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NOTES AND COMMENTS

Judgments—Executions—Statute of Limitations

On December 22, 1932, *P*, trustee under a will, recovered a judgment by confession against W. B. Drake, and his wife, in the amount of $13,307.83. No action was taken on this judgment until September 30, 1942, when execution was issued thereon at the instance of *P*. Pursuant thereto the homestead exemption allotted Drake's wife was confirmed, but as a result the execution was returned "for lack of time in which to advertise." On October 21, 1942, execution returnable on December 21 was issued. By virtue of this execution the land was duly advertised and sold on November 24, 1942. *P*, as at all subsequent sales, was the last and highest bidder. On December 4 the bid was raised and, as required by statute,[1] the Superior Court Clerk rejected *P*'s bid and ordered the sheriff to reopen the sale, readvertise,

[1] N. C. CODE ANN. (Michie, 1939) §2591.

and resell the property. This resale was had on December 22, the day on which the ten-year period of limitations ran against the judgment. The bid was raised on the same day. On December 24 execution was again issued, the property was duly advertised, and the sale was held on January 11, 1943. As in the case of the prior sales, the bid was raised and the fourth and last sale was had on February 9. On February 19, no one having raised the highest bid made at the last sale, the defendants moved for an order recalling the execution issued on December 24, 1942, "and to quash same and the other proceedings thereunder for that . . . said execution was issued more than ten years after the date of the rendition of the judgment confessed by the defendants. . . ." This motion was denied by the trial court, and the defendants appealed. *Held, reversed.*[2]

The pivotal question presented by the case at hand is this: Where execution is issued on a judgment, and the sale is had within ten years after the rendition of said judgment, but the bid is raised and successive resales are ordered as required by statute, with the result that the final sale takes place on a date after the expiration of said ten years, do the execution, sale, and subsequent orders made before the expiration of the ten years have the effect of prolonging the statutory life of the lien of the judgment within the meaning of our statute?[3]

The Court answered this question in the negative, holding that the lien ceased to exist as soon as the ten-year period expired on December 22, 1942, with the result that all proceedings thereafter were of no effect since they were barred by the statute of limitations. This conclusion was reached on the theory that the execution and sale failed to bring the case within the saving clause of the statute which provides thus: "But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by order of injunction, or other court order, or by the operation of any appeal, or by a statutory prohibition does not constitute any part of the ten years aforesaid. . . ."[4] In holding that the execution and sale did not suspend the running of the statute the court relied on several North Carolina cases.[5] It is interesting to note that in none of these cases was there both an execution and a sale before the statute had run.[6*]

[2] Cheshire v. Drake, 223 N. C. 577, 27 S. E. (2d) 627 (1943).
[3] N. C. CODE ANN. (Michie, 1939) §614.
[4] *Ibid.*
[5] Lupton v. Edmundson, 220 N. C. 188, 16 S. E. (2d) 840 (1941); Hyman v. Jones, 205 N. C. 266, 171 S. E. 103 (1933); Barnes v. Fort, 169 N. C. 431, 86 S. E. 340 (1915); Spicer v. Gambill, 93 N. C. 378 (1885).
[6*] The court apparently cited these four cases under the mistaken belief that they were in point and therefore controlling. An examination of the facts of these cases, briefly stated, and the holdings therein shows them to be readily distinguishable from *Cheshire v. Drake*. (1) Lupton v. Edmundson, 220 N. C.

So far as we have been able to discover this is the first case decided by our Court in which the execution was issued and the sale held before action on the judgment became barred by the statute of limitations. In fact, this case could not have arisen before 1933 because it was not until then that our statute on judicial sales was amended to allow upset bids in the case of a sale of property under execution.[7*] There is no quarrel with the general proposition that issuance of execution alone will not lengthen the statutory period. This attitude has been frequently expressed by our Court.[8] However, the forcefulness of the argument on which this attitude rests is somewhat weakened by the fact that it has most frequently appeared as dicta.[9] Also, other

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188, 16 S. E. (2d) 840 (1941). *P*'s assignor recovered a judgment against *D* on August 20, 1930. An action to enforce the lien of the judgment by condemning and selling the land was begun on August 14, 1940. The Court held that the action was barred because the sale of the land could not be made and concluded within the ten-year period. (2) Hyman v. Jones, 205 N. C. 266, 171 S. E. 103 (1933). A judgment charging owelty in a partition proceeding was rendered January 31, 1923. Execution was issued January 16, 1933, but the sale was not held until March 6, 1933. On the basis of Smith, *ex parte,* 134 N. C. 495, 47 S. E. 16 (1904) the Court held "that the issuing of an execution on a decree charging owelty in partition is barred by the ten-year statute of limitations." It is indeed interesting to note that in Smith, *ex parte,* at page 501, the Court phrased this question: "Does the word 'action,' which is used in the statute [Statute of Limitations] include . . . a motion for leave to issue execution upon a judgment charging land with the payment of money for equality of partition?" and answered it in the affirmative. However, the Court denied the motion for leave to issue execution because some twenty-five years had elapsed since the right of action on the judgment accrued. The dicta in these two cases seems irreconcilable to this writer, even though the same result was reached in both cases. (3) Barnes v. Fort, 169 N. C. 431, 86 S. E. 340 (1915). In this case two judgments were rendered, one on December 23, 1898, the other on April 16, 1900. In an action on these judgments in 1911 the Court held them to be barred by the statute of limitations. (4) Spicer v. Gambill, 93 N. C. 378 (1885). A judgment was recovered at the April 10 term of court, 1870. Leave to issue execution was obtained March 3, 1880, and execution duly issued April 14, 1880. The sale was held August 2, 1880. In an action to nullify the sale the Court held that the sale was ineffective as barred by the statute of limitations. In a dictum appearing on page 383 the Court said that "to preserve the judgment lien the process to enforce and render it effectual must be completed by sale within the prescribed time (ten years)," and "if delayed beyond these limits unless interrupted in the manner pointed out in Section 435 of the Code (now C. S. 614) the lien is gone."

[7*] N. C. CODE ANN. (Michie, 1939) §2591, which provides for upset bids and the subsequent procedure, was not applicable to sales under execution until it was amended by the Legislature. N. C. Pub. L. 1933, c. 482, brought sales of real property under execution within the provisions of this Section.

[8] Lupton v. Edmundson, 220 N. C. 188, 16 S. E. (2d) 840 (1941); Osborne v. Bd. of Education of Guilford Co., 207 N. C. 503, 177 S. E. 642 (1934); Hyman v. Jones, 205 N. C. 266, 171 S. E. 103 (1933).

[9] Old Dominion Pants Co. v. Mewborn, 172 N. C. 332, 90 S. E. 311 (1916); Barnes v. Fort, 169 N. C. 431, 86 S. E. 340 (1915); Smith, *ex parte,* 134 N. C. 495, 47 S. E. 16 (1904); Evans v. Aldridge, 133 N. C. 378, 45 S. E. 772 (1903); King v. Powell, 131 N. C. 826, 43 S. E. 1006 (1902); Harrington v. Hatton, 130 N. C. 89, 40 S. E. 848 (1902); Pipkin v. Adams, 114 N. C. 201, 19 S. E. 105 (1894); Lytle v. Lytle, 94 N. C. 683 (1886); Spicer v. Gambill, 93 N. C. 378 (1885); Berry v. Corpening, 90 N. C. 395 (1884); Williams v. Mullis, 87 N. C. 159 (1882); Fox v. Kline, 85 N. C. 173 (1881); Pasour v. Rhyne, 85 N. C. 149 (1881); Lyon v. Russ, 84 N. C. 588 (1881).

jurisdictions seem to have held that the issuance of execution will toll the statute,[10] and several states have adopted statutes which the courts have construed as meaning that execution on a judgment will either suspend the statute or start a new statutory period.[11] An examination of the North Carolina cases related to this problem dicloses, as already indicated, that they are distinguishable from the one under consideration.[12*] Therefore, it is urged that the Court should not have relied on them as controlling in deciding the instant case. On the contrary, it is submitted that the holding should have been that the statute was suspended by the first execution and sale, and that therefore the proceedings after December 22, 1942, were not barred and were thus valid. Such a conclusion would not have been without adequate support and the hardship worked by the present decision would have been avoided.

Clearly the purpose of the statutes of limitations would not be defeated by such a holding. Being statutes of repose, their purpose is to prevent the litigation of stale claims by requiring parties who have rights of action to take some steps to enforce these rights within a prescribed time, or forever lose them. That such is the purpose of these statutes is evidenced by the fact that once the party possessing the right has taken some affirmative action to enforce it the applicable statute of limitations is suspended.[13] This judicial attitude is based on the theory that once the wheels of legal machinery are put in motion the need for the statute is no longer present, for the possibility of the claim becoming stale is thereby resolved.

Our statutes require that an action upon a judgment must be commenced within ten years.[14] Can it be validly argued that the judgment creditor in the case under observation did not commence an action on his judgment within ten years? By issuance of execution and the sale thereunder he not only adopted the statutory process provided for the enforcement of a judgment,[15] but he adopted the only available means of collecting his claim. He thereby employed legal machinery to satisfy

[10] Thatcher v. Lyons, 70 Vt. 438, Atl. 428 (1898); see Shields v. Stark, 51 S. E. 540 (Ct. of Civil App., Tex., 1899); Note (1940) 24 MINN. L. REV. 661.

[11] Koontz v. La Dow, 133 Ark. 523, 202 S. W. 686 (1918); Morgan v. Lewis, 172 Ky. 813, 189 S. W. 1118 (1916); Davis v. Roller, 106 Va. 46, 55 S. E. 4 (1906); *cf.* Orndorff v. State, 108 S. W. (2d) 206 (Ct. of Civil App., Tex., 1937). *Contra:* McGraw v. Mitchell, 142 Miss. 357, 107 So. 423 (1926).

[12*] See note 6, *supra*, where the cases relied on by the Court in the instant case are distinguished from it. For a further comparison of prior North Carolina cases with *Cheshire v. Drake* examine the cases collected in notes 8 and 9, *supra*.

[13] Mass. Bonding & Ins. Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1941); Harrell v. Goerch, 209 N. C. 741, 184 S. E. 489 (1936); MCINTOSH, NORTH CAROLINA PRACTICE & PROC. (1929), §105; 34 AM. JUR. (1941), Limitation of Actions, §§237, 247.

[14] N. C. CODE ANN. (Michie, 1939) §§437, 438.

[15] N. C. CODE ANN. (Michie, 1939) §663.

his claim just as effectively and completely as one issuing summons against a party defendant; and it is universally held that the placing of a summons in the hands of the proper official for service will suspend the statute, even though it is not actually served until after the statutory period has run.[16] It is admitted that our court has been in accord with the majority view in strictly construing the statute of limitations.[17] However, it is worthwhile to note that the judicial attitude toward such statutes is much more favorable than when they first appeared, and the present trend is to construe limitation laws liberally.[18]

The decision in the case before us calls attention to the inequity of an unduly strict construction of the statute as contrasted with the justice and propriety of a reasonably liberal construction, which would have in no way reduced the effectiveness or value of the statute. *P* began his action in ample time to afford a consummation of the sale by execution and delivery of a deed before the ten-year period lapsed. Is it proper that he should suffer because a third party chose to exercise a statutory right and raise the bid? In the absence of the raised bids the matter would have gone to final determination and *P* would have collected his claim before it became barred. Upon the bids being raised the Superior Court Clerk was under a statutory duty to reject the prior bid and readvertise and resell the property.[19] He is required to do this each time a bid is upset, and there is no limit on the number of times a bid may be raised.[20] It is not difficult to perceive that these circumstances may open the door to fraud. A debtor, by securing the collusion of others, is afforded a means of which he may avail himself to escape payment of a legally owed debt, even though the creditor has not been guilty of laches or an unreasonable delay in attempting to collect it. It would be unwise to hazard a guess as to just how far judgment debtors would be able to go in escaping their just obligations by this procedure. However, it does seem clear that there would be many occasions on which it could be used unjustly and illegally to defeat a valid claim which the creditor had taken steps to collect in seemingly adequate time. To attempt to bypass this argument by saying that the creditor should not wait so long to enforce his claim is to say that the statute of limitations is, realistically considered, something less than ten years. Just how much less would, of course, depend on the facts of each case. Our statutes provide that the action must be commenced

[16] Harrell v. Goerch, 209 N. C. 741, 184 S. E. 489 (1936); *accord*, Morrison v. Lewis, 197 N. C. 79, 147 S. E. 729 (1929); *cf.* Tarboro v. Pender, 153 N. C. 427, 69 S. E. 425 (1910); McINTOSH, NORTH CAROLINA PRACTICE & PROC. (1929), §§106, 303; 34 AM. JUR. (1941), Limitation of Actions, §247.

[17] Pipkin v. Adams, 114 N. C. 201, 19 S. E. 105 (1894).

[18] 34 AM. JUR. (1941), Limitation of Actions, §38.

[19] N. C. CODE ANN. (Michie, 1939) §2591.

[20] *Ibid.*

within ten years; they do not say that it must be commenced and finally determined within that period.[21] Unfortunately, they do not indicate what is meant by the word "action." However, since execution and sale is the only method by which a judgment may be collected, it does not seem illogical to conclude that execution and sale were meant to come within the purview of "action" as used in the statutes. On the basis of these observations it is contended that the court should have held either that *P* had, by the execution and sale, sufficiently commenced an action to suspend the statute, or that he was within the protection of that part of the statute's saving clause which provides that ". . . the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon . . . by a statutory prohibition, does not constitute any part of the ten years. . . ."[22]

It will be argued by those in agreement with the Court's decision that *P* could have adequately protected himself by bringing a suit on the about-to-expire judgment when it appeared that it would be barred before the proceedings under the execution were consummated. By so doing he would have acquired a new judgment against which a new ten-year period would begin to run.[23] It does not seem that the availability of this remedy justifies the decision. It is not difficult to conceive of a situation in which this remedy would be merely illusory and completely inadequate. The new judgment obtained in such a suit would not relate back to the date of the original judgment. Rather, it would be effective only from the date on which it was obtained and docketed.[24] Thus, any claims that may have attached to the property of the debtor after the original judgment was obtained, but before the new judgment became effective, would take precedence over the latter judgment. In many instances the creditor may find that there is nothing to satisfy this judgment because all of the debtor's assets have been absorbed in satisfying the intervening third party claims. Furthermore, the creditor would have to begin anew the process of collecting the debt due by execution and sale.[25*] Obviously this means added expense which the debtor must bear. Or, if his assets are not sufficient to

[21] N. C. CODE ANN. (Michie, 1939) §§437, 438, 614.

[22] N. C. CODE ANN. (Michie, 1939) §614.

[23] N. C. CODE ANN. (Michie, 1939) §437(1); King v. N. C. Ry. Co., 184 N. C. 442, 115 S. E. 172 (1922); McDonald v. Dickinson, 85 N. C. 248 (1881).

[24] Springs v. Pharr, 131 N. C. 191, 42 S. E. 590 (1902); McLean v. McLean, 90 N. C. 530 (1884); MCINTOSH, NORTH CAROLINA PRACTICE & PROC. (1929), §159(3).

[25*] The execution and proceedings thereunder based on the original judgment could not be continued after that judgment became barred by the lapse of the ten-year statutory period. Being based on the original judgment they would fail when that original judgment was no longer effective to support them. This would necessitate the beginning anew the efforts to collect the debt with these new proceedings being based on and supported by the new judgment.

satisfy the judgment, as is often the case, it must be borne by the creditor.

In view of these considerations it is submitted that that the decision in the instant case is wrong. Not only does it open the door to fraud, but it seems highly inequitable. The statute of limitations has been employed to penalize a party who has taken all available steps to collect his claim before the statutory period expired. In *Butler v. Bell*[26] the Court commented thus on the statute of limitations: "It is a wise and beneficial law, not designed merely to deprive anyone of his just rights by lapse of time, but to afford security against stale demands." Certainly it was not intended to permit or make possible any such decision as was rendered in the case at hand.[27*]

One further point deserves consideration. What steps should be taken to cure the undesirable result reached in the instant case? It is suggested that proper legislative action would provide the most feasible and adequate answer to this query. Prior to 1943 an analogous situation existed as to foreclosures of deeds of trust or mortgages which were begun before being barred by the statute, but which were not consummated by delivery of a deed until after the ten-year period elapsed.[28] The 1943 General Assembly wisely remedied this incongruity in our legal pattern by the passage of an act which provides, in effect, that deeds executed and delivered after the running of the statute of limitations, in consummation of a foreclosure proceeding on a deed of trust or mortgage, begun before the statute expired, are valid.[29] It is indeed unfortunate that an act was not passed providing that issuance of execution on a judgment and a sale thereunder would suspend the statute of limitations. We strongly recommend that the Legislature pass such an act and thereby preclude any future decisions akin to the one rendered in the instant case.

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[26] 181 N. C. 85, 106 S. E. 217 (1921).

[27*] The effect of the decision in the case at hand will be to induce judgment creditors to take steps to collect their claims long before the statutory period is nearing an end so that there will be no possibility of finding themselves in the position of the creditor in the instant case. Such early and rigorous enforcement of judgment claims will in many cases work a hardship on the debtor which he might not have experienced had the creditor felt safe in allowing him more time in which to settle the debt.

[28] Spain v. Hines, 214 N. C. 432, 200 S. E. 25 (1938); Note (1939) 17 N. C. L. REV. 448.

[29] N. C. Pub. L. 1943, c. 16. This Act is amendment to N. C. CODE ANN. (Michie, 1939) §2589.