VENDOR AND PURCHASER-VENDOR'S RELEASE OF SUB-ASSIGNEE HELD A DISCHARGE OF ALL PRIOR ASSIGNEES

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VENDOR AND PURCHASER — VENDOR’S RELEASE OF SUB-ASSIGNEE HELD A DISCHARGE OF ALL PRIOR ASSIGNEES — The bank for which plaintiff is receiver sold land on contract. There followed four successive assignments of the vendee’s interest, in each of which the assignee expressly assumed the contract obligation. After the fourth assignment, default occurred as to payments and taxes, and plaintiff began negotiations to sell the property to an intermediate assignee, R. To effectuate this sale, plaintiff procured an assignment in blank from the fourth assignee, W, in consideration of a release of W from further liability on the contract. The negotiations with R having failed, plaintiff brought suit against the vendee and all the assignees to foreclose the land contract and to obtain a decree for deficiency. Held, two justices dissenting, the vendor’s conduct in releasing a sub-assignee terminated the liability of the vendee and all intermediate assignees who had assumed the contract. McCurdy v. Van Os, 290 Mich. 492, 287 N. W. 890 (1939).

In giving the vendee and intervening grantees the benefit of suretyship defenses, this decision extended to land contracts the generally accepted rule of mortgages whereby a mortgagor who has transferred land to an assuming grantee may assert the defenses of a surety with regard to subsequent dealings between the mortgagee and the grantee. According to most decisions, if the mortgagee extends time of payment to the grantee, or releases the grantee from

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¹ The courts have habitually dealt with a transfer of mortgaged land to an assuming grantee in terms of suretyship; the assuming grantee being the principal debtor and the mortgagor, the surety. 41 C. J. 737 (1926); 22 Fourth Decennial Digest, “Mortgages,” § 283 (1); 2 Jones, Mortgages, 8th ed., § 920 (1928); 3 Pomeroy, Equity Jurisprudence, 4th ed., § 1206 (1918); 2 Williston, Contracts, rev. ed., § 384 (1936); 5 Tiffany, Real Property, 3d ed., § 1445 (1939). Intermediate grantees who have assumed the mortgage stand in the same position as the mortgagor in this respect and are given the benefit of suretyship defenses.

the obligation, or otherwise alters the obligation of the grantee, the mortgagor has a complete defense. The principal decision is representative of decisions extending suretyship defenses to quasi-suretyship situations. Suretyship terminology provides a convenient means of describing a multitude of situations in which one person is liable for the debt of another. But the application of suretyship labels has been accompanied by the application of suretyship defenses. For example, a grantee who purchased land incumbered by a judgment lien was held to stand in the position of a surety and was discharged by reason of a release given the sureties on the judgment debtor's appeal bond. The wisdom of adopting all the incidents of suretyship without inquiry into business policy and business practice is questionable. In view of the analogy between mortgages and land contracts, application of suretyship defenses to both situations was logical. But the extension is to be regretted, no matter how logically it followed. The defenses themselves need a re-examination and revision. Even when applied to what is looked upon as technical suretyship, these defenses have been criticized. Courts and text writers have experienced difficulty in explaining the theories underlying them, and their drastic and unexpected consequences have been a source of injustice. Furthermore, these defenses are doubly treacherous when applied to situations like the land contract and mortgage cases, where the creditor does not suspect that a suretyship relation is involved. The result reached in the principal case could more properly be based on the ground that the vendor bank, by retaking possession, renting the premises, and dealing with the property for two years as owner, had discharged the contract.

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8 The statement in the principal case is typical: "It is elementary that if the bank by its dealings with Wiersum [the fourth assignee] released him, such release terminated the liability of prior assignees who had agreed to perform the terms of this contract." 290 Mich. 492 at 505. See Gilliam v. McLemore, 141 Miss. 253, 106 So. 99 (1925); and Insley v. Webb, 122 Wash. 98, 209 P. 1093 (1922). Annotation, 41 A. L. R. 277 at 311 (1926). The dissenting justices refused to apply suretyship defenses to land contracts, though they admitted that such defenses could be properly asserted by a mortgagor. Yet their ground of distinction is not clear.

4 Barnes v. Mott, 64 N. Y. 397 (1876).

5 In many cases the courts have mechanically followed the suggestion of Pomeroy that "all the consequences flowing from the relationship of suretyship" must follow. 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 1206, p. 2882 (1918). In general, there is an absence of inquiry "whether there are elements in the situation not present in simple suretyship cases, which make a particular suretyship doctrine inapplicable." 38 HARV. L. REV. 502 at 504, note 15 (1925). See Glassie, "The Assuming Vendee," 9 VA. L. REV. 196 (1923); 4 UNIV. CHI. L. REV. 469 (1937).

6 See 4 WILLISTON, CONTRACTS, rev. ed., §§ 1220, 1222, 1225 (1936); ARANT, SURETYSHIP, §§ 49, 68 (1931).


9 See concurring opinion by Justice Potter in the principal case, 290 Mich. at 516.