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ELECTION OF REMEDIES — DEFICIENCY DECREE AS BAR TO SUBSEQUENT SUIT ON DEBT — After foreclosure in Florida of a purchase money mortgage on Florida land, the mortgagee filed a claim for the deficiency against the estate of one of the co-mortgagors, who was a permanent resident of Michigan, and who had been served only by publication in the foreclosure suit. In the foreclosure proceedings the mortgagee had prayed for a deficiency decree, and the Florida court had retained jurisdiction for that purpose, after ordering the sale. The mortgagee had taken no further steps in that proceeding. *Held*, the Florida law was controlling,[1] and that by Florida statutes,[2] as construed by the courts of that state, a mortgage must elect between proceeding in equity for a deficiency decree and a suit at law. The election was exercised by the mere prayer for a deficiency decree. Since the Florida court accepted and retained jurisdiction, the plaintiff's action was barred. *Battle v. Battjes*, 274 Mich. 267, 264 N.W. 367 (1936).

The traditional view is that a mortgagee has two separate and distinct causes of action, one in equity to foreclose the mortgage and the other at law on the debt.[3] Although equity courts have either by court rule or by statute

[1]For discussion of this aspect of the case, see 1 MICH. SEC. 71 (1936).

[2] Fla. Comp. Gen. Laws (Supp. 1934), § 5751.

[3] 3 JONES, MORTGAGES, 8th ed., § 1565 (1928). It has been pointed out that in the code states the courts have power to restrict the mortgagee to one action on the theory that he should seek all the relief to which he is entitled in the foreclosure action. WALSH, MORTGAGES, § 77, pp. 326-327 (1934).

received the power to grant deficiency decrees,[4] the distinction between the two causes of action has been maintained.[5] The Florida court in construing the statute in question has recognized this distinction,[6] but has held that a mortgagee must choose between his remedy in equity and his action at law. The necessity for an election rests on the inconsistency between the remedies, inasmuch as a court of equity can decree payment of a sum less than the actual deficiency, while the recovery in a separate law action will necessarily cover the entire deficiency.[7] The doctrine of election of remedies, since it operates against the party entitled to redress, is a harsh rule [8] and must be limited to situations where the plaintiff has in fact two remedies available.[9] The mortgagee cannot be said to have made an election when equity refuses to take jurisdiction over the deficiency aspect of the case,[10] or where the equity court has no jurisdiction to order a deficiency decree against the mortgagor.[11] In the principal case, however, the plaintiff still had an action pending against all the co-mortgagees which was inconsistent with the present action.[12] It is obvious that the plaintiff should not be allowed to proceed upon two inconsistent remedies at the same time,[13] but should have dismissed the deficiency proceedings in Florida before proceeding in Michigan.[14] This the Michigan court recognized in holding that, though the plaintiff had made a revocable election, nevertheless, since he had not as yet revoked it, the election still stood as a bar to another action.

Donald H. Larmee

[4] Many states, including Florida, have followed the doctrine that without the aid of a statute a separate action at law was necessary to recover the deficiency. Webber v. Blanc, 39 Fla. 224, 22 So. 655 (1897); WALSH, MORTGAGES, § 77, p. 316 (1934). For a comprehensive collection of authorities and excellent discussion thereof, see Young v. Vail, 29 N. M. 324, 222 P. 912, 34 A. L. R. 980 (1924).

[5] 41 C. J. 654, note 38 (1926).

[6] Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569, 135 So. 795 (1931).

[7] Ibid.

[8] See Hine, "Election of Remedies, a Criticism," 26 HARV. L. REV. 707 at 709 (1913).

[9] Bierce v. Hutchins, 205 U. S. 340, 27 S. Ct. 524 (1907); Henry v. Herrington, 193 N. Y. 218, 86 N. E. 29 (1908). The fact that the plaintiff thought he had two remedies does not bar him. Shenck v. State Line Telephone Co., 238 N. Y. 308, 144 N. E. 592, 35 A. L. R. 1149 (1924). For collection of cases, see 8 L. R. A. (N. S.) 144 (1907).

[10] Gober v. Braddock, 100 Fla. 1406, 131 So. 407 (1930).

[11] Under a similar California statute, Blumberg v. Birch, 99 Cal. 416, 34 P. 102 (1893).

[12] It was suggested that the case in Florida had been closed under a "no progress" statute; but the Michigan court refused to look beyond the record, though it might have done so under Michigan Court Rules (1933), No. 72, §1 (d).

[13] As to the plaintiff occupying successive logically inconsistent grounds, see 36 HARV. L. REV. 593 (1923).

[14] It appears that although the plaintiff could not have dismissed as a matter of right, the court could have granted his motion.