Volume 58 | Issue 4 Article 13

June 1956

# Deeds of Trust--Obligation Due Prior to 1921--Sale Not Barred By Statute of Limitations

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In the subsequent case of *Commonwealth v. Bolish,* 381 Pa. 500, 113 A.2d 464 (1955), (reversed on other grounds), the deceased, a partner in crime of the defendant, set the fire which caused his death. The felony-murder rule was held applicable. The case is distinguishable from the principal case however, in that the defendant in this case satisfied at least the minimum act required to impute the death directly to him, since he instigated the felony and induced the deceased to commit the highly life endangering crime of arson. Moreover, no third person's act was responsible directly for the death. Thus, neither as to *actus reus,* nor as to *mens rea,* does *Commonwealth v. Bolish, supra,* present as dangerous a departure from common law standards as does the instant case.

With the mentioned precedents at its command it was not difficult for the Pennsylvania court to render the instant decision. This case seemingly would fall within the unfortunate Pennsylvania felony-murder rule, but for one aspect: the killing in the perpetration of the felony must be murder. How could the court ignore the words of the legislature? Penal statutes must be strictly construed. In construing the word *murder* to mean any loss of life, the court has violated one of the basic canons of statutory construction. See *Stull v. Reber,* 215 Pa. 156, 64 Atl. 419 (1906).

One of the underlying reasons that prompted the majority of the court to decide in favor of applying the felony-murder in this case was "the protection of society". *Commonwealth v. Thomas, supra* at 207. The whole history of the penal law suggests that the court took a step in the wrong direction. Extreme punishments, and imposition of liability without fault—even partial liability without fault—weaken rather than strengthen respect for the law.

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DEEDS OF TRUST—OBLIGATION DUE PRIOR TO 1921—SALE NOT BARRED BY STATUTE OF LIMITATIONS.—*A* executed a note to *B,* due and payable on November 1, 1914, and conveyed Blackacre to *T,* trustee, to secure payment. *B* died, leaving P as distributee and heir at law. *C* purchased Blackacre from *A,* and *C* and wife executed a note to *P,* due November 1, 1925, allegedly including the above debt. *C* died, leaving a widow and *D,* children and heirs at law. The widow died in 1952, and thereafter *P* requested *T* to sell Blackacre,

but *T* refused. *P* filed a bill praying for the removal of *T* and the appointment of another trustee. From a decree favorable to *P*, *D* appealed, assigning as error, *inter alia,* that sale under the deed of trust was barred by the statute of limitations, that a presumption of payment should have been applied, and that *P*'s claim was barred by laches. *Held,* affirming judgment, that it would be unconstitutional to apply the statute of limitations retroactively, that the evidence rebutted the presumption of payment, and that the circumstances excused the delay on the part of *P*. *Kuhn v. Shreeve,* 89 S.E.2d 685 (W. Va. 1955).

For the third time since the enactment of the statute in 1921, the West Virginia court has held that the statute of limitations cannot constitutionally be applied to a sale under a deed of trust when the obligation secured thereby became due prior to the date of the statute. W. VA. CODE c. 104, § 5a (Barnes 1923) provided that "No lien . . . created by any deed of trust . . . shall be valid or binding as a lien . . . after the expiration of 20 years from which the debt or obligation secured thereby becomes due . . . ." This limitation was re-enacted in substance, and enlarged to include a lien reserved on the face of any conveyance of real estate, in W. VA. REV. CODE c. 55, art. 2, § 5 (1931). In *LeSage v. Switzer,* 116 W. Va. 657, 182 S.E. 797 (1935), the court held that any retroactive application would be an impairment of the obligation of contract, and therefore unconstitutional under U.S. CONST. art. I, § 10, and W. VA. CONST. art. III, § 4. It is possible that the statute could have been interpreted as barring such liens after twenty years from its passage, *i.e.,* 1941, but this construction was impliedly rejected in *McClintic v. Dunbar Land Co.,* 127 W. Va. 454, 33 S.E.2d 593 (1945). There, the court allowed a sale, although the obligation was due in 1919, and suit to enforce the debt was not begun until 1943. The record does not show whether the above interpretation was mentioned to the court, but if it were, it was not accepted. The statute in question was amended in 1949, W. Va. Acts, c. 1, but the provision mentioned was not materially changed, and the opinion in the instant case said that there was no substantial difference as to the barring of the lien. The opinion in the principal case seemed to be inaccurate in saying that ". . . the . . . *note* here asserted is not barred by the statute . . . ." *supra* at 691 (emphasis added). On a contract in writing, signed by the party to be charged or his agent, action must be brought within ten years from the date when the right of action accrues. W. VA. CODE c. 55, art. 2, § 6 (Michie 1955).

This would clearly bar any action on the *notes*, 40 and 29 years past due, but it is well settled law in West Virginia and elsewhere that although a note may be barred, a mortgage foreclosure or a sale under a deed of trust securing the note is not barred short of a period which would raise a presumption of payment. *LeSage v. Switzer, supra; Criss v. Criss,* 28 W. Va. 388 (1886); *Camden v. Alkire,* 24 W. Va. 674 (1884). After a statute of limitations has run against a debt, a creditor remains entitled to use any lawful means available for collecting his debt which does not involve court action. *Morgan v. Farmington Coal & Coke Co.,* 97 W. Va. 83, 124 S.E. 591 (1924); *Roots v. Mason City S. & M. Co.,* 27 W. Va. 483 (1886); 6 WILLISTON, CONTRACTS § 2002 (rev. ed. 1938). Sale under a deed of trust requires no assistance from the courts. *LeSage v. Switzer, supra* at 659.

Since it is apparently settled that the statute of limitations cannot be applied to deeds of trust securing pre-1921 obligations, the main protection against such encumbrances is the presumption of payment, mentioned above. After the passage of a certain time, the debt is presumed paid, but such presumption can be rebutted by sufficient evidence. *Payne v. Dudley,* 1 Va. (1 Wash.) 476 (1793). The presumption applies whether the debt is secured by a deed of trust or not. *Criss v. Criss, supra.* The period sufficient to establish the presumption in the Virginias is twenty years. *Payne v. Dudley, supra; Pitzer v. Burns,* 7 W. Va. 63 (1873). It has been stated that the presumption may be repelled by evidence of the relations and circumstances of the parties. *Camden v. Alkire, supra* at 678. The principal case said that the presumption was factual, and could be rebutted. However clear this abstract rule may be, the application of the rule is not so clear, as to what will or what will not rebut the presumption. The instant opinion stated that possession of a note by the payee is prima facie evidence of ownership, and that "[N]o showing of payment is made in this record." This language can be questioned on two grounds: (1) should the "prima facie evidence" be sufficient to overcome the presumption of payment, and (2) if payment is presumed, why is it necessary to show payment in the record? When a creditor has not attempted to enforce his rights for over twenty years, it would seem that any rebuttal of the presumption should be strong and convincing. In *Criss v. Criss, supra,* circumstances held insufficient to rebut the presumption were the occurrence of the Civil War during the subsistence of the debt, as there was no evidence that either party was

actively engaged, and the lack of any other obstacle to enforcing payment. Further, the statement by the payee that "Not one dollar of this debt has ever been paid" was insufficient to rebut, even though he was a competent witness. The court indicated that the presumption *would* be rebutted by proof of payment of interest during the twenty year period, continued absence from the country by the obligee, continued insolvency of the obligor, or other strong circumstances showing nonpayment or good cause for longer forebearance. *Supra* at 403-04. The presumption may be rebutted by payment of part of the principal of the debt, *Camden v. Alkire, supra,* or by acknowledgement by the debtor, *Payne v. Dudley, supra.* None of the above seemed to be present in the principal case. However, the court apparently placed emphasis on the fact that the obligees and the widow of the obligor were related, and that the plaintiffs did not wish to create a hardship on her by forcing a sale of her home. This circumstance was held to excuse the delay in enforcing the debt, thereby precluding the defense of laches, but in view of the strength of the presumption as stated in the *Criss* case, *supra,* it is questionable whether this factor alone should be a sufficient rebuttal. Evidently, when the above relationship was considered in conjunction with the possession of the note by the obligees, it was enough to rebut the presumption.

The case stands as a warning to the title examiner who finds an unreleased deed of trust, when the obligation it secures became due prior to 1921. The abstractor must evaluate the strength of the presumption as applied to the facts of the particular case and advise accordingly. An unreleased encumbrance is excepted from the provisions of a title insurance policy, and the insured is not protected against its enforcement. GAGE, LAND TITLE ASSURING AGENCIES 91 (1937). Therefore, it is important to determine what weight the court is going to give to the presumption of payment, if and when the question again arises.

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EVIDENCE — PRIVILEGE AGAINST SELF-INCRIMINATION — CONSTITUTIONALITY OF IMMUNITY STATUTE.—*D* was adjudged guilty of contempt of court for refusing to testify before a grand jury investigating matters concerned with attempts to endanger the national security. *D* had been ordered by a federal district court, under the authority granted by the Immunity Act of 1954, to testify with