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Parole Release of a Mortgage

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be expected that they will prove adequate. To illustrate, exemption from the statutes may not be claimed on the basis that sales made at prices below those fixed by contract are restricted by the guilty retail firm to transactions with its employees. A department store, for example, which allows a discount to its employees on goods sold to them is bound by the act, although this may have been its long established policy.[30]

Perhaps the widespread public benefit which these acts purport to confer will far outweigh the apparent injustice they may unavoidably cause in some instances. At least, the legislatures have decided that the policy of the Fair Trade laws is economically sound, and the Supreme Court of the United States has sustained their decision.

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PAROLE RELEASE OF A MORTGAGE

A recent opinion of the Court of Errors and Appeals of New Jersey[1] raises the question whether a mortgage can be released by parole or whether it is such an interest in land that the statute of frauds requires the release of it to be in writing. A survey of the cases reveals that there has been a divergence of opinion. Those courts which state that the release may be by parole regard the debt as carrying with it the mortgage and since the debt can be extinguished by parole, the parole release of the debt releases the mortgage. Other courts regard the mortgage as giving the creditor a security which he would not have otherwise and that if by parole this security be taken from him, it would affect an interest in land because the released security would be the right of foreclosure. The statute of frauds requires an agreement concerning lands to be in writing. Therefore, these courts require the release of the mortgage to be in writing.[2]

The purpose of this note is to discuss the validity of a parole release of a mortgage. Whether an oral promise to *extend* the time for payment is valid is a question not to be confused with the question here set out which is whether

[30]Bristol-Myers Co. v. L. Bamberger & Co., 122 N.J. Eq. 559, 195 A. 625.

[1]George v. Meinersmann, 197 A. 1 (N.J., Jan. 26, 1938).

[2]Williston discusses the problem in Contracts, Section 492, page 1420 in Volume 2 of the Revised Edition and Section 493, page 952, Volume 1 of the 1st. Edition. He says, "A contract to pay a debt or to accept payment by way of accord and satisfaction, or otherwise, is not within the statute, although the effect of such payment may be to discharge a mortgage, and thereby retransfer an interest in land to the mortgagor. On the other hand, an express promise by the mortgagee to surrender or discharge his mortgage, in so far as this involves anything more than accepting payment of the debt, is within the statute."

an oral promise to forbear foreclosure forever is binding. The courts generally hold an oral promise to extend the time for payment to be binding. New Jersey, which holds an oral release unenforceable, has said that, "It is well settled, that the time of payment may be extended by parole."[3]

In the recent case of *George v. Meinersmann*[4] the plaintiff-mortgagee in an action of assumpsit sought to enforce an oral promise made by the defendant that he would pay the principal and interest due on the bond secured by the mortgage given by a corporation of which the defendant was an officer. The defendant's promise was given for an oral promise from the plaintiff to forbear foreclosure of the mortgage. The defense raised was want of consideration in that the promise of the plaintiff is unenforceable because oral. The court upheld the argument of the defendant and said that the plaintiff had not made an enforceable contract with the defendant because "an oral agreement not to foreclose a mortgage covering lands is an agreement concerning an interest in lands and is therefore within the statute of frauds." The court said, "The right to enforce collection is a fundamental and important part of a mortgage, and an agreement to waive such right would undoubtedly constitute an agreement concerning an interest in lands."

An early English case which discussed the question is *Richards v. Syms*[5] decided in 1740. Syms had borrowed from Richards and had given a mortgage and bond. Several years later Syms brought the mortgage and bond to Richards so that he might keep them himself. Richards gave back the deeds and said, "Take back your writings, I freely forgive you the debt." The question was whether there was a valid release. The court adopting the principle that the mortgage is incident to the debt said, "Where a mortgage is made of an estate, that is only considered as a security for the money due, the land is the incident attending upon the other; and when the debt is discharged, the interest in the land follows of course . . . . No writing is in these cases[6] necessary; which shows, that even the law[7] considers the debt as the principal, and the land to be only an incident."

In 1760 Lord Mansfield set forth[8] the reasons why it is consistent to hold that the oral release should be effective. He said, "A mortgage is a charge

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[3]Vanbauten v. McCarty, 4 N.J. Eq. 141 (1842) and Tompkins v. Tompkins 21 N.J. Eq. (1871). Cases of other jurisdictions in accord are: Carurl v. Crump 51 So. 744 (Ala. 1910); Phillips v. Holland, 136 N.W. 191 (Wisc. 1912); and In re Betts, 3 Fed. Cas. No. 1371. General statement in accord, 27 C.J. 218.

[4]197 A. 1, (N.J. 1938).

[5]S.C., 2 Eq. Cas. Abr. 617, 27 Eng. Reprint 567. Cited with approval in Craft for the use of Powell v. Webster, 4 Rawle 242 (1833).

[6]"In these cases" refers to actions in ejectment where a title is made under a mortgage and evidence is given that the debt is satisfied.

[7]In the situation set out in (5) the law court would consider the estate which the mortgagee had as defeated.

[8]Martin v. Mowlin, 2 Burr 969, 97 Eng. Reprint 658.

upon the land: and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; . . . . it would do it, though the debt were forgiven only by parol: for the right to the land would follow notwithstanding the statute of frauds."[9]

THE AMERICAN JURISDICTIONS WHICH FOLLOW THE DOCTRINE OF MARTIN V. MOWLIN

Minnesota has, on several occasions, held that a parole release is valid. In *Schweider v. Long*[10] the defendant payee of plaintiff's promissory note and mortgagee upon which there was an unpaid balance of $1,850 agreed that if the plaintiff would pay a lesser sum before the due date the defendant would deliver up the note and the mortgage securing the same would be cancelled. The defendant breached the contract by selling the note and mortgage before satisfaction and in a suit in assumpsit the plaintiff recovered the difference he had to pay under the note and the amount he would have had to pay under the contract. Justice Berry stated, "The agreement made between the parties was not for the sale of the note and mortgage, but one by which the maker of these instruments was to be discharged thereon by the payee. The agreement, is, therefore, not within the statute of frauds, so as to be required to be in writing."

A later Minnesota case[11] cites *Schweider v. Long* with approval and says that the reason the oral release is not within the statute is that, "The effect of the agreement is to discharge the personal liability of the mortgagors and . . . not to modify the terms of the mortgage." This indicates that the parties must be thinking in terms of personal liability if the oral release is to be valid but it is submitted that this court would impute to the parties an intention to re-

[9]The holding of this case as to consideration was originally accepted in Pennsylvania in Wentz v. Dehaven, 1 S. & R. 312 (1815). In Whitehill v. Wilson, 3 P. & W. 405 (1832) Chief Justice Gibson overruled Wentz v. Dehaven, saying, "It is intimated in Wentz v. Dehaven on the authority of Lord Mansfield's dictum in Martin v. Mowlin that a parol gift or relinquishment of a mortgage debt, will release the mortgage itself, without regard to the question of consideration or actual delivery. It is obvious that Lord Mansfield's attention was occupied with the disputed operation of the Statute of Frauds, instead of the necessity of a consideration or delivery." Later, in Kennedy v. Ware, 1 Pa. 445, Gibson stated that "Wentz v. Dehaven is not to be sustained on any ground." It is submitted that these three Pennsylvania cases overruled Martin v. Mowlin as to consideration but that they have no effect on the Statute of Frauds doctrine therein stated.

[10]13 N.W. 33 (1882).

[11]First National Bank of Benson v. Gallagher, 138 N.W. 681 (1912).

lease the debt even though they had talked in terms of the security and that the result would be that the "debt carries with it the mortgage."[12]

In *Mutual Mill Insurance Co. v. Gordon*[13] the Illinois court indicated that it followed the majority view which is that view indicated in *Martin v. Mowlin*. The court said, "A parol release of the notes as between the parties is sufficient. The payment or discharge of the debt evidenced by the notes, operates to release the mortgage, which is but an incident to the debt."

That a subsequent purchaser of land may set up the oral discharge of his grantor and consequently that the land is free from the lien of the mortgage is established in the Wisconsin case of *Coyle v. Davis*.[14] A owned a part of a large tract of land to all of which B held a mortgage. It was verbally agreed between A and B that A should be released from all personal liability to pay the amounts secured by the mortgages and that B should rely on the owners of the other part of the tract. A conveyed to C and the court decided that B by releasing A deprived himself of the right of insisting upon the liens of his mortgages upon the lands owned by C and that C was entitled to have them discharged.[15]

It is conceivable that the answer to the question concerning the validity of an oral promise to forbear foreclosure might be affected by the attitude of the court toward mortgages generally. Thus in a state which adopts the lien theory there might be a stronger reason to hold the oral release valid than in the title theory state where the mortgagee has the actual title to the property. No case as yet has drawn a distinction based on the 'theory' of mortgages but one case has indicated that a distinction is possible. It is doubtful whether such a distinction would be valid because even in the title states as between the parties the mortgage is regarded similarly to a lien. The following language from *Malins v. Brown*[16] indicates that after the interest of the mortgagee has changed from that of lien-holder merely, he might not be able to make an oral release. "The assignment of the bond or debt secured by the mortgage, passes the interest of the mortgage, the debt being the principal, and the mortgage an accessory which cannot exist as an independent debt; and until proceedings are had for the purpose of enforcing a mortgage of real estate, the interest of the mortgagee may be assigned without deed, by a parol transfer of the debt and mortgage. A mortgagee has no estate, property or interest until he takes

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[12]Idem.

[13]12 N.E. 747 (1887).

[14]20 Wis. 564 (1866).

[15]The further reasoning of the court was that B by releasing A of liability deprived C of a right against A and that since the right of insisting on the personal liability of A was one of the safeguards of the title of C, a purchaser for value without notice, B thereby deprived himself of his security. The Statute of Frauds was not argued by counsel in the case.

[16]Malins v. Brown, 4 N.Y. 403 (1850).

possession. The release of a mortgage is therefore no more than a discharge of a chose in action or other chattel security."[17]

Jurisdictions Which Require A Writing

There are some courts which treat the mortgagee's interest as an interest in land and therefore hold the release of the mortgagor invalid unless in writing. None of the cases which have held a writing necessary have stated why there must be a writing other than that it is concerning an interest in land. No attempt is made to answer the contention stressed in the other viewpoint that the debt may be discharged by parole and that the mortgage being incident to the debt, is extinguished with the debt. New Jersey has recently[18] reaffirmed the necessity of a writing. Other jurisdictions which take this attitude are Maine,[19] Vermont,[20] Massachusetts[21] and Alabama.[22] The Massachusetts court did not discuss the statute of frauds although the case is relied on by the New Jersey court in *George v. Meinersmann.* In the Massachusetts case, N mortgaged a tract of land to D the defendant. N then conveyed to the plaintiff. The plaintiff asked the defendant if he would receive the amount due on the mortgage and discharge it, which the defendant agreed to do. Plaintiff sent the money but the defendant refused to accept it. The plaintiff brought a bill in equity praying that the mortgage deed made by N be delivered to plaintiff and cancelled. The court answered, "We are here called on to enjoin against the use of a mortgage deed, by verbal proof that the respondent had given up his estate. The proposition is self-evidently false." The self-evidency of the contention is hardly a satisfactory answer.

The Pennsylvania Answer

Pennsylvania follows the majority view. There is only one case which expressly so holds but there are dicta which corroborate this conclusion. *Ackla v. Ackla* is the case in point.[23] Benjamin Ackla executed a deed to John Ackla. John gave a purchase money mortgage to secure payment. Benjamin Ackla later gave a parol release in pursuance of a family arrangement whereby it was agreed the mortgage should be set aside and relinquished, in consideration of which, John the son and grantee, abandoned his claim upon the land under

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[17]See also Runyan v. Mersereau, 11 John. 534 (N.Y.) and McCraith v. National Bank, 104 N.Y. 414 (1887).

[18]George v. Meinersmann, 197 A. 1 which holds in accord with Irwin v. Johnson, 36 N.J. Eq. 347 (1882).

[19]53 Me. 157.

[20]Merrill v. Pease, 51 Vt. 556 (1878).

[21]Hunt v. Maynard, 6 Pick. 489 (1828).

[22]Osborne v. Waddell, 57 So. 698 (1912).

[23]6 Pa. 228 (1847).

the deed made to him by his father, which agreement was never acted upon. Benjamin devised to his 5 sons, including John, his realty of which the part previously conveyed was a part. The interests of the sons by subsequent conveyances were vested in Overton. The widow of Benjamin sought to foreclose the mortgage against John as mortgagor and Overton as terre-tenant of the land. The court held that the release by Benjamin was valid.

> "A mortgage being considered and treated merely as a security for the payment of money, or the performance of some other act, it is simply a chose in action extinguishable by a parol release, which equity will execute as an agreement not to sue, or by turning the mortgagee into a trustee for the mortgagor."
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> "Such a release or agreement may be established, presumptively, by showing declarations and acts of the parties inconsistent with an averment of the continued existence of the mortgage and repugnant to the rights and liabilities created by it, as well as by express proof."

In the *Ackla* case the court relied on the parole agreement and other inconsistent acts to uphold the validity of the release. The inconsistent acts were the sale of one acre of the tract granted to John without interference by John; the will and the widow's acceptance thereof; and John's acceptance under the will coupled with his submission to an agreement in which the widow participated concerning the boundary line under the will.

Dictum is found in the case of *Thomas's Appeal*[24] to substantiate the conclusion reached. In *Craft for the use of Powell v. Webster*[25] there is an extended discussion on the fact that the debt carries with it the mortgage.

Although a parole release of a mortgage is effective it does not follow that one should rest secure after he has obtained it. If he is in possession of the land a subsequent assignee of the mortgage would be required to ascertain from him the rights which the mortgagee has under the mortgage. But if the mortgagor were not in possession of the land he should obtain a written release to put on record or he should have the mortgage satisfied of record.

One other factor remains. Does the Sales Act have any effect on the release of a mortgage? A mortgage is a chattel interest and under section 4 of the Sales Act a transfer of a chattel interest must be in writing to be enforcible. It is submitted that an extinguishment of a mortgage does not come under the term "transfer." A transfer implies that the mortgage is kept alive thereby; by an extinguishment the mortgage no longer continues.

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[24] 30 Pa. 383 citing Asay v. Hoover, 5 Pa. 21.
[25] 4 Rawle 242 (1833).