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# Real Property -- Changes in North Carolina's Foreclosure Law

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## Real Property—Changes in North Carolina's Foreclosure Law

In February 1975 a three-judge federal district court,[1] in *Turner v. Blackburn*,[2] held the North Carolina power of sale foreclosure statutes[3] to be unconstitutional as applied. The court found that the statutes violated procedural due process by failing to provide for personal notice to the mortgagor and an opportunity to be heard prior to the deprivation of his property by the foreclosure sale.[4] This holding, which generated much discussion among members of the bar, led to the passage by the North Carolina General Assembly of a new statutory scheme[5] providing, among other things, for notice and hearing in such foreclosure proceedings.

### TURNER V. BLACKBURN

*Turner v. Blackburn* involved the foreclosure of a deed of trust on the property of plaintiff, Stella Turner, who had fallen behind in her payments. Although plaintiff may have been contacted about her late payments prior to the foreclosure proceedings,[6] she was not given personal notice of the foreclosure sale.[7] Notice of the sale, however, was posted and published in conformity with the power of sale foreclosure statute.[8] Following the sale, the assignee of the highest bid, who had become the owner of record, requested the clerk of the superior court to issue an order of possession.[9] Plaintiff then brought an action in federal court claiming that the North Carolina procedure violated procedural due

1. The operation of a state statute may not be enjoined by a federal court on the ground of unconstitutionality except by a three-judge federal court. 28 U.S.C. § 2281 (1970).

2. 389 F. Supp. 1250 (W.D.N.C. 1975).

3. The law then in force was N.C. GEN. STAT. §§ 45-21.1 to -21.33 (1966), *as amended*, (Supp. 1974).

4. *See also* Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975), holding that a sale of a motor vehicle by a garageman holding a possessory lien under N.C. GEN. STAT. §§ 44A-1 to -6 (Supp. 1975), without the opportunity for a prior hearing to determine the validity of the lien, violated due process.

5. Ch. 492, [1975] N.C. Sess. Laws, codified as N.C. GEN. STAT. §§ 45-21.9, -21.16, -21.16A, -21.17, -21.21, -21.29, -21.30, -21.33, -21.45 (Supp. 1975).

6. Address by Charles D. Gray, III, United Title Ins. Co. Seminar on Foreclosure, April 4, 1975.

7. Turner v. Blackburn, 389 F. Supp. 1250, 1259 (W.D.N.C. 1975); Address by Charles D. Gray, III, United Title Ins. Co. Seminar on Foreclosure, April 4, 1975.

8. The applicable statute at that time was N.C. GEN. STAT. § 45-21.17 (1966), *as amended*, (Supp. 1974).

9. Pursuant to *id.* § 45-21.29(k) (Supp. 1974).

process by failing to require personal notice and an opportunity to be heard prior to the foreclosure sale.[10]

The federal court, in a two-to-one decision, held that the extensive participation by the clerk of court required by statute[11] constituted state action and that notice and a hearing prior to a foreclosure sale were constitutionally required unless effectively waived. The court further found that the power of sale in the deed of trust was not an effective waiver in this case since there was a disparity in bargaining power between the parties to the deed of trust, the purported waiver was in minute type, there was no evidence that plaintiff was aware of the legal significance of the waiver language, and the deed of trust did not "even allude to the right to a prior hearing" which it purportedly waived.[12] The court ruled that, *in the future*, foreclosures pursuant to the North Carolina statutes would be unlawful unless the clerk determined that there was either a "knowing, voluntary, and intelligent waiver" or both "adequate and timely notice"[13] and "opportunity for a hearing."[14]

## BACKGROUND—STATE AND FEDERAL

Foreclosures were originally granted by courts of equity in order to cut off the "equity of redemption"—the power of a mortgagor to pay his debt and redeem his property after default. Although the original "strict foreclosure," by which a court decrees title in the mortgagee, is not recognized in North Carolina,[15] North Carolina courts will grant a foreclosure by ordering a sale.[16] In contrast to both of these methods, power of sale foreclosure arises not by authority of a court or statute, but instead from the power of sale granted in a mortgage or deed of trust. Power of sale foreclosure was recognized in North Carolina at least as early as 1830[17] and is today the dominant method of foreclosing real

10. 389 F. Supp. at 1251-54.

11. *See* notes 83-100 and accompanying text *infra*.

12. 389 F. Supp. at 1258-61.

13. The court is slightly unclear whether this means "notice of sale" or "notice of hearing," but the former interpretation is probably more in accord with the context. Of course there can be no real opportunity for a hearing without notice of the hearing also.

14. 389 F. Supp. at 1261. With respect to the plaintiff, the court ordered the owner of record to convey the property to Mrs. Turner in return for a mortgage to him. *Id.* Judge Jones, dissenting, felt that there was not sufficient state action to give the court jurisdiction under 28 U.S.C. § 1343(3) (1970). 389 F. Supp. at 1261-63.

15. Bradburn v. Roberts, 148 N.C. 214, 61 S.E. 617 (1908); J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 250 n.107 (1971).

16. J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA §§ 250-51 (1971).

17. Haines v. Cowles, 16 N.C. 420 (1830).

property in North Carolina. It is quicker, simpler, and less expensive than foreclosure by judicial sale.[18]

Prior to *Turner* the North Carolina statutes dealing with power of sale foreclosure contained provisions that required the posting of the notice of sale at the courthouse door for thirty days and the publication of the notice in a newspaper once a week for four weeks, unless otherwise agreed, but contained no provision for personal notice.[19] With the exception of some dicta seemingly to the contrary,[20] the North Carolina courts had held for many years that personal notice is not required to be given to either the debtor in default[21] or a junior lien holder.[22] This rule was reaffirmed in the 1972 case of *Huggins v. DeMent*[23] despite the contention by plaintiffs in that case that the failure to give personal notice rendered the sale unconstitutional. Thus, *Turner v. Blackburn* was a complete reversal of the former North Carolina law regarding personal notice in power of sale foreclosures.[24]

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18. A further discussion of the types of foreclosures and other means of terminating the equity of redemption can be found in G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 311-45 (2d ed. 1970); and in J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA §§ 234, 243, 248-54 (1971).

19. N.C. GEN. STAT. § 45-21.17 (1966), *as amended*, (Supp. 1974).

20. In Mills v. Mutual Bldg. & Loan Ass'n, 216 N.C. 664, 669, 6 S.E.2d 549, 552 (1940), the court in dictum stated, "The trustee . . . is bound . . . to . . . appris[e] both [the debtor and the creditor] of the intention of selling, that each may take the means to procure an advantageous sale." The court cited Johnston v. Eason, 38 N.C. 330 (1844), which stated, "When a trustee sells . . . , he must . . . give due notice to the parties interested." *Id.* at 335. In *Johnston*, it was the mortgagee contesting a lack of notice. However, both *Mills* and *Johnston* cited Anon., 6 Madd. 10, 56 Eng. Rep. 992 (V.C.C. 1821), in which the court enjoined the trustee from selling since he had not informed the mortgagor of his intention to sell. In Capehart v. Kader Biggs & Co., 77 N.C. 261 (1877), the court stated that, in a mortgage containing a power of sale, omission of a provision for notice to the mortgagor prior to advertisement for sale would "be imputed to a purpose to oppress the mortgagor." *Id.* at 265. This statement, however, was repudiated in later cases. *See* Manning v. Elliott Bros., 92 N.C. 48, 53 (1885); Bridgers v. W.H. Morris & Sons, 90 N.C. 32, 36 (1884).

21. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 241, 141 S.E.2d 329, 334 (1965); Woodell v. Davis, 261 N.C. 160, 163, 134 S.E.2d 160, 163 (1964); Biggs v. Oxendine, 207 N.C. 601, 603-04, 178 S.E. 216, 217-18 (1935); McIver v. Smith, 118 N.C. 73, 75, 23 S.E. 971, 972 (1896); Huggins v. DeMent, 13 N.C. App. 673, 187 S.E.2d 412, *appeal dismissed*, 281 N.C. 314, 188 S.E.2d 898, *cert. denied*, 409 U.S. 1071 (1972), *noted in* 51 N.C.L. REV. 1110 (1973); Hodges v. Wellons, 9 N.C. App. 152, 156, 175 S.E.2d 690, 693 (1970).

22. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 241, 141 S.E.2d 329, 334 (1965).

23. 13 N.C. App. 673, 187 S.E.2d 412, *appeal dismissed*, 281 N.C. 314, 188 S.E.2d 898, *cert. denied*, 409 U.S. 1071 (1972). This case was criticized in Note, *Notice Requirements of the Non-judicial Foreclosure Sale*, 51 N.C.L. REV. 1110 (1973), which predicted that the rule of *Huggins* might not stand.

24. Even since *Turner v. Blackburn*, the North Carolina Court of Appeals has continued to follow *Huggins v. DeMent*. Britt v. Britt, 26 N.C. App. 132, 137-38, 215 S.E.2d 172, 175-76, *cert. denied*, 288 N.C. 238, 217 S.E.2d 678 (1975).

The *Turner* court based its decision upon the failure of the North Carolina foreclosure procedure to meet the requirements of procedural due process. Several United States Supreme Court decisions have discussed these requirements in the debtor-creditor context. In 1969, the Supreme Court embarked on a line of cases holding that procedural due process requires that a debtor be given an opportunity to be heard before he can be deprived of property. In that year, *Sniadach v. Family Finance Corp.*[25] held that garnishment of a debtor's wages upon application by a creditor and before the debtor was given an opportunity to challenge the issuance of the writ of garnishment violated due process. The Court said that an opportunity to be heard was necessary even though the garnishment was only an interim deprivation; final deprivation would not occur until after a trial in court.

Although the language of *Sniadach* might be read as limiting the requirement of an opportunity to be heard to cases involving wages, the Supreme Court resolved this ambiguity in 1972 in *Fuentes v. Shevin.*[26] In *Fuentes* the Court extended the *Sniadach* requirement, holding summary seizure of goods under a writ of replevin to be unconstitutional. The concept of procedural due process, however, became somewhat confused in 1974 when the Court, in *Mitchell v. W.T. Grant Co.*,[27] upheld a Louisiana sequestration procedure that was similar in many ways to the Florida and Pennsylvania replevin statutes struck down in *Fuentes*. In *Mitchell*, like *Fuentes*, the creditor held a security interest in the goods. However, several specific factors in *Mitchell* purportedly led the Court to distinguish *Fuentes*. In *Mitchell* the creditor would lose his lien if the buyer transferred possession (possible if prior notice were given), the writ of sequestration was issued only by a judge and only upon the showing of specific facts, and there was an opportunity for an immediate postseizure hearing at which the creditor had the burden of proof.[28] Although *Mitchell* attempted to distinguish *Fuentes*, the Court actually changed its approach. In *Fuentes* the Court had said that the nature of the case might vary the form of the hearing but could not, absent a specific exigency,[29] postpone the hearing until after the

25. 395 U.S. 337 (1969).

26. 407 U.S. 67 (1972), *noted in* 51 N.C.L. REV. 111 (1972).

27. 416 U.S. 600 (1974).

28. Absence of this last element led a three-judge federal district court, relying upon *Mitchell*, to hold New York's attachment statute unconstitutional. Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted, consolidated with* Carey v. Sugar, 421 U.S. 908 (1975), *remanded*, 96 S. Ct. 1208 (1976).

29. Specific exigencies suggested by the Court were situations in which postponing

seizure. *Mitchell* in effect held that the nature of the case might determine the time of the hearing.

Although some thought *Mitchell* had effectively overruled *Fuentes*,[30] the Court severely restricted the holding of *Mitchell* in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[31] *North Georgia*, which involved the garnishment of a debtor's funds held by a bank, found the Georgia garnishment statute unconstitutional for failing to require notice and a hearing. The Court relied on *Sniadach* and *Fuentes* and distinguished *Mitchell* on the grounds that in *North Georgia* the affidavit necessary for the writ of garnishment "need[ed to] contain only conclusory allegations" (instead of in *Mitchell* "clearly setting out the facts entitling the creditor to sequestration"), the "writ [was] issuable . . . by the court clerk" (instead of in *Mitchell* by a judge), and there was "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[32]

*North Georgia* thus appeared to reaffirm as the general rule the *Fuentes* requirement of notice and an opportunity to be heard. *Mitchell* might be distinguished from *North Georgia* as setting the requirements when both the debtor and creditor already have rights in the specific property, *i.e.* when the creditor holds a security interest in the property.[33] *North Georgia*, however, did not rely on this distinction. Instead, it distinguished *Mitchell* on the grounds noted above. Thus one commentator argues that *North Georgia* in some ways adopted the *Mitchell* rationale that a pre-seizure hearing is not mandatory when other protections, including an "early" hearing, are imposed, and that it thereby paved the way for the extension of *Mitchell* to unsecured creditor situations.[34] Whether this will be the development of the law or wheth-

notice and a hearing were necessary to protect the public against immediate harm, to secure (quasi in rem) jurisdiction, or to keep the debtor from destroying or concealing the goods. The Court, however, said these situations "must be truly unusual," and the statute must be "narrowly drawn." Fuentes v. Shevin, 407 U.S. 67, 90-93 & n.23 (1972). *Mitchell* could be explained on the basis that the danger of lien expiration upon transfer of possession was an exigency, but the case does not place primary importance on this fact, and the language in *Fuentes* does not seem to support the notion of such a generalized exigency.

30. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 623 (Powell, J., concurring), 634-35 (Stewart, J., dissenting) (1974).

31. 419 U.S. 601 (1975).

32. *Id.* at 607.

33. The *Mitchell* decision emphasized this fact. 416 U.S. at 604. *North Georgia* involved an unsecured creditor. Note, however, that *Fuentes*, like *Mitchell*, involved a secured creditor.

34. Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUTGERS L. REV. 541, 563-64 (1975).

er *Mitchell* will be considered a very special situation and be restricted to its facts remains to be seen.[35]

The opportunity to be heard in the debtor context would be incomplete without adequate notice. In *Mullane v. Central Hanover Bank & Trust Co.*[36] the United States Supreme Court recognized that procedural due process requires that the parties affected be given "notice reasonably calculated . . . to apprise [them] of the pendency of the action."[37] *Mullane* held that due process required that personal notice, not merely notice by publication, be given to beneficiaries of a trust fund whose addresses were known before a judicial settlement of accounts.

The United States Supreme Court has also tightened the requirements for finding a waiver of due process rights by the debtor. Waiver of a notice and hearing by the signing of a cognovit note was upheld in *D.H. Overmyer Co. v. Frick Co.*[38] at least partly because the debtor was a corporation, indicating business sophistication, and had received concessions in exchange for the waiver, indicating awareness of the waiver's significance and a bargaining over terms. In *Fuentes v. Shevin*[39] the Court found that the language in the conditional sales contracts[40] did not constitute a valid waiver for the reasons that

> There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. . . . The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.
>
> . . . .
>
> . . . The contracts included nothing about the waiver of a prior hearing. They did not indicate *how* or *through what process* . . . the seller could take back the goods.[41]

The concept of procedural due process is based on the due process clause of the fourteenth amendment to the United States Constitution, which applies only to actions by states.[42] A finding of state action is

35. The Supreme Court noted probable jurisdiction in Carey v. Sugar, 421 U.S. 908 (1975), involving the constitutionality of New York's attachment statute. The case was remanded for state court construction of New York law. Carey v. Sugar, 96 S. Ct. 1208 (1976).

36. 339 U.S. 306 (1950).

37. *Id.* at 314.

38. 405 U.S. 174 (1972). *See also* Swarb v. Lennox, 405 U.S. 191 (1972).

39. 407 U.S. 67 (1972).

40. The language provided that the creditors " 'may take back' " or " 'may retake' or 'repossess' the merchandise." *Id.* at 94.

41. *Id.* at 95-96.

42. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

therefore necessary before due process requirements will exist.[43] State action may be present when state law provides the basis for a deprivation or when state officials are involved in the deprivation.[44] Courts have used several theories to find "indirect" state action. When a private party performs a traditional government function—issuing town ordinances,[45] conducting a "pre-primary" for electing government officials,[46] or managing a public park[47]—courts have found state action.[48] State action may be found when the government's presence becomes so pervasive that the government is a joint participant in the activity, as when a person operates a restaurant within a government owned parking facility in space leased to him by the government.[49] The mere presence of the government, however, is not always sufficient to constitute such a "symbiotic relationship" necessary for finding state action.[50] State encouragement of private discriminatory conduct has been a basis for state action. Such was the case in *Reitman v. Mulkey*[51] when that court found that a constitutional amendment, which forbade the state to restrict a person's right to decline to sell or lease realty, encouraged private discrimination. This holding, however, was based on the facts that the encouragement was a *constitutional* provision, which had *reversed* prior law (fair housing legislation). State action has also been found in judicial enforcement of racially restrictive covenants,[52] although this rationale has not been broadly extended.[53]

Although attempts have been made to apply these rationales to power of sale foreclosures, courts in at least five jurisdictions[54] in the past few years have refused to find state action in power of sale

43. Civil Rights Cases, 109 U.S. 3, 11 (1883). The due process clause of the fifth amendment applies to the federal government.

44. *See, e.g.*, United States v. Raines, 362 U.S. 17 (1960) (based on the fifteenth amendment).

45. Marsh v. Alabama, 326 U.S. 501 (1946).

46. Terry v. Adams, 345 U.S. 461 (1953) (based on the fifteenth amendment).

47. Evans v. Newton, 382 U.S. 296 (1966).

48. *E.g.*, cases cited notes 45-47 *supra.*

49. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

50. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the Court refused to apply the equal protection clause to a private club serving liquor merely because the state regulated liquor licenses.

51. 387 U.S. 369 (1967).

52. Shelley v. Kraemer, 334 U.S. 1 (1948).

53. *See* Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428, 438 (Mo. 1975); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 677-80 (1974).

54. California, District of Columbia, Georgia, Missouri, and Texas. *See* note 55, *infra.*

foreclosures.[55] Powers of sale were not derived from statutes but instead existed prior to the enactment of state statutes regulating foreclosures.[56] The duties of a clerk, a state official, have been seen as insignificant.[57] Foreclosure has not been seen as a traditional government function.[58] Nor have these courts found sufficient "entanglement" by the state to constitute state action.[59] *Reitman v. Mulkey* has been distinguished from the power of sale context because in that case the constitutional provision encouraged what had been forbidden, whereas powers of sale existed before foreclosure statutes, which in fact tended to restrict the powers rather than encourage them.[60] Courts have also refused to find state action in judicial enforcement of the power of sale.[61] In general, these courts have found that "[s]tatutes and laws regulate many forms of purely private activity, such as contractual relations . . . , and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."[62]

Before *Turner*, only federal court decisions in Michigan expressly supported a finding of state action in power of sale foreclosure proceedings. *Garner v. Tri-State Development Co.*[63] found state action present in statutory provisions which encouraged private discriminatory conduct, and the "largely ministerial" participation of the sheriff and regis-

55. Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974); Global Indus., Inc. v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974); U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (Dist. Ct. App. 1974); Coffey Enterprises Realty & Dev. Co. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975); Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428 (Mo. 1975); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App. 1975). In Beaton v. Land Court, — Mass. —, 326 N.E.2d 302, 307 n.6 (1975), the court stated, "The substantial and growing weight of authority in apparently analogous areas suggests that in fact no 'state action' is present in such foreclosures," and cited *Turner v. Blackburn* as an example of "[s]ome authority, now apparently dwindling, . . . which finds 'state action' . . . ."

56. U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44, 57 (Dist. Ct. App. 1974); Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428, 431-32 (Mo. 1975).

57. *See, e.g.*, Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1383 (N.D. Ga. 1974).

58. *See, e.g.*, Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511, 515 (D.C. Cir. 1974).

59. *See, e.g., id.* at 514.

60. *See, e.g.*, Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428, 435 (Mo. 1975); Armenta v. Nussbaum, 519 S.W.2d 673, 677-78 (Tex. Civ. App. 1975).

61. *See, e.g.*, Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1383 (N.D. Ga. 1974); Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428, 437-38 (Mo. 1975).

62. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330-31 (9th Cir. 1973), *quoted in* Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511, 514 (D.C. Cir. 1974).

63. 382 F. Supp. 377 (E.D. Mich. 1974).

ter of deeds.[64] *Northrip v. Federal National Mortgage Association*[65] rejected the latter basis but found state action based on statutory encouragement.[66]

### ANALYSIS OF TURNER

If state action is, for the sake of argument, assumed to be present in *Turner v. Blackburn*, the decision seems fairly consistent with the prior Supreme Court cases in its findings that notice and a hearing are required and that there was no waiver. Although *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia* dealt with personal property, by analogy due process should require the same kind of notice and opportunity to be heard or knowing waiver in the real estate context. Thus, federal courts are becoming involved in an area (real estate) traditionally left to the states. Foreclosure by power of sale involves a permanent deprivation of property, whereas the above cases potentially involved only a temporary deprivation.[67] The due process requirements in the real estate context should therefore be at least as strict. As noted before, the North Carolina foreclosure procedure did not require personal notice of the sale. This conflicts with the personal notice requirements of *Mullane v. Central Hanover Bank & Trust Co.*[68] There was no requirement or opportunity for a pre-sale hearing, unless the debtor instituted an action for an injunction.[69] Even this right would be meaningless if the debtor did not have notice of the sale.[70] In any case, such a right does not appear to be a sufficient opportunity for a hearing under *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia*,[71] although such an argument

64. *Id.* at 379.

65. 372 F. Supp. 594 (E.D. Mich. 1974).

66. *Id.* at 596-97.

67. In *Fuentes*, the Pennsylvania statute did not require the creditor to institute suit following the replevin, but the Florida statute did so require. 407 U.S. at 74, 77. Garnishment, involved in *Sniadach* and *North Georgia*, normally anticipates a trial following the garnishment. Likewise, the sequestration procedure of Louisiana involved in *Mitchell* normally contemplates a subsequent suit.

68. 339 U.S. 306 (1950).

69. N.C. GEN. STAT. § 45-21.34 (Supp. 1975) provides for an injunction or temporary restraining order upon application and the posting of bond. A right to seek such an injunction or order existed even without this statutory section, *see, e.g.*, Bolich v. Prudential Ins. Co., 202 N.C. 789, 791, 164 S.E. 335, 336 (1932); Capehart v. Kader Biggs & Co., 77 N.C. 261 (1877), and would exist in most debtor-creditor cases. Section 45-21.34 was enacted in 1933 partly to reverse the rule of *Bolich v. Prudential Ins. Co.*, *supra*, that equity would not enjoin a sale merely because a general depression would cause the property to be sold at an inadequate price. *A Survey of Statutory Changes in North Carolina in 1933*, 11 N.C.L. REV. 191, 240-41 (1933).

70. *Cf.* Turner v. Blackburn, 389 F. Supp. 1250, 1259 (1975).

71. In Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975), the court ruled a sale

could be made. Even if *Mitchell* sets forth the applicable standard, either because it applies to transactions involving secured creditors (as in a foreclosure) or because it has been implicitly adopted as the general standard,[72] its requirements were not met. There was no provision for an early hearing; indeed, there was no provision for any hearing (except an injunction hearing[73]). In addition, the safeguards surrounding the issuance of a writ in *Mitchell* were not present since there was no writ or order. Nor was there any requirement that the creditor furnish security for the payment of damages the debtor might sustain, as in *Fuentes*,[74] *Mitchell*,[75] and *North Georgia*.[76] Moreover, in holding that language in the deed of trust did not constitute a sufficient waiver, the court in *Turner* properly found many analogies to *Fuentes*.[77]

*Turner v. Blackburn* is ambiguous, however, with respect to whether a hearing is required or merely an opportunity for a hearing[78] (and, if the latter, whether the burden may be placed upon the mortgagor to request a hearing).[79] *Fuentes* indicates that only an opportunity for a hearing is required: "[N]o hearing need be held

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under the mechanic's lien statute to be unconstitutional, calling the seeking of a temporary restraining order or an injunction to be "extraordinary remedies" and not sufficient protection. *Id.* at 649.

72. *See* text accompanying note 34 *supra*.

73. *See* notes 69-71 and accompanying text *supra*.

74. 407 U.S. at 73 n.6, 75-76 n.7.

75. 416 U.S. at 621.

76. 419 U.S. at 602 n.1.

77. *See* text accompanying notes 39-41 *supra*. The deed of trust in *Turner* did, however, indicate the process of deprivation more fully than the contract in *Fuentes*. *Compare* Turner v. Blackburn, 389 F. Supp. at 1255 n.24, *with* Fuentes v. Shevin, 407 U.S. at 94-96.

78. *Compare* "we hold that a hearing prior to foreclosure and sale is essential," 389 F. Supp. at 1259, *with* "foreclosure . . . is . . . unlawful . . . unless . . . there has been . . . opportunity for a hearing," 389 F. Supp. at 1261.

79. One writer has felt that due process in foreclosures could be satisfied if the notice to the debtor informed him that he could request a hearing and then placed the burden on the debtor to so request. Comment, *Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Rights?*, 4 CUMBERLAND-SAMFORD L. REV. 507, 523 & n.81 (1974). This might be supported by language in Fuentes v. Shevin, 407 U.S. 67, 93 n.29 (1972), *quoted in* text accompanying note 80 *infra*. In fact, in Ross v. Brown Title Corp., 356 F. Supp. 595 (E.D. La.), *aff'd mem.*, 412 U.S. 934 (1973), the court upheld the Louisiana executory process procedure, similar to foreclosure, in which the debtor is given notice of sale and then has "thirty-three days in which to take the steps necessary to obtain a hearing . . . ." *Id.* at 601. *Cf.* N.C. GEN. STAT. § 44A-4 (Supp. 1975), which does place the burden of requesting a hearing upon the debtor before a sale to satisfy a mechanic's lien. *But cf.* Garner v. Tri-State Dev. Co., 382 F. Supp. 377, 380 (E.D. Mich. 1974), where the court held that *Fuentes* requires not only a notice of sale but also a notice of hearing. *See also* Buckner v. Carmack, 272 So. 2d 326 (La. 1973), *appeal dismissed*, 417 U.S. 901 (1974).

unless the defendant, having received notice of his opportunity, takes advantage of it."[80]

The most questionable part of the *Turner* decision is the court's finding of state action. Although mentioning other theories, the court in *Turner* apparently based its finding of state action solely upon the direct participation by the clerk of the superior court.[81] This was perhaps the most promising theory of state action,[82] but the court overemphasized the clerk's role in North Carolina.

Participation by the clerk in what was formerly a purely contractual matter—foreclosure sale under power of sale—was imposed by statute in North Carolina in 1915[83] when the upset bid statute was enacted.[84] This statute, enacted to give mortgagors additional protection,[85] required the clerk to order a resale upon the filing of an increased bid with him within ten days of the sale, and, following the resale, "the clerk shall issue his order [requiring] the mortgagee . . . to make title . . . ."[86] Under the original statute, unless there was an upset bid, the clerk had no jurisdiction and no report needed to be filed with the clerk.[87] Under the present statute, a preliminary report is necessary to begin the running of the ten-day upset bid period,[88] and the clerk may compel the filing of this report.[89] Otherwise, the clerk appears to have

80. Fuentes v. Shevin, 407 U.S. 67, 93 n.29 (1972). Since *Fuentes* also refers to "the requirement of a prior hearing," *id.* at 97, the term "hearing" apparently refers merely to the "opportunity for a hearing."

81. 389 F. Supp. at 1254-58. The decision mentioned but did not consider other theories: judicial enforcement, symbiotic relationship, statutory encouragement, and delegation of a traditional government function. *See id.* at 1254-55 n.20.

82. See text accompanying notes 44-66 *supra* for a discussion of the other theories.

83. Ch. 146, [1915] N.C. Public Laws, subsequently codified as N.C. CONSOL. STAT. § 2591 (1919). The clerk had previously been given minor duties with respect to other aspects of deeds of trust. *E.g.*, ch. 128, [1905] N.C. Public Laws, now N.C. GEN. STAT. § 45-6 (1966); ch. 188, [1869-1870] N.C. Public Laws, now N.C. GEN. STAT. § 45-9 (1966).

84. Ch. 146, [1915] N.C. Public Laws, subsequently codified as N.C. CONSOL. STAT. § 2591 (1919). This statute later became N.C. GEN. STAT. § 45-28 (1943), and since the 1949 revision of the foreclosure statutes is now N.C. GEN. STAT. § 45-21.27 through -21.29 (1966), *as amended*, (Supp. 1975).

85. The statute extended to mortgagors in power of sale foreclosures protection similar to that in judicial foreclosures, in which a court of equity could decree a resale upon deposit of a raised bid. Pringle v. Winston-Salem Bldg. & Loan Ass'n, 182 N.C. 316, 317, 108 S.E. 914 (1921).

86. N.C. CONSOL. STAT. § 2591 (1919). This order, however, was said to be "merely ministerial in its nature, and its omission . . . does not invalidate the foreclosure." Cheek v. Squires, 200 N.C. 661, 668, 158 S.E. 198, 202 (1931).

87. *In re* Sermon's Land, 182 N.C. 122, 128, 108 S.E. 497, 499 (1921).

88. N.C. GEN. STAT. §§ 45-21.26 to -21.27 (1966), *as amended*, (Supp. 1975).

89. N.C. GEN. STAT. § 45-21.14 (1966).

had, when *Turner* was decided, no jurisdiction over the foreclosure unless an upset bid was filed (or surplus proceeds were deposited with the clerk[90]).[91] When there is no upset bid, there is no requirement that the clerk confirm the sale.[92] Although the filing of a final report is required,[93] it appears that failure to file a final report would not in itself affect the validity of the foreclosure.[94]

The court in *Turner v. Blackburn* emphasized not only the filing of the preliminary report and the clerk's "administration of the upset bid provisions," but also stated that the essentials of the sale "are subject to explicit verification by the clerk under § 43-21.26."[95] Although the clerk may verify such items, nothing in the statute imposes such authority upon him.[96] The court also stated that "without a showing of personal notice to the *mortgagor* of the property, the disposition of the proceeds of the *sale* must be approved by the clerk."[97] This statement also is not supported by the statutes.[98] The court emphasized the clerk's role in issuing orders for possession,[99] but this seems to imply no more state action in the foreclosure setting than would an eviction order imply state action in a simple conveyance of property by deed.

Thus it appears that the clerk's role in foreclosures in which there is no upset bid is negligible and not sufficient to constitute state action.[100] However, if one accepts the court's reasoning that state action is found in the clerk's administration of the upset bid procedure,[101] its refusal to "examine the various elements of the foreclosure proceeding as disparate bits and pieces"[102] avoids the awkwardness of requiring

90. N.C. GEN. STAT. §§ 45-21.31 to -21.32 (1966), *as amended*, (Supp. 1975).

91. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 243, 141 S.E.2d 329, 335 (1965); *In re* Register Property, 5 N.C. App. 29, 35, 167 S.E.2d 802, 807 (1969).

92. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 244, 141 S.E.2d 329, 336 (1965), *codified in* N.C. GEN. STAT. § 45-21.29A (Supp. 1975); Britt v. Smith, 6 N.C. App. 117, 122, 169 S.E.2d 482, 486 (1969). N.C. GEN. STAT. § 45-21.33(b) (1966) does provide that the clerk shall audit the final account.

93. N.C. GEN. STAT. § 45-21.33 (1966).

94. Cheek v. Squires, 200 N.C. 661, 669, 158 S.E. 198, 202 (1931); *cf.* Britt v. Britt, 26 N.C. App. 132, 135-36, 215 S.E.2d 172, 174-75, *cert. denied*, 288 N.C. 238, 217 S.E.2d 678 (1975).

95. 389 F. Supp. at 1256.

96. *See* N.C. GEN. STAT. § 45-21.26 (1966).

97. 389 F. Supp. at 1257 (emphasis in original).

98. It also seems contrary to implications of the statutes and court decisions. *See* cases and statutes cited notes 90-92 and accompanying text *supra*.

99. 389 F. Supp. at 1257.

100. *See id.* at 1262-63 (Jones, J., dissenting).

101. *Id.* at 1256-57.

102. *Id.* at 1258.

notice and a hearing only in cases in which (and after) an upset bid is filed.

*Turner v. Blackburn* is one of the first cases clearly to hold a power of sale foreclosure procedure to be unconstitutional. *Turner's* present impact on the country does not seem so great when it is remembered that this holding places *Turner* in the minority of decisions on power of sale foreclosures.[103] Subsequent decisions in the state courts of Georgia,[104] Missouri,[105] and Texas,[106] and a Fifth Circuit decision considering the Texas procedure[107] did not follow *Turner*. Even the North Carolina Court of Appeals, in *Britt v. Britt*,[108] refused to follow *Turner*. Nevertheless, *Turner* may later be seen as the beginning of a trend. There are approximately twenty-six jurisdictions that statutorily sanction power of sale foreclosure,[109] and *Turner* could have a substantial influence on courts that consider the constitutionality of those notice procedures. Although the proposed Uniform Land Transactions Act and the proposed Federal Mortgage Foreclosure Act provide for personal notice to the debtor and to junior lienholders, neither act provides for a hearing,[110] and thus would be constitutionally suspect under *Turner*.

103. Only Northrip v. Federal Nat'l Mtg. Ass'n, 372 F. Supp. 594 (E.D. Mich. 1974), also clearly held a particular power of sale foreclosure procedure to be unconstitutional. Garner v. Tri-State Dev. Co., 382 F. Supp. 377 (E.D. Mich. 1974), held that the procedure violated due process absent a waiver, but, since a commercial debtor was involved, the court held that the waiver contained sufficient language on its face to be effective. Law v. United States Dep't of Agr., 366 F. Supp. 1233 (N.D. Ga. 1973), basing its opinion upon fifth amendment due process and thereby avoiding the state action question, *id.* at 1234, denied summary judgment so that the validity of the waiver could be judged. Similarly, Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973), upheld the denial of summary judgment. Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974), held that even if there were state action, the foreclosure statute would not be unconstitutional on its face. In Logan v. Short, 342 F. Supp. 1349 (E.D. Mo. 1972), the federal court abstained pending construction of the statute by a state court. The Louisiana executory process procedure, similar to foreclosure, was upheld in Ross v. Brown Title Corp., 356 F. Supp. 595 (E.D. La.), *aff'd mem.*, 412 U.S. 934 (1973), and in Buckner v. Carmack, 272 So. 2d 326 (La. 1973), *appeal dismissed*, 417 U.S. 901 (1974). Finally, many decisions have upheld power of sale foreclosures on the basis that no state action was involved. *See* cases cited note 55 *supra*.

104. Coffey Enterprises Realty & Dev. Co. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975).

105. Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428 (Mo. 1975).

106. Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App. 1975).

107. Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975).

108. 26 N.C. App. 132, 215 S.E.2d 172, *cert. denied*, 288 N.C. 238, 217 S.E.2d 678 (1975).

109. Madway & Pearlman, *Mortgage Forms and Foreclosure Practices: Time for Reform*, 9 REAL PROP., PROBATE AND TRUST J. 560, 564 (1974). These jurisdictions are listed and their statutes cited in Madway, *A Mortgage Foreclosure Primer*, 8 CLEARINGHOUSE REV. 146, 170-72 (1974).

110. Pedowitz, *Current Developments in Summary Foreclosure*, 9 REAL PROP., PROBATE AND TRUST J. 421 (1974).

Ironically, the statutory provisions that were enacted by North Carolina to protect mortgagors—the provisions for upset bids and for the filing of the preliminary and final reports—caused the foreclosure procedure to be declared unconstitutional. Had the court declared the statutes *per se* unconstitutional, the situation feared by another court might have resulted: contractual power of sale might have continued without any statutory protections.[111] As it was, the dilemma faced by attorneys in North Carolina following *Turner* was alleviated by the passage of substantial amendments[112] to the foreclosure statutes on June 6, 1975. The amendments are effective from that date except as to foreclosures or litigation commenced prior to that date.[113]

### THE NEW AMENDMENTS TO THE FORECLOSURE STATUTES

The new amendments insert a new section 45-21.16, which provides for a hearing to be held before the clerk of the superior court prior to the foreclosure sale.[114] The designation of a clerk to conduct the hearing is somewhat suspect in light of the United States Supreme Court's opinion in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[115] The Court there struck down the Georgia garnishment statute partly because the procedure was overseen by a clerk instead of by a judge as in *Mitchell.*[116] The North Carolina statutory amendments try to counteract such an attack by their recital that the clerk's act "is a judicial act and may be appealed to the judge . . . ."[117] Support for the argument that this provision will be an effective defense to a *North Georgia* challenge can be found in *Hutchison v. Bank of North Carolina, N.A.*[118] In that case, the actions of the clerk in deciding whether to issue a writ of attachment under the North Carolina attachment statute[119] were held

111. Armenta v. Nussbaum, 519 S.W.2d 673, 679 (Tex. Civ. App. 1975). With the statutes declared unconstitutional, there would seem to be no state action to support requirements of notice and a hearing.

112. Ch. 492, [1975] N.C. Sess. Laws, codified as N.C. GEN. STAT. §§ 45-21.9, -21.16, -21.16A, -21.17, -21.21, -21.29, -21.30, -21.33, -21.45 (Supp. 1975).

113. Ch. 492, §§ 13, 16, & 17, [1975] N.C. Sess. Laws.

114. N.C. GEN. STAT. § 45-21.16(d) (Supp. 1975); *cf.* the 1973 amendments to the claim and delivery statute providing for a hearing, *id.* §§ 1-474, -474.1, and the 1975 amendments to the mechanic's lien statute providing for opportunity for a hearing, *id.* § 44A-4. The latter were prompted by Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975). *See* note 4 *supra.*

115. 419 U.S. 601 (1975).

116. *Id.* at 607. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). *See* text accompanying note 32 *supra.*

117. N.C. GEN. STAT. § 45-21.16(d) (Supp. 1975).

118. 392 F. Supp. 888 (M.D.N.C. 1975).

119. N.C. GEN. STAT. § 1-440.5 (Supp. 1975).

to be judicial actions and thus not in violation of the standard for constitutionality enunciated in *North Georgia.*[120] Indeed, *Turner v. Blackburn* spoke of a "showing before the clerk or similar neutral official."[121]

By providing that the clerk make certain findings, the statutory amendments seem to preclude a mere default judgment; instead the trustee must present enough affirmative evidence to enable the clerk to find "the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such . . . ."[122] This conclusion is enforced by the provision indicating that a hearing cannot be waived by lapse of time, but instead must be affirmatively waived.[123] The requirement that evidence be presented is desirable in light of *North Georgia's* distinguishing of *Mitchell* on the ground that in *Mitchell* the affidavit had to "[go] beyond mere conclusory allegations and clearly [set] out the facts," in contrast to the affidavit of "conclusory allegations" in *North Georgia.*[124] Of course, the standards would be stricter in cases such as those in which the debtor has no opportunity to appear. The North Carolina statute, however, is unfortunately unclear as to how "conclusory" the evidence can be. Hopefully, clerks will require attorneys to present evidence "setting out the facts" in order to avoid attacks on the constitutionality of the procedure.

The North Carolina claim and delivery statute also provides for a prior hearing.[125] The constitutionality of that hearing was made sus-

120. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

121. 389 F. Supp. at 1259. However, support for this statement can be found not in the Court's opinion in *North Georgia,* but instead in Powell's concurring opinion and Blackmun's dissenting opinion in that case. 419 U.S. at 611 & n.3, 619. Moreover, Powell justified his choice of a "neutral officer" not necessarily a judge by the statement, "The basic protection required for the debtor is the assurance of a prompt postgarnishment hearing before a judge." *Id.* at 611 n.3. *Fuentes,* the case cited in *Turner* at this point, does not discuss this issue, but merely says that the nature and form of the hearings "are legitimately open to many potential variations." Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

*Cf.* Remarks by James M. Pedowitz, United Title Ins. Co. Seminar on Foreclosure, April 4, 1975, which suggested that the hearing should be before a judicial official if an actual defense is raised; otherwise the hearing may be before a clerk.

122. N.C. GEN. STAT. § 45-21.16(d) (Supp. 1975).

123. *Id.* § 45-21.16(f). Thus the statute requires more than the *opportunity* for a hearing. See notes 78-80 and accompanying text *supra* for a discussion of the uncertainty (which the statute avoids) about what is constitutionally required.

124. 419 U.S. at 607.

125. N.C. GEN. STAT. §§ 1-474, -474.1 (Supp. 1975).

pect by the decision of *Wachovia Bank & Trust Co., N.A. v. Smith*,[126] which held that a debtor could not raise in this hearing the defenses of revocation of acceptance of the goods or the retention of a security interest in them. If this holding were extended to deny the debtor the right to raise similar substantive defenses in foreclosure hearings, the constitutionality of the new procedure would be threatened, as protection of the debtor would be greatly diminished. At least two theories support the non-extension of this holding to foreclosure hearings. First, unlike claim and delivery in which the case is eventually heard on its merits,[127] the foreclosure hearing is generally the last hearing. Secondly, the foreclosure statutory amendments are more explicit in setting forth what the clerk must find than are the claim and delivery provisions.[128]

The new amendments provide only one method of waiving a hearing. Waiver must be on a form mailed *by the clerk* upon request after service of the notice of hearing.[129] This eliminates the constitutional problem of whether a waiver of hearing in the original deed of trust is valid—under the statute it is not. The statutory procedure is also beneficial by making it more likely that the waiver is "voluntarily, intelligently, and knowingly"[130] made.[131]

The new amendments provide for notice of the hearing to be

126. 24 N.C. App. 133, 210 S.E.2d 212 (1974), *cert. denied*, 286 N.C. 420, 211 S.E.2d 801 (1975).

127. *See id.* at 135, 210 S.E.2d at 213.

128. *Compare* N.C. GEN. STAT. § 45-21.16(d) (Supp. 1975) *with id.* §§ 1-474, -474.1.

129. *Id.* § 45-21.16(f). This provision is similar to the waiver provision in the claim and delivery statute. *Id.* § 1-474.1(b). The waiver provision in the version of the bill first passed by the House read in part as follows: "No hearing before the clerk shall be required as to any persons entitled to notice [of hearing] who execute and deliver to the trustee or mortgagee a duly acknowledged written waiver of their right to notice and hearing as herein provided, which waiver shall acknowledge the right of the mortgagee to foreclose without such notice and hearing . . . ." H. 445 Committee Sub., Adopted 5/13/75, N.C. Gen. Assembly, 1975 Sess. § 2 (§ 45-21.16(f)). This waiver provision was replaced in the final version by the provision in the original House and Senate bills. *See* H. 445 and S. 345, N.C. Gen. Assembly, 1975 Sess. § 1 (§ 45-21.16(c)). *Cf.* S. 733, N.C. Gen. Assembly, 1975 Sess., which was similar to the enacted statute but contained no waiver provision.

Presumably, waivers not sent by the clerk executed in foreclosure proceedings begun prior to June 6, 1975, were valid if they met the constitutional requirements. This conclusion would especially apply to a waiver executed by a debtor after default, since the debtor would be more likely to recognize the significance of this separate waiver than one incorporated into the deed of trust.

130. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972).

131. *Cf.* the method of waiver of hearing by lapse of time found in the 1975 mechanic's lien statutory amendments. N.C. GEN. STAT. § 44A-4 (Supp. 1975).

served upon the current record owners of the property at least ten days before the hearing.[132] Prior owners must also be served in order for the noteholder to recover any deficiency from them.[133] The methods of service are those provided by the Rules of Civil Procedure for the service of summons.[134] In addition, if the party cannot be located, the notice may be posted on the property.[135] The statutory provisions indicate that the notice must remain posted upon the property throughout the ten day period immediately preceding the hearing. Continuous checking on the notice would not seem to be required, however, by analogy to *Carson v. Fleming*,[136] in which the court held that "the trustee has a right to presume that [foreclosure sale notices] remained posted during the required period of time."[137] It is uncertain whether notice by posting on the property is sufficient notice to a person no longer an owner of the property to satisfy due process requirements. Thus, when there is no service except by posting, such a person may be not liable for deficiencies. The statutory amendments provide a detailed list of information that must be included in the notice of hearing.[138] In addition, if the information required to be included in the notice of sale[139] is included in the notice of hearing, no further notice of sale need be sent to those receiving the notice of hearing.[140]

Following the hearing,[141] the notice of sale must be posted at the courthouse and published as before, except that the lengths of time have been reduced from thirty days to twenty days for posting and from four

132. *Id.* §§ 45-21.16(a)-(b).
133. *Id.* § 45-21.16(b)(2).
134. *Id.* § 45-21.16(a). The methods of service are set forth in N.C.R. Civ. P. 4. It appears that the provision in section 45-21.16(a) for alternative service by registered or certified mail has been made superfluous by the addition of similar provisions to N.C.R. Civ. P. 4(j). It is arguable, however, that "actual delivery by registered or certified mail, return receipt requested," under section 45-21.16(a), has a broader meaning than, for example, "mailing a copy . . . , registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee only," N.C.R. Civ. P. 4(j)(1)(c).
135. N.C. Gen. Stat. § 45-21.16(a) (Supp. 1975); N.C.R. Civ. P. 4(j)(9)(c).
136. 188 N.C. 600, 125 S.E. 259 (1924).
137. *Id.* at 602, 125 S.E. at 260.
138. N.C. Gen. Stat. § 45-21.16(c) (Supp. 1975).
139. *Id.* § 45-21.16A, *formerly* § 45-21.16 (1966), *as amended*, (Supp. 1974).
140. *Id.* § 45-21.17(4) (Supp. 1975).
141. The statute is not completely clear as to whether the notice of sale may be posted and published before the hearing. However, the provision in *id.* § 45-21.16(d) that, if the clerk at the hearing finds the existence of certain facts, he "shall further find that the . . . trustee can proceed . . . , and the . . . trustee can give notice of and conduct a sale . . ." indicates that posting and publication of the notice of sale must await the outcome of the hearing.

weeks to two weeks for publication,[142] unless the deed of trust specifies longer periods of time.[143] This reduction is presumably intended partially to offset the newly imposed prehearing time. The notice of sale must also be mailed to (not necessarily served upon) parties entitled to receive the notice of hearing at least twenty days prior to the sale.[144] The statutory amendments also provide a procedure for allowing anyone else to request a notice by filing in the office of the register of deeds. This is apparently intended to protect junior lienholders, who otherwise have no right to receive a notice of hearing or a notice of sale, although the provision is not expressly so limited.[145]

The notice of sale under section 45-21.16A must contain the same information as required under prior procedure, except that the notice must additionally contain the names of the original mortgagors, the names of the present owners, and recording data, and the description of the property may need to be more complete. Under the amendments, the description must be "reasonably calculated to inform the public as to what is being sold." Thus, a street address may be advisable. The statute also states, "Describe the real property (including improvements thereon) . . . ." Hence, a description such as "property . . . consisting of a house and lot" (or "a lot and buildings") may be minimally required. Perhaps even more is needed—the statute is rather ambiguous on this point.[146]

The statutory amendments add new requirements for notice if a sale is postponed.[147] If there is a resale, notice of the resale must again be mailed to parties entitled to the notice of sale, but the statute is unclear whether this must be done twenty days before the resale.[148]

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142. *Id.* § 45-21.17(1) (Supp. 1975), *amending* § 45-21.17(b) (1966).

For some reason, the codifiers of the 1975 statute changed the designations of the subsections in section 45-21.17 from those set out in the statute as enacted. Thus section 45-21.17(a)(2)a. of the Session Laws became section 45-21.17(1)b.1. A similar difference is found in section 45-21.29(k) in which the Session Laws inserted a new subdivision (2) and renumbered subdivisions (2) through (6) as subdivisions (3) through (7), but the codifiers merely designated the new subdivision as (2a).

143. *Id.* § 45-21.17 (Supp. 1975). The deed of trust can only extend, not diminish, the lengths of time, in contrast to the former statute, *id.* §§ 45-21.17(a)-(b) (1966).

144. *Id.* § 45-21.17(4) (Supp. 1975).

145. *Id.* §§ 45-21.17(4)-(5), designated as sections 45-21.17(d)-(e) in the Session Laws (*see* note 142 *supra*).

146. *Id.* § 45-21.16A, *formerly id.* § 45-21.16 (1966), *as amended*, (Supp. 1974).

147. *See id.* §§ 45-21.21(b), (d) (Supp. 1975).

148. Presumably not. *Id.* § 45-21.29(b)(3) states, "Notice of resale shall be mailed to each party entitled to notice of sale pursuant to G.S. 45-21.17."

### A SUGGESTED PROCEDURE

Since the trustee's duties under the new statute are more complicated and may be unfamiliar to the practicing attorney, the following basic procedure for foreclosures is suggested:[149]

(1) Search the title from the recording of the deed of trust.[150]

(2) Prepare and mail a blank affidavit to the servicer or noteholder requesting completion and return of the affidavit, addresses of mortgagors (if needed), and other information and documents if needed. This affidavit should state the existence of a valid debt held by the party seeking to foreclose, the existence of and reason for default, and whether the maturity of the debt has been accelerated.[151]

(3) In counties requiring the filing of a petition or motion for hearing, prepare such a petition or motion. Although the statute does not seem to require such a petition or motion, some counties following passage of the new statute asked that a petition or motion be filed.[152]

(4) Prepare a notice of hearing.[153]

(5) Schedule a hearing with the clerk of the superior court to be held preferably at least twenty days after the filing of the petition.[154] Set the date of sale at least twenty days after the date of the hearing, unless the deed of trust requires a longer period of time for posting or publication of the notice.[155]

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149. This procedure is merely a suggested one, and need not be followed in all respects. Also, this procedure may not encompass every detail (such as recording of the appointment of substitute trustee or drawing of necessary checks for fees). Informing the noteholder or servicer, or both, of the progress of the foreclosure proceedings at various points may be desirable and might even be requested.

150. This is necessary to ascertain the current record owner, to whom the new statute requires notice of hearing to be sent. N.C. GEN. STAT. § 45-21.16(b)(3) (Supp. 1975).

151. This affidavit is needed in the hearing before the clerk. The procedure of using an affidavit is not mandatory, and in fact the clerk has discretion to require more to demonstrate a debt and default. *Id.* § 45-21.16(d). When permitted, the affidavit is usually simpler than bringing a representative of the servicer or noteholder to the hearing, and it is questionable whether testimony by a trustee who has no personal knowledge of the default is sufficient.

152. For example, following passage of the new statute, Guilford County requested that a petition be filed, whereas a motion was used in some other places, and Randolph County required neither.

153. This notice must contain the information required by N.C. GEN. STAT. § 45-21.16(c) (Supp. 1975), and preferably would include the information required by section 45-21.16A. *See* text accompanying note 140 *supra.*

154. The notice of hearing must be served not less than ten days before the hearing, N.C. GEN. STAT. § 45-21.16(a) (Supp. 1975), and time must be allowed for service by the sheriff (usually given ten days) or for service by mail.

155. *See id.* § 45-21.17; note 143 and accompanying text *supra.* The dates of hearing and sale must be set prior to serving the notice of hearing, since they must be included in the notice. N.C. GEN. STAT. §§ 45-21.16(c)(6)-(7) (Supp. 1975).

(6) File the petition or motion if required. Deliver the petition or motion[156] and notice of hearing to the sheriff to serve, along with a return of service, or serve by registered or certified mail.[157] The disadvantage of serving by mail is that the debtor may have moved to an unknown address, which fact is discovered only upon receiving the returned envelope, at which point the dates of hearing and sale may have to be reset in order to provide sufficient time for notice.[158] If service is by delivery by the sheriff, he can post the notice on the property if the party cannot be located.

(7) If service was by mail, execute an affidavit of service upon receiving the return receipts.

(8) If service was by the sheriff, check the clerk's file to ascertain if there has been good service.

(9) If waiver of the hearing is desired, request the clerk to mail such waivers to the necessary parties.[159]

(10) Update the title search, ascertaining the record owners on the actual date of service[160] and checking for requests for notice of sale.[161]

(11) Execute an affidavit as to the identity of the record owners at the time the notice was served.[162]

(12) Prepare for the hearing by assembling the completed affidavits,[163] the note, deed of trust, and appointment of substitute trustee, and prepare an order for the clerk to sign.

(13) Attend the hearing; have the order signed if the clerk finds that the trustee may proceed.[164]

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156. Service of the petition does not seem to be required, but probably is preferable when such a petition exists.

157. The parties to be served are listed in N.C. GEN. STAT. § 45-21.16(b) (Supp. 1975). The manner of service is set forth in *id.* § 45-21.16(a).

158. If the original dates are set too far in advance, the foreclosure will take an unreasonably long time, with loss of profits, increased possibility of vandalism, etc.

159. *See* N.C. GEN. STAT. § 45-21.16(f) (Supp. 1975).

160. If a new conveyance was recorded between the time of the first title search and the dates of service, the trustee will have to have the new owners served. *See id.* § 45-21.16(b)(3).

161. *See id.* § 45-21.17(5).

162. Instead of an affidavit as to the record owners and an affidavit of service or return of service, the trustee might execute a single affidavit stating conclusively that the proper parties were served in order to satisfy the clerk that there was "notice to those entitled to such." *Id.* § 45-21.16(d). However, such a single affidavit would not allow the clerk to examine the facts as completely.

163. These include the server's affidavit, the affidavit as to record owners, and the affidavit of service, if applicable.

164. *See id.* § 45-21.16(d).

(14) Prepare and post, mail, and have published the notice of sale as required.[165]

The mechanics of holding and reporting the sale are generally the same as those followed prior to 1975,[166] except that proof must be furnished with the final report that all parties entitled were served with notices of hearing, sale, and resale.[167]

## CONCLUSION

Because of the decision in *Turner v. Blackburn*, the status of foreclosures prior to June 6, 1975, (when the statutory amendments became effective) is somewhat uncertain. Although *Turner* purported to apply prospectively only,[168] there is the danger that a later court will use the principles of *Turner* to invalidate prior foreclosures. This danger leads to uncertainty in land titles. Even if *Turner* is only applied prospectively, foreclosures between February 12, 1975, (the date *Turner* was decided) and June 6, 1975, (the date of the new amendments) would be affected by the decision. The uncertainty of the status of foreclosures prior to June 6, 1975, is mitigated by the 1975 amendments, which purport to validate prior foreclosures unless an action is commenced before June 6, 1976.[169] If this validation is effective,[170] all can rest easier after that date. In any case, foreclosures, though attacked, apparently could be upheld in state courts under *Britt v. Britt*,[171] which chose not to follow *Turner*.[172]

*Turner v. Blackburn* clearly seems applicable to future foreclosures. Although the state action finding, which was based on the clerk's functions, seemed somewhat tenuous in *Turner*, the statutory amendments enacted in response to that case more clearly result in state action.

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165. The notice of sale may be prepared before the hearing in order to save time. *See id.* § 45-21.17 for requirements of posting, mailing, and publishing the notice of sale.

166. The mechanics of conducting a power of sale foreclosure prior to 1975 can be found in I.B. LAKE, NORTH CAROLINA PRACTICE METHODS § 177 (1952).

167. N.C. GEN. STAT. § 45-21.33(c)(3) (Supp. 1975).

168. 389 F. Supp. at 1261.

169. *See* N.C. GEN. STAT. § 45-21.45 (Supp. 1975).

170. Although it is doubtful that the General Assembly can completely waive a constitutional defect (as opposed to a statutory defect), it can perhaps place a statute of limitations on the bringing of constitutional claims, which it has done here.

171. 26 N.C. App. 132, 215 S.E.2d 172, *cert. denied*, 288 N.C. 238, 217 S.E.2d 678 (1975).

172. The court in that case said, "We are not unaware of Turner v. Blackburn but we do not consider that case determinative of this question nor binding on this Court." *Id.* at 137, 215 S.E.2d at 176 (citation omitted). Of course, if *Turner* was prospective only, by its own terms it would not cover the 1973 foreclosures attacked in *Britt v. Britt*.

Thus, with respect to future foreclosures, the basic argument that *Turner* should not be followed has been mooted by passage of the new amendments. The new statutory procedure, then, must be tested against the requirements of due process. The goal of the 1975 statutory amendments was to provide procedures meeting these requirements. For the most part, the amendments fulfill this goal. Although designation of a clerk to conduct the hearing may be attacked, the constitutionality of this designation will probably be upheld. There are, however, some ambiguities in the wording of the amendments. In at least two areas, the way is left open for procedures that might not satisfy due process. There is the danger that evidence presented at the hearing will be "conclusory" instead of "factual." There is also the danger that the defenses that the mortgagor can raise at the hearing will be limited. Although hopefully the new language will not be so construed, the statute should be more definite on these points. The new procedure is ambiguous as to the sufficiency of service on prior owners by posting on the property. This is a constitutional question; but even a determination that such service was insufficient would not affect the major operation of the new procedure. The new amendments are also vague about what kind of property description in the notice of sale is sufficient, a question that will probably be resolved by case law. Other ambiguities may appear with time.

The new procedure may at first seem annoying and overly complex to attorneys accustomed to simpler and quicker foreclosures. In addition, it may be that mortgagors will seldom appear at the hearings. Any feeling that the new procedure is overly burdensome, however, will probably be diminished with the mastery of the new techniques. The extra time, effort, and expense must be balanced against the need to protect some mortgagors against unwarranted loss of their lands or against sales for too low a price. If the ambiguities mentioned above can be properly resolved, perhaps by further statutory amendment, the new procedure will cure the deficiencies found by *Turner v. Blackburn*. While other states wrestle with the constitutionality of foreclosures, North Carolina will have a workable solution.

DURANT M. GLOVER