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LEGISLATION

The Pennsylvania Deficiency Judgment Act of July 16, 1941.¹

The Pennsylvania Legislature unsuccessfully attempted by Acts passed in 1934,² 1935³ and 1937,⁴ to provide that mortgage deficiency judgments⁵

1. Pa. Laws 1941, no. 151. "An Act—To protect the debtors, obligors or guarantors of debts for which judgments are entered, or may be entered, and owners of real estate affected thereby, and others indirectly liable for the payment thereof, by prescribing the method of fixing the fair market value of such property sold on execution, and limiting the amount collectible thereafter on such judgments." See note (1941) 16 TEMP. L. Q. 72.

2. 21 PA. STAT. ANN. (Purdon, 1940 Supp.) § 806.

3. 21 PA. STAT. ANN. (Purdon, 1940 Supp.) §§ 808-820.

4. 21 PA. STAT. ANN. (Purdon, 1940 Supp.) §§ 821a-821l.

5. Actually, there is no separate judgment known as a deficiency judgment in Pennsylvania. When the mortgage is foreclosed by a writ of sci. fa. (an *in rem*

be measured by the difference between the amount of the debt and the fair market value⁶ of the real estate executed upon. These bills were passed to remedy the inequities of the rule arising out of *Wolfe's Appeal*⁷ and *Lomison v. Faust*,⁸ that the price obtained at the sheriff's sale presumably reflected the value of the real estate involved, which presumption was not rebuttable.⁹

Under the Act of 1934, the mortgagee or other interested party was required to petition the court within six months after foreclosure, to fix the "fair value"¹⁰ of the realty sold. In absence of such petition, the debtor could have the prothonotary enter satisfaction of the judgment on the record. The Act was to remain in effect only until July 1, 1935, and applied whether or not the mortgagee purchased the realty on foreclosure. In *Beaver Co. Building & Loan Ass'n v. Winowich*,¹¹ a mortgagee entered judgment on a mortgage bond given before the Act and then bought in at the execution sale.¹² Justice Stern speaking for the majority, declared that the Act, since it subsequently changed the method of enforcing prior mortgages to the detriment of the mortgagees involved, violated provisions of both the Federal¹³ and State¹⁴ Constitutions prohibiting impairment of obligation of contract. This, because the law on enforcement of mortgages existing at the time the mortgage was given was considered a part of the contract.¹⁵ Further, the changes to be effected were not procedural but rather substantive, since the rights of the mortgagee were less valuable after the Act than before it.¹⁶ The late Justice Barnes, in dissenting,¹⁷ maintained that the mortgagor's basic undertaking was merely to pay the debt in full, that the Act was directed against a procedure requiring the mortgagor, after he had paid in full, whether with property or money, to pay additional sums on the debt, and that this did not violate any constitutional prohibitions against impairment of obligation of contract.¹⁸

The 1935 Act, passed before the *Winowich* case reached the Pennsylvania Supreme Court, was by its terms, a continuation of the 1934 Act, in turn to expire on June 30, 1937. This Act though similar to its predecessor, was more elaborate, clarifying many points omitted in the earlier statute. There was however, one significant change. The mortgagee was

proceeding), and the proceeds of the sale are insufficient to pay the debt, an *in personam* judgment must be obtained on the bond debt or on covenants in the mortgage, etc. This latter is the deficiency judgment. When, however, a judgment on the bond is obtained first, there may be execution on that same judgment until it is satisfied. That part of the judgment still unsatisfied after an execution sale is also known as the deficiency judgment. See 13 STANDARD PA. PRACTICE (1939) 603, 606, 674 *et seq.*

6. The term "fair value" was used in the 1934 Act, but this was interpreted in *Market Street National Bank v. Huff*, 319 Pa. 286, 179 A. 582 (1935), to mean "fair market value" at the time of the sale.

7. 110 Pa. 126, 20 A. 410 (1885).

8. 145 Pa. 8, 23 A. 377 (1892).

9. See 1 LADNER, REAL ESTATE CONVEYANCING (2d ed. 1941) § 101-C.

10. See note 6 *supra*.

11. 323 Pa. 483, 187 A. 481 (1936).

12. All cases discussed herein involve a mortgagee who bought in at the foreclosure sale.

13. U. S. CONST. Art. I, § 10:

"No State shall—pass any—Law impairing the Obligation of Contracts. . ."

14. PA. CONST. Art. I § 17:

"No—law impairing the obligation of contracts—shall be passed."

15. 323 Pa. 483, 489, 187 A. 481, 484 (1936).

16. 323 Pa. 483, 493, 187 A. 481, 486 (1936).

17. 323 Pa. 483, 515, 187 A. 921 (1936).

18. It will be noted that the Act was never held unconstitutional as to mortgages entered into *after* passage of the Act and executed on during its existence.

required to proceed first against the mortgaged property before attaching any of the debtor's other real estate, or the real estate or personalty of any other person. This provision was manifestly intended to prevent avoidance of the statute by removing opportunities¹⁹ for satisfying any part of the bond before foreclosing on the real estate securing the debt. *Knox v. Noggle*²⁰ held the 1935 Act unconstitutional as to mortgages entered into prior to the Act on the grounds advanced in the *Winowich* case.²¹ In *H. O. L. C. v. Edwards*,²² the Act was held inapplicable whether the mortgage was given prior or subsequent to the Act. Requiring the mortgagee to proceed first against the mortgaged property, and then limiting him to a deficiency judgment based on the fair market value of the property was considered an anomalous discrimination against mortgage creditors, contravening Article III, § 7 of the Pennsylvania Constitution,²³ since general creditors could, after judgment, execute as formerly on any of the debtor's property, and obtain a deficiency judgment without the limitations imposed on mortgage creditors by the 1935 Act.

The 1937 Act, again temporary, required the mortgagee either to release those personally liable on the mortgage debt, or petition the court to set the fair market value of the mortgaged real estate before executing on a mortgage or on a judgment entered on any obligation secured by a mortgage. If the price set wasn't bid at the sheriff's sale, the court could either permit the highest bidder to take the property or postpone disposal of the same up to two years. In *Pennsylvania Co. v. Scott*,²⁴ the defendant prothonotary had refused to issue a writ of execution on a judgment entered on a mortgage bond after passage of the 1937 Act, because the execution plaintiff had not complied therewith. In this case, as in the *Edwards* case *supra*, the Pennsylvania Supreme Court held the Act violated the Constitutional prohibition against special legislation.²⁵

After the *Scott* and *Edwards* cases, there were no further attempts by the local legislature to correct the deficiency judgment law until the passage of the 1941 Act, which probably would not have been considered if it were not for certain recent decisions of the United States Supreme Court.

In *Richmond Mortgage & Loan Corp. v. Wachovia Bank & T. Co.*,²⁶ the United States Supreme Court upheld a North Carolina statute²⁷ permitting the mortgagor to set off against the debt the fair value of the mortgaged property executed on in an action for a deficiency. The statute was only to apply where the property was sold at a private sale (under a power given in the mortgage) to the mortgagee. Moreover, the statute did not affect the mortgagee's alternate remedy of foreclosing by a bill in equity. Under this alternate procedure, however, the chancellor could control the deficiency judgment by setting aside the sale on the ground of inadequacy

19. The mortgagee could have evidently evaded this Act by executing first on the personalty of the mortgage debtor.

20. 328 Pa., 302, 196 A. 18 (1938).

21. The Court cited *Shallcross v. North Branch-Sedgwick B. & L.*, 123 Pa. Super. 593, 187 A. 819 (1936), with approval, not going into any independent reasoning. The *Shallcross* case, however, was based on the *Winowich* case.

22. 329 Pa. 529, 198 A. 123 (1938).

23. "The General Assembly shall not pass any local or special law: . . . providing or changing methods for the collection of debts or the enforcing of judgments, or prescribing the effect of judicial sales of real estate: . . ."

24. 329 Pa. 534, 198 A. 115 (1938).

25. Actually, the reasoning of the Court was set forth in full in the *Scott* case, the court merely citing that case in the *Edwards* case. Both cases were decided the same day.

26. 300 U. S. 124 (1937).

27. N. C. CODE ANN. (Michie, 1935) § 2593 (d).

of price. Justice Roberts found no violation of Article I, § 10 of the Federal Constitution.²⁸ He employed the reasoning advanced in Justice Barnes' dissent in the *Winowich* case to the effect that the principal undertaking of the mortgage contract was to pay the debt in full, and that this was not impaired.

The next two cases, *Honeyman v. Hanan*²⁹ and *Honeyman v. Jacobs*³⁰ involved temporary amendments to the New York Civil Practice Act.³¹ The amendments provided that for the period of the emergency, in any action on a mortgage debt contracted prior to July 1, 1932, whether in a foreclosure action or not, the defendant could set off the fair market value of the mortgaged property, and that the deficiency judgment must be obtained in the foreclosure action itself if that was brought first. The action for a deficiency judgment in *Honeyman v. Hanan*³² was dismissed because it was brought after the foreclosure action. The case was decided under the Act, but it was not necessary to consider the constitutionality of permitting a set off of the fair market value of real estate foreclosed where the mortgage antedated the amendments. But the *Jacobs* case squarely raised this question, being an appeal from a decision in a foreclosure action refusing a deficiency judgment because of a finding that the property involved was worth at least as much as the debt. The Supreme Court upheld the amendments, citing the *Wachovia Bank* case. Meanwhile, the New York Civil Practice Act, on the strength of the *Wachovia Bank* case, had been permanently amended³³ to permit, on appropriate motion, the court in determining the amount of the deficiency judgment to deduct the fair market value of the property from the mortgage debt, no matter when contracted. *Gelfert v. National City Bank*,³⁴ in holding this statute constitutional reversed the New York Court of Appeals,³⁵ citing the *Wachovia Bank* and *Jacobs* cases. It rejected the theory of the New York court that a statute of this type was constitutional where limited to the period of an emergency, but unconstitutional if not so restricted. In this *Gelfert* case, execution plaintiff had obtained judgment subsequent to the permanent amendment to the New York Act on a mortgage entered into prior to the amendment, but after July 1, 1932.³⁶ The Supreme Court expressly excluded from consideration validity of the statute in a case where the mortgagee was not the purchaser at the foreclosure sale.

In view of these United States Supreme Court decisions, the holding of the Pennsylvania Supreme Court in the *Winowich* case that the 1934 Act violated Article I, § 10 of the Federal Constitution³⁷ could no longer be maintained. While Federal opinions could not impair³⁸ the Pennsylvania court's construction of Article I, § 17 of the Pennsylvania Constitu-

28. See note 13 *supra*.

29. 302 U. S. 375 (1937).

30. 306 U. S. 539 (1939).

31. § 1083a Civil Practice Act of New York. Cf. THOMPSON'S LAWS OF N. Y. (1939, part II) 1761.

32. 302 U. S. 375 (1937).

33. § 1083 Civil Practice Act of New York. Cf. THOMPSON'S LAWS OF N. Y. (1939 part II) 1761.

34. 313 U. S. 221 (1941).

35. *Sub nom.* National City Bank v. Gelfert, 284 N. Y. 13, 29 N. E. (2d) 449 (1940).

36. The temporary deficiency judgment act—(cf. note 31 *supra*)—was still in effect, but it applied only to mortgages before July 1, 1932, so that it would not have affected the mortgage in question.

37. See note 13 *supra*.

38. Fidelity-Philadelphia Trust Co. v. Allen, C. C. P. No. 6 of Phila., Co., No. 3852 June Term, 1941.

tion,³⁹ notwithstanding the fact that it closely follows Article I, § 10 of the Federal Constitution,⁴⁰ they were strongly persuasive. Relying on these federal cases, the 1941 Deficiency Judgment Act again attempted to affect deficiency judgments on obligations entered into before the effective date of the Act. This Act provides:

- A. Where real estate sold in any execution proceedings was purchased directly or indirectly by the execution plaintiff, said plaintiff must within six months of the sale bring a petition to fix the fair value of the property, which value is to measure the deficiency judgment. Otherwise, the whole debt shall be discharged.
- B. If the sale had been effected before the Act, then the above mentioned petition must be made within six months after the effective date of this Act, to wit, on or before January 16, 1942.⁴¹
- C. The petition, which must be signed and sworn to by the plaintiff, shall contain a statement of the fair value of the real estate foreclosed. If no answer is filed, or if an answer is filed controverting plaintiff's statement of fair value but is unsupported by testimony at the hearing, then a deficiency judgment shall be granted on the basis of the plaintiff's statement of value.
- D. If the Act cannot be constitutionally applied to sales prior thereto, then it should apply only to sales after the Act; or if the Act cannot be applied to sales after the Act on obligations arising prior thereto, then it shall be applied only to obligations arising after the Act.

As is clear from the provisions outlined in *A*, this Act applies to all executions on real estate, without reference to whether or not they stem from judgments *in personam*, and whether or not the judgment *in personam* arose out of an obligation secured by real estate. This meets the special legislation objection to the 1937 Act.⁴² Judge Flood of the Philadelphia Common Pleas Court recently so held in *Fidelity-Phila. Trust Co. v. Allen*.⁴³ In this case, the plaintiffs had evidently foreclosed on a mortgage by writ of *sci. fa.* in 1935, and had bought in the property for \$50. In 1941, after passage of the instant Act, they attempted to obtain a judgment *in personam* on a mortgage extension agreement for the deficiency without first petitioning the court to fix the fair market value of the real estate sold, on the theory that the Act was unconstitutional. It is quite evident from *A* and *B supra* that the provisions of the 1934 Act held in the *Winowich* case to be an impairment of the obligation of contract were incorporated into the 1941 Act. For this reason, the lower court in the *Allen* case "regretfully" held the Act unconstitutional.

On appeal, the Pennsylvania Supreme Court in a *per curiam* opinion,⁴⁴ with one Justice dissenting, reversed the lower court in order "to preserve identity of construction of the contract clauses of both State and Federal Constitutions", citing the *Gelfert* case. Justice Stern who had written the majority opinion in the *Winowich* case, concurred in a separate opinion, taking the occasion to explain his change in position. He points out that

39. See note 14 *supra*.

40. See note 13 *supra*.

41. Based on the statutory rule for computation of time. Cf. 46 PA. STAT. ANN. (Purdon, 1930) § 555.

42. *Pennsylvania Co. v. Scott*, 329 Pa. 534, 198 A. 115 (1938).

43. See note 38 *supra*.

44. *Phila. Legal Intel.* p. 1 col. 4, Dec. 1, 1941.

at the time of the *Winowich* decision, all states⁴⁵ passing on the question, except New York, had held such statutes unconstitutional and that since then New York⁴⁶ has come into accord with Pennsylvania and other states. Yet the Pennsylvania court in the *Winowich* case had discussed and relied in the main on opinions of the United States Supreme Court.⁴⁷ Now that the latter court had, in the *Gelfert* case, departed from its previous position, the Pennsylvania court, still following the Federal Court was doing the same.

The *per curiam* opinion in *Fidelity-Phila. Trust Co. v. Allen*⁴⁸ emphasizes that as no question is raised as to the application of the Act to sales on judgments *in personam* made prior to its effective date, no opinion on the subject is expressed. In other words, if the mortgage was foreclosed by entering a judgment on the mortgage bond and execution was had on the property with partial satisfaction entered on the basis of the proceeds of the sheriff's sale, or if there was a foreclosure by writ of *sci. fa.*, and if subsequently, but before the Act a deficiency judgment on the bond was entered, holders of such deficiency judgments might not have to comply with the Act before executing on them. Indeed, cases were cited to the effect that legislation which purports to detract from the enforcement of existing judgments is unconstitutional.⁴⁹ No answer to these cases is afforded by the recent federal opinions discussed above, as the question was never raised there. Nevertheless, it is felt that a precedent does exist, which would permit the Pennsylvania courts to arrive at the result of the *Allen* case if they were so inclined.

According to Williston's account,⁵⁰ a point was reached in English law when equity enjoined the enforcement of judgments as unconscientious, i. e., those on penal bonds beyond the true damages suffered by the obligee. The Pennsylvania courts might likewise refuse to enforce prior judgments which in fact have been satisfied with valuable property bought in at the execution sale. It is true that the courts in Pennsylvania are generally regarded as having only such equity powers as are conferred on them by statute.⁵¹ If, perchance, it can be contended that no prior statute would enable the courts to refuse to enforce a judgment, the 1941 Deficiency Act itself might be construed to confer the necessary power. If it is objected that such action would deprive certain creditors of vested rights without due process of law, it might be answered that the court is not required to define as a vested right,⁵² a remedy which enables a creditor to collect more than the debt.

EFFECTS OF THE ACT

A. On Debtors with Ample Funds

This group will not be affected to any substantial extent, nor was it intended otherwise. Its members were fully protected even before the Act, since they would normally employ their resources to pay their debts when due. But if they did default, they could bid up the property executed on to its full value and thus avoid loss.

45. See note 1 of the concurring opinion of Justice Stern in the *Allen* case.

46. *National City Bank v. Gelfert*, 284 N. Y. 13, 29, N. E. (2d) 449 (1940). This was the case that was reversed by the United States Supreme Court.

47. See *Beaver Co. B. & L. v. Winowich*, 323 Pa. 483, 497-502, 187 A. 481, 493-494 (1936).

48. *Phila. Legal Intel.* p. 1 col. 4. December 1, 1941.

49. See *per curiam* opinion in the *Allen* case.

50. 3 WILLISTON, CONTRACTS (1936 ed.) §§ 774, 775.

51. *Hogsett v. Thompson*, 258 Pa. 85, 101 A. 941 (1917).

52. See PA. STAT. ANN. (Purdon, 1930) PA. CONST. Art. I, § 17 n. 3.

B. *On Debtors with Other Property But No Funds*

These parties will probably derive the greatest benefit from the Act. Prior thereto, being without funds, they could neither pay their debts nor protect their equities in properties executed upon by bidding them up. They could, it is true, have petitioned the court to set aside the sale if the price bid was grossly inadequate.⁵³ Or if the creditor took the property on a nominal bid, they could bargain for an agreeable settlement of the debt by threatening to petition to have the sale set aside. But where the price bid was not sufficiently low to amount to gross inadequacy of price, yet well below fair market value, the debtor suffered a loss against which he had no protection. Under the 1941 Act, he is enabled to eliminate this loss when as is usual, the mortgagee buys in.

C. *On Debtors Who Were Judgment Proof at an Execution Sale Prior to the Act, But Are No Longer So Situated*

Since it is probable that only a small percentage of the present unsatisfied execution plaintiffs will file the "fair market value" petition by January 16, 1942, the debts of many in this classification will automatically be wiped out in full. But where the unsatisfied creditor does enter his petition in time to comply with the Act, his deficiency judgment (barring any future limitation on the application of the Act) will be limited to the difference between the fair market value of the realty at the time sold and the debt.

D. *On Debtors Who Were Judgment Proof at an Execution Sale Prior to the Act, and Still Are*

Under this heading may also be included debtors who shall be judgment proof at a sale after the Act. Of course, an unfair judgment cannot harm a permanently judgment proof debtor. Hence, the following considerations apply only to those who shall again acquire property.

The Act may not prove very beneficial in these cases. Where a debtor has met with demoralizing financial reverses, as is quite common in periods of panic and depression, and lacks hope of financial improvement in a foreseeable future, he will not bother to answer the creditor's petition stating the value of the debtor's realty sold by the sheriff. Even if such a debtor *would* contest the creditor's valuation, practically he *can not* when utterly without funds or other resources. Of course, the petition stating the fair market value must be sworn to by the plaintiff so that if the value stated by him is so low that he could not have believed it, he subjects himself to liability of conviction for perjury.⁵⁴ Yet the protection this affords is slight⁵⁵ for, if the value stated by the execution plaintiff, shall be above that low at which it was plainly perjurious and it is not contested, the creditor's statement of fair value will stand, as the Act declares that the court *shall* give a deficiency judgment based on a plaintiff's uncontested valuation. Armed with such a judgment, the creditor can hopefully look forward to a satisfaction of the judgment if and when the debtor's fortunes improve. This condition might in part be obviated if the courts scrutinized unanswered petitions and required the petitioner to include the assessed

53. Hettler v. Shephard, 326 Pa. 165, 191 A 581 (1937).

54. 18 PA. STAT. ANN. (Purdon, 1941 Supp.) § 4322.

55. As to the difficulty of proving perjury on a matter which involves personal judgment, see 21 R. C. L. (1918) 254.

valuation of the real estate along with the required statement of fair market value. The former figure could have no binding effect, but it might tend to discourage too bold-faced a discrepancy, unless the petitioner honestly believed it justified. Such court control, however, may prove impractical, for when it is needed most, i. e., during a panic, it might place an intolerable burden on the courts.

E. On Judgment Creditors

Gains of the judgment debtor set forth above will be losses to the judgment creditor. However, in the mortgage field at least, private mortgagees generally did not further pursue their mortgagors when the property taken over was roughly worth the amount of the debt, even though they had the legal right to do so. It is true that the Act does burden enforcement of judgments after the first execution on realty, as the execution plaintiff may be put to his proof of his statement of fair market value. But this burden is not believed excessive in view of the check it provides against oversatisfaction of debts.

There is, however, at least one more method, not mentioned above, whereby judgment creditors may still accomplish oversatisfaction despite the Act. A careful reading of the Act will disclose that a mortgagee who holds a bond and mortgage may enter judgment on the bond and execute on personalty of the mortgagor until the debt is nearly satisfied. Then the real estate mortgaged may be sold to satisfy the same unsatisfied judgment which was obtained on the bond, and if there are no other bidders, the mortgagee may take the property for the sheriff's costs. The Act does not attempt to prevent oversatisfaction of a judgment debt through the creditor's buying in *personalty* executed upon below its fair value, nor through buying in the realty after partial satisfaction on personalty.

CONCLUSIONS

It is apparently settled by *Fidelity-Phila. Trust Co. v. Allen*,⁵⁶ that the Act will apply to all executions on realty after the Act, even if the judgment was obtained beforehand, and thus fair value petitions must be filed within six months after execution sales. *Fidelity-Phila. Trust Co. v. Allen*,⁵⁷ itself, holds that the fair value petition must be filed, where there has been an execution on judgment *in rem* prior to the Act, before a deficiency judgment *in personam* on the same debt will be granted after the Act. It is felt that the Act should apply where there was an execution sale on judgments *in personam* prior to the Act, possibly on the theory advanced above, in order to release all past as well as future judgment debtors from liability to twice satisfying a debt. Indeed, it seems anomalous to permit the application or non-application of the 1941 Act to the evil in question to turn on what method of foreclosure was employed, and it is anticipated, although not too confidently, that the Pennsylvania Supreme Court will adopt the same view.

J. A. E., 3rd.

56. Phila. Legal Intel, p. 1 col. 4, December 1, 1941.

57. *Ibid.*