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Improper Service of Notice on Minor Heirs in Administration Sale—Effect on Validity of Sale—Notice Jurisdictional; Inheritance Tax—Applicability of Equitable Conversion; Mortgages—Refusal of Confirmation—Inadequacy of Price Bid—Effect of Financial Depression; New Trial—Impeachment of Verdict by Affidavit of Juror—Compromise Verdict; Usury—Intent Necessary to Make Sale on Credit Usurious

R. T. Y.

RECENT CASES

IMPROPER SERVICE OF NOTICE ON MINOR HEIRS IN ADMINISTRATION SALE—EFFECT ON VALIDITY OF SALE—NOTICE JURISDICTIONAL. *Seal v. Banes*, decided by the Supreme Court of Oklahoma on May 15, 1934, and reported in 35 Pac. 2nd 704, is a case involving the sale of a deceased husband's realty by his wife, the duly appointed administratrix, under the purported authority of the county court of Tulsa, Oklahoma. The deceased's two minor heirs, aged two and four, respectively resided with their mother, the administratrix above, no guardian having yet been appointed for them. At the time of the petition to sell the real estate to settle the debts of the estate, an order was issued to the heirs to show cause why the sale should not be made, and notice thereof was mailed to the heirs, whereas an Oklahoma statute (*O. St.* 1931—*Sec.* 1278) specified that in such cases notice should be personally served. The sale was made, and the property passed in time to the present holders in due course, the defendants in the present action. The encumbrances on the realty had been paid off during this period of time and the defendant's title had been unquestioned for nine years. Oil was then discovered on the land, and now the plaintiff heirs, within the statutory period, and through their guardian who was appointed some time after the probate sale, bring ejectment against the defendants and seek cancellation of the sale made by the administratrix as casting a cloud on their two-thirds share in the real estate.

The Oklahoma Supreme court affirmed a decision for the minor heirs in the lower court, holding that this was a proceeding in personam against the heirs as adverse parties, and that notice was jurisdictional; that without strict compliance with the statute, the county court had no jurisdiction over the parties, and hence a sale under these conditions would deprive the heirs of property without due process of law. In holding that literal compliance with the statute must be had where the court had limited jurisdiction, as they believed existed here, and that failure to give proper notice was fatal to the validity of the sale, the majority cited the following authority: *Campbell et al v. Drais et al*, 125 Cal. 253, 57 Pac. 994 (1899) *Bloor et al v. Smith et al*, 112 Wis. 340, 87 N. W 870 (1901) *Lamont v. Vinger* 61 Mont. 530, 202 Pac. 769 (1921) *Kline et al v. Shoup et al*, 38 Ida. 202, 226 Pac. 729 (1923).

A vigorous dissent by Mr. Justice Busby concurred in by Mr. Justice Bayless attacked the reasoning of the majority and asserted that the decision was contrary to the established law in Oklahoma as stated by *Grignon's Lessee v. Astor* 2 How. 319, 388, 11 L. Ed. 283 (1844), and affirmed by *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433 (1910), that it would tend to overthrow the titles of thousands of land owners who had placed their faith in the validity of sales of real estate made in probate proceedings, and consequently flood the courts with many cases attacking these titles collaterally on the grounds of fatal defects in procedure during the administration proceedings to sell. The dissent supported the defendant's reliance upon the Michigan case of *Grignon's Lessee v. Astor supra*, as decided by the United States Supreme Court almost a century

before, claiming this rule had been adopted by Oklahoma in *Eaves v. Mullen, supra*, twenty-five years before. The *Grignon* case, *supra*, and the *Mullen* case, *supra*, held that, in the former, (proceedings to sell the realty of an intestate) and in the latter, (proceedings to sell the realty of a guardian's ward), the court acquired general jurisdiction by statute at the time the administration proceedings first began, and that all adverse parties such as minor heirs were put on notice at that time; that the sales of the property to pay the debts of the deceased and the ward respectively, dealing as they did with realty, were essentially proceedings in rem, and that the statutory provision as to notice was merely directory not jurisdictional, and therefore not fatal to the validity of the sale.

The majority sidestepped the apparent rule of the *Grignon* case, *supra*, and the *Mullen* case, *supra*, by saying that in the former, jurisdiction was obtained before the ultimate probate sale and that therefore the parties were not adversary, the proceeding was *in rem*, and the notice was merely directory, and, in the latter case, there was a sale by a guardian of a minor ward's property and therefore, the minor was not an adverse party, with the corresponding results noted just above. Moreover, said the majority, in the case at bar, the administratrix was appointed without notice to the heirs so that the argument that they had notice when the proceedings first began (in order to sustain the defendant's claim of general jurisdiction here) does not stand.

To this argument the minority countered saying that there was no distinction between the *Grignon* case, *supra*, and the *Mullen* case, *supra*, since both were *administration* cases involving the conveyance of realty in probate proceedings; that most of the authority relied upon by the defendants and rejected by the majority opinion as not applying (because they did not involve probate sales wherein minor heirs were parties) did in fact apply because as a class, they were *administration sales*, and that as such, there was no distinction to be made; to make such a distinction now, the minority said, would be a dangerous innovation in Oklahoma law. These two contentions are essentially the point of interpretation upon which the court splits; the majority claiming that the application of the statute must be strict and literal, to protect the vested rights of the minor heirs and to guarantee them due process of law, as in proceedings of this nature the court was a protector of minor heirs; the dissent claiming that it is more in accord with public policy to protect the property rights of thousands of good-faith title holders who have relied upon the validity of administration sales as being impregnable against collateral attack based upon procedural error.

The dissent cited Washington authority as tending to uphold their contention that such a proceeding is *in rem*, and that failure to give statutory notice is not fatal to the validity of the sale, *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910 (1891). *Ryan v. Ferguson, supra*, is the first Washington case on this point, holding that in a sale of community property to pay community debts under administration proceedings, being a proceeding *in rem*, personal notice was unnecessary *unless required by statute.*

It was followed by *Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 505 (1893), which held that an administration proceeding was *in rem*, and to the contention of the appellants that the probate sale was void for lack of notice to interested parties of the hearing of the petition to sell the real estate, since the court did not have jurisdiction, the court said that under *sec.* 144 *of the* 1881 *code, Laws of Washington*, providing that an administrator could have immediate possession of the estate of the deceased, the probate court acquired jurisdiction of the estate for the purposes of administration, and its action could not be void for want of jurisdiction. The court having thus acquired jurisdiction, the estate could be administered and the legislature had the power to regulate such sale as it saw fit, even to allowing the sale without petition or notice at all. The possible inference from this case that the Washington court would support the view held by dissenting Justice Busby, that the jurisdiction having been acquired upon appointment of the administrator, and the proceedings being *in rem*, the parties interested were put on notice at that time and that further statutory requirements as to notice would merely be directory, is overthrown, however, for the court in this instance held that minor irregularities in the sale would not disturb the title of good faith purchasers at the probate sale *because the statutes had been substantially complied with.*

The next decision of importance was *Furth v. United States Mortgage & Trust Co.*, 13 Wash. 73, 42 Pac. 523 (1895), to the effect that since the legislature can direct administration sales to be made without notice if it desires, it of course can specify what kind of notice shall be given. "According to the settled law of this state, under repeated holdings of this court, upon the appointment of an administrator or administratrix, respectively the court obtained jurisdiction over the real and personal property of the deceased, and the administration of the estate *in rem*. Citing *Ryan v. Ferguson, supra, Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605 (1893) *Hyde v. Heller* 10 Wash. 586, 39 Pac. 249 (1895) *Dooly v. State*, 10 Wash. 195, 38 Pac. 1000 (1894). Again note that the court does not decide whether notice to interested parties such as minor heirs is directory or jurisdictional; in other words, it is not decided whether jurisdiction of the estate *includes* jurisdiction over interested parties.

This point seems to be clearly raised and settled for the first time in the case of *Ball v. Clothier* 34 Wash. 299, 75 Pac. 1099 (1904). There the administrator of the estate had sold land at a probate sale without there being a compliance with statutory requirements providing for the appointment of a guardian *ad litem* for minor heirs and service of notice upon them. The minor heirs upon becoming of age were allowed to overthrow the title secured at the probate sale, such sale being declared void, and to secure title in themselves, subject, however, to a lien in favor of the good faith purchasers for the value of the purchase price plus the legal rate of interest thereon, although no allowance was made for money spent on improvements on the land. (Here it is worthwhile to note the equitable adjustment of the litigants' rights in this case and

to compare them to the harsh and rather inequitable result reached by the majority in the instant case.) The purchasers claimed, just as did the appellants in the principal case under discussion, that since the proceedings were *in rem*, according to past Washington decisions, that statutes relating to notice and method of sale were merely directory, and that non-compliance alone would not overthrow their title. The Washington court said that even conceding that the administration proceedings were *in rem* so as to give the court jurisdiction over the estate, as stated in *Ackerson v. Orchard*, *supra*, still, *in order to get jurisdiction of the minor heirs and thus to assure them due process of law, the statutory requirements as to notice must be followed literally.* The court cited *Bloom v. Burdick*, 1 Hill (N.Y.) 130, 37 Am. Dec. 299 (1841) which case was definitely in accord with the majority opinion of the principal case under discussion to the effect that although there was jurisdiction of the court over the estate, yet jurisdiction over the persons affected by the sale must be obtained by compliance with statutory requirements for notice. In this manner only, could the sale become valid. *Ball v. Clothier supra*, concluded that the probate court had no jurisdiction to order a sale of the real estate because of the absence of notice to the minor heirs and the failure to appoint the guardian *ad litem* for them, and therefore, under the above authority, the minors were allowed to avoid the sale.

Ball v. Clothier, supra, seems to have been the last Washington case raising the issue in question directly. From it and from the other cases just cited, it clearly appears that in Washington, while the court has jurisdiction over the estate upon the appointment of an administrator and that in this respect the proceedings are *in rem*, yet the jurisdiction over the interested parties such as minor heirs, which is essential to the validity of the probate sale, can be secured only after a strict compliance with the statutory requirements of notice, if there be such a statute. It is of importance to notice, at this point, that under the rule of this state, an heir is vested with title to real property upon the deceased owner's death, taking such title, of course, subject to the prevailing laws at that date. Hence, in dealing with the question of fulfilling the statutory requirements as to notice, etc., in administration sales, it is to be kept in mind that the minor heir has title in himself, which title is subject to being divested to pay various administration costs and debts of the estate, provided statutory provisions are followed in the probate sale. The most recent Washington decision on this question has in general not changed the law in this respect in the least, *State of Washington in re Lauridsen et al v. Superior Court of King County*, 79 Wash. Dec. 183 (1934).

Having arrived at the foregoing conclusions, it is now submitted that Sec. 1494, Rem. Rev. Stat., is the controlling law in Washington on the question of jurisdiction of the parties by a court in ordering a probate sale, except as such may be affected by the general rule in this state that the statute in effect at the time of the death of the deceased shall govern the probate sale of real property of the estate.

The statute is quoted in part: "Whenever it shall appear to the satisfaction of the court that any portion or all of the real property should be sold or mortgaged the court may order the sale or mortgage of such portion of the real property as appears to the court necessary for the purpose aforesaid. Unless the court shall by express order so provide, no notice of the hearing of such petition for the sale or mortgage need be given, except as provided by sec. 1434, Rem. Rev. Stat. hereof, (which merely requires the court to give notice of all important proceedings in a probate sale to those interested parties who may request the same of the court in advance) if, however, the court should order notice of such hearing, it shall determine upon the kind, character, and time thereof The absence of any allegation in the petition shall not deprive the court of jurisdiction to order said sale or mortgage and the court may if it see fit, order such sale or mortgage or both without any petition having been previously presented." Clearly, then, the rule in Washington today allows the court to order the probate sale without providing for notice to minor heirs if it deems fit, and in such case, the administration sale would be valid as against subsequent claims made by the minor heirs and raising the objection of lack of notice to them of the administration sale.

R. T. Y.

INHERITANCE TAX—APPLICABILITY OF EQUITABLE CONVERSION. Deceased, a resident of New Jersey left two parcels of land in Washington. The land was subject to executory installment sale contracts. *Held*: the property was intangible personal property and not taxable in Washington, *In re Eilermann's Estate*, 79 Wash. Dec. 19, 35 Pac. (2d) 763 (1934).

The court thus again applies the doctrine of equitable conversion, and deviates from the broad statement of *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925). The court relies upon *In re Field's Estate*, 141 Wash. 526, 291 Pac. 705 (1930) 2 WASH. LAW REV. 205, which held that while no title passed under the executory contract, nevertheless, for the purpose of administration it should be treated as personal property· the court in the instant case stating, "We cannot see any good reason for holding that, for the purpose of administration of an estate, a vendor's interest in such a contract should be treated as personalty but not so treated when the question of inheritance taxation is involved. The two situations are not distinguishable on principle." No mention is made in the opinion or the briefs of counsel as to whether the contracts contained a forfeiture clause, the court thus ignoring the forfeiture clause test, 3 WASH. LAW REV. 80, although in fact the contracts contained forfeiture clauses.

The court relies upon two apparently contradictory statements from *Corpus Juris*. The first, that "under the principles laid down in later U. S. Supreme Court cases, the doctrine of equitable conversion of realty into personalty for the purposes of taxation is definitely overruled," 61 C. J. 1635. The second, that "the interest of a non-resident vendor in a contract for the sale of land situated within the state is intangible

personal property having its situs at the domicile of the vendor, and it is not taxable in the state wherein the land lies," 61 C. J. 1636.

Upon examination of the authorities cited by *Corpus Juris* it is found that the first statement is applicable where there was a direction in a will to an executor or trustee to sell real estate and distribute the proceeds. This may be termed equitable conversion by will. The second statement is supported by cases where the owner of real estate had entered into a contract of sale prior to this decease—the instant case.

It is submitted that there is a distinction between these situations. In the case of equitable conversion by will, at the exact moment of death, the testator died possessed of the full title, legal and equitable. On the other hand where the contract has been entered into prior to death, by the general doctrine of equitable conversion, the vendor dies holding the legal title in trust. The tax should be levied upon the interest possessed at the time of death. Therefore, while it is arguable whether the doctrine of equitable conversion should apply in either case for the purpose of taxation, a valid distinction may be drawn between the two cases.

Undoubtedly, then, the Washington court relied upon the second statement from *Corpus Juris*, and admits the distinction. The case of *In re Paul's Estate*, 303 Pa. 330, 154 Atl. 503 (1931), where the court of the domicile refused to tax, is contra to the Washington holding in denying the distinction, but not without a strong dissent.

A need for uniformity among the states in the application of the doctrine of equitable conversion in such a case is found when the effect of a variance is noted. In the instant case if after the Washington court applied the doctrine, the New Jersey court applied it; or if neither court applied it, then a uniform result would be reached. But if after the Washington court applied it, the New Jersey court did not, then no tax would be levied. On the other hand if the Washington court refused to apply it and taxed it as real property in this state, and the New Jersey court applied equitable conversion and taxed it as intangible personal property, then both states would be taxing the same property.

No case has been found in New Jersey, but in the dissent to *In re Paul's Estate*, *supra*, at p. 511 is found a statement from the Comptroller of the treasury of New Jersey, stating in a letter dated December 24, 1930, that, "the rule of equitable conversion (as a general doctrine) is well settled in New Jersey," and that applying that rule, "the state of New Jersey would make no attempt to tax the transfer of resident real property of a non resident decedent where such property was under contract of sale entered into by said non resident prior to his death." Therefore, it would appear that in this case New Jersey would apply the doctrine, tax as intangible personal property, and a uniform result reached. However, if the decedent were a resident of Pennsylvania no tax would be levied, the Washington court refusing to tax under the doctrine of the instant case, and the Pennsylvania court under the doctrine of *In re Paul's Estate*, *supra*.

After having once determined that the property is intangible personal property, the court has both authority that it has its situs in the

domicile of the owner, and only subject to inheritance tax by the state of the owner's domicile, *In re Lyon's Estate*, 75 Wash. Dec. 98, 26 Pac. (2d) 615 (1933) *First National Bank of Boston v. Maine*, 284 U. S. 312, 76 L. Ed. 313 (1932) and, the reciprocity clause, Rem. Rev. Stat. 11203-1, which provides that intangible personalty of residents of states not imposing an inheritance tax upon intangible personalty of residents of this state shall be exempt from inheritance tax (it appearing such is the law in New Jersey). C. P Z.

MORTGAGES—REFUSAL OF CONFIRMATION—INADEQUACY OF PRICE BID—EFFECT OF FINANCIAL DEPRESSION. P is mortgagee under a real estate mortgage in the amount of $1500, given by D, mortgagor, in 1926 covering property owned by him in the city of Seattle. Default having occurred after the sum of $300 had been paid on the principal, P instituted foreclosure proceedings and took a decree for $1563, plus attorney fees, costs, and subsequent accruing interest. The usual provisions for sale by the sheriff and for deficiency were embodied in the decree. The sale was regularly held, and P the only bidder at the sale, bought the property for $950, leaving a deficiency of upwards of $613. Subsequent to the mortgage sale, P filed the usual order of confirmation to which D urged exceptions on the ground that the sale price was grossly inadequate and insufficient. At the hearing which followed, both parties submitted affidavits of experienced real estate men expressing their opinions as to the present market value of the premises—those for D fixing an average present valuation of $1766—those for P stating that the price bid was not disproportionate to the present value since the premises were badly in need of repairs. The trial court refused to confirm the sale to P on the ground that the price bid was "unfair, inequitable and grossly inadequate" and ordered a resale for a price "not less than the amount of the decree." Upon appeal, the Supreme Court *held* that the trial court abused its discretion in refusing to confirm the sale at the price bid, and therefore reversed the judgment with directions to confirm the sheriff's sale. *Mellen v. Edwards et al.*, 79 Wash. Dec. 251 (Nov. 1934).

It is the general rule that in the absence of fraud and unfairness, mere inadequacy of price will not invalidate a foreclosure sale, unless the price is so grossly inadequate and unconsionable as to shock the moral sense, or unless there be additional circumstances against its fairness. However, if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will suffice to justify setting it aside. *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22 1911). It is difficult to state a more definite rule than this, and each case must stand upon its own peculiar facts. 19 R. C. L. 584. For an elaborate discussion and collection of the cases bearing on the question as to the effect of inadequacy of price on a sale under a power in a mortgage or trust deed, see annotation in 8 A. L. R. 1001.

In recent years, the general economic depression and its concommitant scarcity of money for ordinary transactions, have produced a forced stagnation of the real estate market, with the result that foreclosure sales are conspicuous for their lack of competitive bidders, the only per-

sons present in nearly all such sales being the sheriff and the mortgagee. The mortgagee in such a situation may bid in just what his fancy dictates, and if his bid is less than the foreclosure decree, he may saddle the mortgagor with the difference in the form of a deficiency judgment. Bearing these facts in mind, courts of equity throughout the land have treated the financial depression as an "additional circumstance" which, when coupled with inadequacy of price, will furnish sufficient grounds for invalidating a foreclosure sale. The relief afforded to mortgage debtors in such cases although essentially the same, varies in some particulars. Thus in *Federal Title & Mortgage Guarantee Co. v. Lowenstein*, 113 N. J. Eq. 200, 166 Atl. 538 (1933), where property valued at $27,500 was bid in by the mortgagee for $100, the court agreed to confirm the sale only upon the condition that the mortgagee-purchaser would credit the market value of the property to the decree. In *Michigan Trust Co. v. Cody*, 264 Mich. 258, 249 N. W 844 (1933), where the present market value of the property was $185,000 and the price bid in by the mortgagee amounted to $86,000, the court refused to confirm the sale and ordered a resale in the "hope" that a more favorable bid would be received, or that a change in general conomic conditions would result in a refinance of the loan. In *Chemical Bank & Trust Co. v. Adam Schumann Associates*, 150 Misc. 221, 268 N. Y. S. 674 (1934), where the value of the property was appraised at $17,000 and the mortgagee's bid was $500, the court was unable to set aside the sale since the property had been sold in the interim to a *bona fide* purchaser, but did refuse to enforce the deficiency judgment against the mortgagor upon the basis of the amount bid, and ordered a hearing to determine the true amount if any of the deficiency. In *Suring State Bank v. Giese*, 210 Wis. 489, 246 N. W 556, 85 A. L. A. 1477 (1933), where the property was valued at $2,000 and the price bid in by the mortgagee was $600, the court valued the property at an amount equal to the mortgage indebtedness, and required that this valuation be credited against the debt as a condition precedent to the confirmation of the sale; however the mortgagee was given the option of accepting or rejecting the condition, and in the event of his refusal to adopt, a resale of the property was directed. The court in that case, in addition to the procedure adopted, pointed out two other possible modes of procedure which might have been followed under the circumstances: (1) It could have declined to confirm the sale and have ordered a resale; or (2) it could have taken notice of the present emergency and after a proper hearing, fixed a minimum or upset price at which the premises must be bid in if the sale was to be confirmed. However, as pointed out in 27 Illinois Law Review, at page 951, in commenting on this case, it was said: "It is to be observed that no one of the above alternatives is a conclusive check upon the possibility of the property being sacrificed at too low a price. If the upset price in (2) above is not bid at the sale, or if the procedure adopted in the case is rejected, the case falls inevitably into alternative (1)—a resale must be had. Since the complainant cannot be compelled to bid a higher price, and assuming there are no other bidders at the sale, the same difficulties would be met that were encountered upon the first sale."

The mere allegations, however, that the market is unpropitious for the sale of the property due to a financial depression or unprecedented scarcity of money, or forced stagnation of the real estate market will not constitute such an equity sufficient to warrant a court in restraining the sale. *Bolich v. Prudential Ins Co.*, 202 N. C. 789, 164 S. E. 335, 82, A. L. R. 974 (1932) *Floore v. Morgan*,—Tex.— 175 S. W 737 (1915) *Caperton v. Landcraft*, 3 W Va. 540 (1869) *Muller v. Bayly*, 21 Gratt. (Va.) 521 (1871) *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223 (1888).

Upon the question whether the court of equity in refusing to confirm a foreclosure sale and ordering a resale, has the power to fix a minimum or upset price at which the premises may be bid if the sale is to be confirmed, the cases present a split in views. Those acknowledging such a power adopt the practice recognized in cases of foreclosure of corporate property which is of such size and character as to preclude the establishment of a fair price by competitive or cash bidding. *Suring State Bank v. Giese*, *supra*. Those denying such a power exists, proceed on the theory that such a limitation on the resale contravenes the statute giving the mortgagee a right to a decree for the deficiency *Michigan Trust Co. v. Cody*, *supra*. The Washington court in the instant case adopts this latter view by way of *dicta*.

Somewhat analogous, and yet distinguishable from the establishment of a minimum price on resale, is the practice under peculiar circumstances, of setting aside a foreclosure sale and ordering a resale, upon the application of an interested party provided the latter offers to bid, or produce a *bona fide* bid of another, in a sum in excess of the amount bid at the original sale. *John Paul Lumber Co. v. Neumeister* 106 Wis. 243, 82 N. W 144 (1900) *Dewey v. Kinscott*, 20 Kan. 684 (1878) *Wolfert v. Milford Sav. Bank*, 5 Kan. App. 222, 47 Pac. 175 (1896) *Means v. Rosevear* 42 Kan. 377, 22 Pac. 319 (1889) *Demaray v. Little*, 19 Mich. 244 (1869) *Strong v. Smith*, 68 N. J. Eq. 650, 58 Atl. 301 (affirmed in 68 N. J. Eq. 655) (1905) *Rowan v. Congdon*, 53 N. J. Eq. 385, 33 Atl. 404 (1895) *New Jersey Nat. Bank v. Savemore Realty Co.*, 107 N. J. Eq. 478, 153 Atl. 480 (1931) *Lents v. Craig*, 2 Abb. Pr. (N. Y.) 294, 13 How. Pr. 72 (1855) *Kirby v. Ramsey*, 9 S. D. 197, 68 N. W 328 (1896) *Moeller v. Miller* 315 Ill. 454, 146 N. E. 449 (1925) *Lefever v. Kline*, 294 Pa. 22, 143 Atl. 488 (1928) *Iron & Glass Dollar Sav. Bank v. Wigman*, 264 Pa. 146, 107 Atl. 661 (1919) see annotation in 85 A. L. R. 1481.

The Washington court in the instant case, before deciding whether or not the trial court had abused its discretion in refusing to confirm the sheriff's sale, first decided that although the jurisdiction of equity in foreclosure proceedings may be purely statutory, and Section 591, Rem. Rev. Stat. provides that the court shall refuse confirmation where there are "substantial irregularities" in the proceedings, still this does not deprive equity of its inherent power to refuse confirmation where it appears that the price bid is so disproportionate to the true value of the property that it is "shocking to the conscience" of the court. On the second question whether or not the court has the power to refuse confirmation of a sale, where the price bid is inadequate due to lack of competitive

bidding as a result of the financial depression, the decision points out that such a power exists only where it appears that the mortgagee is guilty of a "deliberate and wilful attempt to take advantage of the general situation to further a selfish purpose and to enrich himself at the expense of the mortgagor." The court, however, concluded that the price bid by the mortgagee in the instant case was not so disproportionate to the present market value of the property, as to justify the exercise of the extraordinary power of equity in refusing to confirm the sheriff's sale.

To summarize the position which the Washington court has thus taken in the situation where there is a failure to realize the full value of the mortgaged property at the foreclosure sale due to the existence of a general economic depression, the following rules may be safely set forth as follows: (1) Mere inadequacy of price unaccompanied by fraud or any irrregularity in conducting the sale does not constitute a sufficient equity to warrant a court in refusing to confirm the sale; (2) The court will refuse confirmation, however, where there is present not only inadequacy of price bid, but also a showing of deliberate and wilful attempt on the part of the mortgagee-purchaser to profit from the situation at the expense of the mortgagor· (3) The court will always refuse confirmation where the pride bid is so low as to shock the moral sense. J. J. L.

NEW TRIAL—IMPEACHMENT OF VERDICT BY AFFIDAVIT OF JUROR—COMPROMISE VERDICT. The defendant appeals from a judgment of five thousand dollars ($5000) damages for the plaintiff in a tort action, one of the grounds being the alleged misconduct of the jurors in resorting to chance in the computation of the damages. One of the jurors was unable to appear, and the parties agreed that nine of the eleven should bring in the verdict. Affidavits were presented by the jurors showing that several sums were considered in the deliberations and that finally the jurors agreed to be bound in advance by the vote of the majority upon two sums, five thousand dollars ($5000) and two thousand dollars ($2000). Eight jurors voted for the larger sum and three for the smaller. Upon motion for a new trial there was a conflict in the testimony as to whether or not the jury had assented to this sum subsequent to the vote, but the court proceeds as though it had not. *Held*: That this was not a "chance" verdict within the statute admitting juror's affidavits to show that the verdict was reached by resorting to chance. (Code Civ. Proc., sec. 657, subd. 2). *Mirabito v. San Francisco Dairy Co. et al.*, 35 Pac. (2d) 513 (Cal. 1934).

The impeachment of a verdict by affidavit of a juror showing misconduct is a procedure surrounded by many restrictions, though there has been a tendency to relax such restrictions in some jurisdictions either through statutes or decisions as is demonstrated by the statute applicable in the instant case and by a similar statute in this jurisdiction. (Rem. Rev. Stat., sec. 399 (2.) That statute provides in part:

> "* * * wherever any one or more jurors shall have been induced to assent to any general or special verdict, * * * other and different from his own conclusions, and arrived at by a resort to a

determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors."

The rule against impeachment is founded upon the principle that jury deliberations are necessarily inviolate in order to effectuate the administration of justice, and the motives, mental operations, and sentimental considerations of jurors have never been open to challenge. However, certain types of jury verdicts have been held to be arrived at in such a manner that the court will set them aside through impeachment by affidavit. The cases in which impeachment has been allowed have been compiled as to our jurisdiction in a comment in 4 Wash. L. Rev. 78.

The "quotient verdict" is one type which has generally been held to be impeachable. A quotient verdict is one in which an average of all sums considered by the jurors is computed and determined as the true measure of damages; no juror knows before the computation what the exact amount will be. If the jurors agree in advance to be bound by this sum and thereafter there is no further discussion, the verdict has been held bad as a resort to chance and so impeachable through statutory authority or otherwise. The Washington court reached this conclusion in the early case of *Goodman v. Cody*, 1 Wash. Terr. 329, 34 Am. Rep. 808 and note (1871). But a subsequent discussion of the amount and its adoption does not render the verdict bad. *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899 (1896) *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596 (1903) *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130 (1904) *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281 (1905) *Wiles v. Northern Pacific Railway Co.*, 66 Wash. 337, 119 Pac. 810 (1911) *Oliver v. Taylor* 119 Wash. 190, 205 Pac. 746 (1922) Other jurisdictions have refused to allow impeachment of quotient verdicts. *Shepherd v. Inman-Poulsen Lumber Co.*, 86 Or. 652, 168 Pac. 601 (1917) *Manhattan Oil Co. v. Mosby*, 72 F (2d) 840 (1934).

In the instant case there was an agreement in advance to be bound by the decision of the majority, but the California court draws a distinction between this case and that of the quotient verdict, citing *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180 (1893), a case in which a quotient verdict was held to be a resort to chance. The California court distinguishes the cases by pointing out that there exists in the quotient verdict case an additional unknown element, since there the jury did not know the figure upon which they were voting. Here the jury accepted one of two definite figures as the measure of damages and agreed to be bound in the alternative on the vote of the majority. The court's interpretation of "chance" as an implication of the absence of explainable or controllable causation necessarily distinguishes the instant case from the quotient verdict situation and makes the agreement here a compromise verdict, which verdicts have generally been held to be unimpeachable. There has been some authority to the effect that dubious methods of arriving at compromise verdicts should be treated by the courts with disfavor. The Michigan court has said that it is the recognized duty of courts to set aside jury verdicts which are clearly compromise verdicts and which were reached by "splitting differences." *Buckner Loan Co. v. Bicher* 221 Mich. 198, 190 N. W 670 (1922). The

verdict here represented the judgment of eight of the jurors and of the other three because of the compromise arrangement which took the form of an agreement to be bound by the vote of the majority. Such a compromise verdict might well be set aside in a jurisdiction adhering to the views expressed by the Michigan court. In the final analysis the course of action to be taken in cases involving the setting aside of verdicts rests within the discretion of the courts. The exact problem presented by the instant case has never arisen in this jurisdiction.

J. G.

USURY—INTENT NECESSARY TO MAKE SALE ON CREDIT USURIOUS. A applied to B for a loan of money. B declined, but in lieu thereof sold to A upon credit certain corporate stock of the value of $12,500, for which A gave B promissory notes totaling $17,506.25 at seven per cent interest. In an action by A against B to recover damages for an usurious loan, *held* this was a bona fide sale of the stock and not a loan of money, although A had stated in writing at the time the notes were executed that he was delivering the notes as evidence of an indebtedness for the purchase price of the stock in order to circumvent the usury law. *Rose v. Wheeler* 35 Pac. (2d) 220 (Cal. 1934).

Usury is the exacting, taking, or receiving of a greater rate than is allowed by law for the use or loan of money. *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S. W 425 (1924). Instead of making a loan in terms a seller may transfer something to a buyer that is immediately and readily salable for cash, for which the buyer promises to pay in the future a sum amounting to its present cash value plus an amount greater than legal interest. Such a transaction intended by the parties as a means of providing the buyer with money from the sale of what is transferred is usurious. The American Law Institute's Restatement of the Law of Contracts, sec. 529, comment *d*. Accord: *Quackenbos v. Sayre*, 62 N. Y. 344 (1875).

This is not to say, of course, that simply because a buyer makes a bad bargain in purchasing something on credit, the transaction becomes usurious. A person may sell his credit, his responsibility, his goods or his lands; and if he deals fairly, he may take as large a price for either as he can get, and there can be no usury in the case. Tyler on Usury p. 92. A sale of one's property for whatever price, no matter how unconscionable it may be, does not in itself constitute usury. *Blackmore Inv. Co. v. Johnson*, 32 F (2d) 433 (1929).

In the instant case the court held that there must exist the corrupt intent on one side to exact an illegal charge for the use of money lent and on the other to borrow on usurious terms dictated by the lender, elements which the court said were not present. So far as an intent to borrow on usurious terms is concerned, the court overlooks the proposition that such an intent is immaterial so long as the purchaser does intend to convert the thing received into money. The court relies entirely on the fact that the borrower had expressly stated he was executing the notes as payment of the purchase price for the stock. In respct to the former requirement, that is, that the lender intend to make a usurious loan, it

was held in *Washington Fire Insurance Co. v. Maple Valley Lumber Co.*, 77 Wash. 686, 138 Pac. 553 (1914), that one of the elements of usury is an unlawful intent, that is, an intent to do those things forbidden by the statute, but went on to say that it was not necessary that there be an intent to violate the statute as such, the law presuming the necessary unlawful intent from the mere intentional doing of what is forbidden. This decision is followed in a subsequent case in which the court presumed an unlawful intent from an agreement, fair on its face, between a borrower and lender providing for performance by the lender of services of questionable value. *Robinson, Thieme & Morris v. Whittier et al.*, 112 Wash. 6, 191 Pac. 763 (1920). O. J. J.