Marquette Law Review

Volume 20
Issue 1 *December 1935*

Article 10

1935

Chattel Mortgages - Foreclosures - Constitutionality of Penalties in Foreclosure Statutes

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signed as an accommodation party. The note was executed on January 13, 1919, and was payable one year from that date. Interest had been paid on the note until 1932 by the principal debtors, the other co-makers. The claim against the estate was dismissed by the county court because it was barred by the statute of limitations. *Held,* on appeal, order affirmed; the accommodation maker by "waiving notice" of renewals had not consented to payments to be made on his behalf. *In re Schmidt's Estate,* (Wis. 1935) 261 N.W. 240.

Under the common law rule, payments by one co-maker tolled the statute of limitations as to both. *Cox* v. *Bailey,* 9 Ga. 467, 54 Am. Dec. 358 (1851); *Burgoon* v. *Bixler,* 55 Md. 384, 39 Am. Rep. 417 (1881). An accommodation indorser is not a co-obligor with the maker of a promissory note. The indorser's responsibility on a negotiable note must be fixed by presentment for payment and the giving of notice of dishonor. WIS. STAT. (1933) §§ 116.75, 117.07. Thereafter any conduct by the principal debtor, in the way of the payment of interest or the acknowledging of the indebtedness, cannot toll the statute with respect to the accommodation party without the latter's express authority. *Smith* v. *Dowden,* 92 N.J.L. 317, 105 Atl. 720 (1919); and *cf. Bishop* v. *Genz,* 212 Wis. 30, 248 N.W. 771 (1933) where the accommodation party was not technically an indorser but a "guarantor." Nor should any conduct by the accommodation indorser affect the position of the principal debtor-maker with respect to the tolling of the statute. *Cf. White* v. *Pittsburgh Vein Coal Co.,* 266 Pa. 116, 109 Atl. 873 (1920). The effect of payment by one co-obligor, principal debtor or accommodation party, upon the tolling of the statute as to all is frequently covered by express statutory provisions. See *Ford* v. *Schall,* 110 Or. 21, 221 Pac. 1052, 222 Pac. 1094 (1924). The Wisconsin statute provides that payment of interest or payment of a part of the indebtedness by one will not affect the position of the other joint debtor. WIS. STAT. (1933) § 330.47. But the other joint debtor can in fact consent to such payment of interest and such consent will then toll the statute with respect to both parties. *Gillitzer* v. *Duchorme,* 203 Wis. 269, 234 N.W. 503 (1931). This section is not limited by express terms to cases involving principal debtors and accommodation parties, nor to cases involving obligations evidenced by negotiable paper. Where the joint co-makers of negotiable paper purport to agree by provisions written onto the face of the note to all extensions and partial payments before and after maturity without prejudice to the holder, the court has held that such is, in effect, a power of attorney by each co-maker to the others authorizing partial payments on behalf of all. *Kline* v. *Fritsch,* 213 Wis. 51, 250 N.W. 837 (1933). In the principal case there was literally a waiver of notice as to extensions on the note. And the court felt that this meant the execution by the principal debtor of a new note and the taking of that note by the holder. The court refused to construe the literal provision with respect to extensions as amounting to consent to the payments which the other co-debtors had made.

WILLIAM J. NUSS.

CHATTEL MORTGAGES—FORECLOSURES—CONSTITUTIONALITY OF PENALTIES IN FORECLOSURE STATUTES.—The plaintiff brought this action to foreclose a real estate mortgage which was executed together with two chattel mortgages on live stock and farm machinery as security for a $5,500 promissory note. The mortgagors set up as a defense the seizure without their consent of the property covered by the chattel mortgages and the sale thereof in contravention of Sections 241.13 and 241.15 [WIS. STAT. (1933)] which provide that for any violation of any provision thereof the owner of the equity may recover damages sus-

tained through the violation, and a penalty of $25, and that the "debt secured by such mortgage shall be deemed fully satisfied and the mortgage cancelled." The trial court found that the plaintiff had failed to comply with the above cited statutes and entered judgment cancelling the real estate mortgage of record, dismissed the complaint, and awarded the defendant mortgagor $138 damages for the unlawful sale of the property and the $25 penalty for non-compliance with the statutes cited. On appeal, *held,* reversed and remanded with directions to apply the $138 damages and the $25 penalty to the debt and enter judgment foreclosing the mortgage in suit; the penalizing clause of both Sections 241.13 and 241.15, is an unreasonable penalty and is therefore unconstitutional since it deprives the penalized party of his property without due process of law. *Stierle et al.* v. *Rohmeyer et al.,* (Wis. 1935) 260 N.W. 647.

Since 1903 two types of cases have been considered by the supreme court in connection with this provision. In *Emerson-Brantingham Imp. Co.* v. *Paul,* 163 Wis. 589, 158 N.W. 326 (1916), the plaintiff sued for the ballance due on a $2,190 promissory note. Five hundred and ninety-five dollars had been paid on the debt. The defendant mortgagor set up as a counter-claim the seizure of the chattel and the sale thereof for $850 and the failure to file an affidavit in compliance with Section 241.15. For non-compliance with the statute the $745 balance due was declared to be satisfied and the mortgage was cancelled. *Cf. Hammel* v. *Cairnes,* 129 Wis. 125, 107 N.W. 1089 (1906); *F. A. Patrick & Co.* v. *Deschamp,* 145 Wis. 224, 129 N.W. 1096 (1911); *Lierman* v. *O'Hara,* 153 Wis. 140, 140 N.W. 1057 (1913). In *American Hdwe. Co.* v. *Moore,* 177 Wis. 190, 187 N.W. 996 (1922) the action was to foreclose a real estate mortgage, $696.70 being due on the note. The defendant mortgagor set up as a counterclaim noncompliance with Section 241.15 in the seizure and sale of a tractor and a plow covered by a chattel mortgage given to secure the same indebtedness. For this failure to file an affidavit as strictly prescribed in Section 241.15 the real estate mortgage was declared by the court to be fully paid and satisfied, and the defendant was awarded $25 and costs. See also *Berntzon* v. *Edwardsen,* 161 Wis. 180, 152 N.W. 832 (1915). From these cases it seems that the cancelling clause in these two statutes has been upheld because the legislature in enacting them had in mind only the one type of case, i.e., where the value of the chattel covered by the mortgage given as security was in some reasonable proportion to the debt. It is to be noted that the plaintiff mortgagee usually has purchased the chattel at the sale on a low bid, that the court has allowed no actual damages to the defendant mortgagor and in giving judgment has in effect said that the language does not mean that the mortgagee shall lose his debt but that the consideration received from the sale shall satisfy his claim against the mortgagor; i.e., since the plaintiff has the payments made on the debt and the chattel, the penalty is not unreasonable for his failure to comply with the statutes and the plaintiff is not therefore deprived of his claim for protection without due process of law.

Just how far a legislature may go in enacting a penal statute depends on the interpretation of the word reasonable. Statutes which by their terms exact penalties beyond the bounds of reason are unconstitutional. *Missouri Pacific R. Co.* v. *Tucker,* 230 U.S. 340, 33 Sup. Ct. 961, 57 L.ed. 1507 (1913). Insurance companies and common carriers neglecting to satisfy valid claims within a specified period are frequently subjected to an additional liability of a fixed percentage of the risk plus reasonable attorneys fees. *Life and Casualty Ins. Co. of Tennessee* v. *McCroy,* 291 U.S. 566, 54 Sup. Ct. 482, 78 L.ed. 981 (1934); *Chicago & N. W. R. Co.* v. *Nye, etc. Co.,* 260 U.S. 35, 43 Sup. Ct. 55, 67 L.ed. 115 (1922).

It is intimated in these cases that the stipulated sum must bear a reasonable relation to the loss or inconvenience suffered by the person aggrieved. That the exactions are severe is not decisive. The criterion seems to be whether or not the price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. *Ex parte Young,* 209 U.S. 123, 28 Sup. Ct. 441, 52 L.ed. 741, 13 L.R.A. (N.S.) 932 (1908).

In the principal case the court very definitely decided that it would not enforce both the damage provisions and the forfeiture provisions of the local chattel mortgage foreclosure statutes. WIS. STAT. (1933) §§ 241.13, 241.15. And the court decided in this case to give the debtor damages only (the difference between the estimated value of chattels and the price bid) plus the $25 penalty without benefit of the forfeiture provisions. But the decision cannot be taken as overruling a case like *Emerson-Brantingham Imp. Co.* v. *Paul, supra,* in which the court did carry out the forfeiture provisions of the same statutes, allowing the twenty-five dollar penalty but no other damages when the value of the chattel together with the sum already paid in by the debtor was not inconsiderable in comparison with the amount of the original debt. In such a case, forfeiture of the creditor's claim for the balance of the indebtedness is not an unreasonable penalty.

WILLIAM F. HURLEY.

CORPORATIONS—DISREGARD OF CORPORATE ENTITY IN FAVOR OF CREDITORS.—The Defendant is a Michigan corporation. It owns all the stock of corporation *B,* which corporation, in turn, owns all the stock of corporation *A.* The latter corporation was organized by the defendant for the express purpose of entering into a land contract with the plaintiffs. The defendant admits that this was a device to hide its identity from the plaintiffs so that the price asked by them for the property would not be unreasonable. The defendant, through corporation *B,* furnished all the operating capital for corporation *A.* At the time of entering into the agreement the plaintiffs dealt solely with corporation *A* and were ignorant of the defendant's interest. Separate corporate accounts were kept, and there was no evidence of indiscriminate using or mixing of the assets of the corporations. Corporation *A* defaulted on the contract. By a bill in equity the plaintiffs now seek to have the land contract reformed, making the defendant corporation the vendee thereof, and to hold the defendant liable on such reformed contract. The trial court ruled for the plaintiff. On appeal, *held,* decree reversed. Corporation *A* is separate and distinct from its stockholder, and the latter cannot be held liable for corporation obligations unless it is shown that by recognizing their separate entities a fraud upon the creditor would result. *Gledhill et al.* v. *Fisher & Co. et al.,* (Mich. 1935) 262 N.W. 371.

Whether the corporate entity should be disregarded and a corporation creditor allowed to reach through and hold personally responsible the sole stockholder or holding company is a question to be decided solely upon the peculiar facts of a specific case. In the instant case the Michigan court seems to feel that the mixing of assets of the corporations is an important consideration in deciding the question. If the assets of the corporations or of the corporation and the sole stockholder (or stockholders, as in the case of a partnership) are mixed and used indiscriminately, the creditor of the insolvent corporation should be permitted to reach such assets. *In re Rieger, Kapner & Altmark,* 157 Fed. 609 (S.D. Ohio, 1907); *In re Collins,* 75 F. (2d) 62 (C.C.A. 8th, 1934); *Donovan* v.