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Assumption of Mortgages in Missouri

Gary D. McConnell

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COMMENTS

ASSUMPTION OF MORTGAGES IN MISSOURI

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I. INTRODUCTION

An owner of real estate with an existing mortgage often conveys his equity before he has fully paid the mortgage debt. The grantee often agrees to "assume" the mortgage or to take the property "subject to" the existing mortgage. Whether a grantee assumes the mortgage or takes the property subject to the mortgage determines his personal liability for the mortgage debt. Mortgage assumptions are popular because the buyer does not have to obtain other financing for the property. This is particularly beneficial when interest rates are higher than the rate on the existing mortgage. Reported cases on this subject, however, have been infrequent since the depression era. The lack of cases may be due to growth in real estate values during this period, which has caused most land to be of sufficient value to satisfy any mortgage debts at a foreclosure. If real estate values begin to decline, litigation concerning this subject may increase unless enforcement of due-on-sale clauses by mortgagees results in fewer transfers without refinancing.

A conveyance in which the grantee takes subject to a mortgage differs

2. For purposes of this Comment, the terms "mortgage," "mortgagor," and "mortgagee" are used interchangeably with "deed of trust," "beneficiary," and "grantor."
3. The due-on-sale clause is a part of many mortgage instruments and allows the mortgagee to declare the entire mortgage due on a transfer of an interest in the mortgaged land. See G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.21.
4. When a grantee takes subject to a mortgage, he will pay his grantor the land's redemption value, which is the difference between the full unencumbered value and the amount of the mortgage debt. The grantee is the party expected to
from one in which the grantee assumes the mortgage. When land is conveyed subject to a mortgage, the grantor and grantee impliedly agree that, between them, the land is the primary fund from which the mortgagee may satisfy the debt. The grantee does not become personally liable for payment of the debt to either the grantor or mortgagee. Thus, the grantee has no liability for payment of the mortgage beyond loss of the property. When a grantee assumes the mortgage, not only does the land become the primary fund from which to satisfy the mortgage debt, but the grantee becomes personally liable for payment of the mortgage debt. Determining if a grantee has assumed the mortgage debt, however, is often difficult. This Comment will review the law in Missouri concerning the rights and liabilities of the mortgagee, the mortgagor, and the mortgagor’s grantee for payment of a pre-existing mortgage debt when the grantee assumes the mortgage on the real estate conveyed.

II. THE AGREEMENT TO ASSUME AND PROBLEMS OF PROOF

In addition to conveying real property, a deed may be a contract between the grantor and the grantee. The grantee becomes bound on the contract by his acceptance of a deed delivered by the grantor, even though a deed is signed only by the grantor. Thus, a deed containing an assumption clause, when accepted by the grantee, is usually an enforceable contract.

pay the debt in order to retain the property. See id. § 5.3; Warm, Some Aspects of the Rights and Liabilities of Mortgagor, Mortgagor and Grantee, 10 TEMP. L.Q. 116, 116-18 (1936).

The rights and liabilities of a grantee who takes subject to a mortgage are beyond the scope of this Comment, except as they apply to assumption of mortgage problems.

5. McFarland v. Melson, 323 Mo. 977, 984, 20 S.W.2d 63, 66 (1929); Barnes v. Ganss, 72 S.W.2d 884, 888 (Mo. App., St. L. 1934).


7. The right of a mortgagee to recover a deficiency remaining after foreclosure has been recognized in Missouri at least since Scott v. Jackson, 2 Mo. 104 (1829).


9. See Employers Indem. Corp. v. Garrett, 327 Mo. 874, 884, 38 S.W.2d 1049, 1053 (1931). The Garrett court stated:

A deed, though signed by the grantor only, when delivered to and accepted by the grantee, becomes a contract in writing. As the terms of the contract are in writing, the grantee’s acceptance of the deed in which the contract is set out, and of which it forms a part of the consideration, is considered equivalent to the signature of the grantee to the contract.

Id.

10. No particular words are required to create a valid agreement to assume
tract to assume the mortgage debt. On the other hand, the grantee is not bound by an assumption clause when he can prove that he accepted the deed without knowledge of the clause or that it was included in the deed by fraud or mistake.\footnote{11}

An enforceable agreement to assume the mortgage may exist outside the deed if the deed does not contain an assumption clause.\footnote{12} Courts may find such an agreement when the deed of conveyance says nothing about an existing mortgage or says that the grantee takes the property subject to an existing mortgage.\footnote{13} While the deed may recite that the grantee takes subject to a mortgage,\footnote{14} courts have enforced both written and oral agreements to assume the mortgage.\footnote{15} An outside agreement to assume a mortgage is found most commonly in a contract for sale of mortgaged land.\footnote{16} Courts also have looked at the negotiations preceding the sale to find a binding oral agreement to assume the mortgage.\footnote{17}

Courts sometimes will imply an agreement to assume when a contract for sale or the deed recites that the purchaser takes subject to a mortgage but says nothing about whether the purchaser agreed to assume the mortgage. A court may find an implied promise by the purchaser to assume the mortgage when the deed or contract of sale states that the unencumbered value of the property is the consideration, but the purchaser paid the dif-

a mortgage. See McFarland v. Melson, 323 Mo. 977, 986, 20 S.W.2d 63, 67 (1929). Probably the most common words used are that the grantee "assumes" or "assumes and agrees to pay" the mortgage debt. See Annot., 101 A.L.R. 281 (1936).

\footnote{11} Employers Indem. Corp. v. Garrett, 327 Mo. 874, 884-85, 38 S.W.2d 1049, 1053-54 (1931); Laudman v. Ingram, 49 Mo. 212, 214 (1872); Hafford v. Smith, 369 S.W.2d 290, 295-96 (Mo. App., Spr. 1963); Wissmann v. Pearlne, 235 Mo. App. 314, 320-22, 135 S.W.2d 1, 4-5 (St. L. 1940). For a discussion of the parol evidence problems presented when a grantee attempts to prove he did not assume the mortgage, see notes 24-33 and accompanying text infra.

\footnote{12} For a discussion of the parol evidence problems associated with proving that an agreement to assume exists outside the deed, see notes 34-39 and accompanying text infra.

\footnote{13} For cases in which the deed was silent concerning the existing mortgage, see Laudman v. Ingram, 49 Mo. 212, 213 (1872); Heffernan v. Weir, 99 Mo. App. 301, 303-04, 72 S.W. 1085, 1085 (St. L. 1903). For cases in which the deed recited that the grantee took subject to the mortgage, see McFarland v. Melson, 323 Mo. 977, 988-89, 20 S.W.2d 63, 64-65 (1929); Hall v. Morgan, 79 Mo. 47, 52 (1883); Gilmer v. Powell, 256 S.W. 124, 124-25 (Mo. App., K.C. 1923).

\footnote{14} See note 4 supra.

\footnote{15} See Missouri Home Sav. & Loan Ass'n v. Allen, 452 S.W.2d 109, 110-12 (Mo. 1970) (written agreement); McFarland v. Melson, 323 Mo. 977, 987-88, 20 S.W.2d 63, 64-65 (1929) (oral agreement); Gilmer v. Powell, 256 S.W. 124, 124-25 (Mo. App., K.C. 1923) (written agreement).

\footnote{16} See cases cited note 15 supra.

\footnote{17} McFarland v. Melson, 323 Mo. 977, 987-88, 20 S.W.2d 63, 67 (1929) (binding agreement not proven).
ference between the unencumbered value of the land and the amount of the indebtedness. Courts reason that the parties intended the grantee to pay the unencumbered value of the land and that the amount of the indebtedness, which the purchaser retained, is purchase money that belongs to the grantor. 18 For example, S agrees to sell Blackacre, which has an unencumbered value of $40,000, to B. Blackacre is subject to a $30,000 mortgage. If the deed from S to B recites a consideration of $40,000 and states that B takes subject to the $30,000 mortgage, but the evidence shows that B paid only $10,000 to S for the conveyance, the court may imply that B promised to assume the $30,000 mortgage. The court theorizes that B has retained the $30,000, which belongs to S, in exchange for B's promise to pay the mortgage.

Many scholars have criticized this theory. 19 They argue that in arriving at the purchase price for encumbered land, the parties will determine the land's unencumbered market value, from which they will deduct the amount of the encumbrance. In the above example, the scholars would argue that B paid $10,000 of the $40,000 value of Blackacre not because he assumed the $30,000 mortgage, but because $10,000 represented the value of the interest that B received; to conclude that B assumed the mortgage is myopic. B may have assumed the mortgage or he may have taken subject to the mortgage; either finding would be consistent with these facts. 20

The practitioner should be aware of this theory because it is unclear whether Missouri courts would find an implied promise to assume a mortgage if presented with the facts of the foregoing example. 21 The practitioner

18. See id.; G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.8; Warm, supra note 4, at 119-21.
19. See G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.8; Warm, supra note 4, at 119-21.
20. See authorities cited note 19 supra.
21. Some scholars have stated that Missouri courts have applied this theory. See, e.g., Warm, supra note 4, at 119 n.10. A careful examination, however, reveals that no Missouri court has found an implied assumption under these facts. The cases often cited as following the theory in Missouri are distinguishable. See McFarland v. Nelson, 323 Mo. 977, 986-87, 20 S.W.2d 63, 67 (1929) ("We do not agree that . . . an agreement should be implied therefrom . . . for in every ordinary purchase of an equity [of tardy redemption] the process necessarily involved in ascertaining its value is to deduct the amount of the encumbrance from the worth of the interest covered.") (citations omitted). The McFarland court concluded that the parties' intent determines if the grantee assumed the debt. Id. In other words, the agreement to assume is not implied, but must be proven by the use of parol evidence. Landau v. Cottrill, 159 Mo. 308, 60 S.W. 64 (1900), is sometimes cited as authority that Missouri follows this theory. There is dictum in Landau indicating that the court would imply an assumption based on the grantee's payment of only the unencumbered value of the land. Id. at 318, 60 S.W. at 66 (dictum). In Landau, the defendant purchased the property in question subject to the plaintiff-mortgagee's mortgage and subject to a mechanic's lien. The property then was sold to satisfy the
can avoid the risk that a court would imply an assumption of a mortgage by careful drafting of the contract of sale and the deed.22 One treatise has suggested that "where an assumption is not intended the drafter could include after the 'subject' to language, the following language: 'Said mortgage is not being assumed by the Grantee.' "23

Courts often must decide if parol evidence is admissible to prove or to disprove the existence of an agreement to assume the mortgage. The cases admitting parol evidence fall into two categories. First, when the deed of conveyance contains an assumption clause, parol evidence is admissible to prove the grantee did not agree to assume the debt.24 Second, when the deed of conveyance says nothing about the mortgage or says that the grantee takes the property subject to the mortgage, parol evidence is admissible to prove there was an agreement to assume the debt.25 Missouri courts have recognized that the use of parol evidence in these situations does not compare with conceptualizing the deed as a contract.26

Missouri courts have held consistently that parol evidence is admissi-
ble to show whether the grantee agreed to assume the mortgage when the deed contains an assumption clause but the grantee denies that he agreed to assume the mortgage debt. Courts allow parol evidence when the grantee claims the assumption clause was inserted in the deed either without his knowledge or by fraud or mistake. Courts have treated grantees' claims based on lack of knowledge differently than claims based on fraud or mistake, even though these concepts are closely related. Depending on the theory used, the courts treat the grantee as bound or not bound by the assumption clause. Courts treat the grantee as initially bound by the assumption clause when he contends the clause was inserted in the deed by fraud or mistake; the remedy available is reformation or rescission of the deed. On the other hand, courts treat the grantee as not bound by the assumption clause when he contends the clause was inserted in the deed without his knowledge. The theory is that acceptance of the deed by the grantee without knowledge of the assumption clause does not result in a contract binding the grantee to pay the mortgage debt. When applying this theory, courts admit parol evidence to determine if the grantee had agreed to assume the mortgage prior to execution of the deed.

Missouri courts admit parol evidence to prove that an agreement to assume the mortgage existed outside the deed when the deed says nothing about the mortgage or says that the grantee takes the property subject to the mortgage. Parol evidence is admissible to show either a written or an oral agreement to assume the mortgage. Missouri courts have used three

27. See Hafford v. Smith, 369 S.W.2d 290, 295-96 (Mo. App., Spr. 1963); Wissmann v. Pearline, 235 Mo. App. 314, 318-20, 135 S.W.2d 1, 4-5 (St. L. 1940).
29. It is unclear which factors influence a court to treat a case as one of fraud or mistake or as one of lack of knowledge. Compare cases cited note 30 infra with cases cited note 31 infra. For an excellent discussion of this area, see generally Comment, Reformation of Written Instruments in Missouri, 37 MO. L. REV. 54 (1972).
32. Hafford v. Smith, 369 S.W.2d 290, 296 (Mo. App., Spr. 1963) ("Acceptance and recording of the deed containing the assumption clause, without more, does not bind the grantee . . . .")
33. See id. at 296-97; Wissmann v. Pearline, 235 Mo. App. 314, 320, 135 S.W.2d 1, 5 (St. L. 1940).
34. See cases cited note 13 supra.
35. See cases cited note 13 supra.
36. See cases cited note 15 supra.
theories to allow the admission of parol evidence. The first one is that "a stranger to a written instrument is not forbidden to dispute its terms." Second, "an agreement to assume is an independent contract, and . . . parol proof . . . is merely explanatory of the consideration." The third theory is that "the execution of the deed and delivery of possession by the grantor constitute performance on one side such as takes the alleged oral agreement to assume out of the statute of frauds and opens the way for proof thereof." Under any of these three theories, the existence of an agreement to assume the mortgage debt is a question of fact, which courts have required to be established by clear and convincing evidence.

III. ENFORCEMENT OF THE AGREEMENT TO ASSUME

A. Liability of the Assuming Grantee to the Mortgagee

Missouri courts uniformly recognize the right of the mortgagee to sue an assuming grantee directly for a deficiency existing after foreclosure. In other words, the mortgagee can hold the assuming grantee personally liable for an amount left unpaid on the debt after applying the value of the land against the indebtedness. The action is based on the grantee's promise to the mortgagor to assume payment of the mortgage debt. Because the assuming grantee contracts with the mortgagor and not with the mortgagee, a mortgagee wishing to sue the assuming grantee must avoid the usual requirement of privity of contract. Missouri courts, however, have avoided this

39. Id.
40. Id.
41. Id. at 985, 20 S.W.2d at 66; Morris v. Holland, 529 S.W.2d 948, 952-53 (Mo. App., Spr. 1975); Hafford v. Smith, 369 S.W.2d 290, 296 (Mo. App., Spr. 1963).
42. See, e.g., Hafford v. Smith, 369 S.W.2d 290, 298 (Mo. App., Spr. 1963) ("Whether the relationship between mortgagor and assuming grantee be considered one of suretyship, or a simple third-party beneficiary contract, the mortgagee may proceed directly against the vendee."). For present purposes, the discussion will be confined to the situation where there has been only one conveyance of the mortgaged property, i.e., where the only parties are the mortgagee, mortgagor, and the assuming grantee. For a discussion of the liability of a grantee who assumes the mortgage in a more remote conveyance, see Part III.C. infra.
44. See Fitzgerald v. Barker, 70 Mo. 685, 687 (1879); Warm, supra note 4, at 127-28.
doctrine by applying either principles of suretyship and the doctrine of equitable subrogation or a third party beneficiary theory. Although the precise status of these doctrines in Missouri is uncertain, the trend is toward more frequent use of the third party beneficiary theory. Some Missouri decisions, however, have recognized the suretyship-equitable subrogation theory, while others are unclear about which theory they have followed.

The suretyship-equitable subrogation theory begins with the principle that a transfer of the mortgaged premises will not relieve the mortgagor of his liability to the mortgagee on the note. When the grantee assumes the mortgage indebtedness, the relationship of principal debtor and surety is created between the assuming grantee and the mortgagor. The grantee becomes the principal debtor, and the mortgagor becomes his surety. If the grantee defaults, the mortgagee can sue the mortgagor-surety on the mortgage note. Should the mortgagor-surety be forced to pay the debt, he can sue the assuming grantee for reimbursement. The doctrine of equitable subrogation, however, bypasses this circuity and gives the mortgagee the right of the mortgagor to recover directly from the assuming grantee. This theory was recognized in early Missouri decisions.

45. Crone v. Stinde, 156 Mo. 262, 268-70, 55 S.W. 863, 863-64 (En Banc 1900) (third party beneficiary theory allowing recovery); Fitzgerald v. Barker, 70 Mo. 685, 687-88 (1879) (same); Heim v. Vogel, 69 Mo. 529, 535 (1879) (same); Hafford v. Smith, 369 S.W.2d 290, 297-98 (Mo. App., Spr. 1963) (mortgagee can recover whether under suretyship theory or third party beneficiary theory).

46. See G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.12, at 269-70. The majority of Missouri cases employs the third party beneficiary theory. See, e.g., cases cited note 45 supra.

47. See Hicks v. Hamilton, 144 Mo. 495, 499, 46 S.W. 432, 432-33 (1898) (overruled in Crone v. Stinde, 156 Mo. 262, 55 S.W. 863 (En Banc 1900)); Hafford v. Smith, 369 S.W.2d 290, 297-98 (Mo. App., Spr. 1963).


49. Hildrith v. Walker, 187 S.W. 608, 609-10 (Mo. App., Spr. 1916); Calloway v. McKnight, 180 Mo. App. 621, 624-26, 163 S.W. 932, 933 (St. L. 1914). While the courts talked in terms of principal and surety, the relationship may be more accurately referred to as one of quasi-suretyship wherein the land is the principal debtor, the assuming grantee is a surety, and the mortgagor is a sub-surety. See generally G. Osborne, G. Nelson & D. Whitman, supra note 1, §§5.14, 5.19; Warm, supra note 4, at 126-27. For purposes of convenience and because the courts use these terms, this Comment will refer to the assuming grantee as the “principal” and the mortgagor as a “surety,” when discussing the suretyship relationship.

50. See Part III.B. infra.

51. A surety is entitled to reimbursement after he has made a good faith discharge of the mortgage debt. Tucker v. Holder, 359 Mo. 1039, 1045-46, 225 S.W.2d 123, 125-26 (1949).

52. See G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.13, at 272.

53. See Hicks v. Hamilton, 144 Mo. 495, 499, 46 S.W. 432, 432 (1898) (over-
The basis of the third party beneficiary theory is that the assuming grantee’s performance of his promise to the mortgagor to discharge the debt also will benefit the mortgagee. The mortgagee is a creditor beneficiary because the performance of the promise by the grantee will satisfy an obligation of the mortgagor to the mortgagee. As a creditor beneficiary, the mortgagor can sue the assuming grantee on the promise.

B. Rights and Liabilities of the Mortgagor

Unless the mortgagee and the mortgagor’s grantee execute a novation, a mortgagor who has conveyed the mortgaged premises to an assuming grantee remains liable on his note to the mortgagee. The courts apply suretyship principles, making the assuming grantee the principal and the mortgagor a surety. The land, however, remains the primary fund for payment of the debt. Missouri courts require the mortgagor who has notice of an assumption agreement to recognize the suretyship relationship and to treat the assuming grantee as the principal debtor and the mortgagor as the surety.

Although courts allow the mortgagee to sue the assuming grantee directly, this requirement leaves unclear whether the mortgagee must sue the assuming grantee before suing the mortgagor. In Missouri, following default, the mortgagee may sue a surety on his promise to pay the debt.

ruled on other grounds in Crone v. Stinde, 156 Mo. 262, 55 S.W. 863 (1900); Haf ford v. Smith, 369 S.W.2d 290, 297-98 (Mo. App., Spr. 1963).

54. RESTATEMENT OF CONTRACTS § 133 (1932). An incidental beneficiary is one who will be benefitted by the performance of the promise, but the performance is not in satisfaction of an obligation of the promisee to him. An incidental beneficiary cannot sue successfully on the promise. Id. See generally 4 A. CORBIN, CORBIN ON CONTRACTS §§ 772-781 (1951).

55. See cases cited note 45 supra. See also G. OSBORNE, G. NELSON &D. WHIT MAN, supra note 1, § 5.12.

56. A novation is a binding agreement among all of the parties, whereby a new party is substituted for one of the original parties to a contract. A novation would relieve the mortgagor of any obligation on the mortgage and substitute the assuming grantee in his place. See RESTATEMENT OF CONTRACTS §§ 423, 430 (1932). In lieu of releasing the mortgagor, the mortgagee may enter into a covenant not to sue the mortgagor.

57. G. OSBORNE, G. NELSON &D. WHITMAN, supra note 1, § 5.1.

58. See Hildrith v. Walker, 187 S.W. 608, 609-10 (Mo. App., Spr. 1916); Calloway v. McKnight, 180 Mo. App. 621, 624-25 (St. L. 1914).


without first suing the principal debtor. Missouri Revised Statutes section 433.01062 states:

Any person bound as surety for another in any bond, bill or note, for the payment of money or delivery of property, may, at any time after an action has accrued thereon, require, in writing, the person having such right of action forthwith to commence suit against the principal debtor and other parties liable.

This statute appears to govern the quasi-suretyship relationship present with an assumption of a mortgage because Missouri courts require the mortgagee to treat an assuming grantee as the principal debtor.63 Thus, the statute would allow the mortgagor-surety to require the mortgagee to sue for a deficiency against the principal debtor-assuming grantee by serving the mortgagee with written notice to commence suit.64

Three defenses are available to the mortgagor in a suit for a deficiency. When the mortgagor has given the mortgagee statutory notice to commence suit, as discussed above, Missouri Revised Statutes section 433.03065 provides that if suit is not commenced within thirty days, the mortgagor is released from liability.66 When the mortgagee gives the assuming grantee a binding extension of time for payment of the note without the consent of the mortgagor or reservation of rights against the mortgagor,67 the mortgagor

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61. State ex rel. United States Fidelity & Guar. Co. v. Walsh, 540 S.W.2d 137, 140 (Mo. App., St. L. 1976); Stifel Estate Co. v. Cella, 220 Mo. App. 657, 665-67, 291 S.W. 515, 517-19 (St. L. 1927). The mortgagor is a surety and is bound by the terms of the note and mortgage instrument. If the assuming grantee defaults, the mortgagor is bound to perform according to the terms of the mortgage. The mortgagee may sue either the mortgagor-surety or the assuming grantee, as principal, or both jointly at his option. The obligation of the mortgagor as a surety should be distinguished from the obligations of a guarantor in a guaranty contract. The obligation of a guarantor and a surety are similar, but a guarantor is bound to perform by the terms of a separate contract and not by the contract between the principal and the creditor. See Beauchamp v. North Am. Sav. Ass'n, 543 S.W.2d 536, 537-38 (Mo. App., K.C. 1976); State ex rel. United States Fidelity & Guar. Co. v. Walsh, 540 S.W.2d at 140; Stifel Estate Co. v. Cella, 220 Mo. App. at 665-67, 291 S.W. at 517-19.


64. The author has found no cases interpreting the application of this statute in the quasi-suretyship situation of an assumed mortgage.


66. The mortgagor also may be released if the mortgagee fails to pursue the suit diligently. MO. REV. STAT. § 433.030 (1978). The defenses provided by this section are available to the mortgagor only if id. § 433.010 applies to an assumed mortgage. See notes 62-64 and accompanying text supra.

67. MO. REV. STAT. § 400.3-606 (1978). An express reservation of rights against a party preserves all rights against that party which the holder of the instrument had at the time the instrument was originally due. Id. § 400.3-606(2)(a).
is discharged completely. 68 While some Missouri cases follow the above rule, other cases have said that the mortgagor is released only to the extent of the value of the property when the mortgagee gives the extension to the assuming grantee. 69 The mortgagor also may be discharged when the mortgagee releases either all or part of the property securing the debt or when he releases the assuming grantee from personal liability on the debt. 70 This release may effect a total discharge or a discharge to the extent of the value of the premises released. 71

When the assuming grantee defaults and the mortgagor, on demand, pays the mortgagee, the mortgagor can sue the assuming grantee on a contract or a subrogation theory. First, he may sue on the contract of the assuming grantee to pay the debt. 72 Second, relying on suretyship-equitable subrogation principles, he may be subrogated to the rights of the mortgagee. 73 Although the theories appear distinct, courts sometimes do not distinguish them. 74 In the usual situation, when the mortgagee has foreclosed and the mortgagor has paid a deficiency only, the choice of theory would make little difference. If the suit is on the contract, the mortgagor suffers no actual damages until he has paid the deficiency; hence, he would not sue until he has paid. Likewise, the mortgagor, as a surety, is not subrogated to the rights of the mortgagee until he has paid the mortgagee and, therefore, could not sue until he has paid. 75

The express reservation also preserves the right of the surety to pay the instrument as of the time it is originally due, and he will be subrogated to the rights of the mortgagor against the principal debtor. Id. § 400.3-606(2)(b) to (c).

68. See Pratt v. Conway, 148 Mo. 291, 49 S.W. 1028 (1899); Phoenix Trust Co. v. Garner, 227 Mo. App. 929, 59 S.W.2d 779 (K.C. 1933); G. OSBORNE, G. NELSON & D. WHITMAN, supra note 1, § 5.19.


71. Hildrith v. Walker, 187 S.W. 608, 609-10 (Mo. App., Spr. 1916) (discharge to extent of value of release given); G. OSBORNE, G. NELSON & D. WHITMAN, supra note 1, § 5.19, at 292-93. A full discharge has been given by some courts that refused to determine the value of the portion of the property released and thereby the extent of any injury to the mortgagor. Id.

72. Calloway v. McKnight, 180 Mo. App. 621, 622-23, 163 S.W. 932, 932 (St. L. 1914).


74. See, e.g., Calloway v. McKnight, 180 Mo. App. 621, 622-23, 163 S.W. 932, 933 (St. L. 1914) (suit on contract but suretyship principles discussed).

The theory of the cause of action is more important if there has been no foreclosure before the mortgagor-surety pays the mortgagee because the mortgaged property may be the only substantial asset from which to satisfy any judgment obtained. The payment of the indebtedness secured by a mortgage usually extinguishes the encumbrance on the land. It is unclear, however, whether payment extinguishes the power of sale or right to foreclosure and, if not, whether the mortgagor is subrogated to these rights. The better approach would be that the mortgagor is subrogated to these rights to prevent the assuming grantee from being unjustly enriched. These problems may be avoided if the mortgagee assigns the mortgage to the mortgagor-surety, an action that would prevent the mortgage from being satisfied of record.

C. The Remote Assuming Grantee

An unbroken chain of assuming grantees exists when each grantee in a succession of two or more conveyances of the encumbered property agrees to assume the mortgage debt. For example, if M, the mortgagor, conveys to B, who assumes the debt, and B then conveys to R, who assumes the debt, there is an unbroken chain of assuming grantees. B and R are assuming grantees, and R is the remote assuming grantee. Under these facts, the rights and liabilities of the remote assuming grantee are similar to those of the grantee who takes directly from the mortgagor. The relationship of principal and surety arises following each conveyance; the assuming grantee becomes the principal, and his grantor becomes the surety. Thus, the mortgagee could sue under the suretyship-equitable subrogation theory or the third party beneficiary theory. Under the theory of suretyship-equitable subrogation, the mortgagee would be subrogated to the rights of each successive grantor-surety. Under the third party beneficiary theory, the mort-

76. Young v. Clifford, 61 Mo. App. 450, 452 (St. L. 1895).
77. Missouri courts have not yet decided these questions. Tucker v. Holder, 359 Mo. 1039, 225 S.W.2d 123 (1949), by analogy, would appear to indicate that the grantor would be subrogated to the rights of the mortgagee. In Tucker, an assuming grantee took property believing he had received the fee and then paid the mortgage debt. In fact, he had received only a life estate. In a quiet title action brought by the remainderman, the court subrogated the assuming grantee to the rights of the mortgagee in the land on the basis that a life tenant who discharges encumbrances on the land is a creditor of the estate. Id. at 1045-46, 225 S.W.2d at 126-27. Thus, it could be argued that a mortgagor who discharges an encumbrance on the land should be subrogated to the rights of the mortgagee against the land.
78. See id. at 1046, 225 S.W.2d at 126-27 ("[S]ubrogation . . . is the device of equity to prevent unjust enrichment and to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it.").
79. G. OSBORNE, G. NELSON & D. WHITMAN, supra note 1, § 5.15.
80. See notes 48-53 and accompanying text supra.
81. G. OSBORNE, G. NELSON & D. WHITMAN, supra note 1, § 5.15, at 276; Warm, supra note 4, at 128-29.
mortgagee could sue because a promise is received for his benefit by the grantor-surety, who is liable to him. The mortgagor and the intermediate assuming grantees have the same rights against the remote assuming grantee as the original mortgagor has against an assuming grantee who takes directly from the mortgagor. The intermediate assuming grantee in a suit by the mortgagee also may have the defenses of extension and release discussed above.

The problem is more difficult when the chain of assuming grantees is broken, but the grantee who currently holds the property has assumed the mortgage. This occurs when the initial grantee or one or more intermediate grantees have taken the property subject to the mortgage, but have conveyed to a grantee who has agreed to assume the debt. For example, if M, the mortgagor, conveys to B, who takes subject to the mortgage, and B then conveys to R, who assumes the debt, there is a break in the chain of assuming grantees. B is not personally liable for the debt because he took only subject to the mortgage. Although the mortgagee can reach the mortgaged land to satisfy the debt, he may wish to proceed directly against the remote assuming grantee and hold that grantee personally liable for any deficiency. The grantee, however, has taken from a grantor who was not personally liable. In these circumstances, there are problems with both the suretyship-equitable subrogation and third party beneficiary theories.

In the early Missouri case of Hicks v. Hamilton, which has been overruled, the court rejected both the suretyship-equitable subrogation and third party beneficiary theories. The plaintiff Hicks had obtained a mortgage from Clark on property owned by Clark. Clark conveyed the property to Cowling subject to the mortgage; Cowling then conveyed to Hamilton. After default, the plaintiff foreclosed on the land and sued for

82. See G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.15, at 277. The mortgagee is a creditor beneficiary because each successive grantor in the chain of assumptions is liable to him. See notes 54 & 55 and accompanying text supra.

83. See Part III.B. supra.


85. See note 4 supra.

86. No agreement between the parties transferring the land will prevent the mortgagee from reaching the land to satisfy the mortgage debt. G. Osborne, G. Nelson & D. Whitman, supra note 1, § 5.1.

87. 144 Mo. 495, 46 S.W. 432 (1898) (overruled in Crone v. Stinde, 156 Mo. 262, 269-70, 55 S.W. 863, 865 (En Banc 1900)).

88. Hicks was overruled in Crone v. Stinde, 156 Mo. 262, 269-70, 55 S.W. 863, 865 (En Banc 1900). In overruling Hicks, the court allowed recovery on a third party beneficiary theory. A careful examination of Missouri cases reveals none that allowed the mortgagee to recover from an assuming grantee who took after a break in the chain of assumptions on the basis of the suretyship-equitable subrogation theory.
a deficiency remaining on the note. The Hicks court held that the remote assuming grantee, whose grantor had taken only subject to the mortgage, could not be personally liable. In rejecting the suretyship-equitable subrogation doctrine, the court recognized that the doctrine hinged on the mortgagee's ability to enforce the rights that the surety had against the principal. An intermediate nonassuming grantor, however, does not become a surety when he conveys to an assuming grantee because he never has been personally liable for the mortgage debt. Thus, the mortgagee would have no right to subrogation. The Hicks court rejected the third party beneficiary theory because the plaintiff mortgagee was not a creditor beneficiary; there was no privity or obligation between the plaintiff mortgagee and the nonassuming grantor. In Hicks, there was no privity because the nonassuming grantor was not personally liable to the mortgagee.

Two years later in Crone v. Stinde, the Missouri Supreme Court expressly overruled the Hicks decision and allowed the mortgagee to recover on a third party beneficiary theory. The Crone court stated that the contract of assumption between the nonassuming grantor and the remote assuming grantee was made for the benefit of the party holding the mortgage debt, and as plaintiff is owner and holder of that debt we know of no reason, why under our rulings, he is not entitled to sue for and recover judgment for the same, notwithstanding . . . [the defendant's grantor] was under no obligation either legal or equitable to pay the debt. Missouri courts continue to follow this theory and allow a mortgagee to obtain a personal judgment against an assuming grantee who takes his title

89. Hicks v. Hamilton, 144 Mo. at 496-97, 46 S.W. at 432.
90. Id. at 500, 46 S.W. at 433.
91. Id. at 499, 46 S.W. at 433. See also notes 48-53 and accompanying text supra.
92. 144 Mo. at 499, 46 S.W. at 433. See also Warm, supra note 4, at 133-36.
93. 144 Mo. at 499-500, 46 S.W. at 433.
94. Id.
95. Id. In other words, the mortgagee was an incidental beneficiary.
96. 156 Mo. 262, 55 S.W. 863 (1900).
97. Id. at 269-70, 55 S.W. at 864-65.
98. The Crone court stated, "It . . . seems clear that there was a new and valuable consideration for the promise . . . [to assume the mortgage debt]." Id. at 268, 55 S.W. at 864. The court did not make clear what it considered to be the new consideration. The mortgagee was not a creditor beneficiary as the defendant-assuming grantee's grantor owed no obligation to the mortgagee. The mortgagee was probably not a donee beneficiary as it is unlikely that the defendant-assuming grantee's grantor intended to make a gift to the mortgagee. Therefore, the mortgagee was an incidental beneficiary. See RESTATEMENT OF CONTRACTS § 133 (1932). Under traditional third party beneficiary theory, an incidental beneficiary cannot sue successfully on the promise. See note 54 supra.
99. 156 Mo. at 268-69, 55 S.W. at 864.
from one not personally liable for the indebtedness.\textsuperscript{100}

The effect of these decisions on the rights and liabilities of the mortgagor and any assuming grantees who took prior to the break in the chain of assumptions is unclear. While this problem has not been addressed expressly in Missouri, their rights and liabilities are probably no different than when no break in the chain of assumptions exists.\textsuperscript{101} In \textit{Phoenix Trust Co. v. Garner},\textsuperscript{102} the mortgagee sued the assuming grantee of the mortgagor for a deficiency remaining after foreclosure. The defendant had conveyed the property subject to the mortgage. A subsequent remote grantee had assumed the mortgage, and the plaintiff-mortgagee had given an extension of time for payment to this subsequent remote assuming grantee without the knowledge or consent of the defendant.\textsuperscript{103} The court found that when the remote grantee assumed the debt, he became the principal and the defendant became a surety.\textsuperscript{104} The court held that the defendant was not liable apparently because the mortgagee had not given him the proper notice and, therefore, he had been released by operation of law.\textsuperscript{105} This case indicates that courts will treat the mortgagor and the assuming grantee who takes before the break in the chain as if the break in the chain had not occurred.

D. \textit{Subdivision of Land and the Agreement to Assume}

A troublesome problem occurs when the mortgagor conveys a parcel of the mortgaged property to a grantee who assumes the entire mortgage debt\textsuperscript{106} and, thereafter, the assuming grantee conveys all or part of the parcel to others. The problem arises when two conditions occur. First, the agreement to assume the entire mortgage debt does not appear in a deed that is in the chain of title\textsuperscript{107}, and second, the sale of a parcel that the assuming

\textsuperscript{100} Phoenix Trust Co. v. Garner, 227 Mo. App. 929, 933, 59 S.W.2d 779, 781 (K.C. 1933).
\textsuperscript{101} \textit{See Part II.B. supra.}
\textsuperscript{102} 227 Mo. App. 929, 59 S.W.2d 779 (K.C. 1933).
\textsuperscript{103} \textit{Id.} at 930-31, 59 S.W.2d at 780-81.
\textsuperscript{104} \textit{Id.} at 933, 59 S.W.2d at 781. The relationship of principal and surety arose between a remote assuming grantee and a prior assuming grantee who were separated in the chain of title by persons who had not assumed the note and, therefore, had no personal liability for its payment.
\textsuperscript{105} \textit{Id.} The reasoning of the court is not entirely clear. The decision seems to be based on an extension that the mortgagee gave to the remote assuming grantee without the knowledge or consent of the defendant. \textit{See id.} at 930, 59 S.W.2d at 779-80.
\textsuperscript{106} The analysis that follows in the text also applies if the grantee assumes a larger proportion of the mortgage debt than the value of the land he receives bears to the value of the entire mortgaged tract.
\textsuperscript{107} Because the problem results from a lack of notice of the amount of the debt the land is encumbered to discharge, the problem can be eliminated by careful drafting. The terms of the assumption should be stated in the deed. \textit{See} Peterson & Eckhardt, \textit{supra} note 22, \S\ 708.
grantee conveyed would satisfy more than that parcel’s proportionate share of the debt. Because the agreement to assume the entire mortgage debt does not appear in the record, subsequent grantees and subsequent mortgagees do not have notice of it. The problem, however, is not determining the personal liability of the grantees since, by hypothesis, sale of the mortgaged land will satisfy the debt. Rather, the problem concerns marshalling of assets:108 in what order should the parcels be sold at a foreclosure sale?109

The Missouri Supreme Court faced this problem in Missouri Home Savings & Loan Association v. Allen.110 The Allens had executed a mortgage in favor of the plaintiff savings and loan on 160 acres of land. The Allens transferred only the west eighty acres to Greene County Loan Company ("Greene County Loan"), which agreed to assume the entire mortgage debt.111 The deed to Greene County Loan recited that it took only subject to the mortgage and did not mention any agreement to assume. Greene County Loan thereafter executed deeds of trust in favor of two title insurance companies to part of the west eighty acres. The issue before the court was whether to order sale of only the east eighty acres, which the Allens retained, of only that portion of the west eighty acres in the hands of Greene County Loan, or of both tracts with each paying its proportionate share to satisfy the mortgage debt.112

The Allens urged the court to effect the assumption agreement whereby they would be only sureties and Greene County Loan would be primarily liable for payment of the debt.113 The court conceded that an agreement to assume outside of the deed could be the basis of an assuming grantee’s liability,114 but refused enforcement of such an agreement if it would impose obligations on the grantees or lienors of Greene County Loan because

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108. Missouri Home Sav. & Loan Ass’n v. Allen, 452 S.W.2d 109, 110 (Mo. 1970). When a parcel of a mortgaged tract of land is transferred subject to the mortgage, both parcels must contribute to discharge the debt. Hall v. Morgan, 79 Mo. 47, 48-49 (1883).

109. No agreement between the parties transferring the land will prevent the mortgagee from reaching the land to satisfy the mortgage debt. G. OSBORNE, G. NELSON & D. WHITMAN, supra note 1, § 5.1.

110. 452 S.W.2d 109 (Mo. 1970).

111. Id. at 110-11. There was evidence of a contract of sale in which Greene County Loan agreed to assume the entire mortgage debt. In addition, the evidence included a statement of the consideration given to the Allens at the time of completing the transaction which recited that Greene County Loan assumed the entire debt as part of the consideration for the transfer. Id. This evidence should have been sufficient to prove an agreement to assume outside the deed. See notes 34-41 and accompanying text supra.

112. 452 S.W.2d at 110-11.

113. Id. at 111.

114. Id. at 111-12. See notes 12-17 and accompanying text supra.
they had no notice of the agreement. The court stated that subsequent grantees or lienors of Greene County Loan "were entitled to rely on the provisions of . . . [the] recorded deed" and they "properly could consider that all of the land mortgaged was liable for the payment of the mortgage debt." The court upheld the trial court's order that both tracts be sold.

The Allen case is distinguishable from the cases that enforce an agreement to assume the mortgage debt that is outside the deed. When mortgaged land is conveyed, the land remains the primary fund from which to satisfy the debt. In the cases enforcing the outside agreement, the remote grantee has received the entire mortgaged premises and is, therefore, on notice that the premises could be used to satisfy the entire mortgage debt. In Allen, the subsequent grantees received only a portion of the mortgaged premises. They would expect, therefore, that their property could be used to satisfy only its proportionate share of the indebtedness. The Allens were attempting to use the assumption agreement to require satisfaction of the entire indebtedness from the portion of the mortgaged land conveyed to Greene County Loan but now owned by or mortgaged to others. Enforcement of the agreement to assume would have doubled the amount of the indebtedness that the grantees and lienors of Greene County Loan would have expected their property could be required to satisfy at foreclosure.

IV. CONCLUSION

The practitioner handling a conveyance of mortgaged land should insist that the agreement, whether it be to assume or to take subject to the mort-
gage, be written in the deed and also in a separate written agreement signed by all parties to the transaction. The separate written agreement usually will be a prior contract of sale. Recording the deed will eliminate problems of notice to subsequent grantees, and both instruments will alleviate problems of proof if it becomes necessary to prove or disprove the existence of an agreement to assume. In addition, the practitioner representing the mortgagee must be aware of the potential defenses of the mortgagor. In granting an extension of time for payment to an assuming grantee or releasing a parcel of the mortgaged premises, the mortgagee always should notify the mortgagor and should obtain his consent to the extension or release in a signed agreement. The extension agreement should contain a reservation of rights clause in which the mortgagee reserves all rights against the mortgagor. By taking time to obtain written agreements, careful practitioners can eliminate many of the problems associated with assumptions of mortgages.

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