THE

AMERICAN LAW REGISTER.

JUNE 1879.

THE ASSUMPTION OF ENCUMBRANCES BY THE PURCHASER OF LAND.

WHEN the owner of encumbered realty sells it, what are the legal relations established with respect to the encumbrance?

1. Between him and the vendee?
2. Between the vendee and the owner of the encumbrance?
3. Between the heirs or devisees of the vendee and his personal representatives in the administration of his estate?

In England the purchaser of even an equity of redemption is held liable in equity to indemnify his grantor against ever paying the encumbrances, whether he stipulated to do so or not. In *Waring* v. *Ward*, 7 Ves. 333, Lord ELDON said: "The same principle applies to the purchase of an equity of redemption; for the party means at the time of the contract to buy the estate subject to that mortgage in relation to which mortgage the personal contract was entered into, and that was not his. If he enters into no obligation with the party from whom he purchases, neither by bond nor by covenant of indemnity to save him harmless from the mortgage, yet this court, if he receive possession and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for being become owner of the estate he must be supposed to intend to indemnify the vendor against the mortgage." Even if the grantee of encumbered premises expressly covenant to pay the encumbrances, his obligation is construed to be nothing more than an undertaking

to indemnify his grantor. See Mr. Cox's note to the case of *Evelyn* v. *Evelyn*, 2 P. Wms. 664. The reason of these decisions seems to be that the grantor has allowed the grantee to retain the amount of the mortgage-debt in his hands out of the purchase-money, and the grantee has accordingly bought the premises just so much cheaper.

No legal relation whatever appears to be established between the owner of the encumbrance and the vendee, by transactions between vendor and vendee, to which the encumbrancer is not a party.

In the administration of the estates of vendees of encumbered realty, the question constantly arose between the personalty and the realty as to which fund should bear the encumbrances. Although the personalty is the primary fund for the payment of decedent's debts, the realty remained the primary fund for payment of encumbrances thereon, unless the decedent had made them his personal debts, in which case they were thrown for payment, like all his other debts, upon the personalty.

The decedent was not held to have made them his personal debts by having expressly contracted to pay them, because that he would have been bound to do with or without stipulation: *Waring* v. *Ward, supra*; and, therefore, no intent to make the encumbrances his personal debts could be inferred from that act. In *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101, A. having bought premises, subject to an existing mortgage, which he expressly covenanted to pay to the mortgagee by name, and to indemnify his grantor therefrom, devised the same to B. B. having applied to be exonerated out of the personal estate for the mortgage, THURLOW, Ld. Ch., held, that the testator's covenant was merely to indemnify his grantor, and that he had not made himself liable at law to the mortgagee, and of consequence had not made the debt his, so that it should be paid by his executors. And upon re-argument he affirmed the decree, saying: "This appears to be a common case where a man buys an equity of redemption. The question is whether he becomes personally liable to the mortgagee. The buyer takes it subject to the charge, but the debt as to him is a real, not a personal debt. His contract with the mortgagor is only that the debt shall not fall upon him; it is a mere contract of indemnity, as he would be bound without any specific contract to indemnify him as long as he can pay the money." Lord ALVANLEY, in *Woods* v. *Huntingford*, 3 Ves. 130, approved *Tweddell* v. *Tweddell*, the principle of which he said

was, "that where a man buys subject to a mortgage, and has no connection or contract or communication with the mortgagee, and does no other act to show an intention to transfer that debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally." But he held also that a man might make an encumbrance his own personal debt, without an express declaration that he intended to do so, as by contracting directly with the creditor in a new and different instrument, and giving further security for a further advance. See also *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 420; *Barham* v. *Earl of Thanet*, 3 M. & K. 607, and *Townshend* v. *Mostyn*, 26 Beav. 72. But even a personal covenant with the owner of an existing encumbrance for its payment if it be not otherwise altered, though it makes the vendee liable at law, has been held in the administration of his estate to be merely collateral to the charge upon the land, and not to show an intention to make the debt his own: *Tankerville* v. *Faucett*, *Shafto* v. *Shafto*, *Mattheson* v. *Hardwicke*, cited in note to *Evelyn* v. *Evelyn*, *supra*; *Hedges* v. *Hedges*, 5 DeG. & Sm. 330.

Parsons v. *Freeman*, quoted in a note to the case of *Evelyn* v. *Evelyn*, *supra*, and *Belvedere* v. *Rockfort*, 5 Br. P. C. 299, are often quoted as inconsistent with these views. In the former, "A. purchased an estate for 90*l.*, which was at the time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor. The court (Lord HARDWICKE) * * * thought that although the covenant was with the *vendor only*, and the vendee's personal estate therefore not liable in that respect to the *mortgagee*, yet the words were sufficiently strong to show an intention in the vendee to make it his personal debt." In the latter, the consideration was 900*l.*, of which 450*l.* were paid in cash, and the balance represented by a mortgage, "which said principal money of 450*l.*, with the interest thereof from the 10th day of February last, is to be paid and discharged by the said Robert Rockfort out of the consideration-money in this deed expressed." The receipt endorsed on the deed was for "450*l.* sterling in money on the perfection of the deed, and 450*l.* allowed on account of the mortgage. The House of Lords affirmed the decree of the Irish Chancery that the ancestor had made the encumbrance his personal debt." So far as the

question of the decedent's intention to make the mortgage his personal debt is concerned, both these decisions were within the principle of *Tweddell* v. *Tweddell*, *supra*, as qualified by *Woods* v. *Huntingford*, and the only doubt is as to the application of the principle, viz.: whether there was enough in the facts of either case to justify the court in finding that the vendee had shown an intention to do so. In *Butler* v. *Butler*, 5 Ves. Jr. 534, a mortgagee took title to premises in consideration of releasing the owner from a mortgage-debt to him, and of covenanting to pay a prior mortgagee. The facts being thus similar to those in *Parsons* v. *Freeman*, Lord ALVANLEY came to an opposite conclusion. And Lord THURLOW applied the principle quite as strictly in *Billinghurst* v. *Walker*, 2 Bro. C. C. 604. In *Belvedere* v. *Rockfort*, *supra*, Mr. Thurlow, afterwards Lord Chancellor, in arguing the question of the decedent's intention before the House of Lords, contended that he had made himself liable to the mortgagee at law. But as the decree of Lord Ch. LIFFORD was affirmed without opinion, there is nothing to show that this position of counsel, which was not, as we have seen, essential to the decision of the question whether the decedent had manifested an intention to make the encumbrance his own personal debt, was acceded to. In *Parsons* v. *Freeman*, it was expressly repudiated, and Lord THURLOW, in *Tweddell* v. *Tweddell*, and Lord ALVANLEY, in *Woods* v. *Huntingford*, expressed such positive disapprobation of *Belvedere* v. *Rockfort*, in all respects, that it cannot now be considered law. See also Coote on Mortgages 491; 2 Jarman on Wills 556; 2 Powell on Devises 675; Williams on Executors 1693; Fisher on Mortgages, sec. 1112.

In New Jersey there is no liability as in England, upon the purchaser of an equity of redemption to indemnify his vendor against the encumbrances. The grantee of encumbered land does not incur any personal responsibility for the encumbrances, unless he has expressly assumed them or has in some way shown his intention to do so. No personal responsibility will attach to him, because the conveyance describes itself to be under and subject to encumbrances: *Stevenson* v. *Black*, Saxton 338. The insertion of such a clause is regarded simply as a notice to the purchaser that he is buying only the equity of redemption, and so to qualify the covenants of warranty upon the part of the grantor. But, if besides mentioning the encumbrances, the amount of them is included in the consideration, the purchaser will be held between himself and his vendor to

have assumed the mortgage. Such was the case of *Tichenor* v. *Dodd*, 3 Green Ch. 455. The *habendum* clause of the deed was "subject, &c., which said mortgage or the amount thereof is computed as so much of the consideration to be paid to the said D. H. Tichenor." The grantor having been compelled after a sale of the premises to pay the deficiency, brought this action against the grantee to recover the same, which was sustained. *A fortiori*, this is the case where the deed contains language expressly assuming the mortgage: *Klapworth* v. *Dressler*, 2 Beas. Ch. 62. The responsibility incurred by the grantee is held as in England to be that of indemnifying his grantor from ever paying the debt. In *Tichenor* v. *Dodd*, *supra*, the grantee's duty of indemnifying the grantor was founded upon the English reasoning that he had been allowed to retain in his hands enough out of the purchase-money to do so. "By the terms of the deed, the mortgage-money was to be taken as part of the consideration, and hence the second proposition of counsel, that under such circumstances, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor is correct."

Although it is held that there is no direct relation between the vendee and the owner of the encumbrance, the latter is allowed to work out his own salvation in equity. In *Klapworth* v. *Dressler*, *supra*, Dressler bought premises, and having given a mortgage for the purchase-money, conveyed them to Ise, the *habendum* clause of the deed being "subject to a mortgage of $300 which H. Ise does hereby agree and assume to pay, and it is so understood by the parties to these presents." The mortgagees in a bill of foreclosure asked for a decree for the deficiency against Ise. The pinch of the case was whether the complainants, having no privity of contract with Ise, or right against him at law, could get such a decree against him in equity. GREEN, Ch., said, "The premises are not merely conveyed to the plaintiff, subject to the mortgage-debt. When this is done the grantee takes the premises subject to the encumbrance, but incurs no personal responsibility. But the grant here is made upon the specific condition that the grantee agrees and assumes to pay the debt. By the acceptance of the title, the clause becomes his covenant and he thereby becomes bound *to the grantor* to pay the mortgage-debt, and liable to him for any deficiency which may exist upon a sale of the mortgaged premises."

And he held that the grantee, Ise, having assumed for the grantor,

Dressler, the debt due the complainant, he would be regarded in equity as the principal debtor, and Dressler as the surety, and, therefore, the complainant would be entitled to a decree against him for the deficiency, on the equitable principle that "a creditor is entitled to the benefit of all collateral obligations for the payment of the debt for which a person standing in the situation of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment." In other words, equity would enable the mortgagee to take advantage of the duty of the grantee to indemnify the mortgagor. It is hard for the mind to follow this equity, because of the difficulty of regarding the grantee, with whom the mortgagee has no connection, as his principal debtor, and the mortgagor only as a surety. But all the early cases which allowed the mortgagee to recover the deficiency from the grantee, did so on this principle. It is better illustrated by the case in which it was established: *Curtis* v. *Tyler & Allen*, 9 Paige 433. Tyler had given a bond and mortgage to Murray, who assigned the same with a guarantee to Beers, who assigned the same to the plaintiff. Subsequently to Murray's assignment the defendant, Allen, executed his bond to him, conditioned to pay the mortgage or cause the same to be paid by Tyler. In a bill of foreclosure the plaintiff made Allen a party praying for a decree against him for the deficiency, if any, upon sale of the premises. WALWORTH, Ch., said, as Allen's bond was given "subsequent to the assignment of the bond and mortgage to which it was intended to be a collateral security, it is only upon a principle of equity that the present holders of Tyler's bond and mortgage to Murray are entitled to the benefit of this collateral bond. It is well settled, however, that where a surety, or a person standing in the situation of a surety, for the payment of a debt, received a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. And it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence." See also *Vail* v. *Foster*, 4 N. Y. 314. An additional and simpler reason for this method of proceeding is given in *Crowell* v. *The Hospital*, 12 C. E. Green 650, viz.: That equity permits it to avoid circuity of action.

So purely a duty of indemnifying his grantor is the assumption of encumbrances by the grantee considered in New Jersey, that if

for any reason he cease to owe indemnity to this grantor he ceases to be responsible to any one for the encumbrances. For instance, in *Crowell* v. *The Hospital*, *supra*, Currier conveyed premises to the hospital, subject to the payment of a mortgage held by complainant, which the hospital assumed and agreed to pay, the amount thereof having been deducted from the purchase-money. Subsequently the hospital reconveyed the premises to Currier, subject to the mortgage in the same terms. The complainant, in a bill of foreclosure, prayed that if the proceeds should be insufficient to pay the mortgage, a decree for the deficiency might be made against Currier and the hospital. The court held that the duty of the hospital to indemnify Currier having ceased by the reconveyance, their responsibility for the mortgage was extinguished. And so in the case of *Van Horn* v. *Powers*, 11 C. E. Green 257. And in the very recent cases of *Bull* v. *Titsworth*, 29 N. J. Eq. 73, and *Culver* v. *Badger*, Id. 78, it was held that if the clause assuming an encumbrance was inserted in the deed through fraud or mistake, the grantee would owe no indemnity to his grantor, and, therefore, could not be held for any deficiency by the mortgagee. The same conclusion would seem to follow, however the clause might be construed, because the defence set up by the parties was substantially that he had never made any agreement whatever.

By assuming a mortgage for the purpose of indemnifying his grantor, the grantee does not make it his own personal debt, and therefore, in the administration of his estate, it would remain a charge upon the realty, and not be thrown upon his personalty for payment. It is believed that the English authorities would be followed upon this point. And even though the decedent had made himself directly liable to the creditor, this, without other evidence of his intention to throw the encumbrance upon the personalty for payment, would not be enough to do so: *McLenahan* v. *McLenahan*, 3 C. E. Green 101.

In New York, it is held that taking premises under and subject to encumbrances, imposes no personal responsibility for them on the part of the grantee: *Stebbins* v. *Hall*, 29 Barb. 529; *Tillotson* v. *Boyd*, 4 Sandf. 520.

Nor does it alter the case, as in New Jersey, that the amount of the encumbrances is included in the consideration: *Binsee* v. *Page*, 1 Keyes 87; *Belmont* v. *Coman*, 22 N. Y. 431, in which the deed recited a consideration of $12,000, "subject to four mortgages

(described) amounting to the sum of $8500, which has been estimated as part of the consideration-money of this conveyance, and has been deducted therefrom." COMSTOCK, Ch. J., said: "It states that the deed is subject to the mortgages, the sum of which has been estimated as part of the purchase-money and deducted therefrom. If the language had stopped with declaring the subjection of the land to the lien of the mortgages, it would have been the ordinary case of the purchase of a mere equity of redemption. According to all the cases the land would have been the primary fund for the payment of the mortgages, yet without any other liability on the part of the grantee. But the other words, it seems to me, import nothing additional or different. On the contrary, they appear to be used for greater caution. They declare that the amount of the mortgages has been deducted from the consideration which had been previously set forth. The apparent meaning of this is, that so much of the purchase-money as the mortgages amount to being deducted, is not to be paid except as it is charged upon the premises."

When, however, the deed contained language expressly assuming the encumbrances, the liability of the grantee was considered to be simply that of indemnifying his grantor, and the mortgagee was in equity allowed to take advantage of this duty while it continued, for the purpose of recovering any deficiency after a sale of the premises: *Curtis* v. *Tyler*, *supra*; *Blyer* v. *Monholland*, 2 Sandf. Ch. 478. Fitz Randolph sold premises to Monholland, "subject to a mortgage made, &c., which the said party of the second part hereby agrees and assumes to pay." SANDFORD, A. V. C.: "It was a simple contract debt for lands sold and conveyed by the one to the other. The effect of this arrangement in equity, as between them, was to make Fitz Randolph the surety of Monholland, in respect of the debt due to the complainant. As between them and the complainant, it is immaterial whether he was to regard the relationship of principal and surety between them. It sufficed for them, that he held this mortgage-debt against Fitz Randolph, and that the latter had obtained the obligation of Monholland to himself to discharge that debt. This obligation enured in equity to the benefit of the complainant." See also *Cornell* v. *Prescott*, 2 Barb. 16; *Andrews* v. *Wolcott*, 16 Id. 21; *Mills* v. *Watson*, 1 Sweeney 374; *Marsh* v. *Pike*, 1 Sandf. Ch. 210.

Hence it followed, as in New Jersey, that if the grantor, for any

reason, is not liable for the mortgage-debt, or if the grantee has ceased to owe him any indemnity, the grantee will not be liable to the mortgagee: *King* v. *Whiteby*, 10 Paige 465; *Trotter* v. *Hughes*, 12 N. Y. 74.

But the decision of *Lawrence* v. *Fox*, 20 N. Y. 270, produced an entirely new current or rather a whirlpool of authorities which represent the law of New York to-day. Holly, at the request of the defendant, loaned him $300, stating at the same time that he himself owed and had promised to pay the plaintiff that amount the next day, in consideration whereof the defendant promised to pay the plaintiff for him the next day. Upon this promise it was held that the plaintiff could maintain an action because it was made for his benefit. Upon the strength of this case a mortgagee was allowed in *Burr* v. *Beers*, 24 N. Y. 178, to sue the grantee in his own name for the whole mortgage-debt, without any resort to the premises. The deed conveyed the premises "subject, &c., which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay." DENIO, J.: "If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendants parties, the authorities would be abundant to sustain the action in both aspects, * * * but I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption and the holder of the mortgage. The cases proceed upon the principle that the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mortgagor which enures by an equitable subrogation to the benefit of the mortgagee; * * * the plaintiff does not ask to foreclose the mortgage, and does not make the principal debtor, Bullard, a party. If the judgment can be supported at all, it must be on the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise. * * * Finally the question came squarely before this court in *Lawrence* v. *Fox*, *supra*, and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie."

In *Thorp* v. *The Coal Company*, 48 N. Y. 256, in which *King* v. *Whitely*, *supra*, was expressly overruled, EARL, C., said: "In the

deed from Franklin to it the defendant expressly assumed to pay the plaintiff's mortgage, and this, as it is now well settled, binds the defendant to the same extent as if it had also signed the deed. There has been some diversity of opinion as to the ground upon which the liability of the grantee in a deed in such case must rest, and it has finally been settled that it may rest upon the doctrine that where one person makes a promise to another for the benefit of a third person, the third person may maintain an action upon it: *Burr* v. *Beers*, 24 N. Y. 178. In such a case it is not needful that there should be any consideration passing from the third person. It is sufficient if the promise be made by the promisor upon a sufficient consideration passing between him and his immediate promisee, and when the third person adopts the act of the promisee in obtaining the promise for his benefit, he is brought into privity with the promisor, and he may enforce the promise as if it were made directly to him." This was followed by *Campbell* v. *Smith*, 8 Hun 6 and *Vrooman* v. *Turner*, Ibid. 78, in which the mortgagee was allowed to recover a deficiency directly from a grantee, who owed his grantor no indemnity whatever. How far the court went, may be seen from the syllabus of the last case. "A. executed a mortgage on certain premises to B., and afterwards sold and conveyed them to C., and by various mesne conveyances they came to T., a married woman. In none of the conveyances, except the one to T., was there any covenant by the grantee to pay the said mortgage. *Held* that T. was liable on her covenant."

In *Ricard* v. *Sanderson*, 41 N. Y. 179, the owner of premises subject to a mortgage conveyed them to the defendant to secure a certain indebtedness due by him, no other consideration being paid. The deed contained a clause that the defendant "agrees to pay off and discharge the said mortgage as and for part of the consideration-money of said premises." *Held*, he was liable for any deficiency after sale of the premises. It would seem from the facts that the defendant had not purchased the premises at all, but had simply taken them in trust as a security for indebtedness, so that it is hard to reconcile the decision with *Garnsey* v. *Rogers*, 47 N. Y. 234, in which the referee having reported that the absolute deed to the defendant, containing an assumption of the plaintiff's mortgage, was intended by the parties as a mortgage, the court held him not liable.

In *Simpson* v. *Brown*, 6 Hun 251, it was held, in accordance

with *Burr* v. *Beers*, *supra*, that the mortgagor could not release his guarantor so as to prevent the mortgagee from maintaining assumpsit, while in *Stephens* v. *Cassbacker*, 8 Hun 117, it was held, in accordance with the old principle of indemnity, that he could do so. These cases show that the judicial mind is not yet on an even keel, and it may be further disturbed by *Merrill* v. *Green*, 55 N. Y. 270; the facts of which were as follows: an incoming partner, one of the defendants, gave a bond with the other defendant as security to Roberts, the outgoing partner, that he would pay the debts of the old firm. The plaintiffs, creditors of the old firm, brought suit on this bond, which had been assigned to them by Roberts. It was contended that they might recover under *Lawrence* v. *Fox*, without the assignment of the bond, and the statement of that fact in the complaint might be regarded as surplusage. GLOVER, J., "But I do not think the case within the principle of *Lawrence* v. *Fox*. Green was liable with Roberts for the payment of the firm debts. He agreed with Roberts, upon a valid consideration, to assume the payment of the whole of the debts, and Nichols under took that he should perform this contract. This was no agreement made by Green and Nichols with the creditors or for their benefit, but one with Roberts to exonerate him from his liability for the debts of the firm by payment, which Green was to make, and in case of his default, such payment to be made by Nichols. All the liability incurred by either, was on the bond, and this was to the obligee only." Upon the principle as thus stated, it would be hard to sustain the right of the mortgagee to sue the vendee directly.

Chancellor KENT, in *Cumberland* v. *Codrington*, 3 John. Ch. Ca. 229, adopted the principle of *Tweddell* v. *Tweddell*, *supra*, in the administration of a decedent's estate to the full. But in 1830 the law was changed by the Revised Statutes (1 R. S. 749, sec. 4), providing that mortgages should always be paid by the realty, unless in the case of a will it were specially directed otherwise. The statute does not apply to liens which arise by operation of law as for unpaid purchase-money: *Wright* v. *Holbrook*, 32 N. Y. 587; *Lamport* v. *Beeman*, 34 Barb. 239; and as to such cases it is probable, in the light of *Burr* v. *Beers*, that *Cumberland* v. *Codrington* does not express the law of to-day.

H. G. W.

(*To be continued.*)