Kentucky Law Journal

Volume 32 | Issue 1 Article 5

1943

Bar of the Debt as Affecting the Mortgage

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In summary, the following general conclusions concerning the effect of a copyright of a statute compilation are apparent from the few cases decided on this question: although the statutes themselves are not copyrightable as a matter of public policy, the portions of the compilation which are deemed to be the fruits of the compiler's labor, such as annotations, headnotes, cross-references, arrangement, or index, will be protected by a copyright.

ROBERT M. SPRAGENS

BAR OF THE DEBT AS AFFECTING THE MORTGAGE

When the Statute of Limitations has run against a debt secured by a mortgage, a question arises as to whether the mortgagee may proceed on the mortgage for the amount of the debt. The answer apparently depends on two factors: (1) whether the running of the Statute of Limitations entirely extinguishes the debt itself or merely the personal liability of the mortgagor and (2) whether the situation affords the mortgagee two separate and distinct remedies, one on the mortgage against the land and the other against the mortgagor personally

As to the effect of the Statute of Limitations, the great majority of courts hold that where the period provided by the statute for the bringing of the action has elapsed, the debt itself is not extinguished; the statute merely bars the remedy of the obligee to sue on the personal obligation.[1] The mortgagee, therefore, may proceed to recover the same by any other remedy he may have.

The great majority of the courts agree that the mortgage and the debt it secures are separate obligations. It is said that the mortgagee has two remedies, one *in personam* against the mortgagor and one *in rem* against the land.[2] The personal action against the mortgagor usually must be brought within a comparatively short period of time, depending upon the provisions of the statute. However, since the right to hold the mortgage as security and proceed against the land for the amount of the debt is a right *in rem*, the mortgagee has a longer period in which to bring his action to enforce this remedy because in most states the Statute of Limitations does not run against land for a period of fifteen or twenty years. In some states the period for recovery on mortgages is prescribed by statute.[4]

[1] 34 Am. Jur., Limitation of Actions, sec. 11.

[2] Hardin v. Boyd, 113 U.S. 756, 28 L. Ed. 1141 (1884), Austin v. Edwards, 201 Ala. 532, 78 So. 886 (1918); Pratt v. Huggins, 29 Barb. (N. Y.) 277 (1859). Hulbert v. Clark, 128 N.Y. 295, 28 N.E. 638, 14 L.R.A. 59 (1891).

[3] Belknap v. Gleason, 11 Conn. 160, 27 Am. Dec. 721 (1835), Maloney v. Home Loan & Trust Co., 97 Ind. App. 564, 186 N.E. 897 (1933)

[4] Austin v. Steele, 68 Ark. 348, 58 S.W 352 (1900), London & S.F Bank v. Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179 (1898).

In others, equity prevents recovery under the doctrine of laches, depending on the circumstances of the case, but ordinarily only after the statutory period for the recovery of land has elapsed.[5] This situation is analogous to that in torts where one has an alternative right to bring trover for the conversion of a chattel, or assumpsit for the proceeds of sale.[6] In the above stated case the injured party may pursue one of his remedies notwithstanding the other is unavailable through lapse of time.

Furthermore, this is true even though the merger of law and equity in most states, under codes requiring that complete relief be given, has eliminated these separate actions as a practical matter. Statutes providing for foreclosure usually provide for a deficiency judgment against the mortgagor or other person liable for the debt.[7] In an equitable action at common law in a suit on the mortgage alone the mortgagee was limited in his recovery to the value of the land and could not, without a separate action at law against the mortgagor, subject the latter to any deficiency.[8]

However, a few courts have held that the running of the Statute of Limitations against the debt prevents any subsequent action on the mortgage.[9] In some instances these decisions are correctly decided under statutes providing that the period of limitations as to mortgages shall be the same as that of the note or debt they secure.[10] Thus, when the period has run against the note, the mortgage is automatically barred by statute. Also, in some jurisdictions the Statute of Limitations operates, not only to prevent any particular remedy the obligee may have, but it is considered as having extinguished the debt itself and all rights and liabilities connected therewith.[11] In these two jurisdictions set forth above it may be said that the cases are correct in declaring that the mortgage is barred when the debt is barred.

On the other hand, in Kentucky, where there is not such a statutory provision and where the Statute of Limitations is ordinarily considered as affecting merely the remedy and not the right or the thing itself,[12] it has been held that no action may be main-

[5] Tate v. Hawkins, 81 Ky 577 (1884).

[6] Kirkman v. Phillips' Heirs, 54 Tenn. (7 Heisk) 187 (1872)

[7] Simon v. Union Trust Co., 126 Ohio 346, 185 N.E. 425 (1933)

[8] Maloney v. Home Loan & Trust Co., 97 Ind. App. 564, 186 N.E. 897 (1933).

[9] McGovney v. Gwillim, 16 Colo. App. 284, 65 Pac. 346 (1901) Allen v. Shepherd, 162 Ky. 756, 173 S.W 135 (1915)

[10] Austin v. Steele, 68 Ark. 348, 58 S.W 352 (1900), London & S.F Bank v. Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179 (1898).

[11] Ordinarily, under such statutes providing that the right as well as the remedy is extinguished, the courts interpret the same as merely preventing the judicial enforcement of the demand and not as a satisfaction of the right. Eingatner v. Illinois Steel Co., 103 Wis. 373, 79 N.W 433, 74 Am. St. Rep. 871 (1899).

[12] Barnes v. Louisville & N. R. Co., 283 Ky. 261, 140 S.W (2d) 1041 (1940).

tained on the mortgage when the debt has become barred.[13] The Kentucky court takes the view that the mortgage is merely "incidental" to and exists wholly for the purpose of securing the debt. It has no life independent of the debt and unless there can be found in the mortgage wording sufficient to constitute a written promise to pay, thus bringing the mortgage within the fifteen year period as a promise in writing, when the personal remedy is barred the remedy on the mortgage is also barred.

This theory of the Kentucky court dates back to certain statements in *Vandiver* v. *Hodge*,[14] an action on three promissory notes for land sold and conveyed to the defendants with reservation of a lien for securing payment. The notes had become due more than fifteen years before the action was brought. The court, in holding that any action on the vendor's lien was barred, said:

> " no action being maintainable on the notes, the lien, which is only a mere security, can not be enforced. There is no express trust. The lien is only a particular sort of resulting trust; and the statute of limitations applies to all implied trusts. Besides, had the trust been express, and not within the statute, still it could not be enforced as the mere incident to the debt, which is the principal, if the debt itself is paid or barred by time."[15]

The principles of this case were followed in *Yeates* v. *Weeden*,[16] an action on a note executed in consideration of land sold and conveyed and upon which a lien was retained for the security of the debt. In reversing a judgment for the mortgagee, the upper court said:

> " whenever the debt ceased to exist whether it was barred by time or extinguished by payment, the security was lost. It would be strange indeed if a debt which had been paid or barred by time could be resuscitated and enforced by means of a security that was given at its creation for the payment thereof.
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> "The security is an incident that follows the legal obligation to pay, and whenever that obligation ceases, the security, from the very nature of the case, must cease with it; for there can be no security for a debt which has no legal existence (citing *Vandiver* v. *Hodge*)."[17]

It is believed that these cases, in setting out the rules later followed in cases involving mortgages, failed to recognize the real nature of the situation presented. The fact is that although the

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[13] Allen v Shepherd, 162 Ky 756, 173 S.W 135 (1915). K.R.S. sec. 413.120 provides: "The following actions shall be commenced within five years after the cause of action accrued An action on a bill of exchange or upon a promissory note, placed upon the footing of a bill of exchange."

[14] 67 Ky. (4 Bush) 538 (1868).

[15] Vandiver v. Hodge, 67 Ky (4 Bush) 538, 540 (1868).

[16] 69 Ky. (6 Bush) 438 (1869).

[17] Yeates v. Weeden, 69 Ky. (6 Bush) 438, 439 (1869).

mortgage is a separate lien in itself, the note has been treated as the life of the lien causing the lien to cease when the note became unenforceable. The court has described the mortgage as a "mere incident" to the obligation. A mortgage is something more than that. It is a separate remedy in itself, a security bargained for by the mortgagee for the very purpose that he shall have some protection should anything, including the Statute of Limitations, prevent his recovery against the obligor personally Under the lien theory of mortgages, followed by Kentucky, a mortgage is the giving of a lien on land by the obligor with the condition that it shall cease upon payment of the debt. In states where the title theory prevails, the mortgage amounts to a conditional conveyance subject to defeasance when the debt is paid. Whether the problem arises in a jurisdiction following one of these theories or the other is immaterial. If the mortgagee has title he may recover the property in an action of ejectment after the personal obligation is barred. If he is said to have merely a lien, if the debt is considered existent, he may recover the amount of that lien from the land. Thus the question narrows itself to whether the debt has in fact been paid. And as to this it is urged that the Kentucky court erred in early mortgage cases in failing to recognize that the running of the Statute of Limitations does not amount to payment. In *Yeates* v. *Weeden*, contrary to the established rule in Kentucky as to the effect of the Statute of Limitations, the court considered the statute, not only as barring the personal remedy against the obligor, but also, as completely extinguishing the debt as if it had actually been paid. But the running of the statute does not *pay* the debt. The debt continues to exist although it is unenforceable as far as the personal liability of the mortgagor is concerned. And this is the rule adopted by Kentucky and the great majority of courts as to ordinary contracts where the statute has run against the personal obligation of the debtor.[18] Since the debt still exists it follows that the mortgage, given to secure the mortgagee on failure to collect the debt from the mortgagor, whatever the cause may be, should be enforced against the land.

One other point to be considered in this connection is that the Kentucky court has considered the note as the debt itself and in the earlier cases said that since recovery on the note has been barred by the Statute of Limitations, the debt is no longer due and therefore the mortgage cannot be enforced, just as if the debt had been paid. True, no action may be maintained on the note. However, the note is not the debt itself. When the creditor accepts the note of the debtor at the time of the creation of the debt, the acceptance of the note is not ordinarily a discharge of the debt.[19] The

[18] Barnes v. Louisville & N. R. Co., 283 Ky. 261, 140 S.W (2d) 1041 (1940).

[19] 5 TIFFANY, REAL PROPERTY (3d. ed. 1939) sec. 1406.

note is merely evidence of the debt. Thus, the mortgage is not security for the note, but is security for the payment of the debt itself and is just as much evidence of the debt as is the note. Therefore, the fact that the obligee has become barred from making use of the note as evidence of the debt should not defeat his action as mortgagee to proceed on the mortgage against the land as security for the same debt.

The court has refused to accept the rulings of the mortgage cases in the analogous situation where insurance policies are pledged as security for a debt. In *Pollock's Administrator v. Smith*,[20] insurance policies were assigned as security for an obligation of the insured. On his death the company paid the money into court where the administrator of the beneficiary's estate contended that the creditor should recover only those premiums paid within the five years prior to the bringing of the action. It was held that the creditor should have the whole of his debt paid out of the policy The court mentioned the Kentucky rule in mortgage cases that when the debt is barred no recovery may be had on the lien, but, in spite of it, refused to grant relief which would be contrary to the real equities of the case. The contract was a pledge of insurance policies to secure a debt and equity will not require that the pledgee release his pledge until he has in fact been paid. The court pointed out that any other holding would violate the very principles of equity and the intention of the contracting parties.

A similar ruling is found in *Mercer National Bank* v. *White's Executor*,[21] where insurance policies were assigned to secure a debt. The assignor became bankrupt and thereafter sick benefits to which he later became entitled under the policy were sent by the companies to the assignees. In an action by the insured to recover the payments, the court held that the assignees were entitled to keep the amounts paid as sick benefits. It was said that a deposit of collateral will not prevent the running of the Statute of Limitations on the debt, but even though the statute has run on the debt the pledgee may enforce his lien against the property Also, the court stated that a discharge in bankruptcy would not prevent the pledgee from enforcing his lien although the personal liability of the bankrupt has been extinguished.

As to other types of property pledged it is almost the universal rule that the barring of the action on the debt does not affect the right of the pledgee of collateral security to hold and realize upon such collateral, nor the right of the pledgor to call for any surplus money after the principal debt has been paid.[22] The law in respect

[20] 107 Ky 509, 54 S.W 740 (1900).
[21] 236 Ky. 128, 32 S.W (2d) 734 (1930).
[22] Hodge v Truax, 184 Wash. 360, 51 Pac. (2d) 357 (1935), 103 A.L.R. 420, 430 (1936)

to the status of a pledge is well stated in *In re Hartranft's Estate*,[23] wherein the court said:

> "The holder of a note with whom collaterals have been deposited has, while the statute is running, two remedies; one against the maker by suit, the other against the collateral. If he lose the first by the lapse of time, he still has the second. He may not sue the maker, but he may exhaust the securities he holds in pledge; for the statute operates, not upon his debt, but upon his right of action. The deposit of collaterals has, therefore, no effect to prevent the running of the statute against the right of action. The pledge survives though the right of action is gone; and if the creditor realizes from the collateral more than the amount of his debt, the debtor may call upon him for the surplus. He cannot, however, demand a return of the collaterals until the debt has been paid, notwithstanding the statute may have run upon his creditor's rights of action against him."[24]

Although pledges involve personal property rather than realty, the same reasons exist for upholding the right to realize upon the security in one case as in the other. In either situation the holder of the security should have a right to proceed against it as a remedy independent of and different from the remedy of proceeding against the person of the debtor. Where the security is a pledge of personal property, the debtor cannot recover his property until he has paid in full and likewise where a mortgage on land is given as security for a debt, the mortgagor cannot have the lien on his land removed as a cloud on title until he pays the amount due on the mortgage. From this it is clear that equity recognizes the existence of the debt and that it would be clearly inequitable to allow the mortgagor to free his title of the mortgage without first paying what is equitably due the mortgagee.

In conclusion it is submitted that the Kentucky court, in following the earlier cases, not only thwarts one of the very purposes for which the parties bargained, but also, has erred in failing to recognize that the true relationship of the mortgagor and the mortgagee at the maturity of the debt involves two different and independent remedies for its recovery. The one is *in personam* against the mortgagor and the other is *in rem* against the land.

It is believed that the Kentucky Court of Appeals should and will come to recognize these two separate and distinct remedies. And, since it is clear that the rule in Kentucky as to the effect of the Statute of Limitations in pledge cases is that it merely bars the remedy and not the right, if the court applies this rule to mortgage cases where the mortgagee seeks to enforce the mort-

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[23] 153 Pa. 530, 26 Atl. 104 (1893).

[24] *Id.* at 531, 26 Atl. at 105.

gage as an interest in land after the debt is barred, the court cannot help but adopt the rule in effect in the majority of jurisdictions, which seems more just and equitable.

ROBERT S. HAMMOND

CHARACTER OF DECEASED AND UNCOMMUNICATED THREATS BY DECEASED IN HOMICIDE CASES

As a general rule, evidence of the violent and dangerous character of the deceased is inadmissible in homicide cases.[1] This rule is predicated upon the fact that the wicked as well as the good are entitled to the protection of the law, and that it in no degree excuses the taking of human life that the person slain was of bad character or reputation. However, an exception to the general rule exists in cases where the defendant admits the killing but claims to have acted in self defense. Here the character of the deceased is material for two purposes: first, to show the state of mind of the accused as a cause of his action at the time of the killing, and second, to aid in determining which party was the aggressor.[2]

When one charged with murder asserts that he killed in self defense, his state of mind is a material factor as to the existence and reasonableness of apprehension of such violence by the deceased as to justify the defensive measures adopted by the defendant. The law recognizes the fact that men assailed defend themselves with alacrity and force in proportion to the violent and dangerous character of their assailants.[3] It follows that an act of the decedent which, if considered independently of his character would not be sufficient to warrant extreme defensive measures, might, when observed and considered in connection with such character, arouse a belief of imminent peril, thereby justifying the defensive measures adopted.

In order for the accused to prove his state of mind and thereby show the reasonableness of his action by the introduction of evidence of the deceased's turbulent character, it is necessary that the accused first show that he had knowledge of such character prior to the killing.[4] A failure to prove prior knowledge would completely defeat the purpose for which this evidence is admitted. It has been held in at least one case that such knowledge may be presumed.[5]

The second purpose for which evidence of the violent character of the deceased is admitted is to determine whether it was the accused or the deceased who provoked the assault. In this situation

[1] Lang v. Ala., 84 Ala. 1, 4 So. 193 (1888), 13 R.C.L. Homicide, Sec. 219.
[2] Gardner v. State, 90 Ga. 310, 17 S.E. 86 (1892).
[3] Karr v. State, 100 Ala. 4, 14 So. 851 (1894)
[4] Sturgeon v. Commonwealth, 31 K.L.R. 536, 102 S.W 812 (1907).
[5] Trabune v. Commonwealth, 13 K.L.R. 343, 17 S.W 186 (1891).