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Rights and Obligations of Assignees of Contracts for the Sale of Real Property

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so far as to presume a gift in that case. It need not "now interpolate a contract provision which the parties themselves neglected to make," [28] to which the Court objects, and rightly, in Coletti v. Knox Hat Co. The contract provision which is said to be lacking, is implicit in the mere fact of termination and, we submit, should be presumed as a matter of law.[29] This is the sounder rule, resting on greater considerations than *stare decisis*—it stands the tests of both reason and justice.

ESTHER L. KOPPELMAN.

RIGHTS AND OBLIGATIONS OF ASSIGNEES OF CONTRACTS FOR THE SALE OF REAL PROPERTY.

In the absence of stipulations to the contrary, contracts for the sale of real property can be assigned freely.[1] The extent of the rights and obligations which an assignee takes under an assignment has been the subject of frequent decisions in our courts. It has been held that the assignee can enforce specific performance against the vendor;[2] and that the vendor cannot obtain specific performance

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received furnish a new consideration for a new agreement to pay the reasonable value of the services.

d. The master may set up in defense the breach, and damages; the implied promise being to pay over and above the cost to procure completion and the damages; but if the damages exceed the value of the services, the plaintiff cannot recover.

e. Master may elect to recover damages in another action, but if he elects to have them considered in this, he is deemed to concede that they are no more than the actual value of the services performed, and he cannot sue in another action for more."

[28] *Supra* Note 2 at 473, 169 N. E. at 650.

[29] *Supra* Note 17 at 492, where the Court said: "But if, where a contract is made of such a character, a party actually receives labor, or materials, and therefore derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, *the labor actually done, and the value received furnish a new consideration, and the law thereupon raises a promise to pay* to the extent of the reasonable worth of such excess" (italics ours). This case concerned an employee who had left his employment, but we consider the same principle applicable to the instant case, going further, and claiming a presumption to pay at the contract rate, which the parties determined for themselves was the value of the services performed.

In the states in which legislation favorable to our view has been passed, the tendency has been to base the amount of the recovery of the plaintiff on the proportion of the contract completed, and not on the principles of quasi-contractual law which would enable him to recover only the reasonable value of the services performed. For a discussion of the legislative treatment of this subject see (1930) 43 Harv. L. Rev. 647 and cases cited therein.

[1] Lewis v. Bollinger, 115 Misc. 221, 187 N. Y. Supp. 553 (1921); Davidson v. Dingeldine, 295 Ill. 367, 129 N. E. 79 (1920); Epstein v. Gluckin, *infra* Note 2; Gerard Real Property, Sec. 1153.

[2] Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922); Hugel v. Habel, 132 App. Div. 327 (1st Dept. 1909), 117 N. Y. Supp. 78; Midland Co. v. Prouty, 158 Mich. 656, 123 N. W. 549 (1909).

against the assignee unless he has assumed the obligations of the contract.[3] This latter holding clarified the modern concept of the rule of mutuality of remedy.[4] These general rules must be modified in their application, however, and it is with the extent of the modification that this commentary is concerned.

In the recent case of Lojo Realty Co., Inc. v. Estate of Isaac G. Johnson[5] the assignee sought specific performance of a contract for the sale of real property, tendering as the consideration his own bond and mortgage. The contract provided "for the execution and delivery of a purchase money bond and mortgage in the sum of $9,000 made to the seller." The Appellate Division held that the vendor was entitled to refuse to perform unless the original vendee became obligated upon the bond and mortgage called for in the contract of sale. In order to avail himself of the rights which he has purchased, the assignee must tender to the vendor exactly what the vendor was entitled to receive under his contract. Finch, *J.*, in the majority opinion said:

> "* * * the mere assignability as such of a contract does not carry with it the right to change the terms so as to permit a different maker of the bond and mortgage than provided for by the parties in the contract. The vendor in a real estate contract has a right to rely upon the character of the maker of the bond and mortgage as well as upon his financial responsibility. To hold otherwise would render it possible for a vendor to have foisted upon him a vendee whose financial responsibility in a case of a deficiency judgment upon foreclosure he would not have accepted."

This is in accord with the sound doctrine that a party to a contract cannot assign it so as to escape liability of performance.[6] A contrary holding would permit such avoidance, for if the vendee decides to repudiate the contract he has but to assign it to some person who, for financial or other reasons, is objectionable to the vendor. Such assignee could then secure the land from the vendor by an action for specific performance, and the vendor would be obliged to accept the security offered by the assignee.

The minority opinion in the instant case is based upon the theory that the mortgage is the thing relied upon, and so long as the vendor has recourse against the *res,* the personal responsibility of the signer of the bond is of no consequence. While it may be true that in the majority of real estate transactions the vendor looks to the land for

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[3] Langel v. Betz, 250 N. Y. 158, 164 N. E. 890 (1928).

[4] See 3 St. John's Law Review, 253 (1928).

[5] 237 N. Y. Supp. 460 (1929).

[6] Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, 8 Sup. Ct. Rep. 1308, 32 L. Ed. 246 (1887); Friedlander v. N. Y. Plate Glass Ins. Co., 38 App. Div. 146, 56 N. Y. S. 583 (1st Dept. 1899).

his security, yet we do not agree that as a matter of law every vendor, in the absence of expressed intention is willing to forego the additional security he may have contemplated in the personal liability of his vendee, by having the unknown financial ability of a third party thrust upon him.

It is the intention of the parties which should govern in each case—the intention as elicited from the written agreement. We think it fairly can be said that when a vendor contracts to sell land, he expects in the natural course of events, to complete the sale with the vendee. A contrary intent is not to be necessarily implied by the insertion of the word *assigns.*[7] The phrase in which it is used is a general one, found in most contracts which provide that it is "to bind the heirs, executors, administrators, successors and assigns of the respective parties." It added nothing to the force of the contract because it was already assignable. When taken in conjunction with the rest of the agreement in which "the purchaser hereby agrees to purchase said premises—and pay the same—by execution and delivery of a purchase money bond and mortgage," its force and effect is overcome. In other words, in the first clause the purchaser agrees to pay by the execution of a bond and mortgage, and in the second the contract is made binding on the assigns of the parties; but it is hardly logical to declare that the effect of the word "assigns" in the second is to defeat the inference in the first that the purchaser would give his own bond.

It is insisted that if the vendor intended to accept the personal bond of the original vendee only, the contract should have so provided. This argument overlooks the fact that it was the vendee with whom he contracted, and to the vendee he would look for performance. Can it be said, because the contract was assignable from its very nature, it carried with it the intendment that another's bond would be acceptable? To do so would not be interpreting the contract according to the expressed intention, but would be reading into it terms which are not there.

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[7] "The ordinary effect of the word assigns is only to the extent of declaring that whatever is obtained is of an assignable, negotiable, or vendible character." 5 Corpus Juris 1311. But often, though used, it does not have this effect. Thus in an agreement to sell land which contains a clause against assigning, the use of the term "heirs and assigns" is construed to mean "such assignee as the vendor is willing to accept." Lockerby v. Amon, 64 Wash. 24, 6 Pac. 463, 35 L. R. A. (N. S.) 1064, Ann. Cas. 1913A, 228 (1885). So where a contract is for personal service the use of the word does not make it assignable. Swartz v. Narragansett Elect. Lighting Co., 26 R. I. 436, 59 Atl. 111 (1905). See also Chrystie v. Phyfe, 19 N. Y. 344 (1859) and West v. Turner, 33 Sol. J. 234; Puffer v. Welch, 144 Wis. 506, 129 N. W. 525, Ann. Cas. 1912A 1120 (1911). It is clear then that when a contrary intent is expressed or implied in the agreement, the subsequent insertion of the word assigns is nugatory at least to the extent of defeating the prior expressed intent.

> "What equity exacts today as a condition of relief is the assurance that the decree if rendered will operate without injustice or oppression either to the plaintiff or defendant." [8]

There is no such assurance but rather a great possibility of injustice in requiring the defendant vendor to accept the bond and mortgage of another than the one with whom he contracted. It is obviously a sound rule of law which secures to an individual the rights contracted for by him.

The discussion of the inverse rule—that the vendor cannot have specific performance against the assignee unless the latter expressly assumes the obligations under the contract—evolves about a consideration of the effectiveness of an alleged assumption by implication.

> "We must turn from the assignment to the dealings between plaintiff and defendant to discover whether the defendant entered into relations with the plaintiff whereby he assumed the duty of performance." [9]

It has been held by the Appellate Division in a recent case that an action on the contract by the assignee constitutes an assumption.[10] Thus, where the suit is to recover the down payment on the contract, the defendant vendor may interpose a counterclaim seeking specific performance against the plaintiff assignee. If the assignee fails to show that the title is unmarketable, then the prayer of the counterclaim will be granted. If this be sound, *a fortiori* an action in equity begun by the assignee for specific performance, though discontinued, will be deemed an assumption so as to permit the vendor to maintain an action for specific performance subsequently.[11]

In our opinion these concepts arise from a failure to distinguish between a mere exercise of rights acquired through assignment and an adoption of the contract. Where the assignee sues for a return of the down payment because he believes the title to be unmarketable, he is doing nothing more than proceeding on the rights purchased from his assignor—it does not follow necessarily that he adopts the contract. There is no assurance that he would have been willing to take title were it marketable. In fact, suing for the down payment appears to be inconsistent with an assumption that the land is desired. It is no argument that if the assignee successfully sues for specific performance he must pay the consideration specified in the contract—that obligation flows from purely equitable principles as expressed in the Mutuality of Remedy doctrine [12] and ought not to be confused with obligations arising from the contract.

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[8] Epstein v. Gluckin, *supra* Note 2.

[9] Langel v. Betz, *supra* Note 3.

[10] Forsyth Leasing Co., Inc. v. Sacks, 225 App. Div. 440, 233 N. Y. Supp. 395 (2nd Dept. 1929).

[11] Nasha Holding Corp. v. Ridge Bldg. Corp., 221 App. Div. 238, 223 N. Y. Supp. 223 (2nd Dept. 1927).

[12] *Supra* Note 8 in the text.

So too, where the action is brought in equity for specific performance, the assignee is merely exercising his rights. If he discontinue before judgment it is apparent that he does not choose to realize upon them. However, the fact that he has once expressed an intention to take the land by commencing the action, may be held to preclude him from arbitrarily changing his mind, especially if rights of the vendor have been prejudiced in the meantime.

If an assignment is but a grant of rights, the assignee ought to be permitted to act upon those rights without incurring liability, unless such acts have caused a change in the position of the vendor. At least, there would be profit in having a substantial degree of definiteness in the law, rather than the uncertainty attendant upon establishing an assumption by implication.

The request by the assignee for an extension of time, though the request is granted has been held to be insufficient to imply an assumption.[13] It has been questioned whether the vendor can hold the vendee after granting the extension without the vendee's consent.

In transactions between the vendor and the vendee it has been held that though either is unable to perform on the law day, specific performance may still be had if the delay was not unreasonable, and did not materially affect the other party.[14]

> "The true rule must be that, if the delay of itself is unreasonable and unexcused, it is enough to relieve the unwilling party from the contract; and that delay, though not in itself unreasonable, if it has made way for an indeterminate and material change of circumstances, detrimental to the interests of the defendant if obliged to perform, will have the same effect; but in the latter case it must so appear to the court from the facts shown in the case." [15]

This is true only of contracts which do not specifically make time "of the essence," [16] or where, though not made a provision in the contract, the acts of the parties have made it so.[17] We see no reason why this rule should not be extended to cases in which an assignee is involved. If the vendee had not assigned he could have been held within the limitations given above for a reasonable time

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[13] *Supra* Note 3.

[14] Day v. Hunt, 112 N. Y. 191, 19 N. E. 414 (1889); Merchants Bank v. Thomson, 55 N. Y. 7 (1873); Hubbell v. Von Schoening, 49 N. Y. 326 (1872); Page v. McDonnell, 55 N. Y. 299 (1873); 1 Story Eq. Juris., 742; 3 Pom. Eq. 446.

[15] Merchants Bank v. Thomson, *supra* Note 14 at 16.

[16] Missouri River Co. v. Brickley, 21 Kan. 275 (1878); Zempel v. Hughes, 234 Ill. 424, 85 N. E. 641 (1908); Rosenblatt v. Bergen, 202 App. Div. 220, 195 N. Y. Supp. 276 (1st Dept. 1922).

[17] Bolt v. Early, 33 Ind. App. 434, 70 N. E. 271 (1904); Garrett v. Cohen, 63 Misc. 450, 117 N. Y. Supp. 129 (1909). See also case cited *supra* Note 14.

after the law day. Since an assignment does not lessen the obligations of the assignor, to be logical, he should continue to be held after assigning. The reasonableness of the time which has been granted would govern in each case. There is no analogy here to the rule of suretyship which releases the surety from his obligation when he has not assented to an extension of time;[18] or to the principle of the law of mortgages which releases the grantee of real property from liability on the mortgage debt where an extension of time is given without his consent to his grantee who has assumed the obligation of the mortgage.[19] Where an assignor of a contract to convey real property is held liable to perform within a reasonable time after assigning, no new obligations are thrust upon him. But to hold a surety liable after an extension of time would be, in effect, to bind him with an obligation to which he never assented. In the latter case, time is definitely of the essence; it is in fact controlling. In the case of the vendor of real property, the decree of the court of equity granting specific performance to one who has been in default on the law day proceeds of necessity on the theory that time is not of the essence.

THOMAS E. MCDADE.

JUDICIAL INTERPRETATIONS OF SECTION 374a CIVIL PRACTICE ACT.

The marked dissension which followed the recent decisions of two departments of the Appellate Division in interpreting the new Section 374a of the Civil Practice Act [1] may be attributed to a firm conviction on the part of many that the broad, beneficial effect intended by the Legislature in enacting this amendment to the statute was not carried out by the appellate courts in the view which they took towards the legislative intent as expressed by the wording of

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[18] Drucker v. Rapp, 67 N. Y. 464 (1876).

[19] Calvo v. Davies, 73 N. Y. 211, 29 Amer. Rep. 130 (1878); Union Stores v. Caswell, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85 (1892).

[1] L. 1928, Ch. 532:

"ADMISSIBILITY OF CERTAIN WRITTEN RECORDS. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial Judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."