Principal and Surety—Notice of Relation to Creditor—Effect of Extension in Absence of Notice.—The defendants were mesne purchasers of land subject to a mortgage, the obligation of which they assumed. L, purchased from them, also subject to the mortgage. Neither complainant, nor its assignor, the mortgagee, had notice of these conveyances. Later, an extension of time for payment was granted to L by the mortgagee without notice to defendants. L having defaulted, complainant foreclosed. This suit was then brought for the deficiency. *Held,* for complainants; defendants did not prove that complainants had knowledge of defendant's former assumption of the mortgage. *Fidelity Union Trust Co. v. Prudent Investment Corp. et al.*, 129 N.J.Eq. 255, 19 A. 2d 224 (Ch. 1941).

The problem is one of principal and surety, and the fact that realty is involved will not change the application of suretyship law. Having assumed the mortgage, the grantee of mortgaged land becomes the principal debtor; the grantor becomes surety.[1] An extension of time to the principal by the creditor without notice to, and consent of, the surety discharges the surety.[2] In this, as in many other respects, the surety has been the traditional favorite of the law.[3] The doctrine of this case forms an exception to that general rule, although it is but following a well-established lead in so doing.[4] By this exception the surety is only discharged when the creditor has knowledge that the

1. Crowell v. Hospital of St. Barnabas, 27 N.J.Eq. 651 (E. & A. 1876); Codman v. Deland, 231 Mass. 344, 121 N.E. 14 (1918); 3 Minn. Law Rev. 209-11 (1919).

2. Firemen's Ins. Co. v. Wilkinson, 35 N.J.Eq. 160 (E. & A. 1882); Reeves v. Cordes, 108 N.J.Eq. 469, 155 A. 547 (Ch. 1931); Metzger v. Nova Realty Co., 214 N.Y. 26, 107 N.E. 1027 (1915); *Contra:* Iowa L. & T. Co. v. Haller, 93 N.W. 636 (Iowa, 1903).

3. BRANDT, PRINCIPAL AND SURETY (1878), p. 79.

4. Insurance Co. v. Hanford, 143 U.S. 187, 12 S. Ct. 437, 36 L. Ed. 118 (1891); Scott v. Scruggs, 60 F. 721 (C.C.A. 5th 1894); Kaign v. Fuller, 14 N.J.Eq. 419 (Ch. 1862); Young v. Bell, 41 A. 226 (Ch. 1898), not officially reported; Gorenberg v. Hunt, 107 N.J.Eq. 582, 153 A. 587 (E. & A. 1930); De Lotto v. Zipper, 116 N.J.Eq. 344, 185 A. 54 (Ch. 1934); Wittson v. Englewood Plumbing Supply Co., 121 N.J.Eq. 323, 189 A. 920 (Ch. 1937); Fidelity Union Trust Co. v. Gottlieb, 125 N.J.Eq. 152, 4 A. 2d 498 (Ch. 1939); Schumann v. Fidelity Union Trust Co., 126 N.J.Eq.

surety is such at the time of the extension.

What is the basis for this exception? If the surety is discharged ordinarily by an extension without his knowledge, what difference can the creditor's knowledge of the suretyship make? There appears to be no answer to this from the surety's viewpoint. Only a claim by the creditor of a greater right in his own interest can justify this break in the rule. For the creditor has by the suretyship acquired a vested interest, and it would be unjust to him to hold that he has relinquished that interest by an extension made when he did not know he possessed it. This does not answer the surety's argument. But it does present a conflict of reasonable claims, one of which must be subordinated to the other.

The trend of authority is on the creditor's side.[5] The rule was first established in New Jersey in *Kaign v. Fuller,*[6] Chancellor Green stating that the "privilege" of the surety to be discharged was "a mere equity," binding only on those who know of the suretyship.[7] This is scarcely an understatement of the surety's interest. In strict right, he should be obliged to show that he has been injured by an extension before he should be discharged by it. A postponement of the obligation to pay is not *ipso facto* an injury to him. Usually it is a benefit.[8] Nor can the surety complain that he has lost any rights against his principal by the extension. Already exempted from liability up to the value of the land, he can sue the principal for any deficiency which he may have to pay.[9] Lastly, the creditor cannot be charged with notice by virtue of the

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349, 8 A. 2d 852 (Ch. 1940); Harrison v. Courtauld, 3 Barn. & Ad. 36; Gahn v. Niemcewicz, 3 Paige 614, *aff'd,* 11 Wend. 312 (N.Y. 1832).

5. *Supra,* note 4.

6. 14 N.J.Eq. 419 (Ch. 1862), *aff'd* without opinion, 15 N.J.Eq. 501 (E. & A. 1863).

7. 14 N.J.Eq. at page 421.

8. 2 WILLISTON ON CONTRACTS (revd. ed.) 386.

9. Reeves v. Cordes, *supra,* note 2; Delacroix v. Stanley, 113 N.J.Eq. 121, 165 A. 882 (Ch. 1933); Murray v. Marshall, 94 N.Y. 611 (1884).

A mere conveyance of mortgaged premises does not render the grantee liable personally. Shepherd v. May, 115 U.S. 505, 6 S. Ct. 119, 29 L. Ed. 456 (1885). But here the grantee expressly assumed such liability.

recording of the conveyance wherein the surety assumed the mortgage debt.[10]

On the other hand, the surety's position is not without merit. His principal, who has contracted to pay at a fixed time and thus discharge the surety, is guilty of a breach of contract by such extension. And since it is the creditor who by the extension assists in the breach, should not a portion of the blame for the breach be placed upon him?[11] Finally, since the creditor may now sue the principal for the deficiency not only in equity by subrogation[12] but directly at law as well,[13] his attack on the surety before using such methods seems premature.

On the whole, in the light of these conflicting claims, it would be presumptuous to hold that the great weight of authority favoring the creditor in these circumstances is wrong. But, in the light of *Herbert v. Corby*,[14] the surety should at least be immune until the creditor has exhausted his rights against the principal directly.

Res Judicata—Judgment on the Pleadings.—A commenced an action in New Jersey to recover monies advanced to the X corporation in accordance with an oral agreement with B, C, and D. Relying on information received from B, C, and D, that the X corporation was financially incapable of paying the claim, A settled his claim, discontinued his suit, and executed a general release to the X corporation and its president, B. A thereafter discovered that the corporation was thriving and that he had been fraudulently induced to settle his claim. He then started suit in New York against B, C, and D alleging fraud, where-

10. Meyer v. Blacker, 120 N.J.Eq. 35, 184 A. 191 (Ch. 1936).

11. F. B. Sayre, *Inducing Breach of Contract*, 36 HARV. LAW REV. (Apr. 1923); Beekman v. Marsters, 195 Mass. 205, 80 N.E. 817 (1907).

12. Crowell v. Hospital of St. Barnabas, *supra*, note 1; Santoro v. Kleinberger, 115 Conn. 631, 163 A. 107 (1932).

13. Herbert v. Corby, 124 N.J.L. 249, 11 A. 2d 240 (S. Ct. 1940), *aff'd* 125 N J.L. 502, 17 A. 2d 541 (E. & A. 1940).

14. *Supra*, note 13.