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Defendant's testator purchased certain land and gave his note for a portion of the purchase price, executing at the same time a deed of trust to secure the note. Subsequently he sold the land and the grantee "assumed" the mortgage debt. After this the mortgagee without the consent of the mortgagor-defendant released a portion of the land from the mortgage lien. Plaintiff as assignee of the mortgagee brought an action to recover on the note. Defendant contended that when the grantee assumed the obligation, the grantee became the principal debtor, he (the mortgagor) his surety, and that therefore the release of the land by the mortgagee released him from liability. *Held:* The relation of principal and surety existed only between the mortgagor and grantee, and the mortgagee's rights were not affected by the release of the property.[1]

It is generally held that where the purchaser of an equity of redemption promises the mortgagor to assume the mortgage debt, he becomes personally liable to the mortgagor or his assignee for the payment of the debt itself or for the deficiency after foreclosure.[2] But a purchase of the equity "subject to" the mortgage does not amount to an assumption and the mortgagee has no personal action against the grantee on the debt.[3] In both cases, however, the mortgagor remains personally liable to the mortgagee.

Where the grantee "assumes" the obligation, all of the cases found, except the principal case, hold that the grantee becomes the principal debtor and the mortgagor his surety, not only as between these two parties but as to the mortgagee as well.[4] If the mortgagee

[1] Brown v. Turner, 202 N. C. 227, 162 S. E. 608 (1932).

[2] In North Carolina, at one time, the result could be obtained only upon the equitable theory of subrogation. Woodcock v. Bostic, 118 N. C. 822, 24 S. E. 362 (1896) (third-party beneficiary theory rejected, mortgagee's rights not assignable); Baber v. Hanie, 163 N. C. 588, 80 S. E. 57 (1913) (assignee protected, third-party beneficiary theory rejected). Since 1920, however, the mortgagee may sue on a third-party beneficiary contract basis. Rector v. Lyda, 180 N. C. 577, 105 S. E. 170 (1920); Parlier v. Miller, 186 N. C. 501, 119 S. E. 898 (1923); Coxe v. Dillard, 197 N. C. 344, 148 S. E. 545 (1929); Sanders v. Griffin, 191 N. C. 447, 452, 132 S. E. 157 (1926); Keller v. Parrish, 196 N. C. 733, 147 S. E. 9 (1929); (1929) 8 N. C. L. REV. 85.

[3] Harvey v. Kinston Knitting Co., 197 N. C. 177, 148 S. E. 45 (1929); (1929) 8 N. C. L. REV. 85.

[4] The court in White v. Augello, 142 Misc. Rep. 233, 254 N. Y. Supp. 228 (1931), lays down the rule as follows: "When in a deed a grantee assumes and agrees to pay, as a part of the consideration of the grant, a mortgage upon the premises conveyed, the relationship of the mortgagor to the mortgagee is, as between himself and the grantee, altered; the mortgagor ceases to be the

learns of the transaction, a complete suretyship contract is then in existence; and if the mortgagee and grantee deal with the property so as to injure the mortgagor, without his consent, he is released to the extent of his injury.[5] Accordingly, it is held that where the mortgagee releases all the property securing the debt the mortgagor is entirely released.[6] In case he releases only a portion of the property, the mortgagor is entitled to have the mortgage credited in an amount equal to the value of the property released.[7] Also, a binding extension of time by the mortgagee, since it prevents the mortgagor from paying the debt and becoming immediately subrogated to the rights of the mortgagee, releases the mortgagor.[8] And where the mortgagee releases the grantee from personal liability, agreeing to look only to the security for payment, the mortgagor is released because he could not go against the grantee for any deficiency.[9]

The court in the principal case places considerable weight upon the fact that the mortgagee could proceed against the mortgagor on

principal obligor, and takes on the relationship of a surety, while a grantee who has assumed and agreed to pay the mortgage becomes the principal debtor." Meldola v. Furlong, 142 Misc. Rep. 562, 255 N. Y. Supp. 48 (1932); Harden v. First Nat. Bank, 6 Pac. (2d) 1060 (Okla. 1932); Miss. Valley Trust Co. v. Bussey, 49 F. (2d) 881 (C. C. A. 5th, 1931); Farmers & Merchants Bank v. Narvid, 259 Ill. App. 554 (1931); Reeves v. Cordes, 108 N. J. Eq. 469, 155 Atl. 547 (1931); Harris v. DePaulina, 40 Ohio App. 57, 178 N. E. 225 (1931).

[5] Meldola v. Furlong, Reeves v. Cordes, both *supra* note 4; Blumenthal v. Serota 155 Atl. 40 (Me. 1931); Bingna v. Bell, 259 Ill. App. 361 (1930); Harris v. Atchison, 183 Minn. 292, 236 N. W. 458 (1931); Grace v. Wilson, 139 Misc. Rep. 757, 250 N. Y. Supp. 212 (1931); *In re* Roth, 272 Fed. 516 (N. D. Ohio 1920); Insley v. Webb, 122 Wash. 98, 209 Pac. 1093 (1922); Gilliam v. McLemore, 141 Miss. 253, 106 So. 99 (1925).
It is usually held, however, that mere negligence on the part of the creditor resulting in the loss of the security will not release the surety. Fuller v. Tomlinson Bros., 58 Iowa 111, 12 N. W. 127 (1882); Schroeppell v. Shaw, 3 N. Y. 446 (1849); Newcomb v. Hale, 90 N. Y. 326, 43 Am. Rep. 173 (1882); Taylor v. Bridger, 185 N. C. 85, 116 S. E. 94 (1923).

[6] Crisman v. Lanterman, 149 Cal. 647, 87 Pac. 89, 117 Am. St. Rep. 167 (1906); Jordon v. Bullard, 145 Ga. 890, 90 S. E. 41 (1916); Heidahl v. Geiser Mfg. Co., 112 Minn. 319, 127 N. W. 1050, 140 Am. St. Rep. 493 (1910).

[7] In *In re* Hunter, 257 Pa. 32, 101 Atl. 79, 80 (1917), the court said: "Where the mortgagor has parted with his title to the mortgaged premises, a release of a part thereof by the mortgagee, without the knowledge or consent of the mortgagor, will discharge the latter from personal liability for any loss to the mortgagee resulting from a deficiency in the proceeds of a subsequent sale in foreclosure proceedings." Meigs v. Tunnicliffe, 214 Pa. 495, 63 Atl. 1019, 112 Am. St. Rep. 769 (1906); Norton v. Henry, 67 Vt. 308, 31 Atl. 787 (1895).

[8] Meldola v. Furlong, Miss. Valley Trust Co. v. Bussey, both *supra* note 4; Bingna v. Bell, Blumenthal v. Serota, Harris v. Atchison, Grace v. Wilson, all *supra* note 5.

[9] *In re* Roth, Insley v. Webb, Gilliam v. McLemore, all *supra* note 5.

the debt without first resorting to the security or the grantee. But that is true in any surety contract. It in no way affects the creditor's duty to retain the security for the mortgagor. If the surety pays he has a right under the doctrine of subrogation to have the debt and the security assigned to him.[10] If the security has been released the assignment can only operate as an assignment of an unsecured debt leaving the mortgagor dependent upon the general assets of the grantee on an equal basis with other creditors. Such a result is inconsistent with the mortgagor's contract and would, in a great many cases, result in a total loss of the debt.

The result of the decision might be justified in fairness on the ground that the mortgagor was not prejudiced. For the unreleased portion of the land was sufficient to satisfy the obligation. It would seem, however, that the rule announced would render the sale of an equity of redemption extremely hazardous to the mortgagor and thus menace this type of security transaction.

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Negligence—Statutory Measure of Damages For Wrongful Death.

A twelve-year-old boy who contributed to his mother's support by carrying papers was killed by what was at most ordinary negligence on the part of the defendant. In an action by the mother, *held,* under the wrongful death statute of Georgia, the plaintiff may recover the *full value* of the life of the child upon whom she was dependent, or who contributed to her support.[1]

The Georgia statute provides for a recovery for the death of a husband, wife, or parent in any event, and for the death of a child if at least partial dependency is shown,[2] where the death is caused

[10] In *In re* Roth, *supra* note 5, at 520, the court says: "The mortgagor, like any other surety called upon to make payment, is entitled to have surrendered unimpaired all securities and remedies which the creditor holds, including in this case both the mortgage and the personal obligation of the Lumber Company to pay the mortgagor's debt to the Supply Company." Schenectady Sav. Bank v. Ashton, 205 App. Div. 781, 200 N. Y. Supp. 245 (1923); Cooper v. Jewett, 233 Fed. 618, (C. C. A. 8th, 1916); O'Neill v. Russell, 192 Wis. 141, 212 N. W. 278 (1927); Stevens v. First Nat. Bank, 117 Okla. 148, 245 Pac. 567 (1925).
In North Carolina it is held that where the surety pays the creditor, the security must be assigned to a trustee or else the payment operates as a satisfaction and in no other way can it be kept alive. Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227 (1888); Peebles v. Gay, 115 N. C. 38, 20 S. E. 173 (1894).

[1] Michael v. Western & Atlantic R. Co., 165 S. E. 37 (Ga. 1932).

[2] See Central of Georgia R. Co. v. Henson, 121 Ga. 462, 463, 49 S. E. 278 (1904) ("partial dependence upon the child's labor, accompanied by substantial