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VENDOR AND PURCHASER — RIGHT OF VENDOR'S ASSIGNEE TO SPECIFIC PERFORMANCE WHERE CONTRACT CALLS FOR WARRANTY DEED — Vendor, a corporation, contracted to convey real estate to the vendee "by good and

sufficient warranty deed, free of all incumbrances" upon payment of the purchase price by the vendee. The vendor assigned the contract to X as trustee and then went into receivership and liquidation. A new corporation was organized and the real estate subject to the contract was conveyed to it by the old corporation (vendor). The contract was then assigned to the new corporation by X, the trustee. The vendee being in default, the new corporation as assignee of the vendor sued the vendee for specific performance and to require the vendee to accept a deed from the plaintiff. *Held,* specific performance granted. Although the contract called for a warranty deed of the vendor which includes covenants of seizin and against incumbrances, both non-assignable personal covenants, nevertheless the vendee was required to accept the warranty deed of the assignee of the vendor because the personal covenants of the vendor would be worthless since it had been dissolved and the vendee would therefore get substantially as good performance from the warranties of the plaintiff as he would have from the vendor itself. *Coral Gables v. Payne,* (C. C. A. 4th, 1938) 94 F. (2d) 593.

A provision in a contract calling for a "good and sufficient warranty deed" is generally construed to call for "the usual covenants" of seizin, warranty, quiet enjoyment, right to convey and against incumbrances.[1] The covenants of seizin and against incumbrances are usually held to be personal covenants not running with the land and to be broken *eo instanti* when made.[2] Since personal covenants are not assignable and their burden may not be delegated to third persons, the authorities generally hold that the assignee of a vendor who contracts to convey with such personal covenants may not perform in the place of the vendor because the vendee would not receive what he contracted for, i.e., the personal credit and solvency of the vendor.[3] When a contract, however, calls for a deed without warranties, an assignee of the vendor may demand specific performance, for in that case the personal credit of the vendor is not relied upon.[4] The same is true when the vendor contracts to convey by a deed including only covenants running with the land, since the vendee gets what he bargains for in that he has not only the credit and backing of the assignee of the vendor, but

[1] Wilson v. Wood, 17 N. J. Eq. 216 (1865); Ely v. Joslin, 111 Kan. 638, 208 P. 628 (1922); Seaboard Air Line Ry. v. Jones, 120 S. C. 354, 113 S. E. 142 (1922); Fleckton v. Spicer, 63 Minn. 454, 65 N. W. 926 (1896); 7 R. C. L. 1126 (1915).

[2] Stone v. Rozich, 88 Colo. 399, 297 P. 999 (1931); Levine v. Hull, 135 Md. 444, 109 A. 141 (1919); Grant Bond & Mtg. Co. v. Ogle, 17 Tenn. App. 112, 65 S. W. (2d) 1091 (1934); Lockhart v. Parker, 189 N. C. 138, 126 S. E. 313 (1925); Contra: Capital City Lumber Co. v. Olson, 190 Wis. 182, 208 N. W. 891 (1926).

[3] See notes 82 Am. St. Rep. 664 at 671 (1902); 2 L. R. A. 199 (1889); also Marx v. King, 193 Iowa 29, 186 N. W. 680 (1922); Skinner v. Scholes, 59 N. D. 181, 229 N. W. 114 (1930); Dalton v. Callahan, 122 Me. 178, 119 A. 380 (1923); 109 A. L. R. 182 (1937).

[4] Noyes v. Brown, 142 Minn. 211, 171 N. W. 803 (1919); Sargent v. Realty Traders, 82 N. J. Eq. 331, 88 A. 1043 (1915); Hopkins v. Phillips, 76 Pa. Super. Ct. 243 (1921).

also the vendor himself and all previous covenantors in the chain of title.[5] It has been held that the heirs of a vendor may not demand specific performance where the contract calls for a conveyance with covenants because the vendee does not bargain for their covenants, but rather relies on the personal credit of the vendor himself.[6] In some instances, however, this rule has been relaxed and the purchaser has been required to accept a deed from the heirs.[7] A parallel case to the principal case occurs when the assignee of a purchaser tenders his own notes, secured or unsecured, for part of the purchase price where the contract calls for the notes of the purchaser himself. There it has been held that a tender by the assignee of the purchaser of his own notes will not entitle him to specific performance, as the vendor in making the contract intended to rely on the personal credit and solvency of the purchaser himself to back the notes.[8] It has, however, been held that where the purchaser contracts to give his notes for the purchase price, secured by a mortgage of the property contracted for, an assignee of the purchaser may demand specific performance upon tender of his own notes and mortgage, because in that case the security of the land back of the notes is relied upon by the vendor rather than the personal credit and solvency of the purchaser.[9] It would seem, then, that the principal case departs from the general rule that an assignee cannot substitute his own promissory obligation for that of his assignor where personal credit or responsibility are a primary element. But it must be noted that the personal covenant of the vendor would be worthless as a result of its receivership and dissolution, so the court took the common sense view that a deed from the vendor's assignee would give the vendee substantially as good performance as he would have received from the vendor himself. This appears to be the proper result and is bolstered by the fact that the vendee presented no evidence of any incumbrances or defects in title and that the vendee would receive the benefit of other covenants which ran with the land.

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[5] Coral Gables v. Jones, 323 Pa. 425, 187 A. 434 (1936); Big Bend Land Co. v. Hutchings, 71 Wash. 345, 128 P. 652 (1912); Noyes v. Brown, 142 Minn. 211, 171 N. W. 803 (1919).

[6] Note: 37 L. R. A. (N. S.) 1123 (1912).

[7] Prichard v. Mulhall, 140 Iowa 1, 118 N. W. 43 (1908); Winn v. Strong, 196 Iowa 498, 194 N. W. 50 (1923); Wollenberg v. Rose, 41 Ore. 314, 68 P. 804 (1904); Barnett v. Morrison, 2 Litt. (12 Ky.) 68 (1822); Barickmon v. Kuykendall, 6 Blackf. (Ind.) 21 (1841).

[8] Rice v. Gibbs, 33 Neb. 460, 50 N. W. 436 (1891); Kutschinski v. Thompson, 101 N. J. Eq. 649, 138 A. 569 (1927); Lojo Realty Co. v. Johnson Estate, 227 App. Div. 292, 237 N. Y. S. 460 (1929); Hounchin v. Salyards, 155 Iowa 608, 133 N. W. 48 (1911).

[9] Montgomery v. De Picot, 153 Cal. 509, 96 P. 305 (1908).