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SALE IN THE INVERSE ORDER OF ALIENATION: A DOCTRINE BOTH FISHY AND FOUL

By ROGER D. REDDEN*

There is a doctrine in American equity jurisprudence which bears the baffling title "sale in the inverse order of alienation." The title is appropriate enough, as is demonstrated by the following encyclopedist's unmanageable single-sentence definition:

"The doctrine . . . requires that where land subject to a paramount encumbrance is subsequently sold or encumbered in parts or parcels at different times, no intention being disclosed in the instrument that the purchaser or the encumbrancer of the part should pay the whole or his proportion of the paramount encumbrance, the parcel retained by the grantor should be first subjected to the discharge or payment of the paramount encumbrance, and the parcels alienated or encumbered should be reached only in the event the parcel retained by the grantor is not sufficient to pay that encumbrance in full, and then only to the extent of the deficiency and in the inverse order of alienation; and that if all of the land covered by the paramount encumbrance has been successively alienated or encumbered in parcels, the parcel last alienated or encumbered must be first exhausted for the payment or discharge of the paramount encumbrance, before the parcel alienated or encumbered next preceding to the last may be reached, and so on in that order until the parcel first alienated or encumbered is reached, if need there be, provided the alienee or the junior encumbrancer of the part against whose parcel recourse must be had had notice of the prior alienation or encumbrance of another part."¹

Anything as involved as that should not cheat the world by carrying a simple name. What the writer is trying to say, if he would only pause for breath and understand that lawyers are human beings no more competent to deal with the English language than high school teachers or travel agents, is this: O owns Blackacre and Whiteacre, each

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¹ 35 AM. JUR. 399, Marshaling Assets and Securities, §32.

valued at \$10,000. O mortgages both to A as security for a \$10,000 loan. Then O sells Blackacre to B for \$10,000, giving B a fee simple, special warranty deed making no mention of the existence of the mortgage. Some time later, O defaults and A commences foreclosure proceedings against both properties. At this point, B may, under the doctrine, obtain relief in the equity court by alleging the facts of the situation and praying the sale of Whiteacre to satisfy A's claim.

That is easy enough, and no one will complain about the fairness of granting such relief. O got a full price for Blackacre and warranted the property, thus personally guaranteeing to B the payment of the mortgage. O should not now be permitted to save Whiteacre from foreclosure. A is an indifferent or neutral party; as long as he gets his \$10,000 back, it can't matter to him which property is sold. So much for the first part of the doctrine.

Now, suppose that, after selling Blackacre to B, O sells Whiteacre to C, also for \$10,000, giving a special warranty, fee simple deed, no mention being made of the mortgage to A. O now has \$30,000 from his loan, two sales and, as any law student can observe, all the trappings of a villain. He takes his loot and departs rather unexpectedly, the neighbors observe, for Mexico City. A begins foreclosure. Again the doctrine can be advanced by B to protect himself, requiring Whiteacre to go first in satisfaction of A's claim, on the basis that O's intent was to saddle Whiteacre with the primary mortgage liability even though the deeds to the two properties were identical in their assurances and silence about the mortgage. It is here that one recognizes the source of the doctrine's title — the foreclosure sale must be in reverse order of private sale, so that the last parcel sold by the mortgagor is the first to be liquidated for the benefit of the mortgagee.

It is with this latter portion of the doctrine, the part from which arises its mystic title, that the author wishes to quarrel. But, before taking up the cudgels of argument, I should like first to study the Maryland cases on the subject.

While other States have been plagued with many cases the decisions of which turned on the invocation of the doctrine,² the Maryland reporter system contains but three such cases, the most recent having been decided in 1900. Whether this lack of recent appellate interest in the subject indicates the excellence of local title searchers in keeping

² See the excellent annotation in 131 A. L. R. 4.

their clients out of such tangles or a general indifference to the whole business is not for me to say.

In 1846 the Court of Appeals enjoyed its first opportunity to reject the doctrine, and did just that in the case of *Doub v. Barnes*.³ Essentially, the facts were these: Barnes, embarrassed financially and plagued by a number of unpaid judgments, conveyed several parcels of realty to trustees for the benefit of creditors, who were to sell the parcels and pay the creditors out of the proceeds. Doub was one of the earlier purchasers from the trustees and he paid a full, fair value for the parcels he bought. In time, some of the judgment creditors, ignoring the trustees, levied execution on Doub's parcels. He got an injunction against completion of the levy but this was later dissolved; he appealed, and lost. Speaking through Chief Judge Archer, the Court turned down Doub's request that the property still in the hands of the trustees be first sold, that in the hands of purchasers subsequent to him be next sold, and his parcels be touched only if the proceeds from these sales failed to pay off the judgments.⁴ It held, quite simply, that each parcel in the hands of the trustees or purchasers from them was liable *pro rata* for the judgment liens, hence Doub's only relief was the right to demand contribution from the other purchasers and the trustees. This was stated to be the English rule and the Court expressly declined to follow the "departures" that had taken place in New York.⁵ In a separate opinion, Judge Magruder upbraided Doub for failure (1) to see to it that his purchase money was applied to judgment liens on his parcels and (2) to get releases.⁶ He was so disturbed by what he considered Doub's thoughtlessness that he threw a stern latin maxim down from the bench: *vigilantibus non dormientibus leges subserviunt*,⁷ which is, being freely translated, "the law, like the Lord, helps him who helps himself."

By 1881 enough American jurisdictions had adopted the rule for Judge Grason to say, in *Burger v. Greif*,⁸ that "after a careful examination of the authorities [the doctrine] may be considered as settled."⁹ Nowhere in the opinion is there the slightest reference to *Doub v. Barnes*.

³ 4 Gill 1 (Md. 1846).

⁴ He based his argument here on the assumption that the levying creditors had not acquiesced in the trustee's actions, since, if they had, equity would bar their levy without reference to the doctrine.

⁵ 4 Gill 1, 21-22 (Md. 1846).

⁶ *Ibid.*, 11, 15.

⁷ *Ibid.*, 13.

⁸ 55 Md. 518 (1881).

⁹ *Ibid.*, 526.

But it really doesn't matter, because the facts fell not under the rule but one of its exceptions. O leased three lots to A. who mortgaged them to O, then assigned his interest to B, expressly subject to the mortgage. B then mortgaged lot number 1 to C, again expressly subject to O's mortgage. Very shortly thereafter, C started foreclosure proceedings and B assigned his interest in all lots to D for a consideration of "\$60 and 'payment of the mortgage hereinafter referred to' ",¹⁰ being O's mortgage. At the foreclosure sale of his mortgage, C purchased the equity for less than one half the unencumbered leasehold value of the property. D then assigned his interest in lot number 2 to F. When foreclosure was begun under O's mortgage, C filed a bill which alleged the value of his lot to be greater than the outstanding debt, and that he had offered to pay that entire debt, and prayed for a sale of D's remaining lot number 3, then F's lot number 2 before his own, plus an injunction against the sale of his lot before the others. The lower court granted his prayers, but, on appeal, was reversed. The difficulty, as the Court of Appeals saw it, was the fact that all purchasers took by instruments which expressly subjected their interests to the O mortgage.

"Where all the purchasers from a mortgagor have bought subject to a mortgage, the obligation of each to pay the mortgage forming part of the consideration of his purchase, they all stand upon equal footing, and the mortgagee has the right to sell any part he may think proper for the payment of his debt, and the only remedy the party whose land is sold has, is a proceeding to compel contribution from the other purchasers."¹¹

So, with different facts and a different prejudice as to the application of the doctrine, the Court reached the same result as that of *Doub v. Barnes*. The opinion is liberally sprinkled with unclear if not irrelevant dicta.¹² Even Mr.

¹⁰ *Ibid.*, 527.

¹¹ *Ibid.*, 528-9.

¹² For instance, Judge Grason quoted with favor a Pennsylvania case to the effect that the rule "cannot extend to a case where the first sale was made subject to a mortgage." (528). This is not only of doubtful value to the decision but plainly nonsense. If O owns four lots subject to a mortgage, sells number 1 expressly subject thereto, later sells the others for fee simple prices and makes no mention of the mortgage, the sale of number 1 subject to such mortgage is no reason not to apply the rule between 2, 3, and 4 if, at foreclosure, number 1 doesn't bring enough, assuming the doctrine is looked on with favor.

Tiffany wasn't very certain how to handle the case in his footnotes.¹³

The most recent case, *Hopper v. Smyser*,¹⁴ while expressing approval of the first part of the doctrine — that the mortgagor who retains part of the mortgaged premises after sale of another part for full value without reference to the encumbrance should suffer that retained part to be first foreclosed — arrived at a holding identical in effect to that of each of the cases already discussed: where the mortgagor conveys one of three lots expressly "subject" to the mortgage for \$5.00 and other considerations with a special warranty, such lot must pay its *pro rata* share in foreclosure; it is not to be held back until the retained lots are sold.

Are these three cases individually sound? I believe they are. No one will argue seriously with the merits of the *Hopper* holding, for all the Court really decided, for our purposes, was that the addition of a special warranty to a deed conveying part of the seller's mortgaged land does not alter the estate granted — in that case, so much land in fee simple *subject* to a mortgage as recited. Or, to put it another way, the warranty doesn't negative the recitation that, in effect, the buyer will have to be responsible for his *pro rata* share if the mortgage is foreclosed.

Nor is the *Burger*¹⁵ case open to criticism on its holding, for, where a mortgagor conveys parts of his mortgaged premises reciting the existence of the encumbrance, the only fair inference is that he intended every equity owner — himself and his grantees — to pay his own share should foreclosure come about. Only if he accepted a purchase price that a reasonable man would pay only for unencumbered land could it be inferred that he expected to bear the full burden.¹⁶

¹³ 5 TIFFANY, REAL PROPERTY (3d ed. 1939), §1446, notes 93, 96, and 8. In the former the case fitted, but in the latter two it gave fits.

¹⁴ 90 Md. 363, 45 A. 206 (1900).

¹⁵ 55 Md. 518 (1881).

¹⁶ One question that didn't receive its due explanation was the effect of the assignment made prior to the first foreclosure in which the consideration was recited as "\$80 and 'the payment of the mortgage hereinafter referred to.'" *Ibid*, 527. Actually, it was immaterial to the disposition of the case since B was assigning his entire interest. But, had he retained one of the lots, one would expect that such a burden on the lots disposed of would have the effect of charging them with the entire mortgage so that they would be sold completely out in foreclosure before any of the lots retained could be reached. That is, such a recitation shows the intent of the seller to exempt the land retained from the mortgage as long as the

It is with *Doub v. Barnes*¹⁷ that the argument starts. Though its facts don't fit the classical simplicity of the hypothetical case I used to illustrate the meaning of the doctrine, they are close enough: should purchasers who paid full value (but got no warranty — these were trustee's deeds) for parcels encumbered by judgment liens have their land sold in inverse order of purchase to satisfy those liens? The Court said "no", but had to reject the doctrine to do so. In the later cases the Court could pay lip service to the doctrine and still refuse to apply it. With this case such was not possible. I think the result was proper, though for reasons other than the mere fact that such is "the established law in the *English Courts*".¹⁸

Going back to our original hypothetical case in which O owned Blackacre and Whiteacre, each valued at \$10,000 and both mortgaged as security for a \$10,000 loan: why should B, the purchaser of the equity in Blackacre, get preferential treatment in foreclosure (1) over O, and (2) over C? As mentioned before, as between O and B, that Whiteacre, left to O, should be sold first is the only fair solution, since O, by asking a *pro rata* apportionment, is trying to have his cake and eat it too. Though a special warranty deed was used in the illustration, the fact of warranty or not in such a situation is immaterial, for it is O's act of accepting a price which one would expect to be paid only for unencumbered land which obliges him, in equity, to protect Blackacre to the full extent of Whiteacre's value. But, when the argument is between B and C, both purchasers of O for full value, the equity favoring B is not so clear.

Let us once again pay attention to what the encyclopedist has to say:

"The reasons advanced for the rule are that if the parcel had not been alienated, but had been retained by the grantor, it would have been primarily liable for the payment of the paramount encumbrance, in exoneration of a parcel previously conveyed; that a

land sold was worth more than the outstanding debt — a complete reverse on the doctrine.

This raises an additional question; when the first out-conveyance is made, should it be treated as primarily liable or only proportionately liable if it has a "subject" clause? That is, should a "subject" clause be treated the same as an assumption agreement in the consideration? The author says "no", simply because if primary liability is intended, assumption will be put in the conveyance. This was evidently, though not certainly, Judge Grason's attitude in the Burger case.

¹⁷ 4 Gill 1 (Md. 1846).

¹⁸ *Ibid.*, 21.

purchaser of such remaining parcel takes it subject to the same equities as existed against it in the hands of the common grantor in whose seat he sits; and that no act of the common grantor, subsequent to the conveyance or encumbrance of the parcel first alienated or encumbered, can take away from the purchaser or encumbrancer of that parcel the equity which is so attached against the remaining land at the time he purchased his parcel or took his encumbrance thereon, or can convey to the purchaser or encumbrancer of the parcel next alienated or encumbered greater rights in that parcel than the common grantor himself had. It is reasoned that the purchaser or encumbrancer of the parcel alienated or encumbered subsequent to alienation or encumbrance of other parcels of the land can, having the means of determining the fact of prior alienations or encumbrances, protect his land from primary liability falling upon it by reason of the applicability of the doctrine in question; and the rule of equity which fixes responsibility on the party who is in the better position to foresee and prevent the situation from arising is here given effect."¹⁹

This, I respectfully submit, is pure rubbish. It is said that the later purchaser sits in the seat of the common grantor, taking his land subject to the equities which existed against that grantor in favor of the earlier purchasers. This is absurd *because* the equities of B are purely personal against O — they don't run with the land at all. Even if O has warranted Blackacre, the title warranty is personal only. By selling to C, O is not creating higher equities in C — he is merely dropping out of the picture to leave two equally innocent, equally stupid people to dispute who is to pay off the mortgage. As to this "who has more equity" side of the problem I think the presence or absence of warranties in the deeds must control. If B gets a warranty of title and C takes a quit-claim deed, then and only then should the doctrine work, for O has in fact put C in his seat, leaving him what there may be lying around after the conveyance to B. In that situation only are the equity arguments of the doctrine sound. If the situation is reversed — B taking the quit-claim and C the warranty, B opened himself up for later shenanigans by O and should not be heard to complain when O has seen fit to favor C. When each takes a quit-claim deed or each takes a war-

¹⁹ 35 AM. JUR. 404, Marshaling Assets and Securities, §35.

ranty deed, one might say each is *in pari delicto*, or at least equally negligent.²⁰

This brings us to the second reason for the doctrine: that the later purchaser is in a better position to discover the gum in the title chain. Again let the encyclopedist act as the apologist for the doctrinaires:

“ . . . a successor in title to the land retained after the first conveyance, in searching back his title, necessarily finds that it formed a part of a larger tract all covered by a single mortgage, of which a portion had been conveyed away, and he cannot in safety ignore the deed of that portion, but must examine it, if for no other reason than to see that the original owner, after that conveyance was made, still retained title to all the land which he purported thereafter to transfer; and that being pointed so directly to that deed and charged with knowledge that under the law its terms might materially affect his obligation under the mortgage, reasonable care requires that he examine not only the description in it but the terms it contains”²¹

It is true enough that a search of the records, properly made by the later purchaser, will show the state of title. It is also true that the earlier purchaser, by a proper title search, would discover an outstanding mortgage against the property no mention of which is made in his deed. Are we to consider it reasonable for him to ignore that mortgage lien and rest fat, dumb, and happy on the assumption that by his paying full value for the parcel it will go untouched in some later foreclosure proceedings? That is the way the doctrine would have it, but the whole notion flies in the teeth of good conveyancing practice. Let's face it — these situations never arise if a conveyancing lawyer has handled the transfer. Indeed, any attorney who hasn't forgotten all of his law school conveyancing course would demand, as a condition of full value purchase, a release from the mortgagee. It is useless to talk of what the later purchaser would discover by a proper search and ignore what the earlier purchaser should have discovered. The fact is, neither has made a search, and by such lack of diligence, each missed discovering the title defect which, had it been found prior to settlement, would have been re-

²⁰ The courts have not had a happy time with this warranty problem. See 131 A. L. R. 4, 102 *et seq.*

²¹ 35 AM. JUR. 422, *Marshaling Assets and Securities*, §55.

moved. The fault lies as much with the one as with the other. That being the case, each should pay *pro rata* when foreclosure comes.

The point to be driven home is this: if either purchaser had gotten a decent title search he would have discovered that he wasn't getting what he was paying for — unencumbered land. Since neither discovered the ruse being practiced by the common grantor, it is hypocritical to talk of the "better opportunity" of the later purchaser to discover the difficulty and protect himself. It is also nonsense to talk of the grantor's "intent" to charge his remaining land with the primary mortgage liability after the first sale. Such "intent" is pure fiction and, though some legal fictions may be useful and even equitable, this one has no place in the law.

This matter of relative vigilance leads to the final point. Suppose the mortgagor has sold one parcel for full value and even given a warranty. He wants to sell the rest, but his second purchaser, discovering the prior deed and naturally suspicious, demands a release for his parcel. Can the first purchaser, discovering this business, protect himself? Yes — by giving notice to the mortgagee before the release is executed.²² If he does not, then the mortgagee can seek satisfaction entirely from the parcel first conveyed. This is a sensible rule of diligence. But, if such alertness is required of the first purchaser to protect his "equity" from the very normal and natural possibility of a subsequent release of the remaining land, is it not just as reasonable to demand alertness in the first instance — alertness in discovering the mortgage and getting a release for himself before settlement? Surely the latter is an easier way to protect one's land than the former. And it is certainly unfair to hold, as some cases have, that the entry of the first purchaser into possession is itself notice to the mortgagee of this so-called equity, thus making any future release by the mortgagee one at his future peril. Such a rule permits the first purchaser to profit from the laziness or cupidity which originally occasioned his searchless purchase.

Harking back to Judge Magruder's latin in *Doub v. Barnes*²³ — *vigilantibus non dormientibus leges subserviunt* — I should think that one who can be *vigilantibus* about letting the mortgagee know where he stands could equally well have been *vigilantibus* about searching the records in

²² *Ibid.*, §58.

²³ 4 Gill 1, 13 (Md. 1846).

the first place, an effort that would have saved everybody a great deal of perspiration. Our recording system is there to be "used, not abused," a simple little doggerel which the doctrine of sale in the inverse order of alienation completely ignores. The author is not trying to vindicate the later purchaser — he is just as *dormientibus* as his predecessor — but is trying to relieve him of the entire primary liability to pay off the encumbrance which the doctrine would impose upon him for being not one bit sleepier nor more stupid than his predecessor. It seems to me that where two people are equally negligent in using our recording system, their equities are equal and they should shoulder the burden of this irresponsibility in some proportional fashion. This is a matter of equity, not of law, and it seems strange to hear the cry of fairness raised in support of a doctrine which smacks strongly of the old flippancy "let the devil take the hindmost."