

executory,—that the plaintiff would thereafter receive the note of his brother in lieu of the note in suit. Meantime, and until the accord was performed and accepted, the \$1,000 note was not discharged. It was not apparently agreed that the \$7,500 note was canceled, but it was to be taken by the plaintiff, and to become his property. The agreement was not to accept the agreement itself rather than the performance of it, as a satisfaction of the \$1,000 note, neither was it an agreement that the respective notes were immediately transferred from one owner to the other. It was an accord, which is "an agreement, in the case of contracts, where the creditor agrees to accept some other thing in lieu of that which is contracted or promised to be done." 1 Swift's Dig. 499. The authorities upon the subject of accord without satisfaction are numerous and well known, and are uniform that the answer or defense is no bar to the suit. *Goodrich v. Stanley*, 24 Conn. 613; *Kromer v. Heim*, 75 N. Y. 574.

Let judgment be entered for the plaintiff, as of October 19, 1887, for \$1,396, and costs.

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POPE and another v. PORTER.

(Circuit Court, S. D. Iowa, C. D. December 12, 1887.)

1. CONTRACTS—TO PAY ANOTHER'S DEBT—ACTION BY BENEFICIARY.

C. bound himself personally by a note and mortgage on personal property, but in executing the same designated himself as "Agent." He afterwards sold the mortgaged property to the defendant, who, agreeing to pay the mortgage debt as a part of the purchase price, sold the property, but refused to pay the plaintiffs, who were the mortgagees, the amount of the mortgage debt. *Held*, even though C.'s wife was the real owner of the business, C. having bound himself personally, plaintiffs could maintain an action at law against defendant on his contract with C. to pay the mortgage.

2. SAME.

Defendant bought personal property subject to a mortgage, which he agreed to pay as a part of the purchase price. Plaintiffs, who were the mortgagees, brought an action to recover on defendant's agreement with the mortgagor to pay the mortgage debt. *Held*, that defendant was estopped from setting up as a defense an informality in the execution of the mortgage.

At Law.

The plaintiffs, Pope & Davis, were the mortgagees of 5,000 bushels of corn. The mortgagor sold the same to the defendant, James Porter, who agreed to pay the mortgage debt as a part of the purchase price. Defendant sold the corn, and, refusing to pay plaintiffs the amount of the mortgage, they brought this action to recover under the agreement between the defendant and the mortgagees. Defendant demurred.

*Cummins & Wright*, for plaintiffs.

*E. J. Goode*, for defendant.

SHIRAS, J. On the twenty-fourth day of February, 1881, one D. A. Cheney, a resident of Polk county, Iowa, executed a chattel mortgage on

5,000 bushels of corn, stored in certain cribs, for the purpose of securing the payment of a note for \$1,000, due to Pope & Davis, of Chicago, Illinois. On the twenty-ninth of October, 1881, Cheney sold the corn to the defendant, and executed a bill of sale thereof, in which it is provided that said corn "is subject to a mortgage to Pope & Davis, of Chicago, Illinois, for \$1,000, which mortgage said Porter hereby assumes and agrees to pay off and cancel." The defendant took possession of the corn, sold the same, realizing some \$2,000 therefrom, but has wholly failed to pay off the mortgage or any part thereof, and the plaintiffs now seek to recover judgment against him for the amount due them on the mortgage debt.

In executing the note and mortgage, D. A. Cheney attached to his name the word "agent;" but the papers do not disclose the name of a principal, and the mortgage is so drawn as to be the act and deed of D. A. Cheney, notwithstanding the use of the word "agent." On argument of the demurrer, it was stated by counsel that D. A. Cheney was doing business in the name of his wife, and hence counsel for defendant, assuming that the debt due plaintiffs was that of the wife, and not of the husband, seeks to make the point that no recovery can be had at law upon defendant's undertaking, because the debt due plaintiffs was not the debt of the mortgagor, D. A. Cheney; and in support of this proposition counsel cites Jones, Mortg. §§ 755, 760, in which it is said:

"To support an action upon this ground, therefore, it is necessary, in the first place, that the grantor in whose favor the stipulation is made should himself be personally liable for the debt assumed by the grantee; and, in the second place, that there be a debt or some obligation on the part of the person assuming the payment of the mortgage to support his undertaking. If the grantor be not the mortgagor himself, or one who has bound himself personally for the payment of the mortgage debt, the grantee in assuming the payment of the mortgage does not become personally liable through the grantor to the holder of the mortgage to pay the debt to him. There is in such case no chance for any equitable subrogation, and the agreement is considered as a mere declaration that the property was conveyed to the purchaser, subject to the lien of the mortgage."

As already stated, the note and mortgage signed by D. A. Cheney, agent, are so drawn as to bind him personally, and the fact that he was doing business in his wife's name would not in any way tend to relieve him from such liability. Even if the wife was the real owner of the business, still, in the execution of the note and mortgage to plaintiffs, D. A. Cheney bound himself personally for the payment of the debt, and therefore, when the defendant, in consideration of the sale and delivery of the corn to him, contracted with D. A. Cheney to pay the debt due plaintiffs as part of the purchase price of said corn, the plaintiffs can sue on such contract according to the very authority relied on by counsel for defendant. Furthermore, the rule given in the authority cited is the one applicable to mortgages on realty, in which the question is whether the purchaser of the real estate has bound himself to pay the mortgage debt in any event, or has only bought the realty subject to the mortgage. In the case at bar the mortgage was on personal property