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Security Transactions

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SECURITY TRANSACTIONS

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The subject of Security Transactions does not this year nor will it in future years cover security transactions affecting chattels or other personal property. Chattel transactions are now and will be included under the heading of Commercial Transactions. The subject under review will include real property security transactions and suretyship, except insofar as the latter may involve problems arising in connection with negotiable paper. There are no strict suretyship cases for the period under review except a Federal Court of Appeals case[a] which, while arising in South Carolina, involves no application of South Carolina suretyship law.

ABSOLUTE DEED INTENDED AS MORTGAGE

Another of the frequently recurring cases in which attempt is made to have an absolute deed established as a mortgage is *Britton* v. *Amos*.[1] The complaint sought, in the language of the opinion, "to have a deed, absolute on its face, declared a mortgage on the ground that it was frauduently obtained," and also sought actual and punitive damages for alleged wrongful cutting of timber.

The plaintiff in 1936 had conveyed the land in suit to the testator of the defendants, and at the same time the grantee obtained a deed from the Forfeited Land Commission, which had acquired it on sale for non-payment of taxes.

After testimony by the plaintiff that he had been told by the grantee that he was signing a deed to "the bird rights," and other testimony, the presiding judge ordered a non-suit. In his order, the judge noted that there was no contention that the parties actually intended the deed to be a mortgage, and that there was no evidence that there was any understanding that the deed was to be security for any loans or advances made or to be made. "In short," it was concluded, "plaintiff's case falls short of the degree of proof necessary to establish that the deed in question was a mortgage."

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a. United States v. Five Boro Corp., 310 F.2d 701 (4th Cir. 1962).

1. 241 S.C. 336, 128 S.E.2d 161 (1962). This case is also noted in the Property section at note 22.

The Supreme Court affirmed. It took note of the presumption that an absolute deed is what it purports to be and that the proof required to establish a deed as a mortgage must be clear, unequivocal and convincing. The presumption in this case was not overcome, the requisite proof not having been produced. As is usual in such cases, there was attention to the adequacy of the consideration for the transfer, and here the court concluded that there was nothing to show that the grantee had not paid the "full depression value" of the land.

The case would be another of the ordinary run-of-the-mill type were it not for the fact that while the case was disposed of as if it were the usual absolute deed-mortgage controversy, the thrust of the plaintiff's complaint and of his evidence was limited to showing that he had been deceived as to the contents of the instrument he was signing. That ground of attack on a deed is not the same as seeking to show that a deed—known to be such—was intended as security—a distinction sometimes not observed but which has been clearly pointed out by the court.[2] Apparently in this case, both below and on appeal, the court indulgently permitted the plaintiff to pursue the inconsistent courses of showing mistake or fraud as to the contents of the instrument and intention to treat the deed as security.

Another ground of appeal by the losing plaintiff was the alleged error on the part of the trial judge in refusing a motion to try the case as one in equity and submit only specific questions to the jury. The Supreme Court observed that as stated in the complaint the second cause of action—for damages for cutting of timber—was susceptible of the construction that it stated an action at law rather than one in equity. It was not until later, during the course of the trial that it appeared that the plaintiff sought recovery on that cause of action on an equitable theory—that the relationship of mortgagor and mortgagee still existed and that the removal of the timber was therefore the subject of an accounting rather than an ordinary action for trespass. The court concluded that even if the trial judge was in error in not treating the matter as one in equity—and error did not clearly appear—any such error would have been without prejudice to the

2. White v. Livingston, 231 S.C. 301, 98 S.E.2d 534 (1957); White v. Livingston, 234 S.C. 74, 106 S.E.2d 892 (1959). At times the two situations seem to run together or not to be differentiated. *Cf.* Howard v. Steen, 230 S.C. 251, 95 S.E.2d 613 (1956). It is not necessary in order to establish a deed as a mortgage that there be a showing of fraud, mistake or undue influence. Brickle v. Leach, 55 S.C. 510, 33 S.E. 720 (1899).

plaintiff's right. The circuit judge having correctly decided that the plaintiff failed to prove his alleged causes of action, it was "immaterial whether he decided such as a judge sitting in Equity, or decided such by an order of nonsuit." Having heard all the evidence, his decision, on the merits in one capacity or the other, would not be affected.[3]

MORTGAGE FORECLOSURE—VALIDITY

In *Carsten* v. *Wilson*,[4] an action for foreclosure, two issues arose: (1) the validity of the mortgage, and (2) the validity of the sale.

On the first issue the named defendant contended that the mortgage, which had been given by his father, was without consideration, and that the mortgagor was illiterate and unable to understand the contents of the mortgage. The named defendant was grantee of his father (who had since died) and in the transfer had assumed the payment of the mortgage. The referee held adversely to the defendant, and was sustained by the circuit judge, both concluding that the mortgagor had sufficient mental capacity and that there was neither want nor failure of consider-

3. It seems reasonably plain that this action—from the outset and during trial—was in its nature equitable, whether the action was one to set aside the deed for fraud or to have the deed declared a mortgage, particularly the latter; and the denomination of the relief sought for cutting of timber as damages in trespass rather than accounting for waste, would not seem to be important. Although the doctrine of "once a mortgage always a mortgage" originated in equity, it has been the law for a long time that parol evidence is admissible in an action at law to establish that a deed was intended as a mortgage. Where the grantor is the plaintiff, seeking to fasten the character of a mortgage upon a deed, clearly the action throughout is equitable. The typical law case is one in which the grantee seeks ejectment and is met with the defense that the deed was a mortgage. Brownlee v. Martin, 21 S.C. 392 (1884); Brownlee v. Martin, 28 S.C. 364, 6 S.E. 148 (1887); Banks v. Frith, 97 S.C. 362, 81 S.E. 627 (1913); Middleton v. Levy, 106 S.C. 32, 90 S.E. 325 (1916); Stackhouse v. Stanton, 179 S.C. 506, 184 S.E. 105 (1936); Evans v. Evans, 226 S.C. 451, 85 S.E.2d 726 (1955). Parol evidence of the nature of the transaction was admissible in all these cases. In other law cases not involving ejectment parol evidence has likewise been acceptable. Welborn v. Dixon, 70 S.C. 108, 49 S.E. 232 (1904) (damages for breach of contract accompanied by fraudulent act in grantee's conveying to another); Brown v. Insurance Co., 179 S.C. 274, 184 S.E. 670 (1935) (action on fire policy, defended on ground that insured had conveyed property away, insured allowed to show deed was intended as mortgage); Williams v. Griffin, 58 S.C. 370, 36 S.E. 665 (1900) (claim and delivery, plaintiff allowed to show that absolute bill of sale had been intended as security and debt had been paid). What is not so clear, particularly in the ejectment cases, is whether the contention that the deed was in reality a mortgage raised an equitable issue which was to be separately tried without a jury. On the whole it would seem that the issues thus raised in these law cases would, if a party insisted, be triable separately. As raising the deed-mortgage plea in an action in Magistrate's Court to evict, see Lewis v. Cooley, 81 S.C. 461, 62 S.E. 868 (1908).

4. 241 S.C. 516, 129 S.E.2d 431 (1963).

ation.[5] There were no exceptions to the report of the referee or to the trial judge's affirming decree ordering foreclosure.

The Supreme Court observed that, in view of the failure to except to the referee's report, it could not properly consider questions not so raised, and that since the proceeding to foreclose was in equity it could not disturb the concurrent findings of the referee and the trial judge unless such findings were "without any evidence to support them or against the clear preponderance of the evidence." The court nevertheless, *ex gratia*, considered the exceptions and concluded that the evidence was ample to uphold the findings below.

The second issue raised by the named defendant was that the trial judge erred in refusing to set aside the foreclosure sale because of failure of the plaintiff to furnish bond following defendant's notice of appeal—the contention being that on failure to give bond upon such notice the sale was, or should have been, stayed. The defendant relied upon Section 7-412 of the Code. The court dismissed this contention, since that statute relates to the requirement of bond by a judgment creditor seeking sale after levy where the debtor has appealed. The statute was manifestly inapplicable in this case. The appropriate section covering appeals in foreclosure actions, the court pointed out, is Section 7-417 of the Code which provides, on the contrary, that sale is not stayed unless the appellant furnishes bond. Hence in this case, the defendant's failure to furnish bond deprived him of a stay.

ASSUMPTION OF MORTGAGE— LIABILITY TO GRANTOR

The usual case of the assumption of a mortgage debt is one in which the mortgagee sues the assuming grantee. The less usual one is that in which the grantor sues the grantee. The latter situation is presented in *Jones* v. *Bates*.[6] The facts are relatively simple. In brief, the plaintiff Jones gave a note and mortgage which were assigned to John Hancock Insurance Company. As

5. It would appear that since the defendant, the grantee, had assumed the payment of the mortgage, he should not have been allowed to assert its invalidity, either because of estoppel or by reason of third-party beneficiary contract principles which generally deny the promisor the right to set up against the beneficiary defenses that the promisee has against the beneficiary. See OSBORNE, MORTGAGES § 267 (1951); 4 AMERICAN LAW OF PROPERTY § 16.138 (Casner ed. 1952); annot., 21 A.L.R. 439, 490 (1922); RESTATEMENT, CONTRACTS § 144 (1932); 2 WILLISTON, CONTRACTS § 399 (3d ed. 1959). *Cf.* Bank v. Campbell, 2 Rich. Eq. 179 (S.C. 1846).

6. 241 S.C. 189, 127 S.E.2d 618 (1962).

part of the loan transaction the plaintiff procured for the mortgagee the guaranty of the Veterans Administration, to which he gave the usual indemnification agreement. Thereafter Jones sold the mortgaged property to the defendant Bates, who assumed payment of the mortgage. Subsequently Bates sold to Ault, who likewise assumed payment. Finally Ault sold to the Bennetts who in turn assumed payment. The Bennetts defaulted in their payments and the assignee brought action to foreclose the mortgage, making the Bennetts but none of the earlier owners parties. The assignee waived any deficiency, having first obtained the consent of the Veterans Administration to do so.[7] There was no competitive bidding and the property was bought in by the assignee for a nominal sum. The property was thereafter appraised by the assignee and it was ascertained that the debt exceeded the value of the property by $957.95. The assignee called upon the Veterans Administration for payment of this amount, and payment was made. The Veterans Administration then sought payment from Jones, the plaintiff here. Jones made arrangement to make small monthly payments and had made a few when he brought this action against Bates for the amount which he claimed he owed the Veterans Administration.

The principal defenses were (1) that the defendant was not bound by the agreement of indemnity between Jones and the Veterans Administration; (2) that there was no damage sustained by the plaintiff, since he had not actually paid the Veterans Administration the full amount of its claim; (3) that the defendant was not liable because of waiver of the deficiency by the holder of the mortgage.

Both the court below and the Supreme Court held the defendant liable for the amount sued for. The Supreme Court's major holding was that on an assumption by a grantee, he comes under liability to both the grantor and to the mortgagee—a proposition familiar enough in the area of third-party beneficiary contracts, into which assumption agreements fall.[8] The court

7. The waiver was obviously under S.C. CODE § 10-1774 (1952) [S.C. CODE § 10-1774 (1962)] which permits an immediate closing of sale where deficiency is waived, rather than a protracted 30-day bidding under §§ 10-1770 through 10-1773. These statutes are more fully dealt with hereafter.

8. RESTATEMENT, CONTRACTS § 136 (1932) "Duties Created By a Promise to Discharge a Duty. (1) xxx (b) a promise to discharge the promisee's duty creates also a duty to the promisee;" 2 WILLISTON, *op. cit. supra* note 5, § 392; annot., 21 A.L.R. 439 (1922). The theory that a mortgagee, whose debt has been assumed by a grantee, is a third-party beneficiary is the accepted one in South Carolina—South Carolina Ins. Co. v. Kohn, 108 S.C. 475, 95 S.E. 65 (1917) (cited by the court); First Carolinas Joint Stock Land Bank v. DuBose, 181 S.C. 40, 186 S.E. 514 (1936).

further observed that the mortgagor could not divest himself of his liability by any transfer.[9] Having determined that the grantee, Bates, was liable to Jones on her promise, the court declared that the plaintiff might sue the defendant without having first paid the debt, since the contract was that the debt would be paid and was not one to indemnify or reimburse the grantor after he had paid, *i.e.* the action was for breach of contract and not for reimbursement.[10]

Turning to the question of the amount of damages recoverable, the court resorted to a general rule of damages that "in action for breach of contract actual damages may be recovered to the extent of such damage as naturally, directly and proximately results therefrom . . . ."[11] The court continued, "The plaintiff, however, is only entitled to actual damages sufficient to put him in the same position as he would have been if the contract had

9. Citing Harris v. Rice, 131 S.C. 171, 126 S.E. 754 (1924). See, in addition, Scott v. Stone, 149 S.C. 386, 147 S.E. 449 (1928); Mortgage Co. v. Townsend, 156 S.C. 203, 152 S.E. 878 (1930); Hibbet v. Charleston Heights Co., 163 S.C. 327, 161 S.E. 499 (1931). The assumption does not constitute a novation discharging the mortgagor unless the creditor discharges the mortgagor and accepts the assuming grantee as the sole debtor. Callaham v. Ridgeway, 138 S.C. 10, 135 S.E. 646 (1926); Scott v. Stone, *supra.*

10. Again the problem is one of third-party beneficiary and also one of suretyship. The remedy of a promisee against his promisor, who has made a contract with him for the benefit of the former's creditor, is not limited to reimbursement—although he has that implied right, as well as other rights both before and after payment, such as exoneration in the first instance and subrogation in the latter. RESTATEMENT, CONTRACTS § 141 (1932); Latimer v. Latimer, 38 S.C. 339, 16 S.E. 995 (1892) (reimbursement); Dunn v. Chapman, 149 S.C. 163, 146 S.E. 818 (1928) (subrogation); Redfearn v. Craig, 57 S.C. 534, 35 S.E. 1024 (1899) (exoneration). These are all mortgage cases. The cases in strict suretyship applying these principles are too numerous for mention. A mortgagor who transfers to an assuming grantee becomes surety and the latter becomes the principal. Latimer v. Latimer, *supra;* Scott v. Stone, *supra;* Mortgage Loan Co. v. Townsend, *supra.* This being the relation, it would follow that the mortgagor, as surety, would have all the rights that the conventional surety has before or after payment. The surety's right of indemnity or reimbursement is well-recognized; but it is equally well-recognized that where the principal makes a direct promise to the surety, the surety can sue upon the promise immediately upon its being broken and without payment by the surety as a condition precedent. Thus in numerous cases it has been held that where a principal gives his surety a bond or other security for the principal's performance, the surety, on breach by the principal, may sue or foreclose without prior payment by him to the creditor. Ramsay v. Gervais, 2 Bay 145 (S.C. 1798); Tankersley v. Anderson, 4 Des. 44 (S.C. 1809); Bellune v. Wallace, 2 Rich. L. 80 (S.C. 1845); Hellams v. Abercrombie, 15 S.C. 110 (1880); Beasley v. Newell, 40 S.C. 16, 18 S.E. 224 (1892). Of course if the undertaking of the principal to the surety is that the principal is to refund or reimburse the surety for what he may have to pay, an action on the undertaking or its security cannot be maintained until the surety has paid. McDonald v. Bauskett, 10 Rich. L. 178 (S.C. 1856); Doyle v. Jones, 176 S.C. 429, 180 S.E. 451 (1935).

11. Quoting from Stevenson v. B. B. Kirkland Seed Co., 176 S.C. 345, 180 S.E. 197 (1935).

been fulfilled. He should be completely exonerated by his grantee from the obligation which the grantee had assumed. . . . It has been determined that plaintiff's loss is $957.95. . . ."[12]

Neither in the court below nor on appeal was serious consideration given to the contention of the defendant that she was not liable on the basis of the indemnity agreement between the plaintiff and the Veterans Administration which, she urged, was an independent agreement that did not affect her. The trial judge (sitting without a jury) limited himself to stating "It appears to be conceded by the parties hereto that the defendant well knew that the mortgage which she was assuming in the deed from the plaintiff was a veteran's loan mortgage, and therefore, the mortgagee was indemnified by the Veterans Administration, which, in turn, would be entitled to call upon the veteran to pay any loss sustained by it." While affirming the decree, and noting the argument that the indemnity agreement did not apply to the grantee without her express assumption of it, the Supreme Court made no further allusion to or recognition of it. It was perhaps unnecessary, since the court's major premise was that the defendant's liability was based not on a promise to pay the plaintiff whatever he had to pay the Veterans Administration but on her promise to the plaintiff to pay what he owed the mortgagee—and it was this promise which was broken. Collaterally, it may be pointed out that whether the agreement between the plaintiff

12. There is some sympathy for and merit in the defendant's contention that until the plaintiff is out of pocket, he has suffered no loss. Too, he might stand the risk of double payment, since, as assuming grantee, he would be liable to the mortgagee, and his payment to the mortgagor would not be payment to the mortgagee. RESTATEMENT, CONTRACTS § 136(1)(d) (1932); 2 WILLISTON, *op. cit. supra* note 5, § 392; Heinz v. Byers, 174 Minn. 350, 219 N.W. 287 (1928). The risk can obviously be avoided by the grantee's paying the mortgagee first, or the grantee can seek an injunction against the grantor's proceeding with the action "on terms of payment of the debt to the mortgagee." 2 WILLISTON, *op. cit. supra* note 5, § 392. There seems to be narrower and more precise authority fixing the damages in cases of this kind than the general, all-pervasive rule of such damages as flow from breach of contract. The rule appears to be that damages are the amount of the debt which the promisor—the grantee—has agreed to pay to the promisee's creditor. "In mortgage cases, the promisor may thus find himself in a difficult position between the mortgagee and the promisee, the grantor of the premises. If the promisor fails to keep his promise to pay the debt, he is liable to the promisee for the full amount of the debt, even though the latter has not yet paid it. Unless the promise can have the interpretation of a promise to indemnify against loss, this seems sound." 2 Williston, *op. cit. supra* note 5 § 392, citing numerous cases. See, also, Annot., 21 A.L.R. 504, 525 (1922), and supplements. That the amount of the debt would be the measure of recovery seems to be the local law as appears in Hellams v. Abercrombie, 15 S.C. 110 (1880), where a surety who had been given a mortgage as security was held entitled to foreclose for the amount of the debt for which he was surety upon the mortgagor's failure to pay the creditor.

and the Veterans Administration was independent or not, or whether the grantee was or was not charged with it, the Veterans Administration as surety or guarantor would, on payment to the mortgagee, be subrogated not only to the mortgagee's rights against the mortgagor but to the mortgagee's rights against the assuming grantee as well. Since the mortgagee could sue the grantee, the guarantor, by subrogation, could sue the grantee after payment.[12a] All this of course assumes that subrogation would not be denied for some other reason.

The final objection of the defendant was given even less consideration by the trial judge and by the Supreme Court. Aside from mentioning the contention of the defendant "that the waiver of a deficiency judgment in the foreclosure proceeding releases her," the latter court took no other notice of it. Yet it would seem that the objection would be a most vital, if not a successful one, since it involves not only the meaning but also the policy of the "moratorium" laws of the 1930's regulating foreclosure proceedings.[13] The plaintiff's position regarding the defendant's objection was that the mortgagee, even though it had waived deficiency in its pleadings, could thereafter sue on the debt for the deficiency.[14] This prompted a reply brief in which the defendant controverted this position[15] with the additional assertion in effect that the policy of the statutes would be subverted by permitting continuance of personal liability in the face of the waiver of deficiency sanctioned and regulated by the statutes.[16]

12a. "His [the surety's] right of subrogation also extends to . . . his [the creditor's] right as beneficiary against a third person who promised the principal he would pay his debt." SIMPSON, SURETYSHIP § 47 (1950). As to subrogation to the creditor's rights against persons other than the principal, see Rhame v. Lewis, 13 Rich. Eq. 269, 330 (S.C. 1867); Rivers v. Liberty Nat'l Bank, 135 S.C. 107, 133 S.E. 210 (1926); American Sur. Co. v. Hamrick Mills, 191 S.C. 362, 4 S.E.2d 308 (1939); American Sur. Co. v. Hamrick Mills, 194 S.C. 221, 9 S.E.2d 433 (1940). Subrogation against an assuming grantee can also be worked out on the basis of succession to the rights of the mortgagor (principal). "A surety is subrogated to such rights and remedies as the principal has in connection with the debt which will afford him a means of reimbursement." 83 C.J.S. *Subrogation* § 57 (1953); and see 60 C.J. *Subrogation* § 81 (1932) (p 771, n.K) "A surety will be subrogated to the principal's right of action against a third person who has assumed and agreed to pay the debt." *Cf. Ex parte* Reynolds, 68 S.C. 436, 47 S.E. 728 (1903).

13. S.C. CODE §§ 45-88 through 45-96.1 (1955, 1962), permitting defendant against whom personal judgment is taken or asked to obtain appraisal, which may cut down or eliminate deficiency; §§ 10-1770 through 10-1773, keeping bidding open for thirty days after sale; § 10-1774, making these last sections inapplicable *"if the complaint therein states that no personal or deficiency judgment is demanded and that any right to such judgment is expressly waived"* (emphasis supplied).

14. Respondent's Brief, pp. 10-11.

15. Reply Brief, pp. 3-5.

16. Reply Brief, pp. 6-7.

There is much to be said for the defendant's position on both counts. Unquestionably, leaving aside the "moratorium" statutes, a mortgagee could sue in foreclosure without asking for a money judgment, and having obtained a decree of sale which resulted in a deficiency he could thereafter bring an action at law to recover the amount of the deficiency.[17] The practice, however, almost invariably has been to seek both personal judgment and foreclosure in the same equitable proceeding, the earlier form allowing judgment only after the deficiency has been ascertained following sale, and the later and more recent form to seek a decree ordering a personal judgment and foreclosure sale with the judgment effective immediately and carrying over to embrace the defeciency to which it had been reduced by the sale.[18] With the advent of the "moratorium" laws, waiver of the deficiency—abstention from seeking personal judgment—has become the prevailing practice for reasons which the statutes themselves compel, and the accompanying prayer for judgment on the debt has become the exception.

Conceding that in theory a mortgagee might sue to foreclose without at the same time seeking a personal judgment, there is a difference between not asking for a deficiency judgment and

17. Gray v. Toomer, 5 Rich. L. 261 (S.C. 1852).

18. The latter practice is authorized by statute, enacted in 1894. 21 Stat. 816, now S.C. CODE §§ 45-85, 45-86 (1962). Neither the statute nor the earlier practice rules out separate actions at law and in equity, but if the foreclosure action asks for personal judgment action at law is not permitted. Anderson v. Pilgrim, 30 S.C. 499, 19 S.E. 1002 (1888), holding also that "strict foreclosure," *i.e.*, barring the right to redeem unless the debt is paid by a stated date, whereupon the mortgagee acquires absolute title does not obtain in this state. Except in a very narrow range of cases, foreclosure can be only by sale. For history of the practice in foreclosure and its relation to rendition of personal judgment, see McConnell v. Barnes, 142 S.C. 112, 140 S.E. 310 (1927). It appears to be established that an action at law on the debt, resulting in a judgment, would not bar a subsequent action to foreclose. The effect of obtaining the judgment is not to extinguish the debt which the mortgage secures but to bring about the representation of the debt in a new form—the judgment. Annot., 121 A.L.R. 917 (1939); Satterwhite v. Kennedy, 3 Strob. L. 457 (S.C. 1849) (dictum); McClure v. Wheeler, 6 Rich. Eq. 343 (S.C. 1854); American Trust Co. v. Doig, 23 F.2d 398 (4th Cir. 1928). There are cases where, although foreclosure is available, a personal judgment is not. (This is not "strict foreclosure.") It is not a matter of waiver but of unavailability. For example, the mortgagor-owner may be a non-resident (and not actually within the state); or he may have received a discharge in bankruptcy; or action on the debt may be barred by lapse of time; or the note or bond may have been altered without the mortgagor's consent (Heath v. Blake, 28 S.C. 406, 5 S.E. 842 (1887)). The list is not all-inclusive. It is interesting to note that having made only the last owner a party, omitting prior owners, including the mortgagor, who were liable for the debt, the mortgagee could not have obtained a personal judgment if it had wanted or asked for one. The owners who were parties in the action of *John Hancock Ins. Co. v. Bennett*, were non-residents of the state, or at least were served outside of it. Transcript of Record, pp. 7-8.

expressly waiving it, as the language of the statute has it.[19] It would seem in any event, however, that the "moratorium" laws have put an end to the rule or practice which permitted a non-judgment foreclosure to be followed by an action at law for the deficiency. Considering the purpose of these statutes, all of which are to be taken as making up a single package, and taking into account the clear legislative design to keep a mortgagee from having his cake and eating it too, it would be reasonable to assume that a waiver of deficiency would be just what it purports to be—not merely refraining from asking for judgment but affirmatively giving it up. The statute itself (Section 10-1774) couples the negative conjunctively with the waiver.[19a] The mortgagee who does not waive the deficiency subjects himself to the hazards of unclosed bidding and statutory appraisal; he avoids these risks in return for the waiver. To hold that even though he waives the deficiency he may afterwards pursue the debtor at law would be to make the statutes meaningless and self-defeating. In a case uncomplicated by subsequent transfers and assumptions and by the presence of G.I. guaranty, if waiver did not preclude personal resort the mortgagee could sue to foreclose, waive the deficiency, have the mortgage property sold for an amount which might produce a large deficiency without regard to the value of the property—all this without exposure to unclosed bidding and statutory appraisal—and thereafter sue at law for the deficiency. Of course the policy of the statutes could not or should not be frustrated in this fashion. And on principle it would seem that just as the mortgagee should not be allowed to pursue in this way a mortgagor who had not disposed of the property, he should not be allowed, after similar foreclosure against the ultimate owner, to pursue the mortgagor who had conveyed away the property or any intermediate grantees.[20] As

19. See note 13 *supra.*

19a. See note 13 *supra.*

20. It must be admitted that there are gaps in the statutes. Take a case where the mortgagor has conveyed to a non-assuming grantee. The latter can, of course, be sued alone as could an assuming grantee, as was done in this case. S.C. CODE § 45-82 (1962) (probably largely declaratory of the law); Wright v. Eaves, 10 Rich. Eq. 582 (S.C. 1858); Butler v. Williams, 27 S.C. 221, 3 S.E. 211 (1887); Greenwood Loan & Guar. Ass'n v. Williams, 72 S.C. 421, 51 S.E. 272 (1905). The non-assuming grantee not being liable for the debt, no judgment could be obtained against him. Hull v. Young, 29 S.C. 64, 6 S.E. 938 (1888). In order to have immediate sale, deficiency would have to be waived, yet if it were not waived expressly, personal judgment could not be obtained even then. What effect would the foreclosure have upon the mortgagor? Does Section 45-82 itself preclude subsequent resort to the mortgagor? Or take a case where the reason that the mortgagor is not joined is that he

a matter of logic it would seem that a surrender of the right to a deficiency would be a surrender or discharge of the *debt*, which would relieve not only the party primarily liable—the last assuming grantee—but also all those secondarily liable, which would include the mortgagor and other assuming grantees. It is to be recognized that in a conflict between federal and state law, the former prevails, but it would appear inconsistent and contradictory to say the least, for the Veterans Administration to consent to waiver by the mortgagee, thereby invoking state law, and to attempt to negate the effect of the very law it has invoked. When the mortgagee waived the deficiency and thereby discharged the debt, it would appear immaterial whether it was done with the consent of the Veterans Administration or not. The debt was gone and with it the liability of all the parties, except as it may have been preserved by the indemnity agreement between the mortgagor and the Veterans Administration, and this, if it were so, would be limited to them.

Neither below nor on appeal was there disposition or discussion by the court of the suretyship problems that the case presented, nor did the parties call the court's attention to them. Consideration of suretyship rules might or might not have compelled a different result. At least the case deserves to be viewed in the light of these rules. As has been noted, the relationship created by the assumption of a mortgage debt is that of principal and surety.[21] In this case the mortgagor, Jones, having conveyed to Bates, who assumed the debt, the latter became a principal, the former a surety. When Bates conveyed to Ault, who also assumed the debt, the latter became the principal, and Bates as to him a surety. Finally, when Ault conveyed to the Bennetts, they became the principal and primary debtors and all the others became sureties, liable ultimately in inverse order. In this situation the mortgagee waived his claim to a deficiency. Whether this be regarded as a waiver of deficiency as to all the debtors—and it has been suggested that it was—or whether it be regarded as a waiver of deficiency against the Bennetts alone, the effect certainly was to discharge the Bennetts. Under ordinary surety-

is a non-resident, so that no personal judgment in the foreclosure proceeding could be obtained against him even if he had been named a party—would a waiver of deficiency free him of liability? Or another case: the mortgagor conveys to an assuming grantee who alone is sued in an action for foreclosure and personal judgment resulting in a deficiency, but the defendant does not ask for an appraisal which might have eliminated the deficiency. How would this affect the mortgagor?

21. See note 10 *supra*.

ship rules the creditor's release of the principal without the consent of the surety discharges the surety. A prime reason for this result is that the release interferes with the surety's right of subrogation. If the surety, with knowledge of the discharge, pays the creditor and thereafter sues the principal, the latter's defense is that since the creditor cannot sue, the surety, succeeding to no higher right, cannot do so either. Moreover, there being no further duty on the part of the principal, the surety "should not be held to answer for a default of that duty."[22] The rule is not materially different when the suretyship arises from the assumption of a mortgage so that when the mortgagee releases the final assuming grantee he releases the mortgagor and intermediate grantees standing in the relation of surety.[23] In the present case the waiver of deficiency, although it may have been intended to apply only to the last grantee, while not a technical release and without consideration in the usual sense, was binding because the statute made it so. If consideration was lacking it was only in a formal sense and it may well be supplied by the statutory

22. RESTATEMENT, SECURITY § 122 (1941). "Where the creditor releases a principal, the surety is discharged unless (a) the surety consents to remain liable notwithstanding the release, or (b) the creditor in the release reserved his rights against the surety." *Cf.* Varnum v. Evans, 2 McMul. L. 409 (S.C. 1842); Jackson v. Patrick, 10 S.C. 197 (1878); Waldrop v. Leaman, 30 S.C. 428, 9 S.E. 466 (1888). Where the principal is discharged without reserving rights against the surety, the surety is not entitled to reimbursement from the principal. RESTATEMENT, SECURITY § 110 (1941).

23. 59 C.J.S., *Mortgages* § 415 (1949) "Where a mortgagor conveys mortgaged property to a third person who assumes the debt, the mortgagee, knowing the facts, ordinarily is bound to treat the mortgagor as surety and to do nothing to impair his rights as such; and the mortgagor may be released from further liability in the mortgage debt in the event of a breach of a mortgagee of this obligation." "Accordingly, the mortgagor has been deemed to be discharged by the mortgagee's release of the grantee from his personal obligation xx." To same effect: 37 AM. JUR., *Mortgages* § 1079 (1941); 4 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 5 § 16.141; Annot., 41 A.L.R. 277, 311 (1926), and supplements. *Cf.* Scott v. Stone, 149 S.C. 386, 400, 147 S.E. 449 (1928) where it is said: "As a rule, whenever one for a sufficient consideration promises to pay his debt to a third person, the promisor becomes the principal obligor, and the promisee the surety; and if the creditor accepts the promise, he becomes bound to observe the relation of principal and surety existing between the parties and hence must not do any act which would impair the surety's rights." The case involved assumption of a mortgage. The court follows the quoted statement with this: "Both novation and the relation of principal and surety depend upon the same fact—the consent of the mortgagee to release the mortgagor and look only to his grantee." This is a remarkable statement so far as it relates to the principal-surety relationship, since if the mortgagee released the grantor and looked only to the grantee, there would be only a substituted debtor and no surety. In fact the rule in the mortgage situations seems to be even stricter against the mortgagee than against an ordinary creditor: even a reservation of remedies does not prevent discharge of the surety where there has been an extension of time to the principal. A fortiori it would appear that the same would be true where there was a reservation accompanying a release. 4 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 5.

permission to close the sale at once and avoid a court-supervised appraisal in return for the waiver. At any rate, being binding as a result of the voluntary act of the mortgagee, an act not passive in character but positive, the discharge of the principal should have been effective not only as to the principal but as to the sureties as well.[24] Since last grantees, the Bennetts, had been relieved of personal liability, no one of the prior owners could, on payment, sue them for reimbursement, any more than could the mortgagee itself. The mortgagor, despite the indemnity agreement, was a surety, and as between him and the mortgagee, the mortgagee's discharge of the principal should be treated as having discharged the mortgagor as well. Similarly the defendant, also a surety, would appear to have been discharged by the waiver, and if on that account he owed no duty to the mortgagee, it is difficult to see how he could be held delinquent in his promise to the grantor for failing to do what he was no longer under compulsion to do.

24. It is elemental that in order to effect a valid release, it must be binding—ordinarily for consideration or under seal. Mere indulgence or failure to act against a principal does not usually relieve a surety, but positive acts of commission will. Jackson v. Patrick, 10 S.C. 197 (1878).