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well as state court denial to Negroes of the privilege of ownership and use of land, influenced the decision of the Court.[12]

Hinging decisions on subtle casuistries will not produce a satisfactory solution to problems in a field where experience more than adequately demonstrates the necessity for measuring methods aimed at discrimination by their consequences rather than by their form. Disregarding the social and constitutional consideration which prompted *Shelley v. Kraemer*, the Missouri court in *Weiss v. Leaon* has sought to evade its responsibility with a distinction that is merely formal.

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Vendor and Purchaser—Duty of Vendor to Accept Assignee's Notes and Mortgage

The defendant contracted to sell real property to the plaintiff's assignor. The contract stipulated that one-half of the purchase price should be paid in cash and the remainder by notes secured by a deed of trust, and that the seller would convey "to the purchaser, or assignee," upon the payment of the purchase price. The original purchaser assigned all of his rights under the contract to the plaintiff corporation, of which he was president, and which tendered the cash and its own notes and deed of trust. The defendant refused to accept the tender. In an action for specific performance, held, nonsuit of plaintiff reversed. The contention that such a contract necessarily imports that credit is given alone to the person with whom the transaction is personally carried out, thereby making it unassignable, is untenable in the absence of adequate expression in the instrument against assignment or some circumstances judicially recognizable *dehors* the agreement.[1]

Contracts for the sale of land or for the sale of merchandise are generally assignable and entitle the assignee to specific performance.[2] However, the undisputed rule is that the vendee cannot by an assignment of the contract compel the vendor to accept the credit of the assignee.[3] Hence if the performance of the assignor is construed as being

morals, media for crime, delinquency, etc., which a policy of legalized ghetto housing has caused. See, *e.g.*, DRAKE AND CLAYTON, BLACK METROPOLIS (1945); WOOFTER, NEGRO PROBLEMS IN CITIES (1928).

[12] While the opinion of the Court does not refer to the sociological reasons urged by many who filed briefs as *amici curiae*, opposing the covenants, the decision must be analyzed with regard to these pressures. The cases were not decided by a court unaware of the results which racial residential segregation produce. See Crooks, *op. cit. supra* note 5, at 519.

[1] Cadillac-Pontiac Co. v. Norburn, 230 N. C. 23, 51, S. E. 2d 916 (1949).

[2] N. C. GEN. STAT. §1-57 (1943); 5 WILLISTON, CONTRACTS §1439A (Rev. ed. 1937).

[3] Nelson v. Reidelback, 68 Ind. App. 19, 119 N. E. 804 (1918); Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724 (1894); Atlantic & N. C. R. R. v. Atlantic & N. C. R. R., 147 N. C. 368, 61 S. E. 185 (1908); Golden v. Tentzen & Schneyer, 92 Pa. Super. 202 (1927); 2 WILLISTON, CONTRACTS §419 (Rev. ed. 1937).

personal, the assignee cannot maintain an action for specific performance without tendering performance of his assignor. The proper standard for determining this would seem to be the intention of the parties as revealed by the terms of the contract and by the surrounding circumstances.[4]

In cases involving contracts similar to the one in the principal case, one line of decisions has held that the vendor may not be forced to accept the notes and mortgage of the assignee. This result has been reached even in contracts containing a provision that the agreement would be binding on the assigns of the parties,[5] as well as those without such an assignability clause.[6] In the only previous North Carolina case discovered, an option called for notes and a deed of trust signed by two optionees, one of whom assigned to the other. The court held that the optionor was entitled to the notes and deed of trust specified unless the assignee tendered cash.[7] These decisions are based on an interpretation of the contract to the effect that the vendor relied on the character and financial responsibility of the original vendee as his security. "To hold otherwise would render it possible for a vendor to have foisted upon him a vendee whose financial responsibility in the case of deficiency judgment upon foreclosure he would not have accepted."[8] The financial responsibility and character of the vendee being a substantial inducement to enter the contract, to allow the assignee to compel the vendor to accept his obligation would be to change the terms of the contract.

A contrary view has been taken in at least two decisions which have held that the vendor may be compelled to accept the notes and mortgages of the assignee in place of those of the vendee.[9] In these two cases the courts interpreted the contract to mean that the mortgage rather than the personal responsibility of the vendee was the material

[4] North Carolina Bank & Trust Co. v. Williams, 201 N. C. 464, 160 S. E. 484 (1931).

[5] Muller v. Raskind, 100 N. J. Eq. 258, 135 Atl. 682 (Ch. 1927), *aff'd*, 103 N. J. Eq. 20, 142 Atl. 918 (Ct. Err. & App. 1928); Lojo Realty Co. v. Johnson's Estate, 227 App. Div. 292, 237 N. Y. Supp. 460 (1st Dep't 1929), *aff'd*, 253 N. Y. 579, 171 N. E. 791 (1930); Golden v. Tenzen & Schney, 92 Pa. Super. 202 (1927).

[6] Nelson v. Reidelback, 68 Ind. App. 19, 119 N. E. 804 (1918); Houncher v. Salyards, 155 Iowa 509, 133 N. W. 48 (1911); Kutachenski v. Thompson, 101 N. J. Eq. 649, 138 Atl. 569 (Ch. 1927), 28 COL. L. REV. 384 (1928); Adams v. Samuel, 82 Ohio App. 305, 75 N. E. 2d 493 (1947).

[7] Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053 (1909). The court said that the optionor had the right to have the contract accepted and executed according to its terms, but she made no such claim or demand at the time of tender by assignee and thereby waived this right.

[8] Lojo Realty Co. v. Johnson's Estate, 227 App. Div. 292, 237 N. Y. Supp. 460 (1st Dep't 1929), *aff'd*, 253 N. Y. 579, 17 N. E. 791 (1930), 30 COL. L. REV. 420 (1930), 39 YALE L. J. 913 (1930).

[9] Montgomery v. DePicot, 153 Cal. 509, 96 Pac. 305 (1908); Moran v. Borrello, 4 N. J. Misc. 344, 132 Atl. 510 (Sup. Ct. 1926). Both of the contracts involved in these cases contained an assignability clause.

inducement for its execution, and tender by the assignee of his own notes and mortgage would suffice.

If the vendee intends to be free from further liability and the vendor understanding this accepts performance by the assignee, the vendee is discharged from further liability under the contract. Williston views such a transaction as a proposed novation, which the vendor may always refuse, rather than as an assignment.[10]

It seems manifest that the insertion of the assignability clause in a contract indicates an acquiescence on the part of the vendor to the assignment of the rights and duties under the contract by the original vendee, but it is merely a contributing factor, never conclusive.[11] On the other hand in a case involving a contract with a clause expressly denying the right to assign, the North Carolina Court said that restrictions on assignment do not apply when the contract is clearly objective and gives clear indication that the personality of the parties is in no way considered.[12]

The circumstances under which the agreement was made may also be considered. It has been said that the vendor did not negotiate or contract for the personal liability of the vendee where it appeared from the evidence that the vendor did not know the vendee.[13] In the principal case the holding of the court was reinforced by evidence that the vendee was acting as the agent of the corporate assignee in the transaction.[14]

In case there is a foreclosure of the mortgage, the decree generally provides that if the sale produces less than the amount due on the mortgage, the mortgagor or other person liable shall pay the deficiency.[15] Here, clearly, the financial responsibility of the vendee might have been a vital inducement for the contract, and the vendor should not be compelled to take the credit status of the assignee in the place of the vendee for the deficiency. But in North Carolina, by statute,[16] the deficiency

[10] 2 WILLISTON, CONTRACTS §420 (Rev. ed. 1937).

[11] Greenberg v. Schanger, 229 N. Y. 114, 127 N. E. 889 (1920); Swarts v. Monagamult Electric Lighting Co., 26 R. I. 436, 59 Atl. 111 (1904); *cf.* Montgomery v. DePicot, 153 Cal. 509, 96 Pac. 305 (1908); 2 WILLISTON, CONTRACTS §423 (Rev. ed. 1937).

[12] Atlantic & N. C. R. R. v. Atlantic & N. C. R. R., 147 N. C. 368, 61 S. E. 185 (1908).

[13] Carluccio v. Hudson St. Holding Co., 142 N. J. Eq. 449, 57 A. 2d 452 (Ct. Err. & App. 1948). Specific performance denied on the ground that the contract was obtained by fraud.

[14] Cadillac-Pontiac Co. v. Norburn, 230 N. C. 23, 28, 51 S. E. 2d 916, 920 (1949). It is uncertain from the opinion whether the fact of the agency and the intended use of the land by the corporation was disclosed to the vendor. It would seem to have bearing only if the agency were known.

[15] TIFFANY, THE MODERN LAW OF REAL PROPERTY §942 (Zollmann's ed. 1940).

[16] N. C. GEN. STAT. §45-36 (1943). In order to invoke the provisions of this statute there must be a foreclosure sale of real property and it must be apparent on the face of the evidence of indebtedness that it is for the balance of purchase money for real estate.

judgment on a note secured by a purchase money mortgage, or deed of trust, has been in effect abolished. It might be said that the vendor, being unable to obtain a deficiency judgment against the vendee, relies on the mortgage, or deed of trust, for his security and not on the financial responsibility of the vendee. Therefore the duty to tender the mortgage, or deed of trust, and notes evidencing indebtedness, may be assigned and the vendor will be compelled to accept the assignee's performance. Two considerations, however, argue against compelling the vendor to rely on a person other than the original vendee. The vendor may have considered the financial ability of the vendee to pay the installments as they become due in order to avoid the necessity of a foreclosure sale. In addition, the character and reputation of fair dealing of the vendee may have been bargained for, since if the value of the land falls below the debt secured by the mortgage, or deed of trust, the debtor, though financially responsible, may escape liability by an intentional default in payment.

The North Carolina Court holds that the note is the personal obligation of the debtor and the mortgage is a direct appropriation of property to its security and payment.[17]. These remedies against the person and property are entirely different and while subsisting and concurrent, resort may be had to either.[18] Although there is no case in point, it is conceivable that the vendor might avoid the effect of the deficiency judgment statute by disregarding the mortgage and suing on the note alone. Here, clearly, the vendor looks solely to the financial responsibility of the vendee for recovery.

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[17] Morrison v. Chambers, 122 N. C. 689, 30 S. E. 141 (1898); Bobbitt v. Stanton, 120 N. C. 253, 26 S. E. 817 (1897); Capehart v. Dettrick, 91 N. C. 344, 353 (1884).

[18] Capehart v. Dettrick, 91 N. C. 344, 353 (1884).