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THE ASSUMPTION OF ENCUMBRANCES BY THE PURCHASER OF LAND.

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In Pennsylvania it appears most clearly both that the purchaser of encumbered premises incurs no personal responsibility without special agreement, express or implied, and that the responsibility, when incurred, is only to indemnify his grantor. In the early case of *Kearney* v. *Tanner*, 17 S. & R. 94, a grantor who had been compelled to pay the deficiency on the mortgage-debt after a sale of the premises, brought assumpsit for the same against his grantee, who had bought with a knowledge of the encumbrances. McKean, J., in the lower court, charged the jury that, "The defendant was liable to pay the ground-rent and encumbrances on the property if he knew of them when he purchased. That he knew of the encumbrances may be inferred from his payment of the interest. If the fact be that he agreed to take the house subject to these encumbrances, then he undertook to pay them and indemnify the plaintiff, and is liable in this action. * * * Although the defendant purchased the property, yet the plaintiff continued liable, and Kearney became bound to indemnify him. The fact whether he purchased subject to these encumbrances you will determine; and if you determine in the affirmative, then it results that if the plaintiff is bound to pay, the defendant is liable."

On error to the Supreme Court, Rogers, J., said: "It has been erroneously supposed that it was adjudged by the late Judge McKean, that a purchaser of mortgaged premises, made himself

personally liable to the mortgagee for the amount due on the mortgage. If such had been the decision, it was well calculated to create alarm, as the assertion by high authority of a principle heretofore not so understood by the profession and most extensive in its operation. I was pleased to find on a careful examination that this does not appear to have been his opinion. The charge of the court admits of this construction, and when fairly considered no other meaning can be collected from it; that when there was an agreement that the vendee should pay the mortgage-money and afterwards the vendor had been compelled to pay the amount due on the mortgage, he could sustain an action for money paid, laid out and expended, against the purchaser. That an action will lie, when there is a special agreement, either express or implied from the circumstances, is not denied; for it forms part of the purchase-money or price of the land which it is just and in compliance with his agreement that the vendee should pay." But the case which gave direction to all the subsequent decisions was *Campbell* v. *Shrum*, 3 Watts 60. Shrum entered into articles of agreement with Astley and Gibson, for the purchase of land, which he agreed to convey to Campbell, "subject to the payment of all the purchase-money and interest now due on an article of agreement between Thomas Astley and James Gibson of the one part and the said Shrum of the other part." The purchase-money not having been paid, Shrum brought an action in covenant to the use of Astley, who had become clothed with Gibson's interest against Campbell upon the agreement. SERGEANT, J., said: "Here the principal consideration for Shrum's agreement to transfer to Campbell was that Campbell should discharge the arrears due by Shrum for the land, and relieve and exonerate him from his liability therefor. No one that reads this clause can doubt that the understanding of the parties was that Campbell agreed to do so. Without this construction, Shrum would have been left to pay Astley and Gibson in the first instance, and afterwards be turned round to recover upon the equitable claim for indemnity which he would have against Campbell. Whereas, it was intended under the agreement, that Campbell should pay off these arrears forthwith; and a breach of the undertaking upon his part occurred when he omitted to do so, for which Shrum could at once bring his action." Whether the construction adopted was the only or the best one, it is too late to inquire, but we may observe that Campbell's responsibility was held to be merely

that of indemnifying Shrum, and that the action was brought not in the name of Astley against Campbell, but in the name of Shrum to the use of Astley. And no other form could have been sustained in the face of the earlier decision of *Beach* v. *Morris*, 12 S. & R. 16. Beach entered into articles of agreement for the sale of land, purchase-money to be paid in instalments, with Wilson, who assigned the articles subject to the payment of the whole purchase-money to the defendant Morris. No purchase-money having been paid, Beach brought an action of debt therefor against Morris. TILGHMAN, C. J., "I do not see how the action can be supported, because between the plaintiff and the defendant there is no privity, either of contract or estate. That there is no privity of contract is evident, because privity of contract is *personal* privity and is confined to the *persons* of the contracting parties, and there can be no privity of estate, because the estate has never passed from the plaintiff. The assignment of Wilson passed to the defendant all the right which Wilson had, that is to say, an equity by virtue of which he was entitled to demand a conveyance on payment of the purchase-money. Wilson, notwithstanding his assignment, remained liable for the purchase-money on his covenant in the articles of agreement between him and the plaintiff, and from this liability he could not withdraw himself by substituting the defendant in his place. * * * In no point of view is the plaintiff entitled to this action against the defendant, who never made any kind of contract with him. The plaintiff made his bargain with Wilson and kept the legal estate in himself by way of security; and the defendant contracted not with the plaintiff, but with Wilson, and is liable to Wilson on that contract, whatever it may have been." That contract was one of indemnity, as is shown by *Campbell* v. *Shrum*, which GIBSON, C. J., in *Blank* v. *German*, 5 W. & S. 40, explained as follows: "Had the plaintiffs below *purchased* the property subject to the mortgage-debt, the case would have been within the principle of *Campbell* v. *Shrum*, because the price would have been estimated at the clear value less the mortgage-debt, and it may be said, that so much of the price would have been virtually retained to answer it; so that the plaintiff would have lost that much, had he been compelled to pay with other funds than those set apart for the purpose in the defendant's hands. As it would have been a fraud in them to retain his money and let him be pursued for it on his bond, they would have been held liable for it on an implied promise to

apply it to the purpose intended. And it may be said in every such case, that he who purchases expressly subject to an encumbrance, as between the vendor and himself makes the debt his own, which is the principle of *Campbell* v. *Shrum.*" The expression occasionally used in this opinion (and it is true of others), "subject to an encumbrance," must be understood to mean, subject to the payment of an encumbrance, which was the clause in the deed, as the reporter's statement shows. The facts of *Woodward's Appeal*, 2 Wright 326, were as follows: A guardian had purchased for her ward premises "under and subject, nevertheless, to the payment of a certain mortgage-debt or sum of $2000," and the court held that by so doing, she had incurred a personal responsibility, against which she should be indemnified by her ward's estate. Judge STRONG said, in the course of his reasoning, without adopting either view, that there were two explanations of the liability of a grantee in such case. "Thus, in *Blank* v. *German*, 5 W. & S. 42, it was stated to be a general principle that he who purchases expressly subject to an encumbrance, as between the vendee and himself, makes the debt his own. * * * There is a class of cases which treat a purchase expressly subject to a charge or encumbrance as constituting an engagement by the vendee to indemnify the vendor against loss or expense in consequence of the charge or encumbrance. * * * But it is of no importance now to inquire whether Mrs. Woodward, by taking a deed from Mr. Spackman for the Arch street house, 'subject to the mortgage thereon,' assumed the debt as between the grantor and herself, or whether she only engaged to indemnify him against being called upon to pay it." The distinction as pointed out is without a difference. The last two propositions are precisely the same. For the grantee to assume a debt between himself and his grantor is to assume the debt for his grantor only, and for no other person in the world; *i. e.* to indemnify him, and this appears from the words themselves as well as from the cases where they are used synonymously. That Judge STRONG thought so himself may be seen from his language in *Burke* v. *Gummey*, 13 Wright 518: 'We have no cases that are not reconcilable with the doctrine that one who purchases expressly subject to an encumbrance makes the debt his own, and assumes to protect the vendor.'"

Taylor v. *Preston*, 29 P. F. Smith 136, is a literal repetition of *Campbell* v. *Shrum*. In *Girard Insurance Co.* v. *Stewart*, 5 W.

N. C. 87, a mortgagee brought assumpsit for a deficiency directly against a grantee of the premises, under and subject to the payment of the mortgage, who pleaded that he took title as a mere dry trustee, of which his grantor had full knowledge. The court held the mortgagee could not recover, because the defendant personally had not made any agreement about the mortgage at all.

But the law upon this point has been thrown into great uncertainty by the later decisions arising out of the administration of decedent's estates in contests between the heirs or devisees and the personal representatives as to the fund out of which encumbrances should be paid. In *Kezey* v. *Kezey*, 9 S. & R. 71, Kezey, Sr., devised a tract of land which he had bought from one Lowrie, subject to purchase-money due the Commonwealth, to his executor, Kezey, Jr. The executor claimed credit in his account for payment of the purchase-money, which was disallowed on the ground that the decedent had never made it his personal debt. TILGHMAN, C. J., said, *inter alia*, "It may be considered, however, as very clear that even supposing the original taker-up of the land (Lowrie) to have been liable to an action for the purchase-money, that liability would not extend to his assignee." In *McCracken's Estate*, 5 Casey 427, Socin had covenanted to convey land to Springer, purchase-money to be paid in annual instalments; Springer, after paying several instalments, assigned his interest in the land to McCracken, subject to the payment of the unpaid instalments. McCracken, after paying several instalments, died, having devised the land to his daughters, who contended that they should be exonerated by the payment of the instalments in arrear out of the decedent's personal estate. The case appears to have been little considered by the counsel or by the court. LOWRIE, J., said, "Then comes the question, was the debt due to H. Socin a debt of the estate? We think it was; for though McCracken did not bind himself by covenant to pay the balance of the purchase-money due to Socin, yet by buying the equitable title and getting the assignment of the articles from Springer, he impliedly undertook to pay the balance and keep Springer clear of it. His debt or duty was directly to Springer, and through him to Socin." The language of the court shows that there was no intention to abandon the uniform doctrine of the previous cases that the liability of the grantee was simply to indemnify his grantor. But under *Kezey* v. *Kezey*, *supra*, and the English cases this did not make the encumbrance his personal debt, so that it

should be thrown for payment upon his personalty. The second ground for the decision is the only one on which it can satisfactorily rest, viz: that it was the manifest intention of the testator that his daughters should take the land in fee discharged of the encumbrances. The intention of the testator is the law of the will, and it being clear there was no occasion to resort to arbitrary legal principles designed to regulate administration in the absence of intention. In *Hoff's Appeal*, 12 Harris 200, the decedent devised to his wife premises which he had purchased for $13,900, no reference being made in the deed to any mortgage, but the receipt endorsed on it was for $5500, "which with a certain mortgage debt of $8400 made of the same premises by the above-named Abner Elmes to Isaac Harvey, Jr., and the interest due and to grow due thereon, are to be paid by the said John Hoff, is in full of the consideration for the above granted premises." The court held that the mortgage should be paid out of the personalty. WOODWARD, J., said, "Now it is immaterial whether this amounted to a covenant on the part of Hoff to pay the mortgage, though according to the doctrine of *Campbell* v. *Shrum*, 3 Watts 60, and the cases there cited, it might be easy to say it did; but surely there can be no doubt he would be liable to an action for money had and received at the suit of a mortgagee. * * * If then, Hoff in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remain unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in assumpsit, if not in covenant." This is the first time in Pennsylvania that a grantee who had assumed a mortgage was held to have made it his own personal debt, not only in the sense of the English cases so that his executors shall pay it, but also so as to be himself liable to the mortgagee at law. The decision appears to have been a clear

departure from the principle upon which all the previous cases had rested.

The New York authorities were not cited by the counsel or the court, and the judgment appears to have been founded in part upon *Belvedere* v. *Rochfort*, *supra*; a case that may be fairly considered overruled, and in part upon the argument of counsel therein, and the discussion of it contained in 2 Powell on Devises 676. The circumstances manifesting the intention of the testator to make the encumbrance his own personal debt, were far less cogent than those contained in that case, and it is to be regretted that a very doubtful decision was extended any further. But we may positively complain that the court should also adopt as law the contention of counsel that such a stipulation for the especial benefit of the vendor, and incidentally for the benefit of the mortgagee, made the vendee liable to the latter at law.

This has never been decided in England in any case, and in cases of administrators there, the question of the liability of a decedent's personalty to exonerate his realty from encumbrances, is at least independent of the circumstances of his liability to the creditor at law. For instance, in *Parsons* v. *Freeman*, he was held to have made the encumbrance his own personal debt, although it was admitted he had not made himself liable to the mortgagee at law, and on the other hand, in many cases, *Tankerville* v. *Fawcett*, *Shafto* v. *Shafto*, *Mattheson* v. *Hardwicke*, *Hedges* v. *Hedge*, *supra*, he was held not to have made the encumbrance his personal debt, although he had made himself liable to the owner of it at law. But the court joined them both together, and Lord THURLOW'S argument while at the bar was precipitated as the law of Pennsylvania. It was followed in *Lennig's Estate*, 2 P. F. Smith 137. The decedent had bought the premises "in consideration of $20,000 lawful money of the United States paid, &c., and of the assumption of the said F. Lennig of the two mortgages hereinafter particularly mentioned." And in the receipt the assumption of the two mortgages was mentioned as a part of the purchase-money. The court held that the mortgages should be paid out of the personal estate, relying upon *Hoff's Appeal*, *supra*, of which AGNEW, J., said, "It is there held that where the purchaser paid the full price of the land by including the encumbrances which he assumed to pay as the entire consideration of the premises, the purchaser made the debt his own, both as it regards the mortgagor

and mortgagee, and that an action would lie for the mortgagee against the purchaser for the amount of his encumbrance retained out of the price." *Metzgar and Gernert's Appeal*, 21 P. F. Smith 330, need only be noted in this connection as decided upon very obvious principles, without involving any special discussion of the point now under consideration. The following passage is quoted simply to show that SHARSWOOD, J., did not lose sight of the qualifying phrase, the force of which escaped Judge STRONG in *Woodward's Appeal, supra.* "That George Steininger, Sr., was personally liable for the Metzgar dower is undisputed. His deed to his son, George Steininger, Jr., for the land upon which it was an encumbrance subject to that dower *as between him and the vendee* made it the debt of the latter."

It would be impossible to reconcile with previous and subsequent decisions of the same court the purely *obiter* observations in *Hoff's Appeal* and *Lennig's Estate*, which were cases of administration, about the direct liability of the purchaser of property under and subject to the payment of a mortgage to the mortgagee at law. The circumstance seems to have been overlooked in them that in order that a third party may sue on a promise made to another for his benefit, it must have been not incidentally so but for his especial benefit. A trust must, as it were, be declared for him by the promisee's giving to or leaving in the hands of the promisor money or goods for his benefit: *Blymire* v. *Boistle*, 6 Watts 182; *Hind* v. *Holdship*, 2 Id. 104; *Vincent* v. *Watson*, 6 Harris 96; *Beer* v. *Robinson*, 9 Barr 229; *Campbell* v. *Lacock*, 4 Wright 448; *Torrens* v. *Campbell*, 24 P. F. Smith 471; *Nelson* v. *Blight*, 1 Johns. Cas. 205; *Weston* v. *Barker*, 12 Johns. 276.

Indeed under the last judicial statement of the principle in Pennsylvania, it would seem impossible to apply it in favor of a mortgagee: *Kountz* v. *Holthouse*, 5 W. N. C. 463. MERCUR, J.: "The general rule is that an action on a contract, whether express or implied, must be brought in the name of the party in whom the legal interest in such contract was vested: 1 Chit. Plead. 2. Yet many cases are to be found in which the right of a third person to sue has been sustained on a promise made to another. Hence, if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, an action lies by the person beneficially interested. This right of action is not restricted to cases of money only, but extends

to an agreement to deliver over any valuable, so that such third party is the only party in interest. But when a debt already exists, a promise by a third person to pay such debt being for the benefit of the original debtor and to protect him against it, he must necessarily have a right of action against his promisor to secure that protection. If the third person also become liable to the original creditor, he would be subject to two separate actions at the same time, and for the same debt. This would be manifestly unjust." But until two cases to be considered presently were reported, the profession in Pennsylvania remained in a state of honest doubt whether the decisions in *Hoff's Appeal* and *Lennig's Estate* were to be restricted to cases of the administration of decedents' estates where similar language should be found, or whether the doctrine of indemnity was to be absolutely abandoned and the law adopted as now laid down in the state of New York. In *Moore's Appeal*, 36 Leg. Int. 96, the intestate had purchased premises "for the consideration of the sum of $9500, * * * under and subject, nevertheless, to the payment of the aforesaid mortgage-debt of $8500, and the interest due and to grow due thereon." The receipt was for $9500, "being the full consideration-money above mentioned." The question was between the heir and the personal representative whether the intestate had not made the mortgage his own personal debt so as to entitle the heir to be exonerated from it out of the personal estate. The Orphans' Court decided this question against the heir, saying, *inter alia:* "The result of the cases is this, that the promise of W. F. Moore, the decedent, as shown by his deed of purchase, was a promise of indemnity upon which his vendor would have recovered against the decedent only after payment by himself of the mortgage-debt, and upon which the mortgagee could not have maintained a personal action against the decedent." The Supreme Court affirmed the decree, SHARSWOOD, J., saying: "The question then is, did the decedent make this mortgage-debt his own so as to entitle his heir to call upon the personal estate to exonerate the land? An examination of the cases which have been decided on the legal effect of such a clause in a conveyance shows, we think, that unless there exist special circumstances to raise a covenant to pay the encumbrance, it amounts only to an indemnity to the vendor." In *Samuel* v. *Peyton*, 36 Leg. Int. 96, Wheeler, being the owner of a tract of ground, agreed to convey the same to Kressler for $7500, and to advance him the further

sum of $35,700, to build fifty houses thereon, Wheeler to be secured by a bond and mortgage on each house, the houses alone to be liable for the amount of the bonds, and neither Kressler nor his assigns to be personally liable therefor. To carry out this intention Wheeler conveyed the land to Pierie, a man of straw, who executed the fifty bonds and mortgages to Wheeler, and then conveyed the premises to Kressler. The plaintiffs, by divers assignments, became the owner of one of these bonds and mortgages, and the defendant, by divers conveyances, the owner of the premises, under and subject to the payment of it. The plaintiff sold the premises under the mortgage, and brought an action of assumpsit against the defendant, who had ceased to have any title or interest therein, for the deficiency. The defendant pleaded specially the agreement between Wheeler and Kressler that the latter and his assigns should not be personally liable upon the bonds, to which the plaintiff demurred, and the court below sustained the demurrer. The Supreme Court reversed the judgment, SHARSWOOD, C. J., saying: "In Moore's Appeal, which has just been decided, it has been held by this court that the conveyance of land 'under and subject' to a mortgage or other encumbrance, is of itself a covenant of indemnity only for the protection of the vendor. It was shown in that case, on a review of the authorities, that it was only where there was an express agreement to pay the encumbrance, or where such agreement might be implied from the circumstances, that there was liability to the encumbrancer, or that he could sue in the name of the vendor to his use. The vendor must sue, and must show that he has been damnified; or at least must show that his danger of damnification is imminent. The special pleas in this case not only expressly denied any agreement by the defendant to pay the mortgage, but averred a state of things which showed that his vendor never could be damnified. If it was expressly agreed that the first grantee from the party creating the encumbrance should not be personally liable, it is evident that no subsequent grantee could become so without his own express agreement. The first link in the chain by which a subsequent grantee might be called upon to indemnify his vendor would be wanting. On the demurrer to the special pleas of the defendant, we think he was entitled to judgment."

These cases deliberately adopt, as the law of Pennsylvania, the theory that the purchaser of premises under and subject to the

payment of a mortgage does not make it his personal debt, but only undertakes to indemnify his grantor, and that he cannot therefore be made directly liable in assumpsit to the mortgagee.

Finally, so far is the doctrine from public approbation that an Act of June 12, 1878, has been passed to destroy the responsibility of the grantee in its unqualified shape, and to rest what is left of it upon the doctrine of indemnity.

In Massachusetts, the liability of the grantee who assumes encumbrances, is that of indemnifying his grantor: *Pike* v. *Brown*, 7 Cush. 133; *Brannan* v. *Dowse*, 12 Cush. 228. And the mortgagee, for want of privity, cannot maintain an action against such grantee: *Miller* v. *Whipple*, 1 Gray 31. The language of *Tumas* v. *Durgin*, 119 Mass. 500, was not intended to disturb either of these principles, as may be seen by reference to *Pettee* v. *Pennard*, 120 Mass. 522. And in the administration of the estate of a decedent who has bought subject to a mortgage forming part of the consideration, the mortgage will remain charged upon the realty, unless the will manifest an intention that it shall be paid out of the personalty: *Hewes* v. *Dehon*, 3 Gray 205; *Andrews* v. *Bishop*, 5 Allen 491.

In Connecticut, the purchaser of an equity of redemption incurs no liability for encumbrances: *Post* v. *Bank*, 28 Conn. 433. But if he agree to buy subject to the encumbrance, and it is deducted from the purchase-money, he will be held to have undertaken to indemnify his grantor: *Townsend* v. *Ward*, 27 Conn. 614. In *Foster* v. *Atwater*, 42 Conn. 250, the mortgagee was allowed to sue the grantee who had assumed the mortgage directly, but not from any principle of privity, but because the grantee having assigned to him all his right of action, he was allowed by statute to proceed in his own name.

In Iowa, the purchaser of an equity of redemption is not held liable for the mortgage-debt: *Johnson* v. *Morrell*, 13 Iowa 300; but when he has assumed it, he is subject to the same rules of law as ultimately adopted in New York: *Corbet* v. *Watsman*, 11 Iowa 86; *Moses* v. *The Clerk*, 12 Id. 139; *Thompson* v. *Bertram*, Id. 476; *Scott's Adm'r* v. *Gill*, 19 Id. 187; *Bowen* v. *Kuntz*, 37 Id. 240; *Ream* v. *Jack*, 44 Id. 325.

See also Story's Eq. Jur., vol. 1, sec. 574–576; vol. 2, sec. 248; Thomas on Mortgages, ch. 9 and 15; Jones on Mortgages Ch. 15–17.