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# MORTGAGE FORECLOSURES: THE LINGERING EFFECT OF THE COMMON LAW SEPARATION OF LEGAL AND EQUITABLE REMEDIES

In 1961 the Illinois General Assembly amended section 1 of the Civil Practice Act to include mortgage foreclosures in the enumeration of special proceedings regulated by separate statute.[1] As part of the separate procedure for foreclosures, it reenacted without significant change the statutory authority of a court of equity to render a personal judgment in a mortgage foreclosure proceeding.[2] That statute would seem to bring mortgage foreclosures in line with actions brought under the Civil Practice Act wherein complete joinder of legal and equitable claims is permitted.[3] This, however, is not true. While section 44 of the Civil Practice Act is a codification of the general rule of equity favoring complete adjudication of all claims of a controversy in a single action, section 56 of the Mortgage Foreclosure Act is the legislature's response to the acceptance in Illinois of the case law rule that statutory authority is a necessity before a court of equity can exercise personal jurisdiction in a foreclosure.[4] The distinction, though subtle, paved the way for a judicial interpretation which limited the beneficial effect of that statutory authority by not extending personal jurisdiction under it to parties secondarily liable on the note secured by the mortgage.[5] The liability of those parties must be established in a subsequent proceeding. This note is intended to show that neither the origin of the rule generating the statute nor the purpose of the interpretation limiting it contained any significant rationale to counterbalance the widely expressed policy disfavoring a multiplicity of suits.

## THE ORIGIN OF THE RULE

A familiar rule of equity states that once a court of equity acquires jurisdiction over the subject matter of a controversy it retains jurisdiction to render full equitable and legal relief.[6] This general proposition is accepted in Illinois.[7] Despite this concept a case law rule developed that, in the absence of a statute or court rule, a court of equity was without power to render a personal judgment for a deficiency during a foreclosure proceeding.

A deficiency results when the sale of the mortgaged property does not supply sufficient funds to pay the debt it secures. A mortgage is given as security for an obligation not in payment of it. Generally, the holder is entitled

1. ILL. REV. STAT. ch. 110, § 1 (1973).
2. ILL. REV. STAT. ch. 95, § 56 (1973), *formerly* ILL. REV. STAT. ch. 95, § 17 (1961).
3. ILL. REV. STAT. ch. 110, § 44 (1973).
4. Cook v. Moulton, 64 Ill. App. 429 (1896).
5. Walsh v. Van Horn, 22 Ill. App. 170 (1887).
6. Armstrong v. Gilchrist, 2 Johns. Ch. 424 (1800); Lynch v. Metropolitan El. Ry. Co., 129 N.Y. 274, 29 N.E. 315 (1891).
7. Weininger v. Metropolitan Fire Ins. Co., 359 Ill. 584, 195 N.E. 420 (1935).

to payment of the full amount of the debt and accepting a mortgage does not imply that the creditor is to look solely to the property for satisfaction.[8] He may proceed by foreclosure to force a sale of the property, or he may choose to ignore the security and bring an action at law on the indebtedness.[9] If the mortgagee chooses the equity route and the mortgaged property is sold under a foreclosure decree or pursuant to a power of sale,[10] he is recognized to have a cause of action against the mortgagor for the deficiency.[11] Under the case law rule exempting legal remedies from foreclosure proceedings, the mortgagee was obliged to seek recovery of the balance due in a subsequent proceeding at law.

The origin of that rule seems to be *Dunkley v. Van Buren*,[12] a New York case. It was cited for this proposition by the highest courts of Kentucky, Alabama, and Mississippi.[13] While *Dunkley* may have initiated this rule, it did not perpetuate it. In response, many states passed statutes granting equity courts the power to render a deficiency judgment against any person liable on the debt who is properly before the court.[14] *Dunkley* remained the authority cited by courts, deciding questions involving these statutes, for the proposition that such statutes were necessary.[15]

In *Dunkley*, Chancellor Kent held that the in rem nature of a foreclosure action was not intended to include an in personam judgment for a deficiency. He stated that the plaintiff had a right to sue at law for the deficiency, if the sale of the property was not sufficient to cover the debt. English cases were cited as precedent for this proposition,[16] but they were not on point. Those cases recognized that the mortgagee had both a remedy at law on the debt and

8. Rogers v. Ward, 90 Mass. (8 Allen) 387 (1864).

9. Separate actions at law and in equity can be pursued and two judgments obtained, but the satisfaction of one releases the other. Barnes v. Upham, 93 Conn. 491, 107 A. 300 (1919); Taylor v. American Nat. Bank, 63 Fla. 631, 57 So. 678 (1912); Markus v. Chicago Title & Trust Co., 373 Ill. 557, 27 N.E. 2d 463 (1940); Anderson v. Warren, 196 Okla. 251, 164 P. 2d 221 (1945).

10. Sales pursuant to a power of sale contained in a mortgage or a trust deed are no longer permitted in Illinois. ILL. REV. STAT. ch. 95, § 23 (1973).

11. ILL. REV. STAT. ch. 95, § 56 (1973). Gordon v. Gilfoil, 99 U.S. 168 (1879); Voorhis v. Crutcher, 98 Fla. 259, 123 So. 742 (1929); Winne v. Lahart, 155 Minn. 307, 193 N.W. 587 (1923).

12. 3 Johns. Ch. 330 (1818).

13. Hunt v. Lewin, 4 Stew. & P. 138 (Ala. 1833); Downing v. Palmateer, 17 Ky. (1 T. B. Mon.) 64 (1824); Stark v. Mercer, 4 Miss. (3 How.) 377 (1839). Other cases announced the same rule without reliance on any precedent. Noonan v. Braley, 67 U.S. (2 Black) 499 (1862); Orchard v. Hughes, 68 U.S. (1 Wall.) 73 (1863); Cook v. Moulton, 64 Ill. App. 429 (1896); Pool v. Young, 23 Ky. (2 T. B. Mon.) 588 (1828).

14. Presently, 31 states have specific legislation permitting deficiency judgments during mortgage foreclosure proceedings.

15. Tedder v. Steele, 70 Ala. 347 (1881); Julian v. Pilcher, 63 Ky. (2 Duv.) 254 (1865); Culver v. Judge of the Superior Court of Detroit, 57 Mich. 25, 23 N.W. 469 (1885); Weir v. Field, 67 Miss. 292, 7 So. 355 (1890).

16. Aylet v. Hill, 21 Eng. Rep. 384 (1770); Took's Case, 21 Eng. Rep. 476 (1774); Dashwood v. Blythway, 21 Eng. Rep. 1072 (1729); Dashwood v. Bithazey, 25 Eng. Rep. 347 (1729).

in equity to foreclose, but under the then prevailing theory of foreclosure no question of a deficiency was present if the mortgagee elected to seek his remedy in equity.[17]

Under English law at that time a mortgage was a conveyance of the fee by the mortgagor to the mortgagee.[18] The conveyance was conditioned in such a manner that the payment of a specified sum at the proper time and place restored title in the mortgagor.[19] Default in such payment caused the title of the mortgagee to become absolute.[20] It became the practice of mortgagors to petition a court of equity to permit the mortgagor to pay the amount of the indebtedness with interest and costs, notwithstanding that time for payment had passed, and thereby redeem the property.[21] Courts of equity so favored this method of preventing forfeitures that the right to redeem—called the equity of redemption—became firmly fixed in the law.[22] To counter this practice, mortgagees sought the aid of a court of equity to fix the time within which the mortgagor could redeem.[23] This was the origin of the foreclosure suit. It was strictly in rem and, thus, was termed a strict foreclosure.[24] Its object was not to recover on the indebtedness, but to fix and declare the absolute right of the mortgagee in the premises. There was no sale ordered and, thus, no deficiency to be enforced by way of a personal judgment.

Some courts totally rejected *Dunkley*, thereby dissolving the demarcation line between law and equity, without the aid of the legislature, for the purpose of preventing a multiplicity of suits.[25] The Supreme Court of South Carolina, in *Anderson v. Pilgram*,[26] relied on an act of the state legislature that altered the nature of a mortgage from a conveyance on condition to a lien[27] to give courts of equity the power to render deficiency judgments. This alteration changed a foreclosure suit from a proceeding to confirm legal title by cutting off the equity of redemption to an action for sale of the mortgaged premises and application of the proceeds to the mortgaged debt. With the remedy now being satisfaction of the debt, the court declared that the foreclosure proceeding took on the character of an in personam as well as an in rem action.[28] On that ground they justified not following *Dunkley*, without

17. OSBORNE, MORTGAGES § 332 (2 ed. 1970).
18. *Id.* § 5.
19. *Id.*
20. Chaplin, *The Story of the Mortgage Law*, 4 HARV. L. REV. 1, 9, 10 (1890).
21. Kinnoul v. Money, 26 Eng. Rep. 830 (1767); Jones v. Kennick, 2 Eng. Rep. 655 (1727); Wiechalse v. Short, 1 Eng. Rep. 1497 (1713); Rossarrick v. Barton, 22 Eng. Rep. 769 (1672).
22. OSBORNE, MORTGAGES § 6 (2 ed. 1970).
23. *Id.* § 10.
24. *Id.* § 311.
25. Nolan v. Woods, 80 Tenn. (12 Lea.) 615 (1883); Young v. Vail, 29 N.M. 324, 222 P. 912 (1924).
26. 30 S.C. 499, 9 S.E. 587 (1889).
27. The statute under which *Anderson* was decided made no mention of deficiency judgments. It can be found in Morgan v. Bogan, 45 S.C. (11 Rich.) 686, 691 (1857).
28. 30 S.C. at 503, 9 S.E. at 588.

hesitating to consider that the action in *Dunkley* also involved a judicial sale.[29] The court found no reason for the debtor to be harrassed by two suits, one in law and one in equity, when the same result could be reached by permitting a court of equity to render an in personam judgment for the remainder of the debt.[30] Mortgages are now almost without exception treated as liens rather than conveyances in the United States.[31]

### *The History of the Rule in Illinois*

Illinois is a jurisdiction which considers a mortgage to be a lien rather than a conveyance,[32] but it has never accepted the South Carolina rationale preferring to rely on express statutory authority. The Illinois statute empowers a court of equity to enter a deficiency judgment against anyone *personally liable* on the debt and amenable to process.[33] While deciding that the Illinois statute authorized a decree of personal liability only after the foreclosure sale, the court in *Cook v. Moulton*[34] made reference to the necessity of statutory power to render such a judgment without citing any authority. *Dunkley* could have been the origin of this rule in Illinois, since it had been cited earlier in *Vansant v. Allman*[35] for the proposition that a mortgagee could pursue his several remedies on the note and mortgage at the same time. Whatever the origin of the rule, its existence set the stage for judicial construction of the statute authorizing deficiency judgments. An important area of interpretation became the status of persons who could be considered personally liable on the mortgage under the statute.

One of the early controversies in interpreting the Illinois statute, and similar ones in other states, concerned the liability for a deficiency of a grantee who, as consideration for the conveyance, agreed with the mortgagor to assume the mortgage payments. Without statutory authority to grant deficiency decrees,[36] a New Jersey court in *Klappworth v. Dressler*[37] found that a court of equity did not exceed its jurisdictional powers by holding a grantee for the deficiency. The mortgagor's insolvency provided a subtle distinction. The court's theory was that, since the insolvency of the mortgagor left the mortgagee without a remedy for the recovery of the debt, equity should provide relief by permitting him to recover, as the mortgagor could have, from the grantee.[38] Thus, the chancellor was able to enforce against the

29. 3 Johns. Ch. 330 at 331.
30. 30 S.C. at 502, 9 S.E. at 588.
31. 59 C.J.S. *Mortgages* § 1(b) n 15 (1961).
32. Kling v. Ghilarducci, 3 Ill. 2d 454, 121 N.E. 2d 752 (1954).
33. ILL. REV. STAT. ch. 95, § 56 (1973).
34. 64 Ill. App. 429 (1896).
35. 23 Ill. 26 (1859).
36. The New Jersey courts did follow the rule of *Dunkley* that an equity court was generally without power to render a deficiency judgment. Statutory authority to do so was granted after *Klappworth*, but later repealed. *See* Stoddard v. Van Bussum, 57 N.J.Eq. 518, 194 A. 811 (1937).
37. 13 N.J.Eq. 62 (1860).
38. *Id.* at 65.

grantee, what he had no power to enforce against the mortgagor under the *Dunkley* rule.

The Illinois court, using its statutory authority, devised a broader and more satisfactory rule. In *Dean v. Walker*, [39] the court declared the liability of all grantees without any regard to the financial condition of the grantor. They found the contract between the grantee and mortgagor under which the grantee agreed to pay the debt was made to benefit the mortgagee.[40] Under a third party beneficiary theory the grantee had become personally liable to the mortgagee for the debt. Thus, a deficiency judgment could be entered against a grantee, if he was made a party to the foreclosure suit.[41] The court recognized that the grantee had by contract become a party to the original mortgage transaction. This decision with respect to subsequent grantees, however, was not expanded into a general rule that a court of equity could decide the rights between all persons joined as parties in a foreclosure.

## THE ILLINOIS EXCEPTION

Illinois courts developed an exception concerning persons who would not be considered personally liable for the debt under the statute. This exception declared that persons secondarily liable on the note secured by the mortgage could not be subject to a deficiency judgment in the foreclosure proceeding. Their liability would have to be established in a separate action at law. The class of persons secondarily liable could include indorsers,[42] accommodation parties,[43] or guarantors.[44] Their liability is different from that of the mortgagor or grantee, because they have agreed to pay the debt only if the person who has undertaken the primary responsibility for it does not. This exception for secondary parties evolved in cases concerning the liability of the mortgagee to his assignee.

In *Walsh v. Van Horn*,[45] the mortgagee, Walsh, had assigned the notes and mortgage to plaintiff, Van Horn. The debt was not paid and Van Horn

39. 107 Ill. 540 (1883).

40. *Id.* at 545.

41. Ingram v. Ingram, 172 Ill. 287, 50 N.E. 198 (1940).

42. An indorsement is a formal act which is necessary to pass title of a note to the indorser's transferee. ILL. REV. STAT. ch. 26, § 3-202 (1973). The indorser is a person who makes the contract of indorsement. The contract of indorsement is a promise by the indorser that he will pay the instrument if the maker or other person primarily liable does not. Thus, the indorser has become secondarily liable on the note, and his liability is dependent upon the performance of certain conditions, *see* note 49 *infra*.

43. An accommodation party is one who signs an instrument in any capacity for the purpose of lending his credit to the obligation of the debtor. The accommodation party is liable in the capacity in which he signed either as an indorser, *see* note 42 *supra*, or as a co-maker. ILL. REV. STAT. ch. 26, § 3-415(1), (2) (1973). The accommodation party who signs as a co-maker may be considered primarily liable, because he can be sued by the creditor without demand being made on the debtor. *See* Foreman Trust & Sav. Bank v. Cohn, 267 Ill. App. 469, *aff'd*, 342 Ill. 280, 174 N.E. 419 (1932).

44. A guarantor is a person who agrees to pay the indebtedness of another if that person does not. He is not an indorser and is not entitled to the conditions precedent to an indorser's liability, *see* note 49 *infra*. Gridley v. Capen, 72 Ill. 11 (1874).

45. 22 Ill. App. 170 (1887).

foreclosed. Service of process was made upon Walsh in an attempt to hold him for the deficiency. The court held that persons considered personally liable by the statute included only those parties before the court for the purpose of the foreclosure, the mortgagor or his grantee, and not third persons whose liability was that of an indorser or guarantor.[46] The court evidently considered the agreement of secondary parties to be ancillary to the mortgage transaction and decided that the statute had not extended jurisdiction to those questions.

A subsequent appellate court decision cited *Walsh* with approval, but also seems to be equally based on the insufficiency of the complaint. In *Christensen v. Niedert*,[47] the court found the mortgagee, who at the insistence of his assignee, had signed the reserve side of several bearer[48] notes secured by a trust deed to be liable on them as an indorser, but stated that the allegations of the complaint did not disclose whether the conditions precedent to his liability as an indorser had been performed.[49] The court's citation of *Walsh* implied that it agreed with the rule that a personal judgment could not be entered in a foreclosure suit against a person secondarily liable on the debt. But, the reasons stated for its decision might equally indicate that the indorser's liability was not properly established at trial, and for that reason the indorser could not be held liable.

The exception that Illinois grafted on its deficiency judgment statute was not based on the substantive rights of a party involved in the original mortgage transaction or subsequent assignments, but is merely a procedural aberration. The secondary party is not absolved from liability but is merely granted the privilege of a separate suit. The holder of the note will certainly not complain of adjudication of all issues in a single suit. The primary party is not prejudiced by the court's consideration of the additional questions of secondary liability, because his insolvency or refusal to pay ripened the liability of the secondary party. Thus, there does not seem to be any valid considerations to counterbalance the general policy of avoiding a multiplicity of suits.

## THE VIEWPOINT IN OTHER STATES

The Alabama Supreme Court adopted the same exception as did Illinois using a transaction test similar to the one used in *Walsh v. Van Horn*.[50] In *Hamill v. McCalla*,[51] the court held that indorsers of the mortgage notes were

46. *Id.* at 172.
47. 259 Ill. App. 96 (1930).
48. A bearer note may be negotiated by delivery of the note and no indorsement is required. ILL. REV. STAT. ch. 26, § 3-202(1) (1973).
49. The indorser's liability is conditional upon the holder's compliance with specific requirements. ILL. REV. STAT. ch. 26, § 3-414(1) (1973). The holder must present the instrument to the debtor for payment at the proper time, *id.* § 3-503, and must give the indorser notice of the debtor's dishonor, *id.* § 3-508.
50. 22 Ill. App. 170 (1887).
51. 228 Ala. 281, 153 So. 412 (1934).

not proper parties to a foreclosure action. Despite a statute allowing for deficiency decrees, the court said that a party subject to a deficiency decree had to be one who was jointly liable on the debt, had some interest in the property, or had a right which would affect the equity of redemption.[52] A party whose only remaining interest in the transaction was to guarantee payment of the debt was not such a party.[53]

An opposite conclusion was reached by the Wisconsin Supreme Court which held in *Halbach v. Trester*[54] that a secondary party was sufficiently involved in the transaction to be made a party to the foreclosure. There, a deficiency judgment in favor of the third holder of the mortgage note was entered against the original mortgagee on his contract of indorsement. The court acted under a statute which provided that the plaintiff could unite in a foreclosure action every party who might be personally liable on the debt if they were a party to the same contract which the mortgage was given to secure. By its holding, the court inferred that the mortgage transaction was not a singular event and anyone who pledged his credit became and remained a party until the debt was discharged.

Wisconsin courts do, however, recognize the particular characteristics of the indorser's contract. In *Stellmacher v. Sampson*,[55] the court held that a party who "guarantees collectibility" could not be subject to a deficiency decree in a foreclosure action. One who guarantees collectibility is liable for the debt only after the creditor has proceeded to judgment against the party primarily liable.[56] A deficiency decree against the primary party in the foreclosure action fulfills this condition and allows the creditor to proceed against the guarantor of collectibility in a subsequent suit.[57]

The Florida court took the boldest approach in *Degge v. First National Bank of Eustis*.[58] The court was faced with deciding whether a deficiency judgment could be entered against a bank, who had assigned the mortgage and indorsed the note, in light of a change in the statutory language which

52. *Id.* at 285, 153 So. at 416.
53. *Id.*
54. 102 Wis. 530, 78 N.W. 759 (1899).
55. 195 Wis. 635, 219 N.W. 343 (1928).
56. UNIFORM COMMERCIAL CODE § 3-416(2).
57. New York is in accord with the general proposition that persons liable for a deficiency should be parties to the same transaction, Frank v. Davis, 135 N.Y. 275, 31 N.E. 1100 (1892), which would include guarantors, Klienke v. Samuels, 264 N.Y. 144, 190 N.E. 324 (1934), and indorsers, Kerhonson Nat. Bank v. Granite Sunshine Hotel, 26 A.D. 2d 713, 271 N.Y.S. 376 (1966), but not guarantors of collectibility, Robert v. Kindansey, 111 A.D. 475, 97 N.Y.S. 913, *aff'd*, 188 N.Y. 638, 81 N.E. 1174 (1906). The statute under which these decisions were made was repealed, but the new statutory scheme which retains the power to render deficiency judgments during foreclosures, N.Y. RPAPL § 1371 (McKinney Supp. 1974), and adds the requirement of a recorded agreement to hold a grantee liable, N.Y. GEN. OBL. § 5-705 (McKinney Supp. 1974), does not seem to alter the liability of secondary parties. A guarantor was held liable under the new statute in State Bank of Albany v. AMAK Enterprises, 77 Misc. 2d 340, 353 N.Y.S. 2d 857 (1974).
58. 145 Fla. 438, 199 So. 564 (1941).

eliminated the phrase authorizing such judgments "against all persons liable for the mortgage debt." Previous cases had held that due to this alteration there no longer existed a statute or court rule which authorized a court of equity to render a deficiency judgment against an indorser or guarantor.[59] The court said that it bordered on the ridiculous to say that a court of equity had no power to do something without a rule which it could theretofore have made,[60] and declared one based on the well-settled principle that once equity took jurisdiction it could give full relief. The effect of the holding was to declare the power of an equity court to be co-extensive with the rights of the parties properly before it.

Excluding the adjudication of secondary liability from a foreclosure proceeding, as Illinois does, seems to be, at most, lingering residue of the technical rule excluding all legal remedies from foreclosures. Consequently, it is not surprising a similar exception has not been adopted by a majority of the jurisdictions which have considered the question.[61] It is surprising that Illinois should retain this vestige of a rule which the legislature had attempted to eliminate.[62] This retention is inconsistent with the complete merger of legal and equitable jurisdiction under the Civil Practice Act.[63] True, mortgage foreclosures have a separate statutory procedure,[64] but that procedure, which includes a short-form complaint with statutory allegations, seems to be aimed at modernization and efficiency rather than incorporation of old and burdensome concepts of equity.

## The Outer Limits of the Illinois Exception

The Illinois rule exempting parties secondarily liable from deficiency judgments in foreclosures originated in suits involving the indorsement contract of the original mortgagee. It can be argued that the holder has made a contract with the mortgagee-indorser which is separate and distinct from his remedy on the property securing the note, and the indorser should not be a party to a proceeding in which he has no interest until after the sale of the property results in a deficiency. This argument loses much of its validity when one considers that the holder has separate remedies at law and equity and could have proceeded against the indorser on the note immediately upon the mortgagor's default.[65] Thus, the foreclosure action is not a mandatory

59. Prevatt v. Federal Land Bank of Columbia, 129 Fla. 464, 176 So. 494 (1937); Reves v. Younghusband, 101 Fla. 165, 133 So. 618 (1931).

60. 145 Fla. at 441, 199 So. at 565.

61. In states deciding the question the exception for parties secondarily liable has been affirmed in Alabama, *see* note 51 *supra*, and Maryland, Kusknick v. Lake Drive Bldg. & Loan Assn., 153 Md. 638, 139 A. 446 (1927), and rejected in Wisconsin, *see* note 54 *supra*, Florida, *see* note 58 *supra*, New York, *see* note 57 *supra*, Michigan, Michigan State Bank of Eaton Rapids v. Trowbridge, 92 Mich. 217, 52 N.W. 632 (1892), and South Carolina, Welborn v. Cobb, 92 S.C. 384, 75 S.E. 691 (1912).

62. Ill. Rev. Stat. ch. 95, § 56 (1973).

63. *Id.* ch. 110, § 44.

64. *Id.* ch. 95, § 23.

65. *See* note 9 *supra*.

prerequisite to the indorser's liability. The general nature of the rule, however, allows the exception to apply to secondary parties who have a close and continuing relationship to the mortgage contract. The land trust beneficiary and the guarantor of corporate indebtedness are two common examples to which the exception has been applied.

The validity of land trusts has been upheld in Illinois on numerous occasions.[66] The land trust is a device by which the trustee gets complete legal and equitable title in real property, but the beneficiary, usually the previous fee owner, retains under the trust agreement complete control of the trustee's acts with respect to it.[67] The trustee is often called upon to execute a mortgage, and, because the trustee, usually a bank or trust company, desires no personal liability, the trust deed executed as security for the mortgage usually contains a clause exonerating the trustee from any liability for a deificency by requiring the mortgagee to look only to the property for satisfaction of the debt. These exculpatory clauses have been enforced by the court.[68] The effect of such clauses can be a requirement by the mortgagee that the beneficiary sign the note guaranteeing payment.[69]

This situation was before the court in *Schnur v. Bernstein*.[70] There, a trust deed was executed by the trustee, Forman Trust & Savings Bank, as security on a note. The trust deed provided that there was to be no personal liability enforceable against the promisor or anyone beneficially interested, and that the mortgagee's sole remedy was foreclosure of the trust deed. The defendants, beneficiaries of the land trust, signed the reserve side of the note as guarantors and recited that they "waived protest."[71] Liability on such a guarantee has been held effective despite the apparent exoneration in the

66. *See, e.g.*, Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932); Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926); Chicago Title & Trust Co. v. Mercantile Bank, 300 Ill. App. 329, 20 N.E. 2d 992 (1939).

67. *See* Robinson v. Chicago National Bank, 32 Ill. App. 2d 55, 58, 176 N.E. 2d 659, 661 (1961).

68. Lowenstein v. Chicago Title & Trust Co., 340 Ill. App. 160, 91 N.E. 2d 96 (1950).

69. Without agreeing to become a guarantor, the beneficiary of a land trust is not liable on the mortgage note even though he expressly directed the trustee to undertake the mortgage. Conkling v. McIntosh, 324 Ill. App. 292, 58 N.E. 2d 304 (1944).

70. 309 Ill. App. 90, 32 N.E. 2d 675 (1941); *accord*, City of Chicago v. Chatham Bank of Chicago, 54 Ill. App. 2d 405, 203 N.E. 2d 788 (1964); First Nat. Bank of Chicago v. Marks, 304 Ill. App. 438, 26 N.E. 2d 731 (1940).

71. The effect of waiving protest under the commercial code, ILL. REV. STAT. ch. 26, § 3-511(5) (1973), is to waive the necessity of conditions precedent to the indorser's liability, *see* note 49 *supra*. In *Schnur* the indorsers also recited a guarantee of payment. Presently, under the commercial code, ILL. REV. STAT. ch. 26, § 3-416(1) (1973), the holder may look directly to such a signer for payment without going first to the debtor. Thus, post-code, the defendants in *Schnur* would seem to be primarily liable parties, but the question remains unsettled. In City of Chicago v. Chatham Bank of Chicago, 54 Ill. App. 2d 405, 203 N.E. 2d 788 (1964), a post-code case, the party being charged with the deficiency had indorsed with a recital that she guaranteed payment. The court reiterated the rule that a party secondarily liable could not be subject to a deficiency judgment during a foreclosure and cited all of the previous authorities. It did not, however, expressly state that the guarantor there was a secondary party, but held that she was not properly served and, thus, the court had no personal jurisdiction over her.

language of the trust deed.[72] On appeal, however, the lower court's order entering a deficiency judgment against the defendants was reversed, because the nature of their guarantee made them only secondarily liable on the debt.[73]

It is common practice to require the personal guarantee of the officers or directors of a small corporation on a note executed by the corporation. This is especially true, if it is a closely held corporation,[74] and those persons are its substantial owners. In *Mortgage Syndicate, Inc. v. Do and Go Equipment, Inc.*,[75] the mortgagee joined as defendants the three officers of the defendant corporation who had indorsed the mortgage note with the recital "without recourse." While the effect of the "without recourse" indorsement would probably have been to release the officers of liability,[76] that consideration was never reached. The court said that the law had not been changed to allow the surety of an underlying note secured by real property to be called in to make up a deficiency resulting from a foreclosure sale, although this seemed to be permitted by the form of the statutory complaint.[77]

The two illustrations presented have four important aspects in common. As guarantors or indorsers the exempt defendants had both made a contract of secondary liability promising to pay if the primary party did not. Both were original and continuing parties to the mortgage obligation. Both were the real parties that benefited from the execution of the mortgage. Finally, by the manner in which both parties signed, their liability became effective upon the non-payment of the debt by the primary party without any conditions precedent.[78] The beneficiaries of the land trust had waived their rights to conditions precedent by signing with a waiver of protest.[79] The corporate officers had complete control and knowledge of the corporation's non-payment and would not have been prejudiced by lack of notice thereof.[80] Combining these factors points out the abusrdity of the requirement that the liability of these parties had to be tried in a separate suit when the question was so clearly before the court at the time of the foreclosure. These examples are not exceptional circumstances, but are common transactions in which the party who was secondarily liable was clearly the proper, and only, party who had liability for the deficiency.

72. Conerty v. Richstag, 379 Ill. 360, 41 N.E. 2d (1942).

73. 309 Ill. App. at 99, 32 N.E. 2d at 679.

74. A close corporation is one in which the voting shares are held by a closely-knit group of stockholders. Generally, the same people are the shareholders, directors, and officers. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 506-08 (2 ed. 1970). The distinctive nature of the close corporation has been recognized in Illinois. Galler v. Galler, 32 Ill. 2d 16, 203 N.E. 2d 577 (1964).

75. 7 Ill. App. 3d 106, 286 N.E. 2d 520 (1972).

76. ILL. REV. STAT. ch. 26, § 3-414(1) (1973).

77. 7 Ill. App. 3d at 108, 286 N.E. 2d at 522. ILL. REV. STAT. ch. 95, § 23 (1973) provides a short form complaint which incorporates statutory allegations. One of those allegations is a prayer for a deficiency judgment against anyone personally liable on the indebtedness.

78. 7 Ill. App. 3d at 108, 286 N.E. 2d at 522.

79. *See* note 49 *supra*.

80. ILL. REV. STAT. ch. 26, § 3-511(5) (1973).

The Illinois Supreme Court has never spoken directly on the liability of secondary parties. In *Skolnik v. Petella*,[81] an appellate court said that the statute conferring jurisdiction to grant deficiency judgments in mortgage foreclosures[82] was clearly intended to prevent a multiplicity of suits by facilitating the determination of all possible questions between the same parties. The Illinois Supreme Court, in affirming that decision,[83] said that a court of equity, having jurisdiction over the foreclosure and personal jurisdiction over the parties, had the statutory authority to render a personal judgment to avoid piecemeal litigation.[84] The exception with regard to secondary parties is inconsistent with the tenor of those explanations of the statutory policy. No court which has invoked the exception has offered any reason for it except that the statutory authority does not expressly include secondary parties.

## CONCLUSION

When Chancellor Kent announced in *Dunkley v. Van Buren*[85] that equity had no power except by statute to render a deficiency judgment, he relied on English cases which were decided under a theory of foreclosure which did not contemplate a sale of the property much less a deficiency. This rule was later discredited by the highest court in the state of its origin. In *Frank v. Davis*,[86] the New York Court of Appeals pointed out that such a rule contravened the policy of allowing equity to administer full legal and equitable relief and said, with reference to *Dunkley*, that they could perceive "no reason" why mortgage foreclosures had been excluded from this convenient and beneficent policy.[87]

The Illinois courts not only accepted the rule of *Dunkley*,they resisted the legislature's attempt to abolish it by carving an exception into the statute for secondary parties. These courts did not reject the adjudication of secondary liability on the ground of prejudice to any party. Their only concern was that it was not expressly authorized by statute.

There are probably many reasons why this exception has not vanished from Illinois law.[88] Possibly, continually rising property values may preclude most deficiences, or the cost of the subsequent suit might be less expensive than an appeal on the issue. Whatever the reasons, this exception is inconsistent with the Mortgage Foreclosure Act[89] which was designed to

81. ILL. REV. STAT. ch. 26, § 3-511(2)(b) (1973).
82. 304 Ill. App. 331, 26 N.E. 2d 646 (1940).
83. ILL. REV. STAT. ch. 95, § 56 (1973).
84. Skolnik v. Petella, 376 Ill. 500, 34 N.E. 2d 825 (1941).
85. *Id.* at 507, 34 N.E. 2d at 828.
86. 3 Johns. Ch. 330 (1818).
87. 135 N.Y. 275, 31 N.E. 1100 (1892).
88. *Id.* at 278, 31 N.E. at 1101.
89. In First Fed. Sav. & Loan Assn. of Maywood v. Shaffer, 71CH308, Cir. Ct. of Cook County, the trial court found that a prayer for relief against the guarantors preserved the right to

shorten and simplify foreclosure proceedings.[90] It is merely an element of the expense and delay which troubles the area of mortgage foreclosures.[91] While the courts are not likely to change their position, their desire for statutory authority could be satisfied if the state legislature would act to abolish this unfavorable exception.

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amend the complaint adding a count at law after the amount of the deficiency was determined in the foreclosure. Recognizing the continuing validity of the exception, the court then transferred the case to the law division for disposition. ILL. REV. STAT. ch. 95, § 23 (1973).

90. Bernard, *Legal Aspects of 1961 Mortgage Redemption Law Legislation in Illinois*, 43 CHGO. BAR REC. 229 (1962).

91. Bridewell, *Illinois Foreclosures Still Take Too Long and Cost Too Much*, 45 CHGO. BAR REC. 282 (1964).