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Mortgagee's Rights in the Event of a Deficiency

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MORTGAGEE'S RIGHTS IN THE EVENT OF A DEFICIENCY

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When a mortgage is foreclosed in Maryland and the net proceeds from the foreclosure sale of the property are insufficient to satisfy the mortgage debt and interest after the payment of the expenses of the foreclosure and other proper charges a mortgagee or his assignee has certain rights to collect this deficiency. These rights may exist against the mortgagor or mortgagors, a guarantor or guarantors of the mortgage debt, if such exist, and a grantee or grantees of the mortgagor, if any there be.[1]

The rights of an assignee of a mortgagee and those of a mortgagee are ordinarily identical, as it is expressly so provided in the usual mortgage. If it is so provided, then the statutes giving the mortgagee equitable remedies likewise give these remedies to assignees.[2] Therefore, when a mortgagee's rights are discussed, the discussion is equally applicable to the rights of an assignee of a mortgage.

I

RIGHTS OF A MORTGAGEE AGAINST A MORTGAGOR FOR A DEFICIENCY

When There Has Been No Assignment by the Mortgagor

As a general rule a mortgagee has three remedies *in personam* against a mortgagor in case of a deficiency in a foreclosure sale: (1) the statutory right to a deficiency decree; (2) an action at law on the covenants in the mort-

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[1] This article does not deal with rights in personam against a defaulting purchaser at foreclosure sale for which see Md. Code, Art. 16, Sec. 239, and Md. Code Supp., Art. 16, Sec. 239 and the cases cited thereunder, particularly: Mercantile Bank v. Md. Title Guarantee Co., 153 Md. 320, 138 Atl. 251 (1927); Bilbrey v. Strahorn, 153 Md. 491, 138 Atl. 343 (1927); Miller v. Mitnick, 163 Md. 113, 161 Atl. 157 (1932).

[2] This applies equally to an assignee of all the mortgagee's right, title and interest as well as to an assignee for the purpose of foreclosure. Md. Code, Art. 66, Secs. 6-24; Md. Code of Public Local Laws, Flack's 1930 Ed., Art. 4, Sec. 720.

gage; (3) an action at law *in assumpsit.* These remedies are cumulative and either one or all may be pursued until satisfaction of the debt is had.[3]

The first remedy above is given by three separate statutes. Which of these three statutes is applicable to a particular case depends on the method of foreclosure a mortgagee selects. If the foreclosure is an ordinary equity foreclosure, which procedure may be followed in Baltimore City and any county of the State, the right of a mortgagee to a deficiency decree is set forth by the Code.[4] If the foreclosure is under a power contained in the mortgage, which procedure is also State-wide, then the right to a deficiency decree is given by another code provision.[5] If the foreclosure is by a consent decree, as provided for solely in Baltimore City, then the right to a deficiency decree is given by a local law in the City Charter.[6] These three statutes are almost identical in language and have been held similar in meaning,[7] and it will suffice to quote in the footnote the provisions of the City Charter referred to above.[8]

If the mortgage is under seal, then, under the above statutes, a mortgagee may procure a deficiency decree in Equity

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[3] Commercial Bldg. Assn. v. Robinson, 90 Md. 615, 632, 45 Atl. 449 (1900); Wilhelm v. See, 2 Md. Ch. 322 (1849); Andrews v. Scotten, 2 Bland Ch. 629, 665 (1830).

[4] Md. Code, Art. 16, Sec. 232.

[5] Md. Code, Art. 66, Sec. 6-38, particularly Sec. 24.

[6] Code of Public Local Laws (Flack's 1930 Ed.) Art. 4, Secs. 720-732-A, particularly Sec. 731-A.

[7] McDonald v. Building Assoc'n., 60 Md. 589 (1883); Kushnick v. Bldg. & Loan Assn., 153 Md. 638, 644, 139 Atl. 446 (1927).

[8] "If, upon a sale of the whole mortgaged property by virtue of a decree passed under an assent to the passing of a decree contained in the mortgage under the provisions of section 720 of this Article, the net proceeds of sale, after the cost and expenses allowed by the court are satisfied, shall not suffice to pay the mortgage debt and accrued interest, as the same shall be found and determined by the judgment of the court upon the report of the auditor thereof, the court may, upon the motion of the plaintiff, the mortgagee or his legal or equitable assignee, after due notice, by summons or otherwise, as the court may direct, enter a decree in personam against the mortgagor or other party to the suit or proceeding, who is liable for the payment thereof, for the amount of such deficiency; provided the mortgagee or his legal or equitable assignee would be entitled to maintain an action at law upon the covenants contained in the mortgage for said residue of said mortgage debt so remaining unpaid and unsatisfied by the proceeds of such sale or sales; which decree shall have the same effect and be a lien as in a case of a judgment at law, and may be enforced in like manner by a writ of execution in the nature of a writ of *fieri facias* by attachment or otherwise."

against anyone who signs it as mortgagor, even though the one so signing as mortgagor has no interest in the property,[9] or, is the owner's wife who signs the mortgage as an accommodation to her husband,[10] or, does not receive the consideration which is paid to a friend of the mortgagor and not to the mortgagor,[11] unless, of course, the signature of the person so signing as mortgagor was procured by fraud, false and fraudulent representations, duress or intimidation.[12] But fraud or deceit will not be a defense, if the person signing the mortgage was able to read and write and could with reasonable diligence by reading the mortgage have discovered what he was signing.[13]

When there are several mortgagors, a mortgagee may obtain a deficiency decree against all the mortgagors, and if the mortgage contains a provision that it can be extended on the request of any one of the mortgagors, the right is not lost against all, when an extension of the mortgage is granted at the request of only one.[14]

There might be a question whether the one so signing does so as a mortgagor or a guarantor, and if he signs as a guarantor and not as a mortgagor, there is no right to a deficiency decree against him.[15]

When the Mortgagor Has Assigned.

The rights of a mortgagee against a mortgagor, where the mortgagor has assigned his equity of redemption to a grantee, are ordinarily the same as where no assignment has been made.[16] Those rights are usually altered if there is an agreement whereby the grantee assumes the mortgage debt and makes his promise to pay the debt to the mortgagee. If there is such an assumption, the grantee then

[9] Kirsner v. Mortgage Co., 154 Md. 682, 141 Atl. 398 (1928).
[10] Bletzer v. Cooksey, 154 Md. 568, 141 Atl. 380 (1928).
[11] Golden v. Kovner Bldg. & Loan Assn., 156 Md. 167, 143 Atl. 708 (1928).
[12] Central Bank v. Copeland, 18 Md. 305 (1862); and cases cited in footnotes 9, 10 and 11.
[13] Ibid.
[14] Kirsner v. Mortgage Co., 154 Md. 682, 141 Atl. 398 (1928).
[15] Kushnick v. Bldg. & Loan Assn., 153 Md. 638, 139 Atl. 446 (1927); Druid Hill, etc. v. Pumpian, Circuit Court of Baltimore City (O'Dunne, J.) Daily Record, Nov. 1, 1935; See later discussion of rights against a guarantor.
[16] Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890).

becomes the principal debtor and the mortgagor surety.[17] If such an assumption is followed by a course of conduct between the mortgagee and the grantee which changes the mortgagor-surety's obligation, the mortgagor is thereby released.[18] In other words, before a mortgagor is released there must be first an assumption by the grantee of the mortgage debt and then a change of the obligation without the mortgagor's consent.

The theory is that if the grantee is not personally liable to the mortgagee to pay the mortgage debt, there is no relationship of principal and surety between the mortgagor and grantee, and as that relationship does not exist, the mortgagor is not discharged nor his liability for the mortgage debt affected by any indulgence as to time of payment given by the mortgagee to the grantee. It follows that an extension of time for payment of the mortgage debt, either of principal or of interest, given by the mortgagee to the grantee is only considered a release of the mortgagor, if the grantee has bound himself to the mortgagee to pay the mortgage debt. The rights of the mortgagor against his grantee, who has promised the mortgagor to pay the debt, are not discussed in this article.[19]

It is pertinent to inquire first as to what facts will amount to such an assumption. There may be a specific assumption, or there may be acts of the parties amounting to an assumption.[20] Even though the grant of the mortgagor's interest to a grantee is made subject to the mortgage, it does not follow that the grantee thereby assumes the mortgage debt, and so a relationship of principal and surety as between the grantee and the mortgagor is not necessarily created. In such case, the mortgagor would

[17] Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890); George v. Andrews, 60 Md. 26 (1883).

[18] Rosenthal v. Heft, 155 Md. 410, 142 Atl. 598 (1928); Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890). Of course if there is a novation between the mortgagee and grantee the mortgagor is released from all liability. Chatterly v. Safe Deposit, 168 Md. 656, 178 Atl. 854 (1935), or if the mortgagee assents to the assignment and by a course of conduct estops himself from looking to the mortgagor for payment, the mortgagor is released. East End etc. v. Berman, 185 Atl. 332 (Md. 1936). In Penna. Ave. etc. v. Dubin, 165 Md. 555, 170 Atl. 169 (1933), the facts failed to establish such an estoppel.

[19] Rosenthal v. Heft, 155 Md. 410, 419, 142 Atl. 598 (1928).

[20] See cases in note 18.

not be discharged nor his liability affected, if the mortgagee should accept payments from the grantee at times later than those specified in the mortgage.[21]

However, when there has been a grant by the mortgagor, it is presumed that the grantee assumed the mortgage debt, if the amount of the mortgage debt is deducted from the price paid the mortgagor by the grantee.[22]

If the grantee has assumed the mortgage debt, then the relationship of principal and surety arises as between the mortgagor and the grantee, with the mortgagor as the surety and the grantee as the principal. Once such relationship has been established, then if the acts of the parties change the mortgagor-surety's obligation he is released from liability on the mortgage debt.[23]

This is on the theory that the extension changes the mortgagor-surety's obligation and thereby releases him from personal liability. This consequence could be avoided by a distinct reservation by the mortgagee of his rights against the mortgagor and of his rights to proceed with foreclosure at the mortgagor's request,[24] for if these reservations are made the mortgagor-surety's obligation has not been changed.

In order that the extension of time to or change of obligation of the grantee amounts to a release of the mortgagor, the act of the mortgagee must be supported by valid consideration and be enforceable against him.[25] The mere acceptance of payments by the mortgagee from the grantee of less than the amounts due under the mortgage does not in and of itself operate to create an extension, even though the mortgagee does not notify the mortgagor of such de-

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[21] Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890).

[22] Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890); Shatterly v. Safe Deposit & Trust Co., 168 Md. 656, 178 Atl. 854 (1935); East End Loan etc. v. Berman, 185 Atl. 332 (Md. 1936); cf. Rosenthal v. Heft. 155 Md. 410, 142 Atl. 598 (1928); see Prodis v. Constantinides, 167 Md. 33, 172 Atl. 286, 93 A. L. R. 1200 (1934), and cases therein cited, 167 Md. 37.

[23] Asbell v. Bldg. & Loan Asso., 156 Md. 106, 143 Atl. 715 (1928); George v. Andrews, 60 Md. 26, (1883) and cases in note 22 herein.

[24] George v. Andrews, 60 Md. 26 (1883).

[25] Asbell v. Bldg. & Loan Asso., 156 Md. 106, 143 Atl. 715 (1928) and cases cited at 156 Md. 112; Warner v. Williams, 93 Md. 517, 49 Atl. 559 (1901); Berman v. Elm Loan Asso., 114 Md. 191, 78 Atl. 1104 (1910).

fault.[26] In other words, the mortgagee will retain his rights against the mortgagor, even though he does not press all his remedies, and he may extend to the grantee time for payment of the mortgage debt, if, at the same time, he reserves the right to foreclose, if the mortgagor insists.

Since the relationship between the mortgagor and a grantee, who has assumed payment of the mortgage debt, is that of principal and surety, not that of principal and agent or of joint obligors, payment of interest to the mortgagee by the grantee will not retard the running of the statute of limitations in favor of the mortgagor.[27]

When the Mortgage Is Not Under Seal

When the mortgage is not under seal the mortgagee, not being entitled "to maintain an action at law upon the covenants contained in the mortgage," is not entitled to a deficiency decree under the above statutes providing for that remedy.[28]

However, there have been two statutes passed by the legislature which might be considered to have varied the law and to have given the mortgagee the same rights under an unsealed mortgage which he formerly only had under a sealed one. The statute validating mortgages otherwise defective for want of sealing by the mortgagor first became law in 1904 and has been passed in every succeeding legislature.[29] The other statute passed by the legislature

[26] Gross v. Bldg. & Loan Asso., 157 Md. 401, 146 Atl. 229 (1929); Golden v. Kovner B. & L. Asso., 156 Md. 167, 143 Atl. 708 (1928); Warner v. Williams, 93 Md. 517, 49 Atl. 559 (1901); Berman v. Elm Loan Asso., 114 Md. 191, 78 Atl. 1104 (1910); Asbell v. Bldg. & Loan Asso., 156 Md. 108, 143 Atl. 715 (1928).

[27] County Trust Co. v. Harrington, 168 Md. 101, 176 Atl. 639 (1934).

[28] McDonald v. Building Asso., 60 Md. 589 (1883), see Allen v. Seff, 160 Md. 240, 246, 153 Atl. 54 (1931).

[29] This Statute has now been codified, Md. Code Supp., Art. 21, Sec. 87:

"All deeds, mortgages, releases, bonds or conveyances, bills of sale, chattel mortgages and all other conveyances of real or personal property, or of any interest therein or agreements relating thereto which may have been executed, acknowledged or recorded in the State subsequent to the passage of the Act of the General Assembly of Maryland, passed at its January Session, 1858, Chapter 208, which may not have been acknowledged according to the laws existing at the time of said acknowledgment, or which may not have been acknowledged before a proper officer, or in which the certificate of acknowledgment is not in the prescribed form, or in which the official character of the officer taking the acknowledgment is not set out in the body of the certificate, or has not been certified to as required by

in 1918[30] abolished the distinction at law between the actions of assumpsit and covenant.

Since the passage of the first statute it has been law that an unsealed mortgage is binding between the mortgagor and the mortgagee as if sealed[31] regardless of the fact that the rights of third parties may not have been affected by said statute.[32] The statute validating mortgages reads that the mortgage "shall be valid to all intents and purposes as if sealed." This might be construed to mean that an unsealed mortgage shall be treated as a sealed instrument, the mortgagee thereby being entitled to the same rights in *personam* against the mortgagor that he would have had if the mortgage had been under seal. This would particularly seem to be so since the action of covenant has been consolidated with the action of assumpsit. The one

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law, or in which the conveyance has not been witnessed to or sealed as required by law, or any deed heretofore made to or from a corporation prior to the payment of bonus tax which was afterwards paid, shall be and the same are hereby made valid, to all intents and purposes as if the conveyances and agreements had been acknowledged, certified to, witnessed and sealed according to law; providing the said deeds, mortgages, bonds of conveyances, bills of sale and other conveyances and agreements are in other respects in conformity with the laws; provided, further, that nothing in this section shall affect the interest of bona fide purchasers or creditors, without notice, who may have become so previous to June 1st, 1935."

[30] Md. Code, Art. 75, Sec. 4:

"In all actions *ex contractu* there shall be no distinction in the pleadings by reason of the presence or absence of a seal upon any instrument or writing involved in the case, except in so far as the presence or absence of a seal may affect the substantive rights of the parties (such as necessity for a valuable consideration, period of limitation, etc.) as distinct from matters of procedure; and counts for recovery upon sealed instruments may be joined with counts for recovery upon unsealed contracts, express or implied; and there shall be but one form of action for recovery upon any cause of action arising *ex contractu* or *quasi ex contractu*, namely, the action of assumpsit, in which it shall be sufficient for the plaintiff to state briefly in his declaration the facts essential to recovery (but nothing hereunder shall be construed as abolishing the use of the common counts). Provided that no period of limitations now prescribed by law with respect to any cause of action now existing or hereafter arising shall be altered by this section. And in any such suit at law it shall be sufficient for the defendant to file a general issue plea that the defendant never was indebted as alleged, or that the defendant never promised as alleged, under either of which forms of plea all matters of defence and discharge shall be admissible in evidence, except any matters which could only be availed of by a special plea, or by a more express denial than such general issue plea, in an action of assumpsit prior to the enactment of this section.

And the provisions of this section shall apply, *mutatis mutandis*, to the pleadings when the defendant relies upon matter *ex contractu* in a plea of set-off."

[31] See McDivit v. McDivit, 148 Md. 271, 129 Atl. 291 (1925).

[32] See Wingert v. Ziegler, 91 Md. 318, 46 Atl. 1074 (1900).

statute validates the mortgage as between the mortgagee and mortgagor, and the other gives the mortgagee the right to maintain an action at law to enforce the covenants contained in the mortgage, and if the mortgagee has such a right, then it would seem that he should be entitled to a deficiency decree.[33]

However, the right to a deficiency decree will not be extended if any reasonable basis for the denial of that right can be found, and since the statute validating unsealed mortgages was passed primarily to cure defects in title, it probably will not be construed to make an unsealed mortgage a sealed one for all purposes, but will be construed to mean that an unsealed mortgage will be treated as if sealed only in so far as title to real estate is affected, thus leaving the parties to their other remedies in *personam*. The chances are that the law is unchanged in regard to rights in personam and a mortgage must be under seal before the mortgagee will be entitled to obtain a deficiency decree against the mortgagor.[34]

Even though the promise is not under seal the mortgagee still has the right to foreclose, and to bring an action of assumpsit against the mortgagor to collect the mortgage debt, as the mortgage is still valid as between the parties thereto.[35]

II

Rights Against a Grantee of the Mortgagor

The mortgagee may have the right to collect the mortgage debt from the grantee. But before the mortgagee may sue the grantee there must be a binding agreement between the grantee and the mortgagee whereby the grantee agrees

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[33] See Note 8.

[34] Allen v. Seff, 160 Md. 240, 153 Atl. 54 (1931). In this case a deficiency decree was sought against the grantee and not against the mortgagor. The reasoning of the court however leads to the belief that the law is still to the effect that a deficiency decree may only be obtained when the mortgage is under seal.

[35] Md. Code Supp., Art. 21, Sec. 33; Johnson v. Hines, 61 Md. 122, 138 (1883).

to pay the mortgage debt.[36] If such right exists, it may be enforced either by an action in assumpsit or by a deficiency decree. The method of enforcement depends on the way the grantee has bound himself.

The mortgagee may secure a deficiency decree against the grantee of the mortgagor, *if the grantee has covenanted under seal with the mortgagee to pay the mortgage debt.*[37] A promise to the mortgagor, even though under seal, is not enough.[38] If the promise is not under seal then there is no right to a deficiency decree.[39]

The mortgagee, however, is not without remedy against the grantee for even though he is not entitled to a deficiency decree against him because the promise of the grantee to the mortgagee is not under seal he still may recover in an action of assumpsit.[40]

It must be remembered that the mere taking of a deed by the grantee from the mortgagor in which it is recited that the grantee takes subject to a mortgage, does not obligate the grantee to pay the mortgage debt.[41]

Whether or not the grantee assumed the mortgage debt is a question to be decided by the jury on the evidence. Evidence of payments by the grantee and of conversations between the grantee and the mortgagee, wherein the grantee asked the mortgagee to withhold foreclosure proceedings for a time, has been held to justify a finding that the grantee had assumed the debt and a verdict for the mortgagee.[42]

The Court in the *Mashkes* case[43] carried the doctrine that a mortgagee is not entitled to a deficiency decree against a grantee, who, by a covenant under seal, promised the

[36] Mashkes v. Bldg. & Loan Asso., 167 Md. 270, 173 Atl. 54 (1934). The mortgagee, however, may sue the grantee taking title on the covenant to pay taxes, that being a covenant that runs with the land. Union Trust Co. v. Rosenberg, et al., Daily Record, February 17, 1937 (Md. 1937).

[37] Gross v. Bldg. & Loan Asso., 157 Md. 401, 146 Atl. 229 (1929); see Allen v. Seff, 160 Md. 240, 153 Atl. 54 (1931).

[38] Scherr v. Building and Loan Asso., 166 Md. 106, 170 Atl. 197 (1934). Cf. Mashkes v. Bldg. & Loan Asso., 167 Md. 270, 173 Atl. 54 (1934) and Gable and Beacham v. Scarlett, 56 Md. 169 (1881).

[39] Allen v. Seff, 160 Md. 240, 153 Atl. 54 (1931).

[40] Safe Deposit, etc., v. Strauff, Daily Record, Jan. 27, 1937 (Md. 1937). See Mashkes v. Building and Loan Asso., supra, note 38.

[41] Cases supra note 37 and Mashkes v. Building and Loan Asso., supra, note 38; Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890).

[42] Mashkes v. Building and Loan Asso., supra, note 38.

[43] Ibid.

mortgagor to pay the mortgage debt considerably further than seems proper. In that case, the Court (in passing on a prayer of the plaintiff's) held that the mortgagee on a like promise of the grantee could not even recover against the grantee in an action of assumpsit.

It seems that the Court of Appeals has disregarded the doctrine that a third party creditor-beneficiary may sue on the promise made for his benefit. In the *Scherr* case[44] the Court on the authority of *Hartford Accident & Indemnity Co. v. Knox Net & Twine Co.*[45] affirmed the doctrine that a donee-beneficiary of a contract may sue the promisor but held that that case was not applicable in the case of a creditor-beneficiary unless the promise was made specifically for the benefit of the creditor-beneficiary. Apparently in both the *Mashkes* and *Scherr* cases the Court overlooked the case of *Small v. Schaeffer,*[46] which followed the famous case of *Lawrence v. Fox,*[47] in which it was held that a creditor-beneficiary was entitled to sue the promisor, although the principle established by the *Small* case apparently has been recently affirmed by the Court.[48]

The following anomalous situation seems to be law. If a mortgagor assigns to A, who promises the mortgagor to pay the debt, and A assigns to B, who promises A to pay the mortgage debt, the mortgagee may not sue A in assumpsit, as the promise of A is not for the mortgagee's benefit. But probably the mortgagee may sue B because as to him he is a donee-beneficiary, and B's promise to A is considered as having been made for the mortgagee's benefit.

It is clear that the assignee is not bound in an action of covenant, nor, under the statutory proceeding, for a deficiency decree, unless he makes a promise under seal to the mortgagee to assume the covenants in the mortgage. Likewise, under the *Scherr* and *Mashkes* cases, the mortgagee may not sue the grantee in assumpsit, unless the

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[44] Scherr v. Building and Loan Asso., supra, note 38.
[45] 150 Md. 40, 132 Atl. 261 (1926).
[46] 24 Md. 143 (1866).
[47] 20 N. Y. 268 (1859).
[48] Boulevard Corp. v. Stores Corp., 168 Md. 532, 537, 178 Atl. 707 (1935). Restatement, Law of Contracts, Sec. 144, Illustration 2.

grantee has promised the mortgagee to pay the mortgage debt.

In a recent case the Court of Appeals applied ordinary contract principles to determine what course of dealing between the mortgagee and grantee will be considered a promise by the grantee to pay the mortgage debt.[49]

III

Rights Against a Guarantor of the Mortgage Debt

A mortgagee may pursue the usual common law remedies against a guarantor of the mortgage debt, but he has no right to get a decree *in personam* against such a guarantor, because that right is given by the statutes above quoted, and the mortgagee may get a deficiency decree only when he may sue the person against whom such decree is sought, on the covenants contained in the mortgage. Even though the guarantor signs as such on the mortgage itself,[50] still he is only liable on his contract of guarantee and not on the covenants in the mortgage.

It is difficult to tell whether one signs as a guarantor of a mortgage[51] or as a co-mortgagor to accommodate the owner of the property.[52]

It has been decided at Nisi Prius in Baltimore City that oral evidence is admissible to prove that the parties sought to be held by a motion for a deficiency decree signed as guarantors and not as mortgagors, although in form the signature appeared to be that of a co-mortgagor.[53]

Of course, it might be that even though the signature was that of a guarantor, which would mean that the mortgagee could not secure a deficiency decree against one so signing, nevertheless suit could be brought by the mortgagee under the Speedy Judgment Act against the guar-

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[49] Safe Deposit, etc., v. Strauff, supra, note 40.
[50] Kushnick v. Building and Loan Asso., 153 Md. 638, 139 Atl. 446 (1927).
[51] Allen v. Seff, supra, note 39.
[52] Kushnick v. Building and Loan Asso., supra note 50; Kirsner v. Mortgage Co., 154 Md. 682, 141 Atl. 398 (1928); Bletzer v. Cooksey, 154 Md. 568, 141 Atl. 380 (1928).
[53] Druid Hill, etc., v. Pumpian, et al., Supra, note 15.

antor with the mortgage attached to the declaration as the cause of action.[54]

Before proceeding against a guarantor, the mortgagee probably must exhaust his remedies against the mortgagor, but he is not bound to pursue these remedies against the mortgagor the minute he becomes entitled thereto, in order to continue to hold the guarantor.[55]

Before a delay in going against the mortgagor will operate as a release of the guarantor, the mortgagee must bind himself by an agreement with the mortgagor to postpone action against him and a mere delay or promise of delay, without consideration, is not sufficient to discharge the guarantor.[56]

IV

Procedure in Procuring a Deficiency Decree

In an action for a deficiency decree, a mortgagor or his grantee are proper parties. To bring them before the Court there must be personal summons,[57] but for this purpose service need not be received until after the auditor has filed his account in the foreclosure suit.[58]

And the mortgagor or his grantor may not ordinarily then raise a defense that he could have raised by excepting either to the ratification of the foreclosure sale or to the ratification of the auditor's account.[59]

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[54] Ibid.

[55] Golden v. Kovner B. & L. Asso., 156 Md. 167, 143 Atl. 708 (1928) and cases cited at 156 Md. 177. Berman v. Elm Loan Asso., 114 Md. 191, 78 Atl. 1104 (1910).

[56] Ibid.

[57] McDonald v. Building Asso., 60 Md. 589 (1883).

[58] Gross v. B. & L. Asso., 157 Md. 401, 146 Atl. 229 (1929). Allen v. Seff, supra, note 39.

[59] Bletzer v. Cooksey, supra note 52; Kirsner v. Mortgage Co., supra note 52. It may be that such defenses would be available to one who had no knowledge of the foreclosure proceedings until he received a personal summons after the ratification of the sale and the auditor's account when the mortgagee has moved for a deficiency decree. If there were fraud in the sale or the sale price were grossly inadequate, it would seem a travesty of justice to hold that a person is precluded from setting up such defenses, before he had an opportunity of knowing about them.

Conclusion

It, therefore, appears that in Maryland, under the statutes now in force a mortgagee may foreclose in any one of the usual methods and may sue for a deficiency any one who is bound to the mortgagee to pay the mortgage debt. In order, however, to avail himself of the statutory remedy of securing a deficiency decree, he must be sure that the one against whom he is seeking to enforce that remedy, comes within the strict wording of the statutes. In all other respects the rights of the mortgagee and their enforcement are for the most part governed by the ordinary rules of common law both as to substantive rights and as to procedure.