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Mortgages -- Contract of Assumption -- Consideration

Peter Hairston

then have jurisdiction also of the ancillary proceedings, regardless of the usual requisites for federal jurisdiction in the latter. In view of that situation, would it not be a bit incongruous to hold that, if one district court had jurisdiction of the principal suit, the other could not rely upon *that* jurisdiction to sustain the ancillary proceedings brought before it? Policy would seem to demand that the district courts stand in readiness to aid one another without undue formality, and that, as long as the system of equity receiverships exists, it be given every assistance to the speedy and efficient accomplishment of its purpose.[18]

D. W. MARKHAM.

Mortgages—Contract of Assumption—Consideration.

A certain E. C. Vest was heavily indebted to various persons. Some of these creditors held first and second mortgages on two lots owned by him; the rest were unsecured. In order to put this property beyond the reach of the latter group, he conveyed it to his mother-in-law, Mrs. Booth; and, apparently for the purpose of creating the appearance of a sufficient consideration, she assumed the secured debts. She then reconveyed by warranty deed to her daughter, Mrs. Vest. The property having been sold to satisfy a prior lien, the second mortgagee makes claim in the present suit against Mrs. Booth's estate on the agreement of assumption.[1] The West Virginia court *held,* the promise was without consideration and hence unenforceable.[2]

Under this view of the transaction, Mrs. Booth was only a conduit,[3] and the conveyance to her was merely a sham device to get title

[18] Compare §56 of the Judicial Code, 28 U. S. C. A. §117 (1927), and REPORT PAMPHLET No. 1: THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1926-27), ANNUAL REPORT OF SPECIAL COMMITTEE ON EQUITY RECEIVERSHIP, 19-31.

[1] The suit was originally brought in chancery by the receiver of a bank, which held an unsecured claim reduced to judgment against Mrs. Booth, to set aside certain conveyances made by her to her children and children-in-law on the grounds that they were voluntary and made without consideration and to defraud and hinder creditors. Pending this suit, Mrs. Booth died. Thereupon, her administrator was substituted, and he made all of her heirs and all persons making claims against the estate parties defendant. The appellee, a second mortgagee of the lots, was made a party as one of the latter group. She answered by setting up the claim against the estate in her cross-bill. Brief of Appellee in the Supreme Court of Appeals of West Virginia in the case of Lawhead v. Booth, 177 S. E. 283 (W. Va. 1935) pages 2-5.

[2] Lawhead v. Booth, 177 S. E. 283 (W. Va. 1935). The sole authority cited by the court was 1 WILLISTON, CONTRACTS (1920) §394, which says that a promisor of a third party beneficiary contract may set up want of consideration as a defense to a suit by the beneficiary.

[3] The so-called "conduit" cases are, however, not in point. They deal with the problem of the attaching of liens upon the property of the conduit. Stow v. Tifft, 15 Johns. 458 (N. Y. 1818) (Does dower attach to the interest of a purchase money mortgagor?); Mills v. Van Voorhies, 20 N. Y. 412 (1859).

seemingly based on good consideration into her daughter.[4] It was never intended that she get the property, and so her promise to assume was not based on any consideration. If this is the proper interpretation to be put on the case, the court is correct; but the parties took an extremely dangerous means to accomplish their end, for there are other equally logical conclusions which may be drawn from the facts.

Thus, the same line of reasoning used in considering the deeds as constituting a single transaction might have led to the opposite result. If Mrs. Booth were a person of some means,[5] her purpose may have been not only "to save" the lots, but also to help the Vests out of a bad financial situation and to give her daughter control of the property. If that were the state of facts, then even a deed made directly to the daughter would furnish sufficient consideration.[6] This is probably consistent with the finding of fraud by the lower court, for the lots would still have been put beyond the immediate reach of creditors without liens. Color is lent this view by the facts that only the mortgage debts were assumed, that the mother-in-law gave a warranty deed, that the deeds were made during the period of economic optimism in April 1928 when the land probably had some speculative value, and that Mrs. Booth did not resist the claim in her lifetime.

There is, however, yet another method by which the estate could have been held, even apart from the question of fraud. The deeds might have been taken at their face value, that is that they were two separate transactions. The mother-in-law, then, got the land in return for her agreement to assume the debts and the fact that she later gave it to her daughter would not alter the already binding contract. The form of the instruments seems to make this the most obvious analysis.[7]

Finally, the court might have reasoned that the plea of no consideration was substantially a setting up by Mrs. Booth of her own fraud. The ostensible consideration for her assumption was the land. To say,

[4] For a discussion of defense available to a grantee of mortgaged realty who assumes the debt see Note (1934) 12 N. C. L. REV. 383. In Boyd v. White, 65 Okla. 141, 164 Pac. 781 (1917), it was held, analogously, that an assumption in a deed which created a resulting trust in the grantor was not based on sufficient consideration.

[5] This assumption is justified from a reading of the appellate briefs submitted in the case and also from correspondence with counsel representing the parties.

[6] Riddle v. Hudson, 68 Okla. 172, 172 Pac. 921 (1919); 1 WILLISTON, CONTRACTS (1920) §102 ("That a detriment suffered by the promisee at the promisor's request is sufficient, though the promisor is not benefited is well settled"); RESTATEMENT, CONTRACTS (1932) §75 (2), ann. (1934) 13 N. C. L. REV. 41.

[7] This point is strongly urged by counsel for appellee in their petition for rehearing dated Nov. 7, 1934. They contend therein that the reconveyance to Mrs. Vest could not have been made at the same time as the original deed since it refers to the volume and page of the Book of Deeds in which that conveyance was recorded and that the second deed was a mere "pocket deed" to be used in case of Mrs. Booth's death.

therefore, that she did not get the land is to say in substance that she held it to keep it away from Vest's creditors or that she immediately conveyed it to her daughter for the same purpose. It is to be doubted whether she should not be estopped to relieve herself of an obligation by the use of such a plea.

The brief of the appellee-mortgagee reveals no less than six conveyances made by or to Mrs. Booth within some three years' time for the sole purpose of defrauding and hindering her own or the Vests' creditors.[8] In such a situation, created by the mother-in-law as well as the Vests and participated in by the whole family, it would seem that any doubts should be resolved in favor of the creditors.

On the court's interpretation of the facts, the result reached in the principal case is defensible. It would not have been under other interpretations. The opinion does not adequately indicate the problems involved.

PETER HAIRSTON.

Mortgages—Fiduciary Relationship of the Parties.

The defendant operated an automobile sales agency. He borrowed money from the plaintiff acceptance company to purchase a car, delivering to the company his promissory note, a mortgage upon, and a bill of sale to, the car, and a trust receipt. That document stated that the defendant would hold the car in storage as the property of the company and would not dispose of it until the note was paid. While in the defendant's display room, the car was sold without the plaintiff's consent. The defendant failed to remit the purchase price; rather he filed a petition in bankruptcy and received his discharge. The acceptance company had been listed as a creditor in the bankruptcy proceedings. Following the filing of the petition, this action for conversion was instituted. The company contended that the defendant's acts came within section 17(4) of the Bankruptcy Act,[a] which provides that discharge in bankruptcy does not release liabilities created by "fraud, embezzlement, misappropriation, or defalcation while acting in any . . . fiduciary capacity." Judgment was rendered for the defendant.[1]

It may be safely stated that the line of cleavage between those who

[8] Brief filed on behalf of Elizabeth E. Keiffer, Appellee, in the Supreme Court of Appeals of West Virginia in the case of Lawhead v. Booth *et al.*, page 8.

[a] 11 U. S. C. A. 35 (4) (1927).

[1] Davis v. Aetna Acceptance Co., U. S., 79 L. ed. 137, 55 Sup. Ct. 151 (1934) (The problem of whether the defendant had wilfully and maliciously injured the plaintiff's property within the terms of subdivision two of the same sections was also presented. The court decided that the evidence showed a technical but not a malicious conversion); *cf. In re* Burchfield, 31 F. (2d) 118 (W. D. N. Y. 1929).