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The Assumption of a Mortgage by Grantee of Encumbered Premises

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THE ASSUMPTION OF A MORTGAGE BY GRANTEE OF ENCUMBERED PREMISES.—Prior to the passage of Chapter 502, Laws of 1938, a purchaser of land could assume a mortgage debt to which it was subject by any contract or agreement which so manifested his assent. No particular form of words, other than a clear expression of intent, were necessary. The insertion of a clause, with this expression of intent, in the deed would be sufficient[1] or it could be present in a separate instrument, which instrument required no formalities in execution.[2] It has been held that such an agreement clear and convincing is not within the Statute of Frauds and therefore may be oral.[3] An additional way in which a grantee may have assumed a mortgage other than by a recital in a deed and its subsequent acceptance or by separate writing is by implied agreement. Thus, from facts and circumstances accompanying a transaction, the court may imply an agreement to assume a mortgage. An agreement between grantor and grantee to the effect that payment of the mortgage debt shall constitute part of the purchase price will guide the court in implying an assumption of the mortgage debt by the purchaser.[4] In jurisdictions outside of New York purchasers have been held to have assumed the mortgage where the amount of the mortgage debt was deducted and retained by the purchaser out of the agreed price.[5] In New York the mere deduction of the amount of the mortgage by the purchaser was held not to be conclusive evidence of intention to assume the encumbrance since such conduct may be explained away otherwise. The deduction may be for protection against a questionable encumbrance, yet it is of value as some evidence of assumption.[6]

Chapter 502 no longer makes it possible for a grantee to assume a mortgage orally, or by implication or even by separate instrument unless certain formalities accompany the instrument. Under the present status of the law, a grantee will not be held to have assumed a mortgage unless "such grantee shall simultaneously with the convey-

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[1] Campbell v. Smith, 71 N. Y. 26 (1876); Bowen v. Beck, 94 N. Y. 86 (1883); Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280 (1885); Kress v. Central Trust Co. of Rochester, 246 App. Div. 76, 283 N. Y. Supp. 467 (4th Dept. 1935), *aff'd*, 272 N. Y. 629 (1935); Hardee v. Karmon, 149 Misc. 339, 266 N. Y. Supp. 601 (1932).

[2] Watkins v. Vrooman, 51 Hun 175, 5 N. Y. Supp. 172 (4th Dept. 1889); Howard v. Robbins, 67 App. Div. 245, 73 N. Y. Supp. 172 (4th Dept. 1901).

[3] Taintor v. Hemmingway, 18 Hun 458 (N. Y. 1879); Vilas v. McBride, 62 Hun 324, 17 N. Y. Supp. 171 (3d Dept. 1891); Peet v. Kent, 5 N. Y. St. Rep. 134 (1886); N. Y. Life Ins. Co. v. Aitken, 125 N. Y. 660, 26 N. E. 73 (1891).

[4] Dorr v. Peters, 3 Edw. Ch. 132 (N. Y. 1837); Halsey v. Reed, 9 Paige 446 (N. Y. 1842); Ferris v. Crawford, 2 Denio 595 (N. Y. 1845); Douglass v. Cross, 56 How. Pr. 330 (N. Y. 1878).

[5] Townsend v. Ward, 27 Conn. 610 (1858); Jogel v. Vollinger, 174 Mass. 521, 55 N. E. 458 (1899); Wenaus v. Wilkie, 41 Mich. 264, 1 N. W. 1049 (1879); Kostenbader v. Spotts, 80 Pa. 430 (1876).

[6] Ferris v. Crawford, 2 Denio 595 (N. Y. 1845); Belmont v. Corman, 22 N. Y. 438 (1860); Bennett v. Bates, 94 N. Y. 354 (1884); Equitable Life Assurance Society v. Bostwick, 100 N. Y. 628, 3 N. E. 296 (1885).

ance to him of such real property execute and acknowledge before an officer authorized to take acknowledgments of deeds, a statement in writing stating in substance that such grantee assumes and agrees to pay such mortgage debt and giving the specific amount of the debt assumed. The execution and the acknowledgment by a grantee of the deed of conveyance to him containing such written statement shall be sufficient compliance with the provisions of this chapter." [7] Thus two methods are left open to a grantee who is about to assume and unless one of these are followed, there can be no assumption. The grantee must sign a written statement in substance stating that he assumes and agrees to pay such mortgage debt, giving the specific amount of the debt assumed. The statement must be acknowledged by an officer authorized to take acknowledgments of deed, and its execution and acknowledgment shall be simultaneous with the conveyance of the real property. The only other way to assume would be by the execution and acknowledgment by the grantee, of the deed of conveyance to him containing such written statements.

The Statute should not be interpreted as causing any change in the substantive law of assumption of mortgages. For example, a grantee who follows the prescribed formalities of the Statute will still not be held to have assumed if the grantee were not personally liable.[8]

The abuses and confusion which prevailed under the old law are practically self-evident. Doubts and uncertainties remained with the court in their attempt to find whether one had assumed a mortgage or merely taken subject to the encumbrance. This is understandable since the courts relied chiefly for their decisions on separate informal instruments or drew their implications from facts and circumstances accompanying the transaction. Remedial legislation was long awaited. Chapter 502 aims to remove the confusion and the doubt which has accompanied the assumption of mortgage cases. Hereafter, a compliance with the formalities will give ample warning to the grantee of the obligation which he is undertaking.

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[7] Laws of 1938, c. 502.

[8] Trotter v. Hughes, 12 N. Y. 74 (1854); Vrooman v. Turner, 69 N. Y. 280 (1877); Carrier v. United Paper Co., 73 Hun 289, 26 N. Y. Supp. 414 (4th Dept. 1893); King v. Sullivan, 31 App. Div. 550, 52 N. Y. Supp. 130 (2d Dept. 1898); Williams v. Van Gerson, 76 App. Div. 592, 79 N. Y. Supp. 95 (4th Dept. 1902); Jenkins v. Bishop, 136 App. Div. 104, 120 N. Y. Supp. 825 (3d Dept. 1909); Genesee Valley Nat. Bk. *etc.* v. Bolton *etc.*, 248 App. Div. 530, 290 N. Y. Supp. 913 (4th Dept. 1936); Ross v. Davis *etc.*, 138 Misc. 864, 248 N. Y. Supp. 442 (1931); Union Trust Co. v. Allen, 147 Misc. 888, 264 N. Y. Supp. 732 (1933).