UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 58 | Number 4 Article 8

4-1-1980

Mortgages and Deeds of Trust -- Ross Realty Co. v. First Citizens Bank and Trust Co.: North Carolina Anti-Deficiency Judgment Statute Bars Personal Actions against Purchase Money Mortgagors

Joel M. Craig

NOTES

Mortgages and Deeds of Trust—*Ross Realty Co. v. First Citizens Bank & Trust Co.*: North Carolina Anti-Deficiency Judgment Statute Bars Personal Actions Against Purchase Money Mortgagors

Since the enactment in 1933 of G.S. 42-21.38,[1] the North Carolina statute prohibiting deficiency judgments upon foreclosure of purchase money mortgages and deeds of trust, the extent of a mortgagor-vendee's personal liability to a mortgagee-vendor on a purchase money note[2] has been uncertain. The statute clearly prevents a creditor from obtaining a deficiency judgment upon foreclosure and sale of the secured property for less than the full amount of the debt, but it does not explicitly address the question whether the creditor can, in an action for the debt without foreclosure, obtain a judgment for the full amount of the debt.[3] The North Carolina Supreme Court recently resolved the uncertainty in *Ross Realty Co. v. First Citizens Bank & Trust Co.*,[4] holding that a purchase money mortgagee or deed of trust beneficiary can-

1. Law of Feb. 6, 1933, ch. 36, § 1, 1933 N.C. Pub. Laws 28 (codified at N.C. GEN. STAT. § 45-21.38 (1976)). The statute applies both to judicial foreclosures and to sales by mortgagees and trustees under powers of sale.

2. While "purchase money mortgage" is a label sometimes applied to any security agreement under which the purchaser mortgages land in return for a loan of the purchase price, the term as used here has a more restricted meaning. The anti-deficiency judgment statute by its terms applies only when a mortgage or deed of trust is taken "to secure to the seller the payment of the balance of the purchase price of real property." N.C. GEN. STAT. § 45-21.38 (1976). Thus, the term "purchase money" refers only to the situation in which it is the vendor who extends the credit and whose debt is secured by the purchase money mortgage. The statute has no application to the typical mortgage securing a debt owed by the purchaser of land to a third party lender.

3. The statute provides:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the 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: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

Id.

4. 296 N.C. 366, 250 S.E.2d 271 (1979).

not ignore his security and bring an in personam action against the debtor on the note secured by the mortgage or deed of trust.[5] Instead, explained the court, the secured creditor is limited by the anti-deficiency judgment statute to recovery of the security.[6]

Defendant in *Ross Realty*, acting as trustee of an industrial profit sharing retirement plan and trust, discontinued payment on a purchase money note secured by a deed of trust when it determined that the property it had purchased from plaintiff realty company was worth less than the sum remaining to be paid on the note. When the vendor gave notice of its intention to accelerate the unpaid balance, defendant tendered a deed to the property in lieu of foreclosure. The vendor, however, refused the offer and brought an action against defendant for payment of the debt. Defendant counterclaimed, seeking a judgment declaring that it could not be held liable on the note for any deficiency above the current sale price of the security.[7]

The court of appeals affirmed the trial court's entry of summary judgment for plaintiff.[8] The three-judge panel agreed with the trial court that the anti-deficiency judgment statute had no application when the creditor refrained from using his foreclosure remedy and instead sought payment of the obligation underlying the mortage in an in personam action for the debt. The court of appeals recognized that its literal application of the statute "creates an anomalous situation in that a creditor, who would be barred from a deficiency judgment if he elected to pursue his remedy of foreclosure, can in the alternative sue on the note for the full purchase price."[9] This "anomalous situation" was thought to be superior, however, to the "intolerable result" of giving a purchaser "the right to unilaterally rescind his contract when he deems it advantageous to do so" by limiting the creditor's remedies to

5. *Id.* at 373, 250 S.E.2d at 275.

6. *Id.* at 370, 250 S.E.2d at 273.

7. *Id.* at 366-67, 250 S.E.2d at 271-72. *See* Record at 1-9.

8. Ross Realty Co. v. First Citizens Bank & Trust Co., 37 N.C. App. 33, 245 S.E.2d 404 (1978), *rev'd*, 296 N.C. 366, 250 S.E.2d 271 (1979). On the basis of the stipulated facts, the trial court had concluded "that the provisions of G.S. 45-21.38 are inapplicable to the subject matter of this action" and had entered summary judgment for plaintiff. *Id.* at 33, 245 S.E.2d at 405. The supreme court's summary of the trial court's reasoning was that "this action was brought solely to effect collection of the balance due on a purchase money note without recourse to or foreclosure of the deed of trust securing the same; that G.S. 45-21.38 'abolished deficiency judgments arising out of the sale of real property securing a balance purchase money note; however, in this case, such security was abandoned, resulting in there being no foreclosure and no sale of such real estate.' " Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. at 367, 250 S.E.2d at 272 (1979).

9. 37 N.C. App. 33, 35, 245 S.E.2d 404, 406 (1979).

recovery of the security.[10]

Reversing the court of appeals' decision, the supreme court held that even though the language of the statute referred only to sales of real property pursuant to powers of sale and judicial foreclosures, plaintiff could not sue on the note because the legislature, in enacting the measure, intended to limit the creditor's recovery to the property conveyed in the purchase money situation.[11] This intent, said the court, should be given effect by broadly interpreting the statutory language.[12] Such an interpretation, held the court, precluded plaintiff from bringing any action on the note for recovery of the debt.[13]

The court's decision rested entirely on its understanding of the 1933 General Assembly's purposes in enacting the anti-deficiency judgment statute.[14] While there is no legislative history and little pertinent contemporary commentary on this statute,[15] it is clear that the legislature's purpose in enacting the statute was to provide relief for mortgagors whose land was being sold and whose other assets were being levied upon to make up deficiencies.[16] Why the legislature should limit this relief to purchase money mortgagors is less clear.[17] One possible explanation for the limitation lies in the nature of a representative purchase money transaction, in which the seller often has a disproportionately powerful position. In such a transaction, vendor and purchaser agree upon a price and, when the purchaser is unable to acquire sufficient third-party financing to meet the price,[18] the vendor agrees to

10. *Id.* at 36, 245 S.E.2d at 406-07.

11. 296 N.C. at 370, 250 S.E.2d at 273.

12. *Id.* at 373, 250 S.E.2d at 275.

13. *Id.*

14. *See id.* at 368-70, 250 S.E.2d at 273-74.

15. See *A Survey of Statutory Changes in North Carolina in 1933*, 11 N.C.L. REV. 191, 219 (1933), in which it is stated that "[t]he effect of this section is to limit the creditor to the property conveyed, when for the purchase money, changing in that respect the present statute."

Subsequent commentary assumed that the statute permitted the creditor to bring an action on the note, but argued that such an election should bar the creditor from subsequent access to the mortgaged property. Note, 35 N.C. L. REV. 492, 495-96 (1957). A later article—Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1—which was cited by the supreme court in *Ross Realty*, reached a different conclusion, however. Currie and Lieberman concluded that the General Assembly did not do an adequate job of protecting the purchaser because the statute failed to close the "loophole" available to creditors of suing on the note. *Id.* at 23-24, *quoted at* 296 N.C. at 371, 250 S.E.2d at 274.

16. *See* Currie & Lieberman, *supra* note 15, at 13-14.

17. Obviously, economic conditions in 1933 fostered the foreclosure of countless mortgages of all types; the general economic distress was not limited in its impact to purchase money mortgagors. *See id.* at 38-39.

18. One likely reason for the purchaser's inability to obtain third-party financing is that the market value of the land is below the price set by the vendor. A commercial lending institution

perform the financing function himself. The vendor consequently takes a purchase money note and deed of trust in addition to a small downpayment. Upon default by the purchaser, the vendor is able to foreclose the deed of trust—possibly buying the property himself at a typically depressed foreclosure sale price—and to hold the purchaser liable for any deficiency.[19] Upon the completion of this sequence of events, the vendor has the purchaser's downpayment, the sum of any regular payments made by the purchaser, clear title to the land and a judgment enforceable against the purchaser's other assets, while the purchaser has nothing.[20] At the root of the problem, in many cases, is amateur financing. Such financing is often undertaken only because commercial lending institutions are unwilling to extend the amount of credit necessary to allow the purchaser to meet the purchase price. If the purchaser cannot or will not meet the downpayment requirements established by commercial lenders, the vendor, in order to make the sale, may agree to extend credit for the amount in excess of the commercial lender's limit or to finance the entire transaction himself. In either case, the value of the property securing the debt is likely to be insufficient.[21] During a general economic decline in which land values become depressed and debtors become unable to meet their obligations, this overvaluation problem, arising as a result of the amateur parties' lack of information as to the market value of the security, can bring devastating consequences throughout the economy if it is allowed to exist on a wide scale. When numerous foreclosure sales depress land values even further and unsatisfied personal judgments pile up, the resulting bankruptcies of large numbers of debtors may exacerbate the existing economic decline and contribute to a catastrophic depression such as that of the 1930s.[22]

A state legislature, viewing the problem in retrospect, might decide

can make an accurate assessment of the market value of land, whereas a layman purchaser is not likely to be able to make this judgment. *See id.* at 38. Alternatively, financing by the vendor is encouraged when the prospective purchaser discovers that his liquid assets are insufficient to meet a third-party commercial lender's downpayment requirements.

19. Or at least such was the practice in North Carolina until 1933, when N.C. GEN. STAT. § 45-21.36 was enacted. Law of April 18, 1933, ch. 275, § 3, 1933 N.C. Pub. Laws 401. This statute enables a mortgagor to defend post-foreclosure suits for deficiency judgments by proving that at the time the mortgage was created the property securing the debt was of sufficient value to discharge the debt, or by proving that the amount bid at the foreclosure sale was substantially less than the true value of the property. *Id.*

20. *See* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 8.1 (1979).

21. Currie & Lieberman, *supra* note 15, at 32-36.

22. *See* Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 U.C.L.A. L. REV. 753 (1975). *See also* 3 R. POWELL, THE LAW OF REAL PROPERTY § 471 (1979).

to shift the risk that the security will not satisfy the outstanding debt to the purchase money mortgagee[23] by prohibiting deficiency judgments against defaulting purchase money mortgagors.[24] Shifting the risk of loss to the purchase money mortgagee reduces to some extent the incentive for overvaluation of the property by vendor-mortgagees.

It is possible, however, for mortgagees to circumvent a legislative prohibition against deficiency judgments by anticipating a deficiency upon sale of the property and, in effect, obtaining it in advance through an action on the purchase money note. Under North Carolina law, a secured creditor has two remedies upon default. He can sue in equity to foreclose the mortgage or bring an action at law for the debt.[25] The latter is an in personam action against the debtor, while the former is an in rem action to subject the mortgaged property to payment of the debt.[26] In the in personam action a creditor can take his claim to judgment, levy on the debtor's other assets, and then recover any deficiency by foreclosing the mortgage and selling the mortgaged premises.[27]

Concerned that purchase money mortgagees would attempt to manipulate the two available remedies in this fashion so as to circumvent the reach of the anti-deficiency judgment statute,[28] the supreme court in *Ross Realty* forbade the type of anticipatory in personam action described above on the ground that it violates the spirit, if not the letter, of the statute. Thus, to avoid vitiating the statute, the court construed it broadly and held that the legislative intent, if not the statutory language, required that the purchase money mortgagee be limited to recovery of the proceeds of a sale of the security upon default.[29]

23. Among the reasons that have been advanced for shifting the risk to the purchase money mortgagee are: (1) the vendor is made whole by having both his land and a sum of money paid by the vendee for its use while in the vendee's possession; (2) the vendor is estopped to deny that the value of the land is insufficient to cover the outstanding debt; (3) because the vendor set the terms of the transaction and never "risked" any money himself, he should be required to bear the risk of loss upon default; and (4) the vendor knows the value of his land and, by accepting the mortgage, assumes the risk that the security may become inadequate. Currie & Lieberman, *supra* note 15, at 30-31.

24. In addition to North Carolina, at least five states have done so: Arizona, California, Montana, Oregon and South Dakota. *See* ARIZ. REV. STAT. ANN. § 33-729 (1974); CAL. CIV. PROC. CODE § 580b (West 1976); MONT. REV. CODES ANN. § 93-6008 (1964); OR. REV. STAT. § 88.070 (1977); S.D. COMP. LAWS ANN. § 44-8-20 (1967). *See also* G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 20, at § 8.3 (1979); 3 R. POWELL, *supra* note 22, at § 473 (1979).

25. *See* Warren v. Hetherington, 171 N.C. 165, 88 S.E. 139 (1916); Councill v. Bailey, 154 N.C. 54, 69 S.E. 760 (1910); Silvey v. Axley, 118 N.C. 959, 23 S.E. 933 (1896); Ellis v. Hussey, 66 N.C. 501 (1872).

26. Silvey v. Axley, 118 N.C. 959, 23 S.E. 933 (1896).

27. *See* 296 N.C. at 372-73, 250 S.E.2d at 275.

28. *Id.* at 373, 250 S.E.2d at 275.

29. *Id.*

At first glance *Ross Realty* appears merely to confirm a legislative judgment in favor of protecting purchase money mortgagors from the potentially oppressive consequences of default, but the significance of the decision goes much deeper. This sweeping decision renders any sale of real estate[30] financed by a purchase money mortgage or deed of trust voidable at the option of the purchaser.[31] By virtue of his option to discontinue payments and avoid personal liability on the mortgage debt, the purchaser can transfer to the vendor not only the risk of overvaluation of the security at the time of the sale, but also the risk of a decline in the value of the mortgaged premises occurring after the sale.[32] This transfer of the burden of risk to mortgagees not only contravenes traditional principles of allocation of economic risk in secured transactions, but also creates a perplexing legal situation for risk-conscious lenders, who no longer have the option of securing purchase money credit transactions in real estate by both the value of the land the purchaser's personal assets.[33]

In analyzing the economic impact of the *Ross Realty* decision it is important to note at the outset that it applies only to situations in which the mortgage debt actually exceeds the value of the security.[34] Because

30. The limitation of the statute to *sales* of *real estate* is critical for purposes of applying the statute to transactions other than sales. In Kavanau Real Estate Trust v. Debnam, — N.C. —, 263 S.E.2d 595 (1980), the supreme court declined to extend the reach of the statute to an action on a promissory note secured by a deed of trust encumbering a leasehold interest in an apartment complex. The decision turned on the court's conception of a leasehold estate as a chattel real, which is governed by the law of personal, rather than real, property. Because a leasehold interest is not an interest in real estate, reasoned the court, the anti-deficiency judgment statute cannot apply to a suit on a note secured by a mortgage on the leasehold. *Id.* at 597.

31. *See* Ross Realty Co. v. First Citizens Bank & Trust Co., 37 N.C. App. 33, 36, 245 S.E.2d 404, 406-07 (1978), *rev'd*, 296 N.C. 366, 250 S.E.2d 271 (1979).

32. By defaulting on the obligation and allowing the purchase money creditor to sell the secured property, the purchaser divests himself of any personal liability for the debt and loses only his downpayment and any periodic payments of interest and principal. *See* 296 N.C. at 373, 250 S.E.2d at 275.

33. The court in *Ross Realty* was aware of the potential economic repercussions of the case. In responding to the argument that purchase money sellers of real estate would be disadvantaged in the market by its decision—which imposes no limits on the rights of non-vendor mortgagees to bring in personam actions against their mortgagees—the court dismissed the argument as "not persuasive." *Id.* at 373, 250 S.E.2d at 275. The court suggested that purchase money sellers of real estate could protect themselves by raising their downpayment requirements to ensure that the security upon default is sufficient to satisfy the unpaid balance of the purchase price. *See id.* The court's response, however, must itself be considered "not persuasive" in that it fails to acknowledge the competitive disadvantage at which the court's decision has placed the commercial lending institution that wishes to internally finance the sale of real property that it owns when it must raise its downpayment requirements above the normal rates in order to protect itself against a post-sale decline in the value of the security.

34. In cases in which the value of the security exceeds the outstanding balance of the debt, the secured creditor is able to recover his debt in full by foreclosure and sale of the security.

recent history demonstrates that the value of single family residential realty is not likely to drop below its original sale price,[35] the decision will probably have its greatest impact in the business and investment, rather than the residential, area.[36] Application of the decision in this area, however, by transferring the risk of loss to the vendor in purchase money credit transactions, contravenes the traditional economic and legal assumption that the risk of loss in a commercial or investment venture lies primarily with the entrepreneur or investor.[37] Furthermore, the court's perception that the legislature's intent in enacting the anti-deficiency judgment statute was to limit use of the purchase money financing mechanism because it in some way gives vendors an unfair advantage over purchasers is of questionable validity when the purchaser is a commercial entity or investor rather than an eager, but unsophisticated, prospective homeowner.[38]

The economic illogic of *Ross Realty*[39] is compounded when the

35. As inflation in building costs increases prices of newly-constructed homes, the market value of existing residences appreciates correspondingly. Recent estimates of appreciation in the Raleigh, North Carolina housing market, for example, place the annual rate of appreciation at ten to twenty percent. Cobbs, *Home Costs Zoom Upward*, The News and Observer (Raleigh N.C.), Sept. 9, 1979, § IV, at 1, col. 1. Thus, even in the case of the now uncommon residential purchase money loan negotiated by amateurs, in which the possibility for significant overvaluation of the security is substantial, the rapid appreciation in the value of the property will in many cases permit the creditor, upon default, to recoup the entire debt through foreclosure and sale.

36. Indeed, *Ross Realty Co.* itself and the two subsequent cases applying that decision—Kavanau Real Estate Trust v. Debnam, — N.C. —, 263 S.E.2d 595 (1980) and Chemical Bank v. Belk, 41 N.C. App. 365, 255 S.E.2d 421, *cert. denied*, 298 N.C. 293, 259 S.E.2d 911 (1979)—were all cases arising from transactions in land for business or investment purposes.

37. Faced with the problem of applying anti-deficiency legislation that is in some ways similar to that of North Carolina to the situation in which a commercial purchaser has defaulted and the seller's purchase money mortgage has been subordinated to the lien of a third-party lender who has foreclosed and thereby exhausted the security, the California Supreme Court has permitted an in personam action by the then unsecured junior lienor against the purchaser. Spangler v. Memel, 7 Cal. 3d 603, 498 P.2d 1055, 102 Cal. Rptr. 807 (1972). In the commercial sector, according to the California court, the anti-deficiency legislation's function of preventing overvaluation of security is served by imposing personal liability on the purchaser, rather than by placing the risk of loss on the vendor. This difference arises because the market value of commercial real estate is in large measure a function of the energy, care and skill supplied by the purchaser in developing the land. The potential for personal liability is presumably an incentive for commercial success and thus for a realization of the land's market value as commercial property. *See* Liepziger, *supra* note 22, at 753.

38. It is important to note that in the business and investment area, the purchase money financing vehicle is unlikely to be tainted by the flaws that may exist when a purchase money transaction occurs between individuals in the residential context. The property is less likely to be overvalued by the vendor-financier, and the purchaser is presumably better able to protect himself. *See* Currie & Lieberman, *supra* note 15, at 38.

39. The *Ross Realty* decision has already been applied by the court of appeals to allow an investor to avoid personal liability on a note secured by a deed of trust on a building operated as a hotel by the investor's hotel management corporation. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, *cert. denied*, 298 N.C. 293, 259 S.E.2d 911 (1979). Defendant in *Chemical Bank* was required to guarantee a purchase money note executed by his hotel management corporation

case is examined in light of the North Carolina Supreme Court's prior holding in *Brown v. Kirkpatrick*.[40] In *Brown*, the supreme court held that the anti-deficiency judgment statute does not bar an in personam action against a purchase money mortgagor when the security for the debt has been exhausted by foreclosure of a security interest having priority of lien and the purchase money mortgagee is, therefore, left unsecured.[41] The conflict between *Brown v. Kirkpatrick* and *Ross Realty* is apparent. If the value of the security is less than the outstanding balance on the purchase price, a purchase money mortgagee has no hope of recovering the entire debt after default unless the purchase money mortgage can be subordinated to the rights of a third-party se-

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pursuant to an option-to-purchase provision in a lease agreement on the building. The option was exercised by the corporation to avoid legal action for late payments on the lease contract. The management corporation then assigned its rights in the building to defendant. Defendant took a deed to the hotel, subject to the existing purchase money deed of trust. In the process, defendant executed an estoppel certificate stating that there were no defenses, offsets or counterclaims to the note or to the deed of trust securing the note. Upon default, the deed of trust beneficiary declined to accept a deed to the hotel building and sought enforcement of the promissory note. The court of appeals, relying on *Ross Realty*, held that the protection of the anti-deficiency judgment statute cannot be waived and that, therefore, the creditor was limited to the security.

In Kavanau Real Estate Trust v. Debnam, — N.C. —, 263 S.E.2d 595 (1980), however, the supreme court allowed an in personam action on a promissory note secured by a deed of trust on the value of defendant's leasehold interest in an apartment complex in favor of plaintiff, who was owner and lessor of the complex. *See* note 30 *supra*.

The divergent results in *Chemical Bank* and *Kavanau* are inexplicable from an economic standpoint and appear to be based solely on the traditional nice legal distinction between sales and leases of real estate. The risk-conscious purchase money financier, therefore, should now become measureably more receptive to a ground lease or a lease of existing improvements than to an offer to purchase a fee interest on purchase money credit.

40. 217 N.C. 486, 8 S.E.2d 601 (1940). The facts of the case, somewhat simplified, as are follows: Brown, the owner of the land, encumbered the land with a deed of trust to secure a loan from a trust company. Brown then conveyed the land to Kirkpatrick, who took subject to the outstanding deed of trust and also executed a purchase money note and deed of trust in favor of Brown. Brown's security was, of course, subordinate to the rights of the trust company. Kirkpatrick later conveyed to Dixon, who took subject to both outstanding deeds of trust. Upon Dixon's default, the third-party lender foreclosed its deed of trust and sold the land for the amount due. The sold-out junior lienor, Brown, was therefore left with no option but to sue Kirkpatrick on the purchase money note. *Id.* at 486-87, 8 S.E.2d at 602.

41. *Id.* at 487, 8 S.E.2d at 602. The court explained its reasoning as follows:

> It is apparent that this statute does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. The statute applies only to the holders of notes "secured by such . . . deed of trust," that is, the deed of trust under which the security was foreclosed and the land sold. It refers to the "obligation secured by the same." The holder of the note secured by the first deed of trust upon foreclosure, presumably, will receive satisfaction of his note from the sale, or he can protect himself by purchase of the land. But the holder of the note secured by the second deed of trust, who receives nothing, or an insufficient amount, from the sale, finds himself without security. 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.

Id. at 487-88, 8 S.E.2d at 602.

cured creditor who will foreclose and sell the property. Relying on *Brown*, the purchase money creditor, though now unsecured, can assert his rights against the debtor on the note. Assuming that the debtor is solvent, the result is that an unsecured creditor is in a better position to recover the full outstanding debt than is a secured creditor.[42] Whether a creditor might be able to avoid the intricacies apparently required in order to take advantage of *Brown* and achieve the same result merely by releasing his security interest prior to bringing the action for the purchase price is a question left unanswered by either *Brown* or *Ross Realty*. Thus, while the broad interpretation of the anti-deficiency judgment statute by the court in *Ross Realty* precludes evasion of the statute through the use of an anticipatory in personam judgment, if the intention of the legislature in enacting the statute was "to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction,"[43] the legislative intent remains unfulfilled. A secured creditor can apparently still escape application of the statute by releasing the security before bringing an action for the debt, in which case there would be no outstanding mortgage to which the anti-deficiency judgment statute could conceivably apply.[44]

The precise intent of the General Assembly in enacting the anti-deficiency statute, however, remains unclear. If its purpose was to limit purchase money mortgagees to the property conveyed upon default, the language of the statute manifestly fails to express that purpose.[45] If, on the other hand, the purpose of the statute was only to provide some degree of protection for purchase money mortgagors against their se-

42. In a case prior to Spangler v. Memel, 7 Cal. 3d 603, 498 P.2d 1055, 102 Cal. Rptr. 807 (1972), the California Supreme Court, confronted by facts similar to those in *Brown*, declined to create a conundrum such as the one that now exists under North Carolina law. In Brown v. Jensen, 41 Cal. 2d 193, 259 P.2d 425, *cert. denied*, 347 U.S. 905 (1953), the court refused to allow a claim for a deficiency against a purchase money mortgagor by a sold-out purchase money mortgagee who had subordinated his rights to those of a third-party lender. The anti-deficiency statute, said the court, is an absolute bar to any recovery other than the proceeds of a sale of the security under the California one-action rule. *Id.* at 198, 259 P.2d at 427. *See* Comment, *Anti-Deficiency Judgment Legislation in California*, 3 U.C.L.A. L. REV. 192 (1956). The *Spangler* case, however, limits *Brown v. Jensen* to noncommercial purchase money transactions. *See* note 37 *supra*.

43. 296 N.C. at 373, 250 S.E.2d at 275.

44. The anti-deficiency judgment statute is inapplicable to actions on unsecured purchase money notes. Brown v. Owens, 251 N.C. 348, 350, 111 S.E.2d 705, 707 (1959).

45. The language of the statute is poorly suited to express an intention to eliminate one of the two traditional remedies of mortgagees against defaulting mortgagors. The statutory language itself makes no reference to the personal liability of purchase money mortgagors; it merely precludes entry of deficiency judgments upon the sale of real property under powers of sale or incident to judicial foreclosure. *See* N.C. GEN. STAT. § 45-21.38 (1976).

cured creditors,[46] the legislature has expressed its intention adequately. Limitation of the vendor-creditor's remedies upon default to recovery of the property conveyed, however, is only one of a number of possible methods of accomplishing this purpose. An alternative method of protection of the purchase money mortgagor that does less violence to the underlying economics of real estate transactions is to limit the purchase money mortgagee to one or the other, but not both, of his traditional remedies upon default. A line of decisions in the Oregon courts,[47] construing an anti-deficiency judgment statute quite similar to the North Carolina legislation,[48] provides that a purchase money mortgagee may elect to sue on his note or to foreclose the mortgage but that, once the election is made, the alternative remedy is waived.[49] Prior to the *Ross Realty* decision, commentators had predicted that decisions under the North Carolina statute would mirror these Oregon cases.[50] The North

46. The protective purpose of the statute is evident both from the circumstances surrounding its adoption—the depths of the Great Depression—and from the second proviso at the end of the statute. The proviso reads:

> [W]hen said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as hereinset out.

Id. The motivation for this provision is clear. It is designed to protect purchase money mortgagors from being deprived of the benefits conferred by the statute by reason of the seller's failure to include language in the note that identifies it as being for the balance of purchase money for real estate. The statute is by express terms inapplicable to cases in which the note or deed of trust instrument does not show upon the face that it is for the balance of purchase money. *Id. See* Gambill v. Bare, 32 N.C. App. 597, 232 S.E.2d 870 (1977).

The protective purpose of the entire statute is asserted by Currie and Lieberman in their 1960 article, which was quoted approvingly by the court in *Ross Realty*. Currie & Lieberman, *supra* note 15, at 23-24, *quoted at* 296 N.C. at 371, 250 S.E.2d at 274.

47. *See* Bantier v. Harrison, 259 Or. 182, 485 P.2d 1073 (1971); Ward v. Beem Corp., 249 Or. 204, 437 P.2d 483 (1968); Stretch v. Murphy, 166 Or. 439, 112 P.2d 1018 (1941); Wright v. Nothnagel, 163 Or. 156, 96 P.2d 228 (1939); Wright v. Wimberly, 94 Or. 1, 184 P. 740 (1919); Page v. Ford, 65 Or. 450, 131 P. 1013 (1913).

48. OR. REV. STAT. § 88.070 (1977) provides:

> When a decree is given for the foreclosure of any mortgage given to secure payment of the balance of the purchase price of real property, the decree shall provide for the sale of the real property covered by such mortgage for the satisfaction of the decree given therein, but the mortgagee shall not be entitled to a deficiency judgment on account of the mortgage or note or obligation secured by the same.

49. *E.g.*, Bantier v. Harrison, 259 Or. 182, 485 P.2d 1073 (1971). In that case the Oregon Supreme Court stated:

> [T]he holder of the mortgage note may waive the mortgage and bring an action on the note. If the purchase money mortgagee elects to foreclose the mortgage, he is barred from bringing an action on the mortgage debt, or he may obtain a judgment on the mortgage debt, in which case he loses his mortgage lien.

Id. at 186, 485 P.2d at 1075 (citations omitted).

50. *See* Note, *supra* note 15, at 495-96 (1957). The prediction was based on an assumption that the North Carolina statute would permit an in personam action against a defaulting purchase

Carolina Supreme Court in *Ross Realty*, however, declined to follow the interpretation placed on the Oregon statute.[51]

Although the Oregon election-of-remedies rule perhaps provides less protection for those purchase money mortgagors who have been duped by their mortgagee-vendors into purchasing realty that is not worth the purchase price, it does protect purchasers who would otherwise be in danger of losing both their land and their unsecured personal assets. Moreover, it offers significant advantages over the North Carolina rule announced in *Ross Realty*. First, the Oregon rule does not create a paradoxical situation in which secured creditors will attempt to become unsecured in order to avoid a rule that limits them to recovery of the land conveyed. Second, and more important, the Oregon rule does not permit commercial purchasers of real estate to transfer the risk of decline in the value of the property to their sellers. In view of the court's rejection of the Oregon rule, it appears unlikely, however, that this election-of-remedies theory will be applied to actions under the North Carolina statute, despite its apparent advantages over the rule announced in *Ross Realty*.

The inadequacies of the *Ross Realty* court's treatment of the anti-deficiency judgment statute in the context of commercial transactions in land call into question the wisdom of permitting the statute to remain in force. The ostensible purpose of the statute as a relief measure for farmers and homeowners has largely been vitiated by time and economics, rendering it more a trap for the unwary seller than a shield for the deserving purchaser. The protection the *Ross Realty* decision offers to investors who seek to purchase in haste and repent at leisure is difficult to reconcile with the likely purposes of the Depression-era legislature. Furthermore, the court's construction of the statute disrupts traditional allocation of risk concepts in commercial real estate transactions. The General Assembly should, therefore, correct the errors of the court in *Ross Realty* by repeal of the anti-deficiency judgment stat-

money mortgagor, which was based in turn on the North Carolina Supreme Court's citation of Page v. Ford, 65 Or. 450, 131 P. 1013 (1913), in support of its decision in Brown v. Kirkpatrick, 217 N.C. 486, 8 S.E.2d 601 (1940).

51. The North Carolina court determined that Page v. Ford, 65 Or. 450, 131 P. 1013 (1913), which permitted an action on a purchase money note on the ground that the Oregon anti-deficiency judgment statute applied only to foreclosures, *id.* at 455, 131 P. at 1015, was an overly mechanical application of the statute. The court said that the Oregon decision "fail[ed] to attempt to determine the purpose which the Legislature sought to accomplish." 296 N.C. at 372, 250 S.E.2d at 275.

ute.[52] Repeal of the statute would provide uniformity to secured transactions law in North Carolina, and would prompt the North Carolina court to recognize that the modern purchase money real estate transaction is generally an arm's length economic vehicle deserving of treatment no different from other finance methods. Under the present state of the law, the well-informed purchaser can use the purchase money financing vehicle to shift the full burden of risk of decline in the value of the property to his seller. This opportunity for risk-free speculation in land is inconsistent with the purposes of the General Assembly in enacting the anti-deficiency judgment statute and should provide the motivation for its repeal.

JOEL M. CRAIG

52. *See Property, Survey of Developments in North Carolina Law, 1978*, 57 N.C.L. REV. 1103, 1111 (1979).