debt.[20] If North Carolina were also to hold, in accord with Oregon, that foreclosure is waived by suit on the note, it would seem that suit on the note would put the security beyond the reach of the creditor.

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Criminal Law—Applicability of the National Motor Vehicle Theft Act to Embezzlement and False Pretenses

In *United States v. Turley*,[1] the Supreme Court of the United States has settled a conflict between the circuits as to the applicability of the National Motor Vehicles Theft Act[2] to such crimes as embezzlement and obtaining goods by false pretenses. The Act, more commonly known as the Dyer Act, reads as follows:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."[3]

The area of controversy has been whether to interpret the term "stolen" as synonymous with common-law larceny, or to allow a broader interpretation which would include the crimes of embezzlement and obtaining goods by false pretenses.

The fifth,[4] eighth[5] and tenth[6] circuits have held that the term "stolen" should be limited to the definition of common-law larcency. In

[20] McPeters v. English, 141 N. C. 491, 54 S. E. 417 (1906); Camp v. Coxe, 18 N. C. 52 (1834).

[1] 77 Sup. Ct. 397 (1957).
[2] 41 STAT. 324 (1919), as amended, 18 U. S. C. § 2312 (1952).
[3] *Ibid.*
[4] Murphy v. United States, 206 F. 2d 571 (5th Cir. 1932).
[5] Ackerson v. United States, 185 F. 2d 485 (8th Cir. 1950); United States v. O'Carter, 91 F. Supp. 544 (S. D. Iowa 1949).
[6] United States v. Hand, 227 F. 2d 794 (10th Cir. 1955) (dictum); (jury found the defendant intended to steal car from the inception); Hite v. United States, 168 F. 2d 973 (10th Cir. 1948).