**Subject:** South Carolina ruling on Fraudclosure

September 20, 2013

In a stunning ruling from the Ninth Judicial Circuit Court of Common Pleas of Charleston, South Carolina, a Judge has issued a detailed, 4-page written opinion **dismissing a foreclosure action filed by Deutsche Bank National Trust Company** as the claimed trustee of an IndyMac securitization, holding that DB failed to show that it was the owner and holder of the original **Noteand Mortgage** at the time the Complaint was filed. FDN South Carolina network counsel Bill Sloan, Esq. represents the homeowner and prepared and argued the homeowner's Motion to Dismiss.

Counsel for DB made **the familiar argument that** it had possession of the original **Note endorsed in blank**, that the Note was a negotiable instrument under the UCC, that the**Mortgage follows the Note**, and that thus DB had established its right to foreclose. **The Court disagreed**, citing precedent from the **United States Supreme Court's** decision in **Carpenter v. Longan**, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313 (**1872**) which the Court found "clearly supports the notion that the **Plaintiffmust own the Note and the Mortgage to foreclose on the property (emphasis in the opinion)."** The Court determined that "Plaintiff failed to show that it owned the Mortgage at the time the Complaint was filed", and also noted that the Mortgage shows MERS to be the mortgagee but that "MERS is never mentioned in the Note."

The Court stated: "It is clear that to have standing in this foreclosure case, Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well. Plaintiff's Complaint in this case fails to meet this criteria. Plaintiff lacks standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12(b)(6) SCRCP is appropriate."

This ruling is based on foreclosure law from the United States Supreme Court, which trumps any contrary state law which does not require the foreclosing Plaintiff to own both the Note and the Mortgage at the time that the foreclosure Complaint is filed. This ruling demonstrates the essential fallacy in the "UCC, I have the Note, mortgage follows the Note" theory espoused by every attorney for the banks and servicers. What remains to be seen is whether the judiciary handling foreclosure cases will follow the law of the U.S. Supreme Court or

not.

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Cf.

*Carpenter v. Longan*, 83 U.S. 271, 274 (1872) (The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.[3] ... 3.*Jackson v. Blodget*, 5 Cowan 205; *Jackson v. Willard*, 4 Johnson 43.); http://supreme.justia.com/us/83/271/case.html#F3

*McCullough v. Huston*, 1 U.S. 441, 444 (1789) (Upon the whole, we are unanimously of opinion, that the indorsee of a promissory Note, does take it, subject to all equitable considerations, to which the same was subject in the hands of the indorser, the original payee. And, therefore, Let the defendant have a new trial.); http://supreme.justia.com/us/1/441/case.html

# Carpenter v. Longan - 83 U.S. (16 Wall.) 271 (1872)

## U.S. Supreme Court

*APPEAL FROM THE SUPREME*

*COURT OF COLORADO TERRITORY*

*Syllabus*

1. The assignment of a negotiable note before its maturity raises the presumption of a want of notice of any defense to it, and this presumption stands till it is overcome by sufficient proof.

2. When a mortgage given at the same time with the execution of a negotiable note and to secure payment of it, is subsequently, but before the maturity of the note, transferred *bona fide* for value, with the note, the holder of the note when obliged to resort to the mortgage is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he did the note.

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the Court.

On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of $980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half percent per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate

therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect.

On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the District Court of Jefferson County, Colorado territory, to foreclose the mortgage.

She answered and alleged that when she executed the mortgage to Jacob B. Carpenter, she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return of the note and mortgage and of the wheat and flour, all which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage, he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the wheat and flour were in the hands of Miller & Williams, warehousemen, in the City of Denver, that they sold, and received payment for, a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the case renders it unnecessary to advert more fully to the facts relating to the subject. The district court decreed in favor of the appellant for the full amount of the note and interest. The supreme court of the territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this Court by appeal.

It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consideration



before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was nonnegotiable,

or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. [Footnote 1] The contract as regards the note was that the maker should pay it at maturity to any *bona fide* endorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a nonnegotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger." [Footnote 2]

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note and interest, and that could have been recovered in an action at law. Equity could not find that



less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited *supra,* says:

"But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the endorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the endorsee or assignee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him, but to allow him the benefit of on the account."

A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of

enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another.

The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding.

The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. [Footnote 3]

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It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration.

In *Baily v. Smith* [Footnote 4] -- a case marked by great ability and fullness of research -- the Supreme Court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes, negotiable, are made so by statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the latter as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers.

The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a

moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action,

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where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*

In *Pierce v. Faunce,* [Footnote 5] the court said:

"A mortgage is *pro tanto* a purchase, and a *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage is on the same footing with the *bona fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

*Matthews v. Wallwyn* [Footnote 6] is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case, the mortgage was given to secure the payment of a nonnegotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally:

"The debt therefore is the principal thing, and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee,*the account must be settled in that action.* In this Court, the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment."

The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity.

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So neither can it be worse. Upon this ground we place our judgment.

We think the doctrine we have laid down is sustained by reason, principle, and the greater weight of authority.

*Decree reversed and the case remanded with directions to enter a decree in conformity with this opinion.*

[Footnote 1]

Powell on Mortgages 908; 1 Hilliard on Mortgages 572; Coot on Mortgages 304; *Reeves v. Scully,* Walker's Chancery 248; *Fisher v. Otis,* 3 Chandler 83; *Martineau v. McCollum,* 4 *id.*153; *Bloomer v. Henderson,* 8 Mich. 395; *Potts v. Blackwell,* 4 Jones 58; *Cicotte v. Gagnier,*2 Mich. 381; *Pierce v. Faunce,* 47 Me. 507; *Palmer v. Yates,* 3 Sandford 137; *Taylor v. Page,* 6 Allen 86; *Croft v. Bunster,* 9 Wis. 503; *Cornell v. Hilchens,* 11 *id.* 353.

[Footnote 2]

*Hern v. Nichols,* 1 Salkeld 289.

[Footnote 3]

*Jackson v. Blodget,* 5 Cowan 205; *Jackson v. Willard,* 4 Johnson 43.

[Footnote 4]

14 Ohio St. 396.

[Footnote 5]

47 Me. 513.

[Footnote 6]

4 Vesey 126.

## MCCULLOUGH v. HOUSTON - 1 U.S. 441 (Dall.)(1789)

## U.S. Supreme Court

### MCCULLOUGH v. HOUSTON, 1 U.S. 441 (1789)

**Supreme Court of Pennsylvania**

**September Term, 1789**

This was an action brought by Hugh M'Cullough, as assignee of Samuel Young, upon a promissory note drawn by John H. Houston; and, on the trial of the cause, a verdict was given for the Plaintiff, subject to the opinion of the Court on the following point:

> 'Whether the indorsee of a promissory note, takes it subject to all equitable considerations, to which it was subject, in the hands of the indorser, the original payee?' And, if the opinion of the Court was in favor of the Defendant, a new trial was to be awarded.

The point was argued at the last term, before all the Judges, by Sergeant, for the Plaintiff, and Ingersol, for the Defendant.

For the Plaintiff, it was observed, that in the act of Assembly, making bonds and notes negotiable, there is no provision enabling the promissee, or drawee, to bring an action on the note itself; 1 State Laws 77. that such an action did not lie at common law; and, consequently, that wherever it had been brought in Pennsylvania (which is in numerous instances) the proceeding must have been founded on the statute of 3 and 4 Ann. c. 9. and the law of merchants. That statute, therefore, must be considered as extended in practice to this country before the revolution; and a legislative sanction is given to the practice by the act of Assembly, which declares, that such parts of the statute law of England as were heretofore in force, shall still be binding in Pennsylvania. 2 State Laws. 3. On the assignment itself the assignee cannot bring an action against



the assignor; but he may bring covenant, of, perhaps, an action for money had and received &c. 2 Lord Raym. 1242.1419. But, in respect to notes, a blank indorsement passes, as if payable to bearer; and every part of the statutes of William and of Anne, for giving negotiability to bills of exchange and notes of hand, has been introduced into this province from the earliest times. For the Defendant, it was urged, that, at common law, bonds and notes were mere choses in action, and the assignee took them under all the equitable circumstances to which they were liable in the hands of the assignor. That promissory notes do not come within the law of merchants is clear; for, if they did, the statute of Anne would have been unnecessary. The question, therefore, is, whether that statute has been extended to Pennsylvania? or, whether, by our act of Assembly, notes are put on the same footing with bills of exchange? From the general rule of the extension of statutes, the 3 & 4 Ann. has not been extended; because it was passed

subsequent to the settlement of Pennsylvania; because the province is not particularly named in it, nor would it, indeed, have been the policy of the British Legislature to promote the circulation of our paper credit; and because it has not been recognized and adopted by any positive act of Assembly. With respect to the introduction of the statute by practice, it operates no further than this, that the payee of a promissory note has brought an action on the note against the signer before our act of Assembly was passed; but till then, the indorsee could not maintain such attraction; and obligations and promissory notes, are put on the same footing. With respect to the act itself, that the Legislature could not intend to put promissory notes upon the same footing with Bills of Exchange, appears evidently from this consideration, that the preceding part of the act pursues the statute of Anne, nearly verbatim; but when it comes to that clause in the latter, which places Notes on the same footing with Bills of Exchange, the Act equally varies its spirit and expression: And, it is declared, that the assignee of a note. &c. shall recover so much thereof as shall appear to be due at the time of the assignment, in like manner as the assignor could have done. The Chief Justice now delivered the opinion of the Court in the following manner:

M'Kean, Chief Justice In pronouncing the opinion of the Court, on the point reserved for their consideration, I shall premise that Bonds, and Promissory Notes in writing, stood on the same footing at common law; and that the assignment of those instruments, as well as the form, operation, and effect of such assignment, depends entirely upon the municipal law of the place where it is made. By an act of Assembly of Pennsylvania, passed on the 28th day of May, 1715, entitled 'An act for the assigning of Bonds, Specialties, and Promissory Notes,' it is recited in the preamble, 'that it hath



been held, that Bonds and Specialties under hand and seal, and Notes in writing, signed by the party who makes the same, whereby such party is obliged, or promises to pay unto any other person, or his order, or assigns, any sum of money therein mentioned, are not by law assignable or indorseable over to any person, so as that the person to whom the said Bonds, Specialties, Note or Notes, is or are assigned or indorsed, may, in their own names, by action at law, or otherwise, recover the same, &c.' 1 State Laws, 77. This, then, is conclusive as to the operation or effect of the assignment of a Bond, or the indorsement of a Note, previously to the passing of the Act; for, no assignment, or indorsement, could take place by law, though it might in equity; and,

the assignee, or indorsee, could not, in any case, sue in his own name. The Act, however, afterwards provides for such assignment and indorsement toties quoties: It also declares, that the person or persons to whom the assignment or indorsement is made, may, in his, her, or their name, or names, sue at law, 'for the recovery of the money mentioned in the Bond, Specialty or Note, or so much thereof as shall appear to be due at the time of the assignment, in like manner as the person or persons to whom the same was, or were, made payable, might, or could, have done;' and that 'the assignors shall not, after the assignment, have power to release any of the debts or sums of money really due by the said Bonds, Specialties, or Notes. The question before the Court must be decided upon a just construction of the parts of the act of Assembly, to which I have just referred. Throughout the whole of this Act, Bonds and Promissory Notes are placed exactly on the same footing; except, indeed, that Bonds and Specialties are to be assigned under hand and seal, and in the presence of two or more credible witnesses: How, then, can the Court make any distinction or difference between assignees of the one, and indorsees of the other? They certainly may both sue in their own names, and respectively recover the money mentioned in the Bonds or Notes, assigned or indorsed, or so much thereof as shall be really due thereon, in like manner as the obligees, or payees, could have done; but, surely, this seems to be equally clear, that neither can recover more than what was really due at the time of the assignment or indorsement; in other words, no more than the original payees could have done prior to the transfer. Before this act was passed, it appears, that actions by the payee of a Promissory Note, were not maintained, nor can they since be maintained, otherwife than by extending the English statute of 3 & 4 Ann. c. 9. Sect. 1. Actions upon Promissory Notes were probably brought here, soon after the passing of the statute, by attornies. who came from England, and were accustomed to the forms of practice in that kingdom, but did not, perhaps, nicely attend to the discrimination with regard to the extension, or adoption of statutes.



I have no doubt, indeed, that many acts of Parliament, passed, not only before, but subsequent to the union of England and Scotland, have, by the same means, been introduced and practised upon in Pennsylvania; and as experience has proved such proceedings to be beneficial, so constant and uninterrupted usage has given them a legal existence, that cannot now be shaken or destroyed. But the indorsees of Promissory Notes, according to the best information which we can obtain, have never

grounded their actions against the drawer, upon any other basis than the act of Assembly now under consideration; though, I think, the action by an indorsee, against the indorser, must be founded on the statute of Anne, and the usage under it, as no such action is given by the act.

The question, so far as it relates to the assignees of Bonds, has been determined in the affirmative, in the Supreme Court of Pennsylvania, before the revolution. See ant. 23. And, as, on the one hand, the Legislature has made no difference whatever between the assignees of Bonds and the indorsees of Notes, so, on the other, we cannot discover any solid or good reason to introduce a distinction in the particular before us.

Upon the whole, we are unanimously of opinion, that the indorsee of a promissory Note, does take it, subject to all equitable considerations, to which the same was subject in the hands of the indorser, the original payee. And, therefore,

Let the defendant have a new trial.