NOTES AND COMMENTS

CODE PLEADING

PERSONAL REPRESENTATIVE AS A PARTY TO FORECLOSURE SUIT AGAINST REAL PROPERTY OF AN ESTATE.

A practical problem in Ohio probate procedure is presented by the question of whether the personal representative is a necessary party to a foreclosure action brought by a mortgagee on real property belonging to the estate. A usage prevalent in Ohio is to join the personal representative in all foreclosure actions and where there is no personal representative, to have one appointed in order to make him a party defendant.

It is generally held in the United States that a personal representative is not a necessary party to an action to foreclose a mortgage on real property belonging to the estate. On the other hand, he is a proper party as the land of a decedent is an asset in the hands of his personal representative for the payment of his debts, if needed for that purpose. *Trapier* v. *Waldo*, 16 S.C. 276 (1881); *Worthington* v. *Lee*, 2 Bland. 678 (Md. 1830); *Henry* v. *McNew*, 29 Tex. Civ. App. 288, 69 S.W. 213 (1902); *Daniel* v. *Grahame*, 2 Har. & G. (Md. 1827); *Simon* v. *Sabb*. 56 S.C. 38, S.E. 799 (1899); *Prager* v. *Wootton*, 30 S.W. (2nd) 845 (Ark. 1930); *United Security Life Ins. & Trust Co.* v. *Vandegrift's Adm'r.*, 51 N.J.E. 400, 26 A. 985 (1893); Bliss Code Pleading (3rd Ed.) Sec. 102; Story, Equity Pleading (10th Ed.) Sec. 196.

A minority of the jurisdictions uphold the view that the personal representative is not only a proper but a necessary party to an action to foreclose a mortgage. In California the general code provides that the heir shall be represented by the representative, but the other jurisdictions support their conclusions by nothing other than the statement itself. *Miles* v. *Smith*, 22 Mo. 502 (1856); *Huston* v. *Stringham*, 21 Ia. 36 (1866); but the decision of the case is weakened because it relies on the authority of *Darlington* v. *Effey*, 13 Ia. 177 (1862), wherein the court held that the representative was a proper rather than a necessary party; *Seal* v. *Chadwick*, 45 A. 718 (Del. 1900); *McCaughey* v. *Lyall*, 152 Cal 61, 93 Pac. 681 (1908).

The only authority available in Ohio is found in the decisions of inferior courts and respectable authorities on Ohio probate procedure.

These express the view that the personal representative is a necessary party only where judgment is demanded against the estate though he is a proper party in all cases. The earliest decision, that in *Hall* v. *Musler*, 1 Disney 36 (Ohio, 12 Ohio Dec. 471 (1855), while not stating that proposition in so many words, seems to reach that conclusion. However, the law so stated in *McMahan* v. *Davis*, 19 O.C.C. 242, 10 C.D. 467 (1899), and that case is approved in a dictum in *Sherman* v. *Millard*, 6 C.C. (N.S.) 338, 17 C.D. 175 (1904). See also Phillips, Code Pleading (1st Ed.) Sec. 508.

The minority American view purports to find its support in four instances: 1. Where the property is sold on foreclosure sale for more than the mortgage debt. 2. Where a creditor files his claim within the statutory period but after inception of the foreclosure action. 3. Where the property is likely to be sacrificed on foreclosure sale. 4. Where a money judgment is sought against the estate. After careful consideration of the four situations, it is submitted that the only situation which supports the minority view is that wherein a money judgment is sought against the estate.

If the property is sold for more than the mortgage debt, the joining of the personal representative to the foreclosure action offers no advantages. In any case, the money is paid into the probate court pending administration of the estate, and its disposition is handled through the court. This procedure is followed regardless of the amount realized through the sale.

When a creditor files his claim within the statutory period but after inception of the foreclosure action, that information can be had from the representative or the probate court whether or not the personal representative is a party to the foreclosure action.

Where the property is likely to be sacrificed on foreclosure sale, the only power devolving upon the personal representative is to buy the property for the estate, and that power can be exercised by him whether or not he is a party to the action.

However, in the case where a money judgment is sought against the estate, the personal representative must be made a party to the action in order to render a valid personal judgment against the estate. Furthermore, where the estate has assets that might be resorted to in the event that the sale did not bring enough to cover the mortgage, it is advisable to have a personal representative appointed and to join him as a party defendant, and in the petition, pray for a deficiency judgment.

While in many cases the procedure may not be necessary, it is always proper, and on the whole a desirable practice. Strictly speaking the neces-

sity arises only where a money judgment is sought against the estate. Where an estate has no assets of which a deficiency judgment could be availed, a prayer for a money judgment should not be included in the petition. But where the estate has assets that might be resorted to in the event that the sale did not bring enough to cover the mortgage, it is deemed advisable to pray for a deficiency judgment and have a personal representative appointed and joined as a party to the foreclosure action.

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CONSTITUTIONAL LAW

VALIDITY OF STATUTE ALLOWING MODIFICATION OF CRIMINAL VERDICT BY APPELLATE COURT.

The defendant, Turk, procured others to fire a building so that he might collect insurance. The fire spread to adjoining apartments, and Miss Clara Withers was burned to death. Turk was indicted and convicted of murder in the first degree. Turk brought error to the Court of Appeals of Cuyahoga County. Because there was no evidence of any intent to kill, but merely evidence of homicide committed in perpetration of arson, the Court of Appeals modified the verdict to "guilty of manslaughter." *Turk* v. *State*, 48 Ohio App. 489, 194 N.E. 425 (1935). Affirmed by divided court, 129 Ohio St. 245, 194 N.E. 453 (1935).

This action was taken under the authority of Section 13449-1 paragraph 4 of the Ohio General Code:

> ". . . if the evidence shows the defendant to be not guilty of the degree of crime for which he is convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly *without ordering a new trial.*"

and of Article IV, Section 6 of the Ohio Constitution:

> "The courts of appeal shall have . . . appellate jurisdiction . . . to modify, . . . the *judgments* of the courts . . . of record."

It will be noticed that the statute allows modification of the *verdict*, while the constitutional provision authorizes only the modification of the *judgment*.

The Ohio Constitution, Article I, Sections 5 and 10, guarantees the right of trial by jury. Is this right violated by the statute quoted above? This question was not raised in the principal case, but the facts present it.

The Ohio statute was copied from Section 1181, paragraph 6 of the California Penal Code (1927), but the Ohio statute was made to