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It is interesting to note the historical evolution of the Wyoming mortgage foreclosure practice involving personal judgments and the right to jury trial and how it differs from the practices developed in other states. The following article, tracing this evolution, is based on a section from Professor Rudolph's new book, THE WYOMING LAW OF REAL MORTGAGES.

WYOMING FORECLOSURE DECREES-- PERSONAL JUDGMENTS AND THE RIGHT TO JURY TRIAL

*E. George Rudolph**

VIEWED historically the primary function of foreclosure is to terminate the mortgagor's interest in the mortgaged land. This was entirely clear under the early practice when strict foreclosure was the prevailing remedy and the decree operated simply to make the mortgagee's title absolute upon the expiration of a specified period for redemption. But with the general change over to foreclosure by sale, and the development of the lien theory, we have come to place principal emphasis upon the security aspect of the mortgage, and to view foreclosure more as a means for applying the property to the satisfaction of the debt. This, in turn, has resulted in a tendency to equate foreclosure with the sale of land on execution. As an original proposition this would seem to make good sense, but historically the two are entirely different and, consequently, any attempt to provide for both by a common set of rules is likely to result in a good deal of confusion or worse. Wyoming has probably gone a good deal further in this direction than most jurisdictions. The developments now to be recounted have undoubtedly played a leading role in this.

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The usual foreclosure decree in Wyoming first gives judgment for the entire amount of the debt and then orders the property sold "as upon execution" or "in conformity with the statutes."[1] On the other hand, the conventional type decree employed in many other jurisdictions finds the amount due, orders the property sold and leaves the matter of a possible deficiency judgment for later determination, jurisdiction for such purpose being expressly reserved.[2] Properly speaking, then, there is no such thing as a deficiency judgment in Wyoming.[3] It should be emphasized that Wyoming is certainly not unique in this. Foreclosure in a substantial number of states, especially in this area, follows a similar pattern.

The practice apparently came to us from Ohio, along with the Code of Civil Procedure, and traces back to the case of *Ladd v. James*,[4] decided by the Supreme Court of Ohio in 1859. There the court held:

> Where an action is brought upon a note and on a mortgage given to secure its payment, and a judgment is asked upon the note, and for the sale of the mortgaged property, any issue of fact which affects the judgment upon the note, is an issue which either party has a right to demand that it shall be tried by a jury.

This obviously has reference to a suit to recover judgment for the entire amount of the debt rather than a true deficiency judgment. The court went on to say that if the plaintiff merely sought a determination of the amount due and a sale of the property there would be no right to a jury trial. It further stated that the claim for personal judgment on the note and the claim for mortgage foreclosure were separate

1. *See* Walter v. Kressman, 25 Wyo. 292, 169 P. 3 (1917) and Grieve v. Huber, 41 Wyo. 168, 283 P. 1105 (1929). This statement is also based on a review of foreclosure decrees in the office of the Clerk of the District Court for Albany County. The quoted phrases are undoubtedly the result of WYO. STAT. §§ 1-478 to 1-489 (1957) providing a common method for the sale and redemption of realty for both execution and foreclosures.
2. *See* Form 14:504 in Am. Jur. *Pleading and Practice Forms* 285 (1958).
3. In Bank of Commerce v. Williams, 52 Wyo. 1, 69 P.2d 525 (1937) the court in discussing the conformation proceedings stated: "No deficiency judgment was asked by plaintiff at this time or given by the court against the defendants or either of them, nor could it have been had, as the sale was, it will be noticed, apparently for the full amount of plaintiff's claim and costs."

   While this seems to assume the propriety of a deficiency judgment the statement was wholly dictum and may not have received much consideration. *See also* Conradt v. Lepper, 13 Wyo. 473, 81 P. 307 (1905) in which the plaintiff apparently prayed for a conventional deficiency judgment.
4. 10 Ohio St. 438 (1859).

causes of action, and that there might be a misjoinder if the issue were seasonably raised.

In 1864, to take care of the question of possible misjoinder, the Ohio legislature enacted a statute expressly authorizing the joining of claims for personal judgment on a note with a claim for foreclosure of a mortgage or other lien securing the note.[5] With this enactment the Ohio law took its final form although it has been necessary for the Ohio courts to reaffirm it from time to time since.[6]

The most important of the subsequent Ohio cases is *Simon v. Union Trust Company*[7] which demonstrates that the differences between the two types of foreclosure decrees may be of practical importance apart from the jury trial question. The mortgagor in that case had conveyed the premises subject to the mortgage, and he therefore argued, in the foreclosure suit, that no personal judgment should be entered against him until after the sale and then only for the deficiency, if any. The argument was based on the generally recognized substantive right of the mortgagor to be exonerated by the mortgaged land under such circumstances. However, the court held against the mortgagor on the ground that the practice of taking judgment for the full amount of the debt was too well established to permit any exception. By way of contrast, it may be noted that a foreclosing mortgagee in Arkansas apparently has a choice between the two types of decree.[8]

The Wyoming Code provision, patterned after the Ohio enactment of 1864, read as follows:

> In an action to foreclose a mortgage given to secure the payment of money, or to enforce a specific lien for the money, the plaintiff may also ask in his petition a judgment for the money claimed to be due;

5. *See* Simon v. Union Trust Co., 126 Ohio St. 346, 185 N.E. 425 (1933). For the present version *see* OHIO REV. CODE § 2307.191 (Baldwin 1964).
6. King v. Safford, 19 Ohio St. 587 (1869); Maholm v. Marshall, 29 Ohio St. 611 (1876); Keller v. Wenzell, 23 Ohio St. 579 (1873); Crellin v. Armstrong, 32 N.E.2d 60 (Ohio App. 1936).
7. 126 Ohio St. 346, 185 N.E. 425 (1933). This expressly overruled Marion Dev. Co. v. Bruce, 39 Ohio App. 253, 177 N.E. 471 (1931) which held under similar circumstances that a personal judgment could be entered against the mortgagor only after the sale and only for the deficiency.
8. Pfeiffer v. Missouri State Life Ins. Co., 177 Ark. 1013, 8 S.W.2d 505 (1928); Bank of Endora v. Ross, 168 Ark. 754, 271 S.W. 703 (1925). These Arkansas cases are interesting since they refer to the true deficiency judgment as the "ancient practice" and indicate that the practice of taking judgment for the full amount of the debt is available only by virtue of express statutory authorization.

> and such proceedings shall be had and judgment rendered thereon as in a civil action for the recovery of money only.[9]

The Wyoming Supreme Court considered the matter in two cases decided prior to the adoption of the Rules of Civil Procedure, but only with respect to the right to trial by jury. In brief, these cases followed the Ohio law in holding that if a personal judgment is sought either party may demand a jury trial, but that, if the only relief requested is foreclosure and sale, then the suit is equitable and there is no right to a jury trial.[10] In neither case did the court mention the joinder provision set out above, but instead confined its consideration to the Code provision granting jury trials "in actions for the recovery of money only."[11]

On the jury trial question another possibility deserves mention. The law and practice in Oklahoma and Kansas are generally considered similar to that of Ohio and Wyoming on these matters. However, there is at least a suggestion in some of the opinions from these jurisdictions that, if the validity or amount of the debt is put in issue, then a jury trial may be demanded even though foreclosure and sale is the only relief sought.[12] In one of its decisions, the Wyoming court, by way of dictum, recognized the possibility of so holding.[13] However, it seems clearly wrong. Consistently with the statute last mentioned, the right to a jury trial should depend upon the relief sought and not the issues litigated. It should be added that the Oklahoma court seems to have finally reached this result but only after a considerable cost in litigation.[14]

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9. WYO. COMP. STAT. § 3-703 (1945).
10. Burns v. Corn Exchange Nat'l Bank, 33 Wyo. 474, 240 P. 683 (1925). This holds that in a suit to foreclose a chattel mortgage in which no personal judgment is sought the defendant is not entitled to a jury trial. The reasoning is, of course, equally applicable to real mortgages. *See also* Baldwin v. McDonald, 24 Wyo. 108, 156 P. 27 (1916) containing dictum to the effect that a jury trial may be demanded if a personal judgment is sought. In a much earlier decision the court held that a jury was permissible even though foreclosure is equitable in nature, at least if the verdict is only advisory. *See* Chosen Friends Home Loan & Sav. League v. Otterson, 7 Wyo. 89, 50 P. 194 (1897).
11. WYO. COMP. STAT. § 3-2104 (1945).
12. Jones v. Benson, 158 Okla. 25, 12 P.2d 202 (1932); Union Bank v. Chapman, 124 Kan. 315, 259 P. 681 (1927); Fidelity Nat'l Bank and Trust Co. v. Cloninger, 142 Kan. 558, 51 P.2d 35 (1935).
13. Burns v. Corn Exchange Nat'l Bank, 33 Wyo. 474, 240 P. 683 (1925).
14. Irwin v. Sanks, 265 P.2d 1097 (Okla. 1953).

The Wyoming court recently considered a somewhat different aspect of the matter in *Chopping v. First National Bank of Lander*.[15] In that case the mortgagee did seek a personal judgment, but the court nonetheless held that the mortgagor was not entitled to a jury trial as a matter of right. After the maturity of the debt the mortgagor had given the mortgagee a further mortgage on an additional tract of land. The mortgagor alleged that at the time of this transaction the mortgagee had orally agreed to accept a conveyance of such land in satisfaction of the debt, and that he had signed the mortgage thinking that it was a deed. The court construed this as a counterclaim for reformation and for specific performance of the oral agreement. Both types of relief are equitable in nature, and the court therefore concluded that the case presented no issue properly triable on the law side of the court and that the defendant was not entitled to a jury trial.[16] The end result, then, seems to be that there is no right to jury trial unless a personal judgment is sought, and then only if legal, as opposed to equitable, defenses are asserted.

In the *Chopping* case the court noted that the law on the question, as stated in the earlier Wyoming cases, may have been changed by the adoption of the Rules of Civil Procedure, but the court found it unnecessary to consider this. At least on the surface the possible changes appear substantial.

In brief, the Rules preserve the statute with respect to jury trials as Rule 38 (a) and, by Rule 87, supersede or abrogate the joinder provision. Rule 18, on joinder of claims and remedies generally, is intended to stand in its place. So far as pertinent to the present discussion, Rule 18 reads as follows:

> (a) *Joinder of Claims.* The plaintiff in his complaint . . . may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party . . . .

15. 419 P.2d 710 (Wyo. 1966).
16. This mode of analysis is correct since the Wyoming Supreme Court held in Bank of Rock Springs v. Foster, 9 Wyo. 157, 61 P. 466, 63 P. 1056 (1900), that Wyoming Constitution, Article 1, Section 9 preserves the common law right to trial by jury in civil cases. A mere reading of the constitutional provision might indicate otherwise.

> (b) *Joinder of Remedies.* . . . Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties . . . .

The simplest solution to the problem presented by the elimination of the joinder statute is to continue the old practice under paragraph (a) of Rule 18. Apart from being general instead of specific the only apparent change made by the rule is the elimination of the statutory clause: ". . .; and such proceeding shall be had and judgment rendered thereon as in a civil action for the recovery of money only." The obvious purpose of this was to take care of the jury trial question. But, as the Ohio history shows, it was not really necessary for such purpose. Likewise, as previously noted, the Wyoming Supreme Court, in considering the right to jury trial in a mortgage foreclosure suit, did not find it necessary to refer to the joinder statute.

The only trouble with the above analysis is that it does not square with the intention of the draftsmen of the federal rule on joinder of which Wyoming Rule 18 is a literal copy. In their view, the mortgagee's right to a personal judgment in a foreclosure is taken care of by paragraph (b) of Rule 18, not paragraph (a). The Advisory Committee Note to Federal Rule 18, Subdivision (b), states:

> This rule is inserted to make it clear that in a single action a party shall be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in Equity Rule 10.[17]

Even without going into the old equity rule it is obvious that the reference here is to the more conventional type foreclosure decree which first directs the sale of the mortgaged property and the application of the proceeds and then pro-

17. 3 MOORE'S FEDERAL PRACTICE § 18.01 (2d ed. 1968). Professor Moore criticizes this on the grounds that in a foreclosure suit there is only one claim or cause of action and therefore no joinder issue at all, but only a question of obtaining both legal and equitable relief in a single action and that the latter is authorized by Rule 2. 3 MOORE'S § 18.09. However, this analysis seems unsatisfactory on the jury trial issue.

vides for a personal judgment against the mortgagee for the deficiency only.

It would seem, therefore, that the adoption of the Rules could properly be viewed as directing a fundamental change in Wyoming foreclosure practice. Certainly the only basis for importing the Ohio practice was the joinder statute now abrogated. Since, apart from the jury trial question, the problem is wholly procedural, such a reading of the Rules would not seem to raise any question concerning the scope of the Court's rule-making authority.[18] While such a change would no doubt eliminate the right to jury trial in foreclosure suits, this would come about more or less incidentally or indirectly. A foreclosure suit which results in a true deficiency judgment could not very well be considered an action "for the recovery of money only" within the meaning of Rule 38 and the prior statute. It is principally an action for foreclosure and sale of the mortgaged property, and the deficiency judgment is only incidental or ancillary thereto.[19] The Wyoming cases, previously considered, which confirm the mortgagor's right to a jury trial when a personal judgment is sought, dealt with an entirely different type of judgment and therefore would not be in point.

A further problem which would have to be faced in following this course should be mentioned. There is substantial authority that a deficiency judgment may be entered only if authorized by statute or, possibly, a rule of court.[20] No attempt will be made to discuss the problem in detail here. The proposition traces back to the New York case of *Dunkley v. Van Buren,*[21] decided in 1818, which held that a deficiency judgment could not be entered in a foreclosure suit. The decision was based on the impropriety of joining claims for legal and equitable relief. This objection is, of course, no longer available in view of the one form of action provisions of both the

18. *See* WYO. STAT. § 5-19 (1957).

19. *See* Young v. Vail, 29 N.M. 324, 222 P. 912 (1924) holding that there is no right to a jury trial where a true deficiency judgment is sought since such a judgment may be considered as a further equitable remedy granted in the foreclosure suit, which is clearly equitable, to provide complete relief. Although the rationales may vary no state recognizes a right to jury trial with respect to such a deficiency judgment. *See* OSBORNE ON MORTGAGES 977 (1951).

20. *See* OSBORNE ON MORTGAGES 976 (1951) and 1 GLENN ON MORTGAGES 466 (1943).

21. 3 Johns, Ch. 330 (1818).

Code and the Rules.[22] In addition, it may properly be argued that Rule 18(b) itself provides sufficient authority for a deficiency judgment. This, clearly, is the federal position on the question.[23]

Obviously no very definite conclusion is now possible on this question. There is probably nothing really wrong with the old practice, in the sense of reversible error, even under the Rules. The real question is whether a mortgagee may, if he desires, have the other type decree with a true deficiency judgment. The answer to this question probably awaits a mortgagee who feels strongly enough about the jury trial issue to take a case to the Supreme Court. In the meantime, it is interesting to note that the person most responsible for the present foreclosure practice in Ohio and Wyoming, and apparently a number of other states, is the lawyer, long dead and no doubt largely forgotten, who drafted the complaint and judgment in *Ladd v. James*. Had he chosen to cast these papers in the other form, providing first for the foreclosure sale and then for a true deficiency judgment, the questions presented for consideration by the court would have been entirely different. And, it may be supposed, the legislative response, if any were needed, would likewise have been different. In other words, the matter would have developed as it did in other jurisdictions which started from *Dunkley v. Van Buren*.

22. Wyo. R. Civ. P. 2.
23. *See* 1 GLENN ON MORTGAGES 463 (1924).